THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 19

Case No. 10,848 — Case No. 11,438

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PAULINE—PRIZE CASES

Case No. 10,848—Case No. 11,438

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FEDERAL CASES.

BOOK 19.

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

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

Case No. 10,848.

The PAULINE.

[1 Biss. 390.] [1]

District Court, D. Wisconsin. April, 1863.

EXECUTORY CONTRACT FOR TRANSPORTATION.

1. Executory contract for transportation, or for the service of a vessel is not a subject of admiralty cognizance.

[Cited in The William Fletcher, Case No. 17,692.]

2. It is not a maritime contract nor is any lien created upon the vessel thereby.

[Cited in The William Fletcher, Case No. 17,692; The James McMahon, Id. 7,197; The Monte A., 12 Fed. 332.]

3. On breach of such a contract the cause of action is purely of common law jurisdiction.

4. The court will dismiss a libel on exceptions.

[Cited in The William Fletcher, Case No. 17,692; Scott v. The Ira Chaffee, 2 Fed. 406; The Monte A., 12 Fed. 332.]

In admiralty. Libel by Daniel Newhall for breach of verbal charter. The facts appear in the opinion.

W. H. Peckham, for libellant.

The cause of action is of admiralty jurisdiction, in personam and in rem.

(1) In Personam. The jurisdiction of the admiralty in personam in a case of contract depends solely on the question whether the contract be maritime or not, and is entirely independent of the existence or non-existence of a maritime privilege or lien. If such privilege or lien exist, the admiralty then has further jurisdiction in rem. "Admiralty," says Judge Story, "has a rightful jurisdiction over all maritime contracts in personam; but in cases of that sort, it cannot proceed in rem unless there be a maritime lien, or a positive pledge as security." The Draco [Case No. 4,057]. "To determine jurisdiction in this country, the inquiry is whether it was a maritime contract and the service to be performed on tide waters; if so, the admiralty has jurisdiction." New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344. The subject matter of the contract or service gives jurisdiction. Waring v. Clark, 5 How. [46 U. S.] 441. If the subject matter of the contract relates to navigation of the seas, though it be made on land, the admiralty has jurisdiction. Zane v. The President [Case No. 18,201]. As to contracts the jurisdiction depends on the subject matter, whether maritime or not. De Lovio v Boit [Id. 3,776]. "The admiralty jurisdiction in cases of contract depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to navigation and commerce." People's Ferry Co. of Boston v. Beers, 20 How. [61 U. S.] 401. In cases of charter-party and bill of lading, the charter-party is not a contract preliminary to a maritime contract, but it is the contract, and the bill of lading mere evidence of the shipping. Abb. Shipp. 277. See, also, The Tribune [Case No. 14,171]. A contract of charter-party or affreightment is a maritime contract of which admiralty has jurisdiction. Morewood v. Enequist, 23 How. [64 U. S.] 491; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 334 The respondents' advocate claims that there can be no personal liability where the ship itself is not liable, and quotes from the quotation of the United States supreme court, in The Freeman v. Buckingham, 18 How. [59 U. S.] 189. Now the doctrine of the quoted quotation in the case where it was used was true and is true, i. e., a case of marine

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

tort committed by the master where the court hold the liability of the owners and the vessel to be co-extensive. And the supreme court, after making the quotation, call attention to the subject matter of which it was spoken, and then immediately show that it is not universally true, and proceed to illustrate by cases where the vessel would be liable, and not the owners, and vice versa. The falsity of the proposition as a general rule might also be illustrated by the familiar instance of the right of a master to proceed in personam while he cannot proceed in rem. Fland. Shipp. §§ 322, 324; The George [Case No. 5,329]; Willard v. Dorr [Id. 17,680]; Hammond v. Essex Fire & Marine Ins. Co. [Id. 6,001]. Also the right of material-men and furnishers of supplies in the home port to proceed in personam, but none to proceed in rem, unless by virtue of state laws, and not even in that way since the amendment to the 12th rule in admiralty. See McGuire v. Card, 21 How. [62 U. S.] 248; Ben. Adm. pp. 145, 153, § 269, and cases cited. "No doubt," says the United States supreme court, in the case of The General Smith, 4 Wheat. [17 U. S.] 438, "is entertained by this court that the admiralty rightfully possesses a general jurisdiction in cases of material-men; and if this had been a suit in personam there would not have been any hesitation in sustaining the jurisdiction of the district court." The jurisdiction in rem was sustained in that case by virtue of the state law. The same doctrine is held in the case of The Draco, before cited. The cases cited by respondent's advocate, in 18, 19, and 24 Howard, have no bearing on this point, for they were all mere discussions as to the existence of maritime liens; and in this point we are not discussing the question of liens.

(2) In Rem. This court has jurisdiction in this cause in rem—First, on the ground of a maritime lien; second, on the ground that the contract, being maritime, and the state law giving a lien the admiralty will enforce it. First, there is in this case a maritime lien. "In order to give jurisdiction to the admiralty in rem, where the contract is maritime in its subject and nature, it is not essential that the ship should have entered on the performance, and that the breach should have occurred in the course of the voyage. Hence, if she refuses to receive the cargo on board when it is at her side ready to be delivered, or the passenger with his baggage when he is ready to embark, the ship is bound and the party aggrieved may proceed in the admiralty in rem. The obligation results directly from the contract, and not from the performance which is simply in fulfillment and discharge of it." Fland. Shipp. p. 477, § 506. See Ben. Adm. 111, 112; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 392; Cutler v. Rae, 7 How. [48 U. S.] 732; The Volunteer [Case No. 16,991]; Hannah v. The Carrington [Id. 6,029]. This was directly held in the case of The Pacific [Id. 10,643]. Substantially the same state of facts existed in the case of The Tribune [Id. 14,171]. There is a lien by virtue of the state law which the admiralty will enforce. We think we have clearly shown this to be a maritime contract. That being so, and the court having jurisdiction of the contract, it will enforce a state lien. The General Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 324: The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175, 183; Roach v. Chapman, 22 How. [63 U. S.] 129. The Statutes of Wisconsin (Taylor's Ed.) p. 1745, provide: "Every boat or vessel employed in navigating the waters of this state shall be liable for all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment, or any contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of the boat or vessel on which such contract is to be performed." This section was re-enacted literally in 1859. See Laws 1859, p. 152. The 12th rule in admiralty, as amended, changes the law in this respect so far as concerns suits by "material-men for supplies or repairs," but no further; and this case, not being one of supplies or repairs, is unaffected by the 12th rule.

(3) The respondents in personam and the vessel in rem are properly joined. Both are liable, and the general rule is that they may then be joined. Ben. Adm. 213, 214. So held in the case of The Zenobia [Case No. 18,208].

Wm. P. Lynde, for respondents, filed the following brief:

(1) In England the courts have decided that the court of admiralty has no jurisdiction over contracts of affreightment, whether by charter party, or bill of lading, but that they are solely within the jurisdiction of the courts of common law. 1 Conk. Adm. Prac. 123 et seq.

(2) The supreme court of the United States has decided that the court of admiralty in this country has jurisdiction over contracts of affreightment when the goods are received on board of the vessel or delivered to the master, and not otherwise; that "if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charter has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases." Vandewater v. Mills, 19 How. [60 U. S.] 90; The Freeman v. Buckingham, 18 How. [59 U. S.] 188; Bulkley v. Naumkeag Steam Cotton Co., 24 How. [65 U. S.] 386.

(3) The owner of the vessel is never liable in a suit in admiralty on a contract of affreightment, where the vessel is not liable. In The Freeman v. Buckingham, 18 How.

[59 U. S.] 189, the court says, "And it has been laid down by the high court of admiralty in England (The Druid, 1 W. Rob. 399) 'that in all causes of action which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship, where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship, and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible; and, vice versa, no responsibility can attach on the owners if the ship is exempt and not liable to be proceeded against.' See, also, The Bold Buccleugh, 2 Eng. Law & Eq. 537." The libel cannot be sustained in rem and in personam. Dean v. Bates [Case No. 3,704]; The Orleans, 11 Pet. [36 U. S.] 175; Citizens Bank v. Nantucket Steamboat Co. [Case No. 2,730]; Bondies v. Sherwood, 22 How. [63 U. S.] 214; Ward v. Ogdensburgh [Case No. 17,158]. No jurisdiction. The vessel is not stated to be engaged in commerce between states. This is not a maritime contract for a court of admiralty. The contract was a verbal contract on land. It was a mere preliminary executory contract, not executed. Vandewater v. Mills, 19 How. [60 U. S.] 82-90; The Freeman, 18 How. [59 U. S.] 188; Bulkley v. Naumkeag Steam Cotton Co., 24 How. [65 U. S.] 392; The Zenobia [supra]. If the joining of defendants and vessel is not correct, the libellant will have to proceed in personam. Definition of a maritime contract. People's Ferry Co. of Boston v. Beers, 20 How. [61 U. S.] 400; Roach v. Chapman, 22 How. [63 U. S.] 129.

MILLER, District Judge. This libel is brought against the vessel, her master, and owners. The libel propounds, that the said owners of the schooner, by their agent chartered said schooner to libellant, verbally, for a voyage from the port of Milwaukee to the port of Buffalo, to be provided by, and to carry for, said libellant a cargo of eight thousand bushels of wheat, under deck, from Milwaukee to Buffalo, at the freight of eight and one half cents per bushel, to be paid on the discharge of said cargo at Buffalo; said voyage to be made and said wheat taken immediately on the return of the vessel to Milwaukee, she being at the time on her way from Buffalo to Milwaukee; that the vessel reached Milwaukee, and a better offer having been made for said vessel by other parties, the defendants chartered her to other persons, and refused to comply and fulfill the charter to libellant. The libellant sustained damage to the amount of four hundred dollars.

The defendants filed exceptions to the libel, as follows: (1) That the libel does not allege sufficient to give jurisdiction to the court, over the contract or over the vessel. (2) That the cause of action, as laid in the libel, is purely of common law jurisdiction, and not of admiralty. (3) That a proceeding in rem and in personam is improperly joined.

There is no objection to the contract, as being by parol. It is sufficient for the coasting trade, although a loose way of doing business. Conk. Adm. 131, and cases cited. In England, the admiralty has not allowed jurisdiction of contracts of affreightment. The common law courts claimed the jurisdiction. In this country, the constitution of the United States and the acts of congress are construed as conferring upon the district courts admiralty jurisdiction of contracts of affreightment.[2] A maritime contract depends on its subject matter, and the courts have jurisdiction of contracts, which relate to the service or employment of a vessel. And contracts of affreightment entered into by the master or agent of the vessel in good faith, and within the scope of his apparent authority, bind the vessel to the merchandise. Under the maritime law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo, until the cargo is shipped under it. The Freeman v. Buckingham, 18 How. [59 U. S.] 182, 188. In Vandewater v. Mills, 19 How. [60 U. S.] 82, the court lay down and establish the following rules in admiralty, to wit: "Maritime liens are stricti juris, and will not be extended by construction, analogy, or inference. Contracts for the future employment of a vessel do not, by the maritime law, hypothecate the vessel. The obligation between the ship and cargo is mutual and reciprocal, and does not take place till the cargo is delivered on board." The opinion of the court expressly repudiates the doctrine, that mere agreements for the service or employment of a vessel may be enforced against the vessel by admiralty proceedings in rem. The same principle is reiterated in Bulkley v. Naumkeag Steam Cotton Co., 24 How. [65 U. S.] 386. The master had receipted for the cotton to be carried on his vessel, and placed it on a steam lighter, of which he had control, to be transferred from the warehouse to his vessel, and it was lost by fire. The court held that a delivery of the cotton to the lighterman was a delivery to the master, and bound the vessel, the voyage being considered to have commenced. On page 392, the court remarks: "It is insisted that the vessel is exempt from responsibility, upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this court, and in England, in support of the position. The

[2] [See The A. M. Bliss, Case No. 274.]

Freeman, 18 How. [59 U. S.] 189; Vanderwater v. Mills, 19 How. [60 U. S.] 90; Grant v. Norway, 2 Eng. Law & Eq. 337; Hubbersty v. Ward, 18 Eng. Law & Eq. 551; Coleman v. Riches, 29 Eng. Law & Eq. 323. But it will be seen, on reference to these cases, the doctrine was applied or asserted upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfillment on the part of the shipper, namely, the delivery of the cargo. It was conceded no suit could have been maintained upon the original contract, either against the owner or the vessel." In the case of The R. C. Winslow [Case No. 11,736] decided in this court, the master had contracted to receive on board his vessel for transportation a quantity of wheat from a warehouse, where wheat is weighed in one hundred bushel drafts, tallied by the first mate, and discharged through an iron pipe, extending from the warehouse to the vessel; the second mate being on deck to watch the flow of wheat from the pipe into the hold of the vessel, to shift the pipe, to control the discharge of wheat into the pipe, and to trim the vessel; and through the negligence of this mate seven drafts of the wheat were lost in the river by the parting of the pipe. It was held that the wheat was delivered to the vessel when it passed from the warehouse into the pipe, and that the vessel was liable for the wheat lost. I remarked, "This case is different from a contract merely executory, where there has been no delivery of the goods to the master, nor change of possession, nor effort to deliver. When there is no delivery of the goods, the contract of the master for their transportation creates no lien." In Hannah v. The Carrington [Id. 6,029], the ship was withdrawn from the trade, and refused further to comply with a contract of affreightment, and the vessel was not liable. The cases here referred to are wanting in the essential particular of delivery to the vessel.

In the great case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] on page 392, it is remarked by the court: "Some question was made on the argument founded on the circumstance, that this was a suit in personam. The answer is, if the cause is a maritime cause subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship; it must, in its nature, be complete, for it cannot be confined to one of the remedies on the contract when the contract itself is within its cognizance." In Morewood v. Enequist, 23 How. [64 U. S.] 491, the admiralty jurisdiction of the courts of the United States extends to contracts of charter party, &c., affreightment; and are cognizable in courts of admiralty by process either in rem or in personam. But no responsibility can attach to the owners if the ship is exempt and not liable to be proceeded against. Freeman v. Buckingham, 18 How. [59 U. S.] 182–189.

It is not necessary to pursue this inquiry any further, notwithstanding the voluminous and ingenious argument of libellant's advocate. The agreement propounded in the libel is cognizable in the common law courts, and is not the subject of admiralty cognizance. It was a mere executory contract for the service of the vessel; or rather an agreement preliminary to a maritime contract. Such contracts must be equally binding on both parties. And it could not be pretended that this court in admiralty would have jurisdiction of a libel against Newhall, at the suit of these owners, if he had been the delinquent party.

The state law authorizing proceedings against boats and vessels does not create such a lien as is cognizable in the admiralty, and consequently there is not to be a proceeding in personam. By rule 12, proceedings in personam, but not in rem, shall apply to cases of domestic ships for supplies, repairs, or other necessaries. This case does not come within the rule.

In the case of Vandewater v. Mills, 19 How. [60 U. S.] 82, the court dismissed the libel on exceptions. Following that precedent, this libel, for the reasons here given, will be dismissed on the exceptions herein filed.

NOTE. Nor is a contract to furnish materials for the construction of a vessel even on the shores of tide waters, within the admiralty jurisdiction. Young v. The Orpheus [Case No. 18,169]. See The Dick Keyes [Id. 3,898], where it is held that a contract for the use of a barge at a stipulated rate is cognizable in admiralty. Admiralty has no jurisdiction over a preliminary agreement. Andrews v. Essex Fire & Marine Ins. Co. [Id. 374].

PAUL SHEARMAN, The (UNITED STATES v.). See Case No. 16,012.

Case No. 10,849.

In re PAULSON.

[Betts, Scr. Bk. 75.]

District Court, S. D. New York. 1842.

BANKRUPTCY—PRIVILEGED CLAIM—MONEY LOANED.

This was an application on the part of a creditor asking to have a portion of his claim against the estate of the bankrupt [Leonard Paulson], and which amounted to $57.54, put among the privileged claims. He alleged that he had advanced the money to pay the wages of some operatives, who had been employed by the bankrupt, and he alleged that it was a similar case contemplated by the act in providing that wages should be deemed privileged claims, and paid in full.

THE COURT say that they cannot allow such a construction of the act. The clause applies solely to claims for personal services, such as domestic servants, and could not be construed into a case of money lent.

PAUTUCKET HAIRCLOTH CO. (STAFFORD v.). See Case No. 13,275.

Case No. 10,850.

The PAVONIA.

[5 Ben. 279.] [1]

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

COLLISION IN HUDSON RIVER — STEAMBOAT AND SLOOP—LOOKOUT—LIGHT.

A sloop and a ferry-boat came in collision at night in the Hudson river. The ferry-boat had no lookout forward of her pilot-house, and the red light of the sloop, which was the one which should have been visible to the ferry-boat, was out. *Held*, that both vessels were in fault, and the damages must be apportioned.

This was a libel by the Newark Lime and Cement Manufacturing Co., owners of the sloop Arsenal, to recover for the loss of the sloop, which was sunk in consequence of a collision with the ferry-boat Pavonia, which was on a trip from New York to Hoboken, on the night of December 2d, 1869. The ferry-boat had a pilot in her forward pilot-house, and with him another man, whose duty was to be lookout, but who was assisting the pilot to steer. The sloop, which was coming down the river, showed no light.

C. Donohue, for libellant.

R. D. Benedict and D. Field, for respondents.

BENEDICT, District Judge. I am of the opinion that the damages arising out of the collision in the pleadings mentioned must be apportioned.

There was clear fault on both vessels. The fault of the ferry-boat was in running in a dark night without a lookout. The man, whose duty it was to be at the forward part of the boat, and engaged exclusively in looking out, had been called up into the pilot-house, and was engaged in assisting the pilot to steer. The absence of this man from his post was a fault which must render the ferry-boat liable.

I notice in this connection a bit of evidence worthy of mention, as showing the correctness of the rule, which declares that in ordinary cases the pilot-house is not the proper place for a lookout. In this case it is proved that when the pilot first surmised the proximity of the sloop, he told the man, whom he had called into the pilot-house, to go out of, and forward of the pilot-house, to see what it was, and the man went. The action shows the opinion of this pilot that the pilot-house is not the best place to see, at the earliest moment, a vessel approaching in the dark.

But the sloop was also in fault, for her red light was out. There is much contradictory evidence on this question of fact, but the weight of evidence appears to me to show the absence of the red light. Such an omission is sufficient to render the sloop liable.

Both vessels being in fault, the decree must be that the damages be apportioned.

The question of costs is reserved until the coming in of the commissioner's report.

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

Case No. 10,851.

The PAWASHICK.

[2 Lowell, 142; 7 Am. Law Rev. 361.] [1]

District Court, D. Massachusetts. Sept., 1872.

EVIDENCE—FOREIGN LAWS — SEAMEN'S WAGES — SUITS BETWEEN FOREIGNERS.

1. In this court the law of England may be proved by printed books of statutes, reports, and text-writers, as well as by the sworn testimony of experts. Some cases on this point examined.

[Quoted in Dundee Mortgage & Trust Investment Co. v. Cooper, 26 Fed. 668.]

2. Attention is called to St. 24 Vict. c. 11, which authorizes and suggests that treaties should be made for facilitating the proof of the foreign law reciprocally, in the countries of the contracting parties.

3. A British shipmaster may proceed in this court for his wages against the British ship in which he served: The Havana [Case No. 6,226], followed.

[Cited in Whitney v. The Mary Gratwick, Case No. 17,591.]

4. The court will take jurisdiction of such a suit between foreigners, if the voyage is ended, and there is no contract binding the parties to another jurisdiction, and no reason given why justice cannot be done here.

[Cited in The Belgenland, 114 U. S. 364, 5 Sup. Ct. 864.]

Libel in rem, by Charles Finch, late master of the British bark Pawashick, of Summerside, Prince Edward's Island, for wages. The libellant and the claimant both lived at Summerside. The contract between the parties was as follows: "Captain Charles Finch agrees to take charge of bark Pawashick, for the sum of nine pounds sterling per month, from this date, and Robert T. Holman, the owner, agrees to pay that sum. Summerside, P. E. I., Sept. 6, 1870."

The vessel made several voyages under the libellant's command, and arrived at Liverpool in December, 1871, needing repairs, which detained her there for more than three months. The correspondence between the parties during this time, and the other proofs, tended to show that the owner wished to have a master who had received the certificate required for the commanders of mer-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 7 Am. Law Rev. 361, contains only a partial report.]

chant vessels in certain trades by the law of the flag; that the libellant had no certificate, and did not choose to apply for one; that no fault was found with his skill or conduct; that he was displaced by the agent of the ship on the 12th of February, 1872, and his wages were paid in full to that time; that the vessel was ready to sail from Liverpool early in April, and Finch then proceeded in the admiralty for an alleged balance of £48. 10s. It was thereupon agreed in writing that he should receive £20, and a free passage home in the bark, and discontinue the suit, and settle with the owner at Summerside. The money was paid, but the libellant preferred to come home in a different vessel, in which he engaged as second mate.

C. T. Russell, for claimant, contended, that no evidence had been introduced of the laws of England, which must, therefore, be presumed to be like our own, by which a master could not proceed in rem. If the court felt at liberty to examine the merchant shipping act, and the decision of Judge Sprague in The Havana [supra], he should contend that the reasoning in that case was not sustained by the later cases in the supreme court, which refuse to recognize statute liens. (2) The court will not take jurisdiction of this case. It does not come within any of the exceptions mentioned in The Becherdass Ambaidass [Case No. 1,203]. (3) The libellant has waived his lien, if he ever had one. The William Money, 2 Hagg. Adm. 136; The Bolivar [Case No. 1,609]; The John Lowe [Id. 7,356]; Packard v. The Louisa [Id. 10,652]; Leland v. The Medora [Id. 8,237].

C. G. Thomas, for libellant, relied on The Havana [supra].

LOWELL, District Judge. In the admiralty, as in other courts, foreign law must be pleaded and proved, as a fact. Talbot v. Seeman, 1 Cranch [5 U. S.] 1; The Prince George, 4 Moore, P. C. 21; The Peerless, Lush. 40; Le Louis, 2 Dod. 241. The various modes in which such proof shall or may be made have been much discussed, especially in the United States, which are judicially treated as foreign to each other. The following text-books contain a reference to the decisions on this subject, some of which I shall have occasion to cite hereafter. Story, Confl. Law, § 641; Whart. Confl. Laws, § 771; Greenl. Ev. § 486, &c.; Bish. Mar. & Div. (4th Ed.) c. 23. But, first, I may observe that, upon the question of the master's lien, the case of The Havana is a precedent for my guidance. It has been ruled, indeed, in England, though without argument, that in the courts of that country the law of Scotland must be proved anew in each case: McCormick v. Garnett, 5 De Gex, M. & G. 278; and this is approved by Mr. Westlake, Private International Law (section 413), who says it would be entirely unsafe to refer to the proof in some preceding English case, because the foreign law may have been changed in the interval. But I find it more consistent with reason and analogy to presume the law to remain constant, until a change is proved, as in case of a local custom, which, proved in one case by a verdict and judgment, is taken to be true thereafter in that jurisdiction. It may be said that a local custom within the realm is the law of the realm, of which the courts will take notice, after they have once been judicially informed of it, while the foreign law is a fact as to which testimony may differ. But how can it be said that Judge Sprague's decision, that a British ship may be proceeded against by her master in this court for wages is not a decision of law, of which I am to take judicial notice, though its foundation may, in part, be a matter of fact? Lord Stowell, in Dalrymple v. Dalrymple, 2 Hagg. Consist. 54, 81, in enumerating the authorities he should cite to prove the law of Scotland, mentioned, first, "the opinions of learned professors given in the present or similar cases." And he quoted opinions given in a case which was tried more than twenty years earlier than the one then in judgment.

This case, however, will require some examination of the law of Great Britain besides that of the master's privilege against the ship, some other sections of the merchant shipping act and their received interpretation, and I have, therefore, inquired whether I can receive in evidence the books of admitted authority, or must rely wholly on the sworn testimony of experts. Here, again, we find, in the case last cited, the eminent judge making reference to books of authority, and to adjudications of the Scottish courts. This celebrated opinion, from which extracts are made in several text-books, has been criticised by Lord Brougham as being in its method ultra vires, when it steps beyond the sworn evidence, and undertakes to discover and reason on the law of Scotland. Tayl. Ev. § 1280, note. Mr. Taylor and other writers appear to agree with the dictum, that the foreign law, written or unwritten, must always be proved by an expert. 1 Rose. N. P. Ev. (13th Ed.) 138; 2 Phil. Ev. (4th Am. Ed.) 428. Mr. Westlake (section 414) points out that this criticism rests on dicta, rather than decisions. The cases that are supposed to have decided it are Baron de Bode's Case, 8 Q. B. 208, 246; Sussex Peerage Case, 11 Clark & F. 85, 114. What these cases actually decided was, that a scientific witness may testify to the written foreign law, with or without the text of the law before him, the value of the evidence resting in the soundness of his opinion, and the court not being supposed competent to criticise it by any comparison with the books. Before these cases, the law permitted codes or statutes to be proved by copies, authenticated to the reasonable satisfaction of the court, but was not supposed to require the aid of an expert in all cases. The rule was usually stat-

ed as in Story, Confl. Law, §§ 640-642, that foreign written laws are proved by copies (giving various modes in which the copies may be verified), and unwritten laws by the testimony of skilled witnesses. The great stress laid, by the majority of the learned judges in Baron de Bode's Case, upon the comparative value of the opinion of a skilled witness, and of the mere text of a code, has led, I suppose, to the adoption by text-writers of the sweeping generalization above mentioned. With deference to their opinion, I think Mr. Westlake's caution more safe; for the reasoning by which the opinion of the expert was exalted, and the illustrations made use of by the court, go very far to show that they would admit books of authority as well as sworn experts. Thus Lord Denman (page 253) quotes with approbation, and as part of his reasoning, the language of Lord Ellenborough in Picton's Case, 30 How. State Tr. 225, 491, that "text-writers furnish us with their statement of the law, and that would certainly be good evidence upon the same principle which renders histories admissible." And he adds: "A person states that the law is in a book; and a witness, having said that such book is considered of authority, it is received at once as evidence of the law in question." And again, "In questions of foreign law, books of the highest authority must frequently be resorted to: Pothier's works, for instance, as to the law of France upon contracts, bills of exchange, policies of insurance, and so on" (page 254). The point to be decided being that an expert might state the result, the actual state of the law, without producing the codes, &c., the parallel of text-books which state such results was brought up. This argument hardly seems to countenance the doctrine that books are never to be received.

Lord Stowell, in Dalrymple v. Dalrymple, ubi supra, after mentioning as the first source of information of the foreign law the opinions of learned professors, adds, "secondly, the opinions of eminent writers, as delivered in books of great legal credit and weight; and, thirdly, the certified adjudications of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority."

I believe the rule thus announced is the true rule for this court in respect to the English law. I say this with a full knowledge of the criticisms that have been made upon it; and I will proceed to give my reasons for that opinion. The relations which we hold to England in the common origin of our laws, a similar mode of legal reasoning, the habit of studying and citing the English cases, the common language and frequent intercourse between the two countries, render it safe and proper to adopt a similar practice with respect to the laws of that country that the states of this Union have generally found it expedient to carry out in relation to each other. It was soon found, in trials in the United States, that the danger of mistaking the laws of the other states was, on the whole, a less evil than the danger of injustice and delay, if the strict proof were required in every case. In consequence of this discovery, many of the states have passed laws admitting the printed statutes and books of reports of the sister states to be read in evidence. See Story, Confl. Laws (Redf. Ed.) § 641a. But before these statutes were passed, or without their aid, the courts of some states have taken this step for themselves. Thompson v. Musser, 1 Dall. [1 U. S.] 458; Raynham v. Canton, 3 Pick. 293; Young v. Templeton, 4 La Ann. 254; Lord v. Staples, 3 Fost. [23 N. H.] 448. In two of these cases a query was made whether foreign statutes, strictly so called, could be proved by printed copies only, even with evidence tending to show the authenticity of the copies. But such statutes have been received in two cases, in which it was merely proved that they were bought of the public printer (Jones v. Maffet, 5 Serg. & R. 523; U. S. v. Certain Casks of Glassware [Case No. 14,764]); in another, because the code had been promulgated by the executive department of our government as authentic (Talbot v. Seeman, 1 Cranch [5 U. S.] 1); in another, because the copy had been sent to the supreme court of the United States by authority of a foreign government (Ennis v. Smith, 14 How. [55 U. S.] 400). In that case it was said, as the ratio decidendi, that foreign written law may be received when it is found in a statute book, with proof that the book has been officially published by the government which made the law. This does not exhaust the list of cases, nor the actual or possible modes of authentication. The only rule to be made out of the late American cases is, that the copy of the statute must be shown, to the reasonable satisfaction of the court, to be genuine. Now we all know, and it is virtually admitted in this case, as I understand the argument, that we are fully as well able to verify the printed copies of the merchant shipping act, as any expert could be. In U. S. v. Certain Casks of Glassware [supra], Judge Betts said he should have received the statute without the oath which proved it to have been bought of the queen's printer. The law is a progressive science, and, if printed books have superseded manuscripts, and are cited instead of certified copies, we may as well acknowledge the fact, and act accordingly. Between the doctrine, which has never obtained in America, if it does anywhere, that there must always be a sworn expert, and one which shall admit printed books of known authority to prove foreign statutes, I see no safe middle ground.

I believe it to be the true doctrine that the unwritten law of England may be proved in this court, not by experts only, but also by text-writers of authority, and by the

printed reports of adjudged cases; and that the written law may be proved by the printed copies, and be construed with the aid of text-books as well as of experts. Conscious as I am of my liability, and that of the bar, to mistake the foreign law, if we rely on books alone, ready as we shall always be to receive instruction from scientific witnesses, yet I cannot but see the great delays, misunderstandings, and difficulties which attend any rigid exclusion of books in all cases. We are obliged by the present state of the law to look to such aids for determining the actual law of all the states of this Union, and the danger of mistaking the laws of England is the same in kind as that which affects an ascertainment of the laws of New York or Wisconsin, and less in degree than we may apprehend in dealing with those of Louisiana, or any state the base and origin of whose jurisprudence is wholly different from ours. Indeed, in this court I am bound to take judicial notice of all those laws, and, on principle, this must exclude the testimony of experts, which puts me at a much greater disadvantage than if I merely should admit the books subject to explanation and correction.

It is singular how little direct authority there is on either side of the proposition that English law-books may be read in our courts as evidence of English law. A great many cases are decided here every year which involve some points of that law; and I suppose the parties usually agree, either expressly or tacitly, that the books may be read. For instance, Roberts v. Knights, 7 Allen, 449, turned on the construction of the merchant shipping act, and the report shows that the law was not proved by witnesses. The Maggie Hammond, 9 Wall. [76 U. S.] 435, decides points of English law which were not proved. In Carnegie v. Morrison, 2 Metc. [Mass.] 381, 404, Shaw, C. J., intimates an opinion that our relation to the English unwritten law is such that perhaps we need not rely on experts to prove it. It is plain, from a careful perusal of the whole passage, that he was prepared to control the opinion of very eminent experts by his own examination of what he rightly calls the authorities usually cited; that is, the reports of adjudged cases. In Ennis v. Smith, 14 How. [55 U. S.] 400, Wayne, J., delivering the opinion of the court, cites with apparent approbation a part of the same statement by Lord Ellenborough that was cited by one of the judges in Baron de Bode's Case, as above shown; namely, that the books of approved text-writers would certainly be admitted as evidence. I have seen no case in which it has been expressly decided that the common law of England must in all cases be proved by experts in the courts of America. I have cited some intimations and dicta to the contrary. The reason of the case seems to me to be that we should have the same liberal rule as has generally, though not universally, obtained with respect to the laws of the other states of this government. Again, I do not see how it would be possible, under the American practice, to reject certified copies of the decisions of English courts; and, if not, we come back to the question, whether an idle and unnecessary and obsolete mode of verification shall be insisted on. In respect to the laws of France, Germany, or Russia, or any other country which has a wholly different system from our own, I should be inclined to say that the rigid rule might be better; but I am dealing now only with the laws of England, and wish to be so understood. And I hold that those laws may be proved by such books as aforesaid, as well as by the testimony of experts.

Again, there is authority for the proposition that a court of admiralty may exercise greater liberality in such matters than other courts. Dr. Lushington, in 1860, having the decisions of the queen's bench and house of lords in mind, as his remarks plainly show, explained and defended the practice of his court in waiving in fit instances strict technical proof by experts; and he admitted a printed copy of a statute coming from quasi official custody as evidence of the law of India: The Peerless, Lush. 30, 40. It may be added that the admiralty has, or at least uses, somewhat greater control over the conduct of causes than is usual in other courts. It may decline jurisdiction in some cases, or it may require further proof when necessary, and, in short, may adapt its practice to the exigencies of each case.

In The Maggie Hammond, 9 Wall. [76 U. S.] 452, Clifford, J., delivering the judgment of the court, appears to adopt for courts of admiralty a liberal rule; for he cites from Bell's Commentaries, to show that maritime law partakes of an international character, and that in all discussions respecting the same in the courts of Scotland the continental collections and treatises on the subject are received as authority.

I do not, however, feel compelled in this case to rely on any peculiar practice in the admiralty, for I consider that the better rule is that in the federal courts here, while the English law is undoubtedly to be pleaded and proved, yet evidence is competent which consists only of books of acknowledged or ascertained authority, and that, to prove that authority, an oath is not necessary in all cases. The proposition that Abbott on Shipping, and the regular reports of decisions of the courts, and the various books cited as authority for the law in England, cannot be read for this purpose here, appears to me little less than absurd.

There are, of course, a great many nice and intricate points of English law on which a court of this country would be unwilling to pronounce, with no aid but from books of authority. Such points are not, perhaps, so likely to arise in the admiralty as in some

other courts; and, when they do, a court of admiralty can, as I have intimated, take means to obtain instruction. Unfortunately, too, it is conceivable that experts may differ in opinion. No single strict rule is adequate to insure correctness on all occasions. In respect to cases of delicacy and importance, I would call attention to the act 24 Vict. c. 11, which gives power to the courts, when they have before them a suit which involves the law of a foreign country, to cause a statement of the facts or special case to be prepared and submitted to one of the courts of that country for the decision and certificate of the foreign law; and so, reciprocally, of questions arising in other countries involving the law of England. This statute is in the nature of a proposition to other governments, and is to take effect only when treaties shall have been made providing for its operation. But it seems to me to embody a very useful suggestion; and I hope our government will consider whether it may not be adopted to advantage.

The claimant further objects that the master's privilege against the ship cannot be enforced in our courts. Judge Sprague's opinion in the case cited was that such a lien was not merely a remedy to be enforced in the domestic forum, but that it created a right in the thing which any court of admiralty could give effect to. I see no reason to re-examine that opinion. It is true, as was argued, that the supreme court, after Judge Sprague's decision was made, showed a disinclination to enforce the laws of the states giving liens for building and repairing ships, and changed the twelfth admiralty rule in that sense. But this action was explained in The St. Lawrence, 1 Black [66 U. S.] 522, and The Potomac, 2 Black [67 U. S.] 58, as being founded on expediency, and not on any doubt of the jurisdiction; and at the last term of that court, the rule has again been modified, so that the district courts now have jurisdiction of all admiralty liens, whatever their origin; and the decision in The Havana has been approved, and its reasoning has been followed and expanded, by Clifford, J., delivering the opinion of the supreme court in The Maggie Hammond, 9 Wall. [76 U. S.] 450.

This court, then, has jurisdiction, though it is not bound to exercise it in circumstances of hardship to the defendant, or any others which make it more expedient to remit the parties to the home tribunals. I examined the law of this subject with some care in The Becherdass Ambaidass [Case No. 1,203]. Without attempting, in that case, to lay down any general rule, I mentioned some cases in which jurisdiction had usually been taken. Among them were cases like The Havana, in which the voyage ended, or was broken up, within this jurisdiction. This case is not without analogy to those; because, though the voyage did not end here, it was ended before the parties came here: so that there was no allegation on either side of a continuing connection or contract between the parties; and it resembles any other case in which two British subjects are in court, one of whom asserts the right to proceed against the vessel of the other. By one section of the merchant shipping act, seamen who have engaged for a voyage ending at home are not to sue for their wages abroad: that means, of course, while the voyage is yet unfinished, not that, months or years afterwards, if wages are still due them, they may not sue wherever they can find jurisdiction. I cite this merely by way of illustration of the most usual cases in which the courts have remitted parties to their home. It has been when they have seen that they were prima facie bound to proceed and finish a voyage, but undertook to ask a foreign court to relieve them of that duty. Thus, in the case above cited, I was asked to say that a foreign contract, which required the libellants to finish a voyage, was void by the foreign law; not that its terms had been broken, not that there was cruelty, misconduct, or even deviation, on the master's part; but I was called on to annul a contract which appeared to be reasonable, and to be in the course of proper fulfilment, on the mere ground of an insufficient description of the voyage to comply with a real or supposed statute of obligation. That I refused to do.

In this case, there is evidence that the libellant arrested the ship, or at least extracted a monition in a proceeding against her, in England; that there he was paid £20, and agreed to discharge that proceeding and settle his dispute with the owner at their common home. It is argued that this agreement is to be construed as a definitive and perpetual release of the ship, and an undertaking to settle by some other form of action, if suit should become necessary. I do not so read the paper. It seems to be merely a discharge of that suit, remitting both parties to all their former rights. The mention of home means that the libellant will forbear all further action of any kind in England, and until he has an opportunity to meet the owner at home. And it appears that the parties met at home, and failed to settle this controversy. The libellant thereafter had all rights and remedies he had ever had for any balance that might be due him after crediting the £20. If this suit were vexatious, that the libellant, having ample opportunity, omitted to sue at home, with the hope of extorting a settlement by arresting the vessel here,—which has been suggested, indeed, but not proved,—or any other evidence of vexation or oppression, I should hold my hand; but, the case being bare of any such facts, I take jurisdiction.

The title of the libellant to relief on the merits of his case is not so plain. His engagement was for an indefinite time, at so much a month. The master is not a ward of the admiralty in the same sense as the seamen. His contract is construed very differ-

ently, and much more like any ordinary agreement of agency. Thus it is held in England that his wages do not depend on the earning of freight, and it is said that they may be insured: Hawkins v. Twizell, 5 El. & Bl. 883.

Under a contract of this sort for an indefinite time, either party may end it on reasonable notice to the other, at least when no voyage is in progress; and in such a port as Liverpool, where, on the one hand, employment may be obtained, and, on the other, a master can be readily found, I do not know that any notice would be necessary. Curt. on Merch. Seam. 165; 3 Kent, Comm. 161; The Crusader [Case No. 3,456]. In this case, the libellant had notice that the owner wished to obtain a master who had a certificate; and the libellant did not care to apply for a certificate,—which would be good cause for his removal, if cause were necessary. If it be said that, by analogy to other seamen discharged abroad, the master is entitled to a passage home, that was offered him, and declined. I do not fully understand how the board in Liverpool comes to be charged; for, when the libellant rendered his account in his own way on the 21st of December, he charged merely his wages; and, again, he gave a receipt in full for his wages to the 12th of February, at the regular rate; no charge, so far as appears, being then made for board. I confess to some doubt whether it was his intention to charge his board to the owner until he found he was displaced. However this may be, the £20 that were paid him appear to me enough to pay for any board, wages, or other damages which the owners ought to meet; and that payment, with the offer of the passage home, should have been satisfactory to the libellant. The £48 which he demanded included wages for three months after his actual services were ended, and board for the whole time he was in Liverpool. Under the contract which he made, no such damages could be awarded for a discharge in the port of Liverpool after the end of a voyage. In my opinion, he has been overpaid.

Libel dismissed.

Case No. 10,852.

PAWTUCKET INST. FOR SAVINGS v. BOWEN et al.

[7 Biss. 358; [1] 9 Chi. Leg. News, 161.]

Circuit Court, N. D. Illinois. Jan., 1877.

FORECLOSURE AGAINST MARRIED WOMEN — PERSONAL DECREE—PERSONAL LIABILITY OF MARRIED WOMEN.

1. A personal decree will not be granted against a married woman who joins her husband in a note and gives a mortgage on her real estate to secure its payment, when the mortgage is foreclosed, and on sale the premises fail to bring enough to pay the note.

2. A married woman cannot be held liable personally, even under the law as it now stands, unless it is made to appear that the debt contracted was for her personal benefit, and about her personal interests, or for the purpose of protecting her personal estate, or that she became surety for her husband.

This was a bill in equity to foreclose a mortgage. The complainant had obtained a decree against the mortgagors and sold the mortgaged property under its decree. The master had reported the sale, and reported that there was a balance remaining unpaid; and the complainant then asked a judgment or a decree in the nature of a judgment at law, for the balance unpaid.

Mattocks & Mason, for complainants.

E. A. Otis, for defendant.

BLODGETT, District Judge. The facts in the case are substantially these: Ira P. Bowen and Mary D. Bowen, his wife, joined in a note to the Pawtucket Savings Bank, and also in a mortgage to secure the payment thereof. The evidence submitted with the master's report, shows that the real estate given as security, was Mrs. Bowen's real estate; and that the loan was secured by the pledge of her property. The application now is for a judgment against both Mrs. Bowen and her husband, which is resisted on the part of Mrs. Bowen, she contending that no personal decree can be taken against her for the balance. I think the position that a personal judgment should not be rendered against her is well taken, and for these reasons:

It is in evidence in the case, that Mrs. Bowen was a married woman at the time this loan was effected, and this security given. There is no averment in the bill, and there is nothing in the case to show that this debt was contracted about her separate estate; that it was a loan for her special benefit; but all the facts in the case go to show that this loan was really made by Ira P. Bowen for his purposes and his business, and that his wife only signed as security for him, and pledged her own property to secure his debt. I do not think that a married woman can be held liable personally, even under the law as it now stands, unless it is made to appear that the debt contracted was for her personal benefit, and about her personal interests, or for the purpose of protecting her separate estate.

Now, there is no evidence in the case that she became surety for her husband, although it is a joint and several note of Mr. and Mrs. Bowen, and I think all the presumptions are that her signature was attached to the note solely for the purpose of making the loan regular upon its face, in order that the security and the indebtedness might correspond.

I do not think, therefore, that the com-

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

plainant is entitled, in addition to taking this woman's property, to have a personal decree against her.

PAXTON (UNITED STATES v.). See Case No. 16,013.

PAYEN (BRITTON v.). See Cases Nos. 1,905 and 1,906.

Case No. 10,853.

PAYEN v. HODGSON.

[1 Cranch, C. C. 508.] [1]

Circuit Court, District of Columbia. July Term, 1808.

PLEA OF MISNOMER—AMENDMENT OF RECORD.

After a plea of misnomer in abatement, the court will not suffer the record to be amended, but upon payment of costs, and a discharge of the bail.

The written order for issuing the writ, was to issue it in the name of Thomas Payson, but by mistake of the clerk, it issued in the name of Thomas Payen. The written order was filed in the clerk's office. The defendant had given bail, and pleaded a misnomer in abatement.

Mr. Taylor, for plaintiff, moved for leave to amend; which THE COURT refused, unless upon payment of costs and discharging the bail.

DUCKETT, Circuit Judge, absent.

Case No. 10,854.

PAYNE v. ABLE.

[This is a state case. See 13 Int. Rev. Rec. 31.]

Case No. 10,855.

PAYNE v. ALLEN.

[1 Spr. 304.] [2]

District Court, D. Massachusetts. Oct., 1855.

SEAMEN—RECEIPT IN FULL OF ALL CLAIMS—CONSTRUCTION—AMBIGUITY—FLOGGING—INCOMPETENCY.

1. Where a seaman, in a whaling voyage, upon his discharge in a foreign port, signed a writing, acknowledging that he had received a certain sum, in full of his share of the proceeds of the voyage, and relinquishing all claims against the owners, master and officers, *held*, that the relinquishment was only of the claim for which he had received compensation, and not of claims for personal violence committed by the master.

[Cited in Gabrielson v. Waydell, 135 N. Y. 9, 31 N. E. 972.]

2. If such receipt be ambiguous, the ambiguity is not to prejudice the seaman.

3. Since the proviso in St. 1850, c. 80, § 1 (9 Stat. 515), punishment by flogging on board of a whale ship is illegal.

4. Incompetency to perform the duties of the station for which an officer or seaman has shipped, is no justification for the infliction of punishment.

In admiralty.

Mr. West, for libellant.

A. Mackie and A. S. Cushman, for respondent.

SPRAGUE, District Judge. The libellant was cooper, and the respondent master, of a whale ship. This suit is brought to recover damages for personal wrongs. The libel sets forth, in distinct articles, several acts of personal violence, and in another article alleges general and continued ill-usage during the voyage. The answer sets up a written release of the libellant, and denies some of the allegations in the libel, and justifies others, as the infliction of merited punishment. The first question is upon the sufficiency of the release. The voyage commenced in May, 1852, and ended by the return of the ship in February, 1855; the libellant continued on board, as cooper, until December, 1854, when he was discharged at St. Helena. The release relied upon was given at the time of that discharge, and is in the following words: "St. Helena, December 22d, 1854. I, John Payne, cooper on board the whaling bark 'Kathleen,' of New Bedford, do hereby declare, that having been discharged by mutual consent from said vessel, at this port, I do acknowledge to have received of Captain Allen, five hundred dollars ($500), as my share of the entire voyage thereof, in relinquishment of all and every claim against the said vessel, her cargo, captain, owners, officers, and crew, of which this is evidence. John Payne. Witness: Geo. W. Kemball, U. S. Commercial Agent."

It is to be observed, that the receipt declares that the $500 is received as his share of the entire voyage, that is, as his share of the proceeds of the voyage. It then goes on to say, that it is in relinquishment of all and every claim against the vessel, cargo, owners, captain, officers and crew. Claim for what? The natural answer would be, for that for which he had received compensation, that is, his share. The relinquishment is to be so construed, as to be co-extensive with the compensation, if it can be, without violence to language. Such instruments, between master and mariner, are usually written by the master, or by some person acting for him, and if he leaves the instrument ambiguous, such ambiguity is not to prejudice the seaman. It does not appear from the receipt, that any compensation was received for personal violence inflicted by the master, but the contrary is implied; it is not, therefore, sufficient to preclude the libellant from maintaining an action for such violence. The parol evidence does not strengthen the receipt, nor show that compensation was received for anything, except the services of the libellant. As to the injuries inflicted, the

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

[2] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

first was the flogging off the Western Islands, when about three months out. It appears that the boat of another ship being alongside, in the evening, the libellant and one other man took her furtively and went toward the shore, but were discovered, pursued, and brought back. For this offence, the master caused the libellant to be tied up in the rigging, and inflicted upon him twelve blows with ratline stuff over the back, he having on one or two woolen shirts. As the law formerly stood, when flogging was allowed, I should have held this punishment to be justified by the offence; but such punishment is now illegal, and cannot, therefore, be justified. The evidence shows that similar blows were inflicted, at a subsequent time, because the libellant got asleep at the mast head, while there on duty looking out for whales. One would think that the danger to himself would be a sufficient security against his indulging voluntarily in such a practice; and that it could be the result only of physical infirmity, for it appears that he had not secured himself against falling and the mate testifies that the reason of flogging him was the danger that he would fall upon and injure some of the officers. I am not satisfied that this punishment was justifiable, even under the old law; it certainly is not, since the present statute. Several instances of punishment of a different character, at various times during the voyage, had been proved; such as his being compelled to stand on his hands and feet, with his head to leeward; kneeling on the top of the house with his head in the funnel of the galley; and standing on deck, with a rope about his neck. The degree and severity of these punishments are much controverted; others are alleged, about which there is much doubt from the evidence. The justification set up is mainly disobedience of orders, inattention, negligence, and incompetency to perform the duty of cooper, for which he shipped. There is evidence tending to show that the libellant was not a good cooper, and did not perform his duty well, certainly not to the satisfaction of the captain. And it is insisted by the respondent, that this arose partly from inability. I do not think it necessary to form an opinion in this case, whether the libellant was competent to perform the duties of cooper or not, because, if incompetent, that would be no justification for punishment. The power of a master to punish, is given only for the purposes of the voyage, as a means of accomplishing its object, by preventing the recurrence of those offences which interfere with, or may defeat, the successful prosecution of the enterprise. If a man is unable to perform his duty, that inability is in no degree diminished by the infliction of personal suffering; and punishment for such cause, therefore, is not allowed. If the libellant shipped for a station for which he was not qualified, it may have been done ignorantly or fraudulently. Never having been to sea before, he may have thought himself fitted for a sea-life, and for the office of cooper on board of a ship, although experience may show that he was not; or he may have known that he had not the requisite skill for the office he undertook to fill. But even in the latter case, that is, a fraud in shipping as a competent cooper, the master would have no right to punish him for such fraud. Punishment would not cure the fraud, diminish the inability, or in any manner further the objects of the voyage; though incompetency might be a ground for reducing compensation, or for damages for the violation of his contract, but not for the infliction of corporal suffering. Whether, therefore, the incompetency existed or not, in regard to which I give no opinion, it would be no justification for the punishment inflicted. Some negligence and inattention is shown, but I do not think sufficient to justify the treatment which has been proved, and the libellant is entitled to damages.

Decree $125, and costs.

PAYNE (BOWERBANK v.). See Case No. 1,727.

PAYNE (COTTLE v.). See Case No. 3,268.

PAYNE (POWELL v.). See Case No. 11,358.

Case No. 10,856.

PAYNE et al. v. SOLOMON.

[14 N. B. R. 162.] [1]

District Court, S. D. New York. April 21, 1876.

WHAT IS AN ACT OF BANKRUPTCY — PAYMENT OF OVER-DRAFT TO BANK—SECURITIES PURCHASED WITH PROCEEDS OF OVER-DRAFT.

1. If a debtor purchases gold certificates by means of an over-draft on a bank, under an agreement that the proceeds of all over-drafts of his shall be the property of the bank, or with the preconceived idea of never paying back the money obtained by the over-draft, but of defrauding the bank, a transfer of the certificates to the bank is not an act of bankruptcy.

2. If a bank merely certifies the check of a debtor in advance, relying on his promise to make his account good during the day, such an over-draft, in the absence of fraud, creates simply the relation of debtor and creditor, and the payment of such a debt after insolvency occurs is an act of bankruptcy.

3. A mere agreement by a debtor, that in a certain event he will deliver to the bank such securities as he may purchase with the proceeds of overdrafts, will not vest a title to the securities in the bank, so that a transfer of them will not be a preference.

4. There is a distinction between an agreement that securities purchased with the proceeds of an over-draft shall all the time be considered the property of the bank, and an agreement to turn over the title, as a future act.

5. Where the defence is, that the securities belonged to the alleged creditor on account of fraud, the burden of proof is on the debtor to establish the fraud and the identity of the securities by a fair preponderance of evidence.

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Petition for an adjudication of bankruptcy against Solomon. Two acts of bankruptcy were alleged, viz., that on May 29th, 1875, [Samuel L.] Solomon, being insolvent, paid to the Continental Bank, as a creditor, thirty thousand dollars, with intent to prefer, and that on June 1st, 1875, he paid the same bank, as a debt to creditor, fifteen thousand dollars, with intent to prefer. The petitioners [Francis E. Payne and others] read in evidence an affidavit of Solomon, made in another case, stating transactions with the bank, which, prima facie, made out the acts of bankruptcy alleged. The proceeding to adjudge Solomon bankrupt was, by his consent and permission, defended by the Continental Bank in his name. The bank produced evidence for the purpose of showing the following facts: Solomon had been a dealer with the bank for some time prior to May 28th, 1875. He had an arrangement by which he agreed to make all over-drafts and certifications good by 3 p. m. of each day, and until he did so whatever property be bought with the proceeds of over-drafts and certifications was, to belong to the bank. The evidence on this point was given by the president and cashier, and it was claimed, by the petitioners, that whatever the evidence established was of too vague and uncertain a character to constitute a lien or right of property. On May 27th, 1875, Solomon made three purchases of gold: one from George D. Arthur & Co., of five thousand dollars, one from James B. Colgate & Co., of twenty thousand dollars, and one from White, Morris & Co., of twenty thousand dollars, the price of the gold varying from 116⅛ to 116 3/16. The gold was to be paid for and delivered on the next day, the 28th. On the 28th, between 10 and 11 a. m., Solomon called for the gold, and received it, in the cases of White, Morris & Co. and George D. Arthur & Co., in the shape of gold certificates, which he paid for in currency checks on the Continental Bank, receiving the gold certificates over the counter. He received from Colgate & Co. their gold check, which he took to the bank on which it was drawn, and obtained payment for it in gold certificates. He paid Colgate & Co. in a certified check on the Continental Bank. The checks which he gave White, Morris & Co. and George D. Arthur & Co., were also certified by the Continental Bank. All the certifications were made by 11 o'clock, and amounted in the aggregate to fifty-three thousand dollars, leaving Solomon overdrawn about forty-five thousand dollars. At 12 o'clock he sent his brother to tell the president of the bank that he had failed. The president called at his office, but could get no definite information about his condition. Subsequently, the president sought for him at his office and residence, and failed to find him, but, getting an accidental clue, went to West Hoboken, on May 29th, and found him there at the dwelling of a relative. Solomon complained that he was very sick, and said he had no money; but that with the aid of relatives, who, he said, were wealthy, he might be able to repay the bank in twelve months. Finally, however, he opened his vest and took out thirty thousand dollars in gold certificates, which he gave to the president, and he also gave him his own note for ten thousand dollars, payable in one year. The next two days (Sunday and Monday) were holidays, but on Tuesday he came to the bank, and gave the president a gold certificate for five thousand dollars, and one hundred shares of Western Union Telegraph stock, and the president gave him two thousand five hundred dollars in bills, and certified his two checks, one for nine hundred dollars, and one for fifteen dollars. There was no evidence of the value of the telegraph stock.

A. Cardozo and Julius J. Lyons, for petitioning creditors.

F. N. Bangs and Develin, Miller & Trull, for the Continental Bank and the debtor.

BLATCHFORD, District Judge (charging jury). I shall not detain you long, gentlemen, in submitting to you the questions in this case. Your intelligence has apprehended, I am sure, the questions of law and the questions of fact involved. The questions of fact and the questions of law have been very clearly stated by the counsel on both sides, and the questions of fact have been summed up to you by them with great distinctness and clearness, and entirely to your apprehension.

There are two acts of bankruptcy alleged in the petition in this case, upon which you are to pass. The first one is, that, on the 29th of May, 1875, which was Saturday, Mr. Solomon, being insolvent, with intent to give a preference to the Continental National Bank, paid to that bank, as a creditor of his, the sum of over thirty thousand dollars. The second act of bankruptcy is, that he did the like thing on the 1st of June, to the amount of over fifteen thousand dollars. This transaction of the 1st of June, based upon the fifteen thousand dollar matter, evidently was intended to cover the five thousand dollar gold certificate, and the one hundred shares of Western Union Telegraph stock. I allude to that branch of the case first, for the purpose of saying that you are to dismiss entirely from all consideration in this case the matter of the Western Union Telegraph stock, for this reason: The evidence is, that Mr. Solomon, on the morning of Tuesday, the 1st of June, came to the bank himself, and brought with him on that occasion a five thousand dollar gold certificate issued by the government, and representing so much gold in the treasury, and also a certificate for one hundred shares of Western Union Telegraph stock, and put the documents representing these two kinds of property into the hands

of Mr. Bard, who says that within two minutes after they came into his hands he went around the counter, and got two thousand five hundred dollars in bills, and gave them to Mr. Solomon. Thereafter, the five thousand dollar gold certificate and the one hundred shares of the Western Union Telegraph stock were put into the hands of Mr. Ponder, by Mr. Bard, as requested by Mr. Solomon at the time he brought them, and were sold by Mr. Ponder, and the proceeds were turned over to the bank. It has not been shown what the Western Union Telegraph stock sold for, or what its value was; but it does appear that this advance of two thousand five hundred dollars was made at this time upon the deposit of these two securities. Under these circumstances, irrespective of the check for nine hundred dollars, which was afterward paid by the bank, and a check, I think, for fifteen dollars or twenty dollars, the state of the evidence is such as to authorize the court to say that the transaction, so far as it concerns the Western Union stock, is to be thrown entirely out of the case, and is in no manner to be considered by you. It is in no manner to enter into the views you may take of the transactions in regard to the gold certificates, either those that were paid over to Mr. Bard, at Hoboken, or the five thousand dollar gold certificate which was brought on Tuesday, the 1st of June.

In respect to those gold certificates, it is proved very distinctly that the bank paid and honored Mr. Solomon's three checks to the order of these respective parties, George D. Arthur & Co., James B. Colgate & Co., and White, Morris & Co., to the amount of fifty-two thousand dollars and over. It is also shown very clearly that with those checks Mr. Solomon purchased, from George D. Arthur & Co., twenty thousand dollars in gold, from James B. Colgate & Co., twenty thousand dollars in gold, and from White, Morris & Co., five thousand dollars in gold, and that he received this forty-five thousand dollars in gold into his hands in the shape of gold certificates issued by the government of the United States. As to these facts there is no dispute. It is alleged, as a defence, in this case, by Mr. Solomon, that, in turning over to the bank the gold certificates to the amount of thirty thousand dollars, which he turned over at Hoboken, and the five thousand dollars, which he turned over on the Tuesday morning following, being thirty-five thousand dollars of gold certificates in all, he was not guilty of any violation of the bankruptcy act in such wise that he therein committed an act for which he ought to be adjudged a bankrupt; in other words, irrespective of the question of insolvency at the time, it is set up by Mr. Solomon that the gold certificates which he so turned over were really and truly not his own property but the property of the bank, and that they became the property of the bank, and were the property of the bank, by reason of one or the other of the two methods that have been argued before you—either by virtue of a previous agreement, under which the over-drafts were made, or by virtue of the fact that he obtained the over-drafts with a preconceived idea of not paying back the money obtained by the over-drafts, but with the preconceived idea of defrauding the bank of that money, and that, therefore, in judgment of law, no title to the money or to its proceeds—the securities into which the money was converted—was vested in Mr. Solomon by the transaction. The court charges you, as matter of law, that if this preconceived idea of committing this fraud did exist, and if the money was obtained by means of these over-drafts, with that preconceived idea of committing this fraud, of not paying back the over-drafts, but of appropriating the proceeds of that money to his own use, or if there was a previous agreement that the securities purchased with the proceeds of over-drafts should be the property of the bank, so far as such securities should remain in the hands of Solomon, and not be passed away to bona fide purchasers or owners, then, if the proceeds of these over-drafts can be traced to and identified with these thirty-five thousand dollars of gold certificates, a perfect defence has been made out. The first question is, therefore, whether the proceeds of these over-drafts have been, to the satisfaction of the jury, traced to and identified with these thirty-five thousand dollars of gold certificates; in other words, whether it is shown to your satisfaction that these gold certificates were purchased by Mr. Solomon with the money he obtained on these three over-draft checks; because, if that is not shown to your satisfaction, the foundation of the defence fails. If you shall be satisfied that these gold certificates were purchased with the money obtained on these checks, if you shall, as reasonable men, upon the evidence, identify these certificates, which it is very clear Mr. Solomon received, some at the Bank of New York, on the check of Colgate & Co., and the others directly at the offices of the two parties who sold the gold, with the gold certificates that were handed over at Hoboken, and with the five thousand dollar gold certificate that was handed over on Tuesday morning, the 1st of June, then you will proceed to solve the other two questions in the case. In determining the question of the identity of these gold certificates, you are to take into consideration, not only the affirmative evidence given in the case on the subject, but you have a right to take into consideration the fact of the absence of evidence, to show that Mr. Solomon had purchased, and had in his possession, any other gold certificates than these gold certificates which it is clearly shown he had purchased, and did take into his possession, and did purchase, as the evidence is very distinct, with the very money obtained on these over-drafts; because it was the very checks themselves, and not the proceeds of the

checks, that he passed over to the parties who sold him the gold. That is all that I deem it necessary to say to you on that branch of the case. It is for you to say, on the evidence, what your view is, as to whether these gold certificates are satisfactorily identified with the gold certificates which passed into the possession of Mr. Solomon. If you solve that affirmatively, if the identity is established to your satisfaction, then you will consider the other propositions. If you find either of the other propositions to be established, in addition to the proposition of the identity of the gold certificates, you will find in favor of the debtor; that is, if you find either that there was this previous agreement, or, if there was no such previous agreement, if you find that these over-drafts were obtained by Mr. Solomon, with the preconceived idea of committing a fraud by not making good his overdrafts, but by taking the money or its proceeds and appropriating the same to his own use.

Now, gentlemen, upon the question of the previous agreement. You have been addressed by the counsel on both sides on that subject. The evidence has been brought to your attention, and all that I need say to you on the subject is this—that the agreement must be made out by clear and distinct evidence. It must not be left to conjecture. You must be satisfied, not only, that an agreement was made, but you must be satisfied as to what the agreement was. You must be abe to say what it was distinctly from the evidence, and you must also be satisfied that the agreement was, that the securities purchased with the proceeds of the over-draft checks, should, while remaining in the possession, custody, and control of Mr. Solomon, be still the property of the bank at any time the bank chose to reclaim them as its own. And, upon the other branch of the case, as to preconceived fraud, you must be satisfied by clear, distinct, and satisfactory evidence, that Mr. Solomon, when he obtained the money on the overdrafts, at that time, which of course extends not merely to the time when he drew the checks, but to the time when the checks were in fact certified by the bank, had this preconceived idea of committing this fraud. And, as I said before, if, in addition to the conclusion, you come to it that these gold certificates are identified, you shall be satisfied that either of these other propositions is made out,—either the one or the other of them—either the prior agreement or the preconceived idea to commit this fraud, then your verdict will be in favor of the debtor; otherwise, in favor of the creditors.

I am asked to instruct you on certain propositions, and I shall instruct you in accordance with them, so far as they seem to me to be consonant with the law. If you believe that the defendant was insolvent on the 28th of May, 1875—and as to that there is no dispute—and that he thereafter made a payment or conveyed property belonging to him to the Continental Bank, with intent to give it a preference, the verdict must be for the plaintiffs. If you shall find that this property did belong to him, then there is no dispute whatever in the case, that the giving it over to the bank was with intent to give the bank a preference; because, under such circumstances, the bank stood as a naked creditor. The simple question is—was the property property that belonged to Solomon, or was it the property of the bank, either by virtue of the previous agreement, or by virtue of his preconceived fraud? So, if you find the fact of insolvency, and of such payment or conveyance of property belonging to Mr. Solomon, then the law deduces his intent in the transaction to have been to give the preference, and the verdict should be for the plaintiffs. These propositions are the correlatives, the obverse, of the propositions that I previously stated to you. So, also, I charge you, that if the transaction between the defendant and the Continental Bank was only that of an ordinary over-draft, that is, unaccompanied by any previous agreement or any preconceived fraud, the bank merely certifying his checks in advance, relying upon his promise to make his account good during the day, which promise would be implied in an overdraft, even though no express promise were made, then such an over-draft as that created simply the relation of debtor and creditor between the defendant and the bank, and, under such circumstances, a payment by Mr. Solomon with his own property or money to the bank, after insolvency, was an act of bankruptcy, and the plaintiffs would be entitled to recover. So, also, I charge you, that unless the prior agreement was that the moneys overdrawn by him should be invested by him as the agent or trustee of the bank, then the bank, in parting with the money, became only the creditor of the defendant, unless this money was obtained with the preconceived fraudulent intent which has been referred to. That is substantially what I have heretofore charged you. So, also, I charge you, that to make out a prior agreement of the kind to which I have referred, the money drawn should continue to be the property of the bank, or the securities into which it should be converted should continue to be the property of the bank; the evidence should be clear to that effect, otherwise, the verdict should be for the plaintiffs. That is a rule applicable to your consideration of that branch of the case. So, also, I charge you, on the subject of this prior agreement, that a mere promise or agreement by Mr. Solomon, that, in a certain event, he would deliver to the bank such securities as he might purchase with the over-drawn funds, would not vest the title to such securities in the bank, or authorize it to take them as the property of the bank. The meaning of that is this—

that, if the agreement shall be found by you to be that Mr. Solomon merely said to Mr. Bard—If anything happens to me, any pecuniary trouble, and if I have on hand any securities that I have purchased with funds that I have obtained by overdrawing you, I promise you I will turn out those securities to you—but nothing more than that, that of itself does not amount to an agreement that the securities shall be, from the time they are purchased, all the time the property of the bank; but amounts simply to a promise, by Mr. Solomon, that he will turn out to the bank such securities as he may have on hand; and, for the violation of such a promise as that, Mr. Solomon would be liable to a suit by the bank; but the bank would have no right or title in the securities, so as to be able to reclaim them as their own, by an action of replevin, for instance, as their specific property. The distinction is very clear between an agreement that those securities shall, all the time they are in his hands, be considered a trust fund, and really the property of the bank all the time, and a mere promise by him that he will, as a future act, turn over to them the title. It is the distinction between an agreement that the title shall, ipso facto, vest at the time of the purchase, and continue all the time in the bank, and the promise that, under a certain contingency, he will turn over such title at a future day; and the agreement which must be made out is one which would enable the bank to reclaim the securities as its own, without any future turning over by Mr. Solomon, or any future act of delivery, or any future concession by Mr. Solomon. I think that distinction and that proposition must be very clear to gentlemen of your intelligence, as it is very clear in judgment of law. And, as I said before, in the absence of any such agreement as that, the bank had no right to follow the proceeds of the over-drafts as its own property, unless you should find, on the other branch of the case, that there was this preconceived fraudulent intent never to pay back the amount of the over-drafts.

I believe, gentlemen, I have touched upon all the points that it is necessary for me to comment upon. I shall not go over the evidence, either the oral evidence or that to be found in the written affidavit of Mr. Solomon, which was read here and has been commented upon. The questions of fact I have endeavored to present to you in such a way, in connection with the rules of law, that I think you can apprehend very distinctly the points I have submitted for your consideration. I commit the case, therefore, now to your consideration.

A Juror: At what time in the day did Mr. S. N. Solomon notify Mr. Ezekiel Solomon that he had failed?

THE COURT: I will tell you. Ezekiel Solomon says: "Mr. S. N. Solomon called at my office about 10 o'clock on Friday, the 28th of May, and informed me that he had failed. Later in the day, about an hour after that, he asked me to go to the Continental Bank, and inform Mr. Bard, the president, that he had failed. I afterwards went to the bank, and told Mr. Bard that my brother requested me to call there and tell him that he had failed." Then, on that subject, Mr. Bard says that "Mr. Ezekiel Solomon came in and inquired for me, and told me he came to see me by request of his brother, and that he was in trouble. He told me that his brother was ill, in distress, and suffering in his head. I asked him where he was; he said he left him at the office; that he was going home. I expressed surprise at his doing so without seeing me, and Mr. E. Solomon apologized, by saying that he was ill. I immediately went to S. N. Solomon's office, saw him in his office, and stated to him certain things." But, on the subject of the hour of the day, Mr. Bard states nothing that I recollect. "The overdraft occurred about 11 o'clock. I learned it from the paying teller. The over-draft was by the certification of these checks." But the hour that he went to Solomon's office, or the hour that Mr. E. Solomon knew of the failure, is not stated by Mr. Bard.

Mr. Cardozo: The affidavit states that at all times in 1875, up to about 12 o'clock on the 28th of May, he was a member of the stock exchange, etc. There are two requests which have been suggested to me: First, in regard to the preconceived fraud, I ask the court to say to the jury that the presumption of law is one of innocence, and that the defendant has the burden of showing that he acted dishonestly, and, if the jury have a reasonable doubt, it should be resolved against the debtor. Second, that the burden of proof is on the defendant, to show that the moneys from the over-drafts bought those particular gold certificates which are in question, and none other, and, if the jury have reasonable doubt about it, the verdict should be against the defendant.

THE COURT: I have stated to you that the burden of proof is on the defendant; and that, as to the preconceived idea of fraud, and also as to the identity of the gold certificates, he has to make out his defence, as in all other civil cases, by a fair preponderance of evidence, to your satisfaction, as reasonable men. The rule is not as in criminal cases, that, if there is a reasonable doubt, it is to be resolved in favor of the defendant. It is a question of a fair preponderance on both those points, on which undoubtedly the defendant is to make out a defence to your satisfaction.

Mr. Bangs: I ask the court to charge that the presumption of law is that the defendant did not intend any violation of the bankrupt law; and that the burden is upon the

petitioners of making out a knowing and intentional violation of the bankrupt law on the part of the defendant.

THE COURT: I decline to charge that, on the ground that, unless it is shown by the defendant that these gold certificates are identified in the way in which I stated, and unless it is shown that one or the other of the two propositions is true, on the undisputed facts in the case, an act of bankruptcy has been committed, and the verdict must be for the plaintiffs.

The jury retired, and after some little absence brought in a verdict for the debtor.

PAYNE (UNITED STATES v.). See Case No. 16,014.

PAYNTER (MURPHY v.). See Case No. 9,952.

PAYSON (BATES v.). See Case No. 1,103.

Case No. 10,857.

PAYSON v. BROOKE.

[1 Wkly. Notes Cas. 89.]

District Court, E. D. Pennsylvania. Nov. 19, 1874.

EVIDENCE — ADMISSIBILITY OF PORTIONS OF RECORD.

Power of assignee of bankrupt corporation to call in subscriptions to stock.

Action in assumpsit to recover from defendants an assessment of 60 per cent. on ten shares of stock of the bankrupt corporation held by them. The declaration averred that defendants had paid 20 per cent. on subscribing, and were liable for remaining 80 per cent. in event of the 20 per cent. cash fund becoming impaired by losses. That afterwards (by Chicago fire) the 20 per cent. cash fund and all the funds of the company were by reason of losses by fire impaired and exhausted. That the company was, on creditors' petition, adjudicated bankrupt, and that the plaintiff, its assignee, applied to the court in bankruptcy and obtained leave to make an assessment on the stockholders of 60 per cent. [see Case No. 11,704] on the par of their stock, which he accordingly did, and gave notice thereof to defendants. A second count, in indebitatus assumpsit, averred in general terms an indebtedness of defendants to plaintiff for moneys, to wit, $600, in respect of divers, to wit, 10, shares of stock of the bankrupt company, owned by defendants, by virtue of divers calls and assessments duly made. Issue joined on plea of non assumpsit.

Plaintiff's counsel offered in evidence under the first count an exemplification of record from the bankrupt court at Chicago, certified to contain "true and correct copies of the original papers and records therein set forth and of the whole thereof." On inspection this record appeared to set forth in full the proceedings up to and including adjudication of bankruptcy, omitted memorandum of first meeting of creditors, but certified the appointment of assignee, acceptance by him, and copy of assignment. The rest of the copy consisted of proceedings on petition of the assignee for leave to make an assessment, but omitted answers of certain stockholders, and the report of the register in that proceeding, the existence of which affirmatively appeared from the portion of the record certified. On objection made, the learned judge admitted the paper to prove assignment, but rejected all that followed that.

Plaintiff's counsel then offered to prove assessment made by assignee, proprio vigore officii, but declined, in answer to a question of the judge, to say that they expected to prove that the liabilities of the bankrupt corporation exceeded the original paid-up capital, and the 60 per cent. assessment on all its stock. They said that they expected to prove that the assignee, on investigation, found and decided that a 60 per cent. assessment was necessary to meet the company's liabilities. The offer was rejected.

J. Cooke Longstreth and H. W. Tenney, for plaintiff.

Mr. Hannis, for defendant.

THE COURT saying: 1. That the exemplification of record offered was not admissable to prove the decree of the court in bankruptcy authorizing an assessment by the assignee, because it is apparent that parts of the record of the proceedings that culminated in that decree were not certified, and there was no offer to prove their contents.

2. To prove an order in a particular proceeding in a bankrupt case, it is not necessary to produce the whole record of that case, but only the whole record of that particular proceeding.

3. That it is not competent for the assignee of a bankrupt corporation, of his own motion, to make an assessment on unpaid balances, or instalments, on stock in such corporation.

4. That before recovery can be had in an action at law from the stockholders of an insolvent corporation, in respect of the unpaid balances on their stock subscriptions, there must have been either corporate action to fix, or a judicial ascertainment of, the defendant's liability.

At the request of plaintiff's counsel, THE COURT withdrew a juror and allowed the case to be continued.

The above case is kindly reported by Mr. Longstreth, at the request of the court.

[NOTE. For actions brought by the assignee against other delinquent stockholders, see Payson v. Hadduck, Case No. 10,862; Same v. Stoever, Id. 10,863; Same v. Withers, Id. 10,864; Same v. Coffin, Id. 10,859 and 10,858.]

Case No. 10,858.

PAYSON v. COFFIN.

[4 Dill. 386; [1] 5 Cent. Law J. 220.]

Circuit Court, D. Kansas. 1877.

BANKRUPT ACT—STATUTE OF LIMITATIONS—JURISDICTION OF CIRCUIT COURT—AMOUNT.

1. The two-years limitation provision in the bankrupt act [14 Stat. 517], applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property.

[Cited in Walker v. Towner, Case No. 17,089; McCan v. Conery, 12 Fed. 318.]

2. Suits may be brought in the circuit courts of the United States, by assignees in bankruptcy, without reference to the amount or value in controversy.

Action by [James R.] Payson, assignee in bankruptcy of the Republic Insurance Company, of Chicago, to recover a second assessment or call from the defendant [W. G. Coffin] as a stockholder in the bankrupt company. Plea: that no cause of action hath accrued against the defendant within two years next before the commencement of this suit. Demurrer to plea.

[The first assessment in this case was levied by the court in Case No. 11,704. An action was brought on this first assessment against the defendant in Case No. 10,859.]

Mr. Howell, for plaintiff.

Mr. Wheat, for defendant.

MILLER, Circuit Justice, orally delivering his judgment, held:

1. That the plea of the statute of limitations was sufficient in point of form.

2. That the plea was good in substance; in other words, the two years limitation in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property.

3. Whether the cause of action accrued until the second assessment (the one in suit) was made by the bankruptcy court, is a question which does not legitimately arise on the demurrer to the plea of the statute of limitations. Demurrer to the plea of the statute of limitations overruled.

It was also held by Mr. Justice MILLER (the circuit judge concurring), on a demurrer to the petition in another case, that assignees in bankruptcy, under the bankrupt act as amended June 22d, 1874 [18 Stat. 178], if not before, may sue in the circuit courts of the United States to collect assets and debts due the estate, without reference to the amount claimed; that the limitation of $500 in the act of March 3d, 1875 [18 Stat. 470], as to the general jurisdiction of the circuit courts, does not apply to such suits.

NOTE. See Walker v. Towner [Case No. 17,089]. Limitation applies to causes of action which existed before the bankruptcy, as well as to those which arise after. Norton v. De La Villebeuve [Id. 10,350]. Conflicting decisions cited, Frank, Bankr. Act (3d Ed.), p. 41, note 86.

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

Case No. 10,859.

PAYSON v. COFFIN.

[5 Dill. 473.] [1]

Circuit Court, D. Kansas. 1878.

BANKRUPT ACT—STATUTE OF LIMITATIONS—LIABILITY OF STOCKHOLDERS.

1. The two-years statute of limitations in the bankrupt act (Rev. St. § 5057) applies to an action by the assignee to enforce against stockholders the payment of their unpaid shares.

2. The statute, in such a case, begins to run from the date of the execution of the deed of assignment to the assignee, and not from the date of the assessment on the shares by the bankruptcy court.

The question to be decided is whether the action is barred by the section of the bankrupt act (Rev. St. § 5057) which provides that no suit at law or in equity shall, in any case, be maintainable by or against the assignee, etc., unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee.

Shortly, the facts are these: June 29th, 1870, the defendant [W. G. Coffin] subscribed for $5,000, being fifty shares of the stock of the bankrupt company. On November 14th, 1872, a petition in bankruptcy was filed against the company. December 18th, 1872, the adjudication of bankruptcy having been made, the register duly assigned and conveyed all of the estate of the bankrupt [the Republic Life Insurance Company] to the assignee [James R. Payson], who is the plaintiff here. On February 4th, 1873, on the petition of the assignee, the bankruptcy court ordered an assessment of $60 on every share of unpaid stock. [Case No. 11,704.] Defendant was sued on this assessment, and on June 9th, 1874, judgment was rendered against him, which he paid. Afterwards, viz., October 17th, 1876, upon the petition of the assignee, the bankruptcy court made another assessment of $10 per share on every share of unpaid stock. On the 12th day of February, 1877, this action was brought to recover the assessment made October 17th, 1876.

The charter of the company provides "that the real and personal property of each individual stockholder shall be held liable for any and all losses and liabilities of the company to the amount of the stock subscribed or held by him and not actually paid in;" and that "in all cases of losses exceeding the means of the corporation, each stockholder shall be liable to the amount of unpaid stock held by him."

Plaintiff avers, in his complaint in this suit, that on the 9th of October, 1871 (the

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

date of the great Chicago fire), "the said company met with losses by fire by which the whole of the cash fund and all of the funds it possessed were exhausted, leaving the company without means of payment, except by assessment upon the capital stock and stockholders."

H. Scott Howell, for plaintiff.
Clough & Wheat, for defendant.

DILLON, Circuit Judge. The two-years limitation in the bankrupt act is applicable to actions like the present. Walker v. Towner [Case No. 17,089]; Scovill v. Shaw, —Cir. Ct. Dist. Mass., Oct., 1878, before Clifford and Lowell, JJ.,—[Id. 12,552]. The assessment upon which this action was brought was made nearly four years after the adjudication of bankruptcy and the execution of the deed of assignment. The only question is when the statute begins to run. The contention of the plaintiff is that it begins to run only from the time when the assessment of October 17th, 1876, was made. If so, the action is not barred. The contention of the defendant is that the statute commenced to run at least from the time when the deed of assignment was executed. If so, the action is barred. Extended consideration of this question is not necessary, since it has been decided, for reasons that are entirely satisfactory, in the case of Scovill v. Shaw, supra, that the stockholders were liable to the suit of the assignee under the assignment, at any time after it was executed, for the enforcement of their obligations as stockholders. The facts of that case presented the exact question we are called on here to decide, and it was elaborately argued by able counsel.

That was an action by the assignee in bankruptcy of a coal and mining corporation against a stockholder to enforce the payment of amounts alleged to remain unpaid on shares held by the defendant. On April 2d, 1874, the petition in bankruptcy was filed, and on April 29th, 1874, the plaintiff was appointed assignee, and received a deed of assignment. On June 10th, 1876, the bankruptcy court made an assessment, and shortly afterward the action was brought. It was held that the cause of action accrued to the assignee on receiving the deed of assignment, and, as more than two years had elapsed before the suit was commenced, the same was barred. The court held that the cause of action was the defendants' obligation to pay for their stock, and not the assessment by the order of the bankruptcy court. If bankruptcy had not taken place, creditors would have had a remedy; and such remedy is equally open to the assignee. Says Clifford, J., in giving his opinion: "Creditors, after the failure of the corporation, could have brought a bill in equity against the corporation, and joined the stockholders to enforce the payment; and it is equally clear that the assignee might have sued the moment the title to the estate of the bankrupt was duly conveyed to him as such assignee. Stockholders, under such circumstances, are debtors to the corporation; consequently, the claim against them passed to the assignee, as part of the property, estate, and credits of the bankrupt." Terry v. Anderson, 95 U. S. 636.

Judgment for the defendant.

[NOTE. Subsequently another action was brought against the defendant upon a second assessment. The case was heard upon demurrer to plea of statute of limitations. Case No. 10,858. For actions brought by the assignee against other defendants. see Payson v. Dietz, Id. 10,861; Payson v. Stoever, Id. 10,863; Payson v. Withers, Id. 10,864; Payson v. Hadduck, Id. 10,862.]

Case No. 10,860.

PAYSON et al. v. COOLIDGE et al.

[2 Gall. 233.] [1]

Circuit Court, D. Massachusetts. Oct. Term. 1814.[2]

BILLS AND NOTES—PROMISE TO ACCEPT NON-EXISTING BILL—CONSIDERATION.

1. A promise to accept a non-existing bill, shown to a third person, who upon the face of such promise takes it for a valuable consideration, is in law an acceptance of such bill, when drawn. And it is immaterial, whether the consideration allowed by the holder was a debt previously due to him from the drawers, or money advanced to them at the time of receiving the draft.

[Cited in Bayard v. Lathy, Case No. 1,131.]

[Cited in Brush v. Scribner, 11 Conn. 403.]

2. What is sufficient evidence of an admission by the acceptors of an endorsement to the holders of a bill.

Assumpsit on a bill of exchange drawn at Baltimore on the 7th of March, 1814, by Messrs. Cornthwait & Carey, for 2,000 dollars, upon the defendants at Boston, payable at sight, to the order of John Randall, and by him endorsed to the plaintiffs. The declaration alleged the bill to be duly accepted by the defendants. At the trial upon the general issue, the endorsement was denied, and, to prove it, the plaintiffs offered in evidence the affidavit of Coolidge (one of the defendants), filed in this cause to procure a continuance thereof. The affidavit, among other things, stated that the deponent expected to prove by Messrs. Cornthwait & Carey, that previous to the 1st day of March, 1814, they (Messrs. Cornthwait & Carey) were indebted to the plaintiffs in a larger sum of money than 2,000 dollars, and that, finding themselves unable to pay the plaintiffs, they gave them a draft on the defendants on the 14th [3] day of March, 1814, for 2,000 dollars,

[1] [Reported by John Gallison, Esq.]

[2] [Affirmed in 2 Wheat. (15 U. S.) 66.]

[3] The draft was really dated on the 7th, and not on the 14th of March; but as no other draft had been given for 2,000 dollars, and that of

in part payment of their demand, without a knowledge of what the defendants had written to Messrs. Cornthwait & Carey; and that the said draft was not taken by the plaintiffs in consequence of any supposed promise on the part of the defendants to accept the same, but was taken by the plaintiffs in the hope of receiving a part of their said debt from funds supposed to be in the defendants' hands, they (Messrs. Cornthwait & Carey) being at that time embarrassed and unable to pay the plaintiffs' demand, which the plaintiffs well knew, &c. &c.; and that, without proof of these and other facts stated in the affidavit, the defendants could not safely proceed to trial. To the admission of this affidavit, for the purpose of proving the endorsement to the plaintiffs by Randall, the defendants by their counsel objected.

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. We are of opinion, that the affidavit, taken in connexion with the bill, is proper evidence to be left to the jury, from which they may infer an admission by the defendants, that the plaintiffs are the legal holders of the bill. It is true, that the bill is not accurately described in the affidavit, and this by mere mistake, as it must be presumed, for there is no reason to suppose a deliberate intention to commit perjury. But there cannot be a doubt, that the bill declared on, and the bill described in the affidavit, are the same, and that the affidavit contemplated them as such. How otherwise could the existence of such a bill, or the circumstances, under which it was obtained, be at all material to the defence of the deponent? Supposing this to be so, there is strong evidence to show, that the plaintiffs are the legal holders of the bill, for the defendants admit, that it came lawfully to their possession for a valuable consideration. Indeed, the whole defence stated in the affidavit turns upon the supposition, that the plaintiffs have a good title to the bill, but that it was not received under circumstances, which bind the defendants to an acceptance. Let the affidavit be read to the jury. "Valeat quantum valere potest."

In the further progress of the cause, it appeared that previous to the existence of the present bill, viz. on the 21st of February, 1814, Messrs. Cornthwait & Carey drew another bill on the defendants for the sum of 2,700 dollars payable to Randall, and by him endorsed to the plaintiffs, which was sent to Boston, and there protested by the plaintiffs for non-acceptance, and afterwards returned protested, and information of the non-acceptance was first received by the drawers in a letter from the defendants dated the 28th of the same month of February. The letter was as follows: "Yours of the 21st instant is at hand this morning, as also a letter from Mr. Williams with a bond of indemnity. This bond, conformably to our laws, is not executed as it ought to be, but it may be otherwise in your state. It will therefore be necessary to satisfy us the scroll is correct and legal with you instead of a seal. We notice no seal to any of the signatures. We regret that you were so hasty in again drawing on us before the business was adjusted, and then even for a sum exceeding the nominal balance of accounts, which compels us to note the draft. We shall write our friend Williams per this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams feels satisfied on this point, he will inform you, and in that case your draft for 2,000 dollars will be honored. The balance may stand to cover expenses, which may probably be demanded before we hear from you again, even if a favorable decision takes place. We do not wish for any benefit to ourselves, but really should think the whole had better remain till the present supreme court is over, when probably the cause will be decided, and if favorably, the whole can be settled in a moment," &c. &c.[4]

The letter written to Mr. Williams by the defendants was of the same date, and as follows: "Yours of the 21st is at hand covering Cornthwait & Carey's bond, which we notice is signed, and a scroll instead of a seal affixed to the signature, which here would not be considered a sealed instrument and legally executed—will you determine whether that is considered, without any question, legal with you; and if you do not find it is, an instrument legally executed must be forwarded instead of it. You know the object of the bond, and of course see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others? They have very hastily drawn on us for 2,700 dollars, somewhat more than the nominal balance of account, which it mortifies us to refuse; but the fault is theirs, and we have written respecting the bond, &c. and told them, you would be able to decide, whether we could consistently honor this draft to the amount of 2,000 dollars, a sum we should pay, provided you

the 7th was the only one in controversy between the parties, it was admitted to be a mere unintentional misdescription of the draft.

[4] This part of the letter alludes to the case of The Hiram, then pending in the supreme court of the United States. This vessel was captured on a voyage to Lisbon, having a British license; Messrs. Cornthwait & Carey were shippers; and the proceeds had been delivered to Messrs. Coolidge & Co. as agents of Cornthwait & Carey, on bail. The bill was drawn on those funds. See The Hiram, 8 Cranch [12 U. S.] 444.

are satisfied the instrument sent us is legal, and the signers of unquestionable solidity, such as you would receive for a debt due you, payable in two or three years, as you know, if not decided at the present term of the supreme court, it will not be for a year at least; or, in case they execute another bond instead of this, provided you find that necessary, which we will return you or them on receipt of the other. You will confer on us a favor by doing in this business the same, as though you were in our place." These letters were duly sent by mail. On or about the 5th of March, 1814, Samuel Carey, of the firm of Cornthwait & Carey, called on Mr. Williams, at his counting room in Baltimore, to know if the latter had satisfied the defendants as to the sufficiency of the bond, to which inquiry Mr. Williams stated the substance, and read a part of a letter written by him that day to the defendants. On the same day, one of the house of the plaintiffs called to know, if Mr. Williams had written the defendants in a manner calculated to satisfy them on the subject of the bond, to whom Mr. Williams stated as he had before done to Mr. Carey, and also read a copy of his letter to the defendants. This letter, dated the 5th of March, was as follows: "I have received by this morning's mail your favor of the 28th ultimo; and am assured, that the bond transmitted to you is executed conformably to the usual mode here; and that it is sufficient for the purposes for which it was given, provided the parties possess the means. And of the last signer I have no hesitation in expressing my firm belief of his being able to meet the whole demand himself; of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all the circumstances, I should not feel inclined to withhold from them any portion of the funds, for which the bonds were given." The draft was afterwards taken by the plaintiffs on the 7th of March, and presented to the defendants for acceptance on the 14th of the same month, who refused to pay or accept the same.

Mr. Hubbard, for defendants, contended, that upon this evidence the plaintiffs were not entitled to recover: (1) Because there was no acceptance of the bill. A promise to accept a non-existing bill is not in point of law an acceptance, although taken on the faith of such promise. Even if a different rule were admitted to exist in ordinary cases it would not apply to this case, for here the bill was taken for a pre-existing debt. (2) The defendants are not bound by the answer of Williams, for he did not pursue the special authority given him. All the signers were not of unquestionable solidity. And he cited Storer v. Logan, 9 Mass. 55.

Mr. Prescott, for plaintiffs, e contra, affirmed the law to be for the plaintiffs on both points.

STORY, Circuit Justice. I take it to be clearly settled, that a promise to accept a non-existing bill, if shown to a third person, who, upon the faith of such promise, receives the draft for a valuable consideration, is in point of law an acceptance. Such was the doctrine of Lord Mansfield in Pillans v. Van Mierop, 3 Burrows, 1663, and Mason v. Hunt, 1 Doug. 297, which, though sometimes doubted in later times, has never been overruled, and in my judgment stands supported by principles of public policy and convenience. See Story, Bills, § 249, note 1, where all the authorities may be found collected; 3 Kent, Comm. (5th Ed.) 84, 85. I shall adhere to that doctrine until a different rule is taught me by a tribunal, which I am bound to obey. There is no foundation for the distinction, asserted by the defendants' counsel, as to receiving such a draft for a pre-existing debt. It is sufficient, that it is received for a fair and valuable consideration, and on the faith of a promise by the drawers to accept it. Although a debt be already due, the party who receives such a draft in part payment, thereby as much gives credit to the drawer and acceptor, as a party who advances his money upon the draft. In respect to Mr. Williams, it is clear that the letter written to him by the defendants was not shown to the drawers or to the plaintiffs, and therefore they have nothing to do with his private instructions. The defendants referred the drawers to him for an answer to certain questions, and agreed to be bound by his answers; and if Mr. Williams gave such an answer, as satisfied the terms of the defendants' letter to the drawers, it binds the defendants as an absolute agreement by them to accept a draft for 2,000 dollars.

The questions for the jury therefore are, upon the whole evidence, whether Williams, upon the application of the plaintiffs, after they had seen the letter addressed to the drawers, did declare himself satisfied with the bond referred to in the letter; and whether the plaintiffs took the present draft upon the faith of that letter and of Williams's declaration. If so, then the plaintiffs are entitled to recover, notwithstanding the consideration for the draft, as between them and the drawers, was a pre-existing debt, or, to bring it to the present case, was a part payment of the previous bill drawn for 2,700 dollars. And even supposing (what does not appear), that Williams, under all the circumstances, did exceed the private instructions given to him by the defendants, still, as those instructions were not communicated to the plaintiffs, it cannot affect the right of the plaintiffs to a recovery.

Verdict for the plaintiffs.

NOTE. See Pierson v. Dunlop, Cowp. 572–574; Johnson v. Collings, 1 East, 98; Clarke v. Cock, 4 East, 57; Wynne v. Raikes, 5 East, 514; Wilson v. Clements, 3 Mass. 1; Banorgee v. Hovey, 5 Mass. 11; Storer v. Logan, 9 Mass.

55; McEvers v. Mason, 10 Johns. 207; Van Reimsdyk v. Kane [Case No. 16,872].

On a writ of error to the supreme court, the judgment in this case of Payson v. Coolidge was affirmed. 2 Wheat. [15 U. S.] 66. See, also, on the same point, Schimmelpennich v. Bayard, 1 Pet. [26 U. S.] 264; Boyce v. Edwards, 4 Pet. [29 U. S.] 121; Wildes v. Savage [Case No. 17,653]; Russell v. Wiggin [Id. 12,165].

Case No. 10,861.

PAYSON v. DIETZ.

[2 Dill. 504;[1] 12 Am. Law Reg. (N. S.) 511; 8 N. B. R. 193; 5 Chi. Leg. News, 434; 30 Leg. Int. 313.]

Circuit Court, D. Iowa. 1873.

BANKRUPT ACT—JURISDICTION OF CIRCUIT COURT.

1. The circuit court of the United States has jurisdiction of a common law or equity action brought by an assignee in bankruptcy appointed in another district where such an assignee is a citizen of another state, and the defendant is a citizen of the state where the action is brought, and the amount in dispute exceeds the sum of five hundred dollars.

[Cited in Stansell v. Levee Board of Mississippi, Dist. No. 1, 13 Fed. 851.]

2. Jurisdiction of the state and federal courts as affected by the bankrupt act [14 Stat. 517] considered.

[Cited in Claflin v. Houseman, 93 U. S. 134.]

[Cited in brief in Cook v. Whipple, 55 N. Y. 156.]

In equity. The defendant moves to dismiss the action for want of jurisdiction.

The petition alleges that the plaintiff, "Joseph R. Payson, assignee in bankruptcy of the Republic Insurance Company of Chicago, Illinois, is a citizen of the state of Illinois, and that the defendant is a citizen of the state of Iowa."

The petition then proceeds to set out a case to recover of the defendant the sum of $600, the amount of an unpaid assessment upon stock held by him in the Republic Insurance Company. Among other averments is one that this company, by reason of losses in the Chicago fire, was unable to meet its debts and liabilities, except by an assessment upon its stockholders; that the said company has been adjudged a bankrupt by the proper district court in Illinois; and that the said court, after notice to the stockholders, ordered the assignee to make upon them a call and assessment for the whole amount due and unpaid upon their stock. [Case No. 11,704.]

There are over one hundred other actions of like character brought by the plaintiff as assignee against the stockholders of the company in this state, in which motions are made to dismiss for want of jurisdiction.

H. P. Allen, Galusha Parsons, and C. H. Gatch, for the motion.

H. Scott Howell, Austin Adams, John N. Rogers, and Joseph G. Anderson, against the motion.

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

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

DILLON, Circuit Judge. Since the amount in dispute exceeds $500, and the plaintiff is a citizen of Illinois, and the defendant a citizen of Iowa, the jurisdiction of this court under the eleventh section of the judiciary act [1 Stat. 78] plainly exists, unless it be taken away by the provisions of the bankrupt act. It is admitted that there is no express provision depriving either this court or the state courts of jurisdiction of actions in behalf of assignees in bankruptcy. It is argued, however, that the jurisdiction of each of these classes of courts is taken away as a necessary or implied effect of the jurisdiction which is conferred by the bankrupt act upon the district courts of the United States as courts of bankruptcy. It is claimed, and we are inclined to think correctly, that the district courts of the United States have jurisdiction by reason of the subject matter of all proceedings in bankruptcy, and over all actions by assignees in bankruptcy, even though such actions be not brought in the district where the proceedings in bankruptcy are pending; and that since congress has thus established bankruptcy courts throughout the United States and given them this full and plenary jurisdiction, and since the second section of the bankrupt act prescribes that the circuit courts may exercise certain specific powers and jurisdiction in bankruptcy proceedings and actions, the conclusion, it is insisted, is a necessary or legitimate one, that it was the intention of congress that all jurisdiction in bankruptcy cases should be exclusively in the bankruptcy courts, except so far as the bankrupt act expressly confers such jurisdiction upon the circuit court.

We have felt the force of the argument made to support the exclusive jurisdiction of the district courts in all actions relating to the collection of the assets of the estate, and in all other actions concerning the estate, except so far as a concurrent jurisdiction is vested in a limited class of cases by the second section in the circuit courts; but upon the best consideration we have been able to give to this view, we have not been able to reach the conclusion that it is sound.

We mention briefly some of the reasons which sustain the jurisdiction of the circuit court in actions of this character.

1. This court, where the jurisdiction arising from citizenship exists, is a court of full common law and equity powers. In this action the requisite citizenship does exist, and the cause of action is not one created by the bankrupt act, but is essentially a common law action to enforce a contract against the defendant. It is true that the assignee claims title under the proceedings in bankruptcy, much like an executor under proceedings in the probate court, but this does not make the action, properly viewed, a proceed-

ing in bankruptcy. With the consent and under the direction of the proper bankruptcy court, there is no reason why an action like this should not be enforced either in the state court, or in this court, as may be deemed most expedient. Essentially it does not differ from actions of which both classes of courts constantly take cognizance as part of their original and rightful jurisdiction.

2. The argument against the jurisdiction of this court derives all its force from the supposed exclusive jurisdiction of the district courts, and that such jurisdiction is exclusive, both of the state courts and of this court, except to the limited extent mentioned in the second section of the act.

If congress had intended by the first section of the act to make the jurisdiction of the district courts exclusive in the collection of assets, and to deprive all other courts of jurisdiction over any action by or against assignees in bankruptcy, it would have been as easy as it would have been natural to employ language to express this purpose. But it will be observed that the word "exclusive" as descriptive of the jurisdiction, is not only not used, but seems to have been carefully avoided.

3. That the state courts are not deprived of jurisdiction in ordinary common law and equity suits, simply because brought by the assignee in bankruptcy, is a proposition that has the support of many well reasoned adjudications made both under the bankrupt act of 1841 [5 Stat. 440] and the present act. Ward v. Jenkins, 10 Metc. [Mass.] 583; Stevens v. Mechanics' Sav. Bank (1869) 101 Mass. 109; Boone v. Hall (1869) 7 Bush, 66; Winslow v. Clark, 2 Lans. 377; Gilbert v. Priest [65 Barb. 444], and cases cited; Peiper v. Harmer, 5 N. B. R. 252, 8 Phila. 100; Mitchell v. Great Works [Case No. 9,662], per Story, J.; In re Central Bank [Id. 2,547], per Benedict, J.; North Carolina v. Trustees of University [Id. 10,318]; Carr v. Gale [Id. 2,435]; Lucas v. Morris [Id. 8,587]; 1 Kent, Comm. 379, 400.

And Mr. Justice Clifford, in the able judgment in which he demonstrated the jurisdiction of the several district courts of the United States in all matters and cases in bankruptcy, expressly admits that "state courts may, doubtless, exercise concurrent jurisdiction with the circuit and district courts in certain cases growing out of proceedings in bankruptcy." Sherman v. Bingham [Case No. 12,762].

And if these courts may exercise a concurrent jurisdiction in any event, it would seem to be in cases where the assignee, with the consent or concurrence of the bankruptcy court, resorted to them for the ordinary purpose of collecting the assets of the estate.

Assuming the decisions in favor of the concurrent jurisdiction of the state courts in certain classes of action by assignees in bankruptcy to be correct, it would be an anomalous result, and one which we can hardly suppose congress intended, viz., that the state courts should exercise their general concurrent jurisdiction, if the assignee should desire to resort to them, but that this court should not exercise its like jurisdiction.

4. The jurisdiction of this court under the judiciary act is plain. Repeals by implication are not favored. Jurisdiction plainly conferred upon one court cannot be taken away by mere affirmative legislation conferring like jurisdiction upon another court. Speaking of this subject, an eminent judge holds this language: "There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it, before possessed." Per Bronson, J., in Delafield v. State of Illinois, 2 Hill, 161.

For these reasons the motion to dismiss for want of jurisdiction is denied. Motion denied.

As to state and federal jurisdiction in cases by and against assignees in bankruptcy, see In re Davis [Case No. 3,620]; Norton v. Boyd, 3 How. [44 U. S.] 437.

[NOTE. For actions brought by the assignee against other delinquent stockholders, see Payson v. Brooke, Case No. 10,857; Payson v. Stoever, Id. 10,863; Payson v. Withers, Id. 10,864; Payson v. Coffin, Id. 10,859 and 10,858; Payson v. Hadduck, Id. 10,862.]

Case No. 10,862.

PAYSON v. HADDUCK et al.

[8 Biss. 293; [1] 11 Chi. Leg. News, 57.]

District Court, N. D. Illinois. Oct., 1878.

ADMINISTRATION OF ESTATES—CONTINGENT CLAIMS NOT BARRED BY TWO YEARS' LIMITATION STATUTE — LIABILITY OF HEIR FOR ANCESTOR'S LIABILITIES—EQUITY JURISDICTION—CAPITAL STOCK ASSESSMENT.

1. A contingent claim which is not due, or which had not accrued prior to the close of the administration of an estate, is not barred by the Illinois statutory two years' limitation of time within which to exhibit claims against a decedent's estate.

2. The heir is liable to the extent both of the personal and the real estate received from his ancestor, for the contracts or liabilities of the ancestor, and where these claims have not accrued until after the administration of the estate is closed, suit may be brought and maintained against the heir, to the extent of the assets derived from the ancestor.

3. Where the ancestor holding capital stock in a corporation, subject to assessment, died, and subsequent to the close of administration of the estate, an assessment was made upon the stock: *Held*, that a suit in equity could be maintained against the heirs for such assessment to the extent of assets received from the ancestor.

[This was a bill in equity by Joseph R. Payson, assignee of the Republic Insurance Company, against Benjamin F. Hadduck, Jr., and others, to enforce the payment of cer-

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

tain assessments levied by the court in Case No. 11,704. Heard upon demurrer.]

Tenneys, Flower & Abercrombie, for complainant.

Mattocks & Mason, for defendants.

BLODGETT, District Judge. I will say to counsel that I have not had time—I have not been able to take such time as I could have wished, in following out the interesting questions that are raised in this case. I have only been able to give the case such cursory examination as has satisfied my own mind; and what I say in disposing of the case, I do not wish to have considered as an exhaustive discussion of the questions of law raised, and which have been so ably argued by counsel.

The facts which are set out in the bill, and admitted by the demurrer, are briefly these:

Prior to the great fire of October, 1871, in this city, there existed in this state a corporation known as the Republic Fire Insurance Company, created under the statutes of this state, and having its proper office and place of business in the city of Chicago. The stock of this company had been issued to the amount of $5,000,000, upon which 20 per cent. had been paid in, and the remaining 80 per cent. was subject to the call of the directors whenever there should be an impairment of the capital by losses. By the great fire in this city, the company became insolvent, and in the course of the year 1872—the date is not material for the purposes of this question—was declared bankrupt, and an assignee duly appointed. Benjamin F. Hadduck was a stockholder in the company to the amount of 500 shares of $100 each, making $50,000, upon which he had paid his first installment of 20 per cent., and was liable to an assessment for the remaining 80 per cent. under the terms of the charter and by-laws of the corporation. Mr. Hadduck died in December, 1871, and letters of administration were issued upon his estate in the Cook county court, during the early part of the year 1872. Shortly after the company was declared bankrupt, the assignee presented to this court an application for an assessment upon the stockholders of 60 per cent. upon their unpaid stock. This assessment was made by the court, and in due course of time so much of it was collected as was collectible. In October, 1876, the assignee represented to the court in a proper manner, by petition, that he had collected all of the 60 per cent. assessment which he was able to collect, and asked for a further assessment of 10 per cent. with which to liquidate the unpaid indebtedness of the corporation. This assessment was ordered to be made on the 18th of October, 1876.

The assessment of 60 per cent. which was made against all of the stockholders was paid by the administrator of Mr. Hadduck's estate in due course of administration, between the time when the assessment was made, and December, 1874; and in December, 1874, the administrator completed the administration, and the estate was declared closed, and the assets, which consisted of about $61,000 of personal property, moneys and credits, and something over that amount in real estate, were duly, by order of court, distributed to the heirs-at-law, who consisted of the widow and one son, Benjamin F. Hadduck, Jr.

It will be seen that the administration of the estate was closed after the 60 per cent. assessment was paid, and before the 10 per cent. assessment was made; and on the making of the 10 per cent. assessment, a call was made upon the administrator, widow and heir-at-law, for this 10 per cent., which they have refused to pay.

The assignee now brings this bill in equity to enforce the payment of this assessment against the widow and heir, and to that bill defendants demur, assigning two causes of demurrer:

First. That this action, and the claim, is barred by section 70 of chapter 3 of the Revised Statutes of Illinois, in reference to limiting claims against the estates of deceased persons to two years from the time the letters of administration are issued.

Section 70, which is invoked in this case, reads as follows:

"All demands against the estate of any testator or intestate shall be divided into classes, in manner following, to-wit:

"First. Funeral expenses.

"Second. The widow's award, if there is a widow; or children, if there are children, and no widow.

"Third. Expenses attending the last illness, not including physician's bill.

"Fourth. Debts due the common school or township fund.

"Fifth. All expenses of proving the will," etc.

"Sixth. Where the decedent has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for.

"Seventh. All other debts and demands, of whatsoever kind, without regard to quality or dignity, which shall be exhibited to the court within two years from the granting of letters, as aforesaid; and all demands not exhibited within two years as aforesaid shall be forever barred, unless the creditors shall find other estate of the deceased, not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid pro rata out of such subsequently discovered estate, saving however to femes covert, infants, persons of unsound mind, or imprisoned, or without the United States in the employ of the United States or of this state, the term of two years after their respective disabilities are removed, to exhibit their claims."

It is insisted on the part of the defendants in this suit, that the remedy of the assignee, as against them, is lost by the operation of this statute; that this claim should have been exhibited to the administrator of Mr. Hadduck before his discharge, and should have been proved and allowed by the county court, and that the failure so to exhibit it and have it allowed by the county court, during the progress of the administration of the estate, forms a complete bar to the claim.

The second point urged is that the form of action or proceeding to recover this assessment should have been by a suit at law, and not in equity.

The question which is presented by this demurrer raises the point as to whether a contingent claim which is not due, or cannot be said to have accrued during the term of the administration of the estate of a deceased person, is to be barred by the operation of this statute. There are a large number of claims which we can imagine may arise against the estates of deceased persons, which cannot be said to have accrued at the time the letters of administration are issued, or during the two years of the administration, such as actions of covenant for breaches of warranty made by the ancestor during his lifetime, and where the breach may not occur until long after the expiration of the limitation here provided for, and long after the settlement of the estate in the probate court; such, also, as liabilities in favor of sureties upon bonds where the liability of the surety is not fixed, perhaps, until long after the close of the estate in the probate court; and numerous cases of contingent liabilities may be imagined where the party could not present a claim to the probate court or exhibit it to the administrator during the two years of limitation which is here provided for; and the question is, does this statute of limitations run as against that class of claims?

I have come to the conclusion from examination of authorities that it cannot be said to run as against any contingent claim where the right of action has not accrued, and does not accrue, before the settlement of the estate is closed.

Without examining or reading the authorities at length upon the subject, I will call the attention of counsel to the case of Hall v. Martin, reported in 46 N. H. 337, which seems to me to more completely cover all the questions which are raised in this case than any other which I have been able to find. It will be sufficient for the purposes of this discussion that I read the syllabus of the case, as I think that fairly states the conclusion of the court:

"At common law the heir was liable on the covenants of his ancestor in which he was specially bound, just so far and no further, as he had assets by descent; and as real estate alone descended to him, his liability was limited to that.

"But where by our statute the personal estate is made to descend to him substantially in the same way, a correct application of the common law principle requires it to be treated as assets in his hands equally with the real estate; and it was therefore held that such heir is liable on the covenants of his ancestors, which could not have been proved while the estate was in the course of administration, to the extent of the personal as well as the real estate which has so descended to him.

"Suits against an heir or devisee are not barred by the provisions of the Revised Statutes, limiting actions against executors or administrators of solvent estates, where no funds are retained for contingent claims by order of the judge of the probate court, to three years from the original grant of administration.

"But the limitation applies only to suits against the executor or administrator, and therefore the remedy against the heir or devisee upon claims which could not be proved during the three years because contingent, is not barred by these provisions, but remains as in the case of insolvent estates."

There are, of course, some provisions discussed in this opinion which are peculiar to the statute of New Hampshire in regard to the settlement of estates, such as those which apply to insolvent estates as distinguished from solvent estates, where, in cases of solvent estates, the administrator is required, or may be required, by order of the court to retain in his hands upon final settlement, or there may be retained in the hands of the court, a certain amount of funds to meet contingent liabilities which have not yet accrued; and so far as the discussion in this case applies to the particular provisions of the New Hampshire statute, of course they are not germain to the case in hand. But the general principle laid down is this: that the heir is liable to the extent both of the personal and the real estate received from his ancestor, for the contracts or liabilities of the ancestor, and that, where these claims have not accrued until after the administration of the estate is closed, suit may be brought and maintained against the heir to the extent of such assets which he derived from the ancestor. At common law the heir was not liable for the debts of the ancestor except upon covenants or bonds under seal, where the heir was specially named, and in those cases only to the extent of the real estate, because he only received real estate by descent. But this case breaks new ground, I think the court may say, and disregards the distinction upon principle between real and personal estate in the hands of the heir, because the law has made the heir the recipient of the personalty as well as realty from the ancestor—made him the heir to the personalty as well as to the realty, and the question of the bar of the statute—the bar of the New Hampshire statute being three

years, instead of two as in our state—is discussed, and held not to apply to a case of this character; so that, without discussing the other cases, not perhaps analogous in all their facts or the findings of the court to this case, but tending in the same direction, which were cited on the part of counsel, I shall content myself with simply alluding to this case as in my mind furnishing a satisfactory basis for the conclusion at which I have arrived. See, also, Pendleton v. Phelps, 4 Day, 476; Neil v. Cunningham, 2 Port. (Ala.) 171; Jones v. Lightfoot, 10 Ala. 26; Burton's Adm'r v. Lockert's Ex'rs, 4 Eng. (Ark.) 412; Walker v. Byers, 14 Ark. 246; Miller v. Woodward, 8 Mo. 169; Finney v. State, 9 Mo. 227.

I come now to consider for a moment the form of remedy to the assignee in this case, whether it is by suit at law or in equity.

Story, Eq. Jur. at section 1216c, treating upon the jurisdiction of courts of equity, says:

"It is upon the same ground, that, where there is a specialty debt, binding the heirs, and the debtor dies, whereby a lien attaches upon all the lands descended in the hands of his heirs, courts of equity will interfere in aid of the creditor, and. in proper cases, accelerate the payment of the debt. At law the creditor can only take out execution against the whole lands, and hold them, as he would under an elegit, until the debt is fully paid. But, in equity, the creditor will also be entitled to an account of the rents and profits received by the heir since the descent cast," etc.

The doctrine, then, of this authority, which is fully sustained by the citation to which the author refers, seems to be that a court of equity did take jurisdiction of this class of cases where it was attempted to enforce a specialty debt as against an heir to the extent of the assets received from his ancestors by descent. Inasmuch as the legislature of this state abolished by statute the distinction between a specialty and a simple debt, so far as the liability of the heir is concerned, of course the principle laid down here applies to the enforcement of a simple debt as well as a specialty debt or a covenant. By later legislation in England, an action at law may be maintained against the heir to the extent of the assets in hand, but we all very well know that courts of equity, where they originally took jurisdiction in many cases because of the inadequacy of the common law to afford an adequate relief, have retained jurisdiction, even after statutory provisions have removed the original cause for taking jurisdiction in equity, except in cases where there is a special provision clothing courts of law with the exclusive jurisdiction of the case. So that it seems from this authority that originally courts of equity were clothed with jurisdiction; and we find in two cases in our state, and in fact more, but two notably, bills of this character were filed and entertained by the supreme court of this state; although there was no challenge of the jurisdiction upon the ground stated in this case.

The first is the case of Thomas v. Adams, reported in 30 Ill. at page 37, where there was an application made on the part of Thomas, trustee of the old State Bank, to collect the amount of several judgments recovered in favor of the bank, from the heirs of one Wynn, who was the judgment debtor, not upon the ground of a lien which had attached, but because of their liability under the law for their ancestor's debts.

The second is the case of Vanmeter v. Love, 33 Ill. 260. Those were both suits in equity, and the court seems to have treated that as the appropriate remedy.

In this particular case, waiving the general question as to whether there may or may not be in some cases an adequate remedy at law, it seems this is a peculiarly appropriate case for relief in a court of equity. This bill charges that there was a residuum of Mr. Hadduck's estate, after the payment of his debts, amounting to $61,000 in personal property, and over that amount in real estate, and that these were turned over by the administrator to the widow and heir. Now, under the statute of this state, the widow takes a certain share of the personalty. The personal property would seem, by all the analogies of the law of Illinois, to be the appropriate fund from which this personal liability should be paid; and it seems to me that the widow claiming under the statute in this state could be properly called upon to account for the portion of the personal property which she took under the statute, and the heir for his share. And running all through the cases, in fact, the way in which Mr. Justice Story groups this class of cases in his treatise upon the jurisdiction of courts of equity, shows that courts of equity took jurisdiction of these cases because there was an implied trust upon the part of the heir to the extent of the funds which he received from the ancestor. It was a trust fund to be followed by the creditors as against the heir or even the devisee, and, therefore, it seems to me that the court should take jurisdiction of it upon the general principle of taking jurisdiction of a case where persons have in their possession trust funds which a creditor is entitled to follow.

In the second place, if the personalty is not sufficient, then the realty would be the next fund to apply to, and in that, the widow only taking her dower, and being entitled only to that as her vested right, it might be necessary to inquire by an accounting as to the value of the estate subject to the widow's dower, or it might be necessary to set off the dower, because, of course, the dower cannot have been divested by a claim of this character any more than any other contract debt against a husband, and a widow might hold her share of the real estate, and the heir be compelled to account for only so much as he had, subject to the dower; so

that it seems to me there is in this case a peculiar fitness in holding that a court of equity has jurisdiction, because complete justice to all parties can only be done by a court of equity.

With these statements in brief, in regard to my views of the matter, I will overrule the demurrer.

[For actions brought by the assignee against other defendants, see Payson v. Dietz, Case No. 10,861; Payson v. Stoever, Id. 10,863; Payson v. Withers, Id. 10,864; Payson v. Coffin, Id. 10,858 and 10,859.]

PAYSON (LEITER v.). See Case No. 8,227.

PAYSON (MICHENER v.). See Case No. 9,524.

Case No. 10,863.

PAYSON v. STOEVER.

[2 Dill. 427;[1] 2 Ins. Law J. 733; 5 Chi. Leg. News, 477.]

Circuit Court, D. Minnesota. June Term, 1873.

BANKRUPT ACT — STOCKHOLDER'S LIABILITY — RIGHTS AND POWER OF ASSIGNEE — CONSTRUCTION OF CHARTER OF THE REPUBLIC INSURANCE COMPANY.

1. Under the bankrupt act [14 Stat. 517], the right to enforce the liability of stockholders with respect to their unpaid stock passes to the assignee; and this is the case with the Republic Insurance Company under its charter, whose assignee in bankruptcy may enforce such liability so far as necessary to pay losses and all other debts provable against the company.

2. The bankruptcy court has authority to make an assessment upon the stockholders, and its action in so doing cannot be collaterally assailed in suits to enforce the collection of the assessment.

3. By the charter of the Republic Insurance Company, its capital stock was fixed at $1,000,000, with authority to increase the same to $5,000,000 at the discretion of the stockholders: *Held*, that the charter contemplated that the increase of stock should be made by the stockholders, and that the directors had no authority under the original charter to make the increase.

4. No formal vote of the stockholders to increase the stock was necessary.

5. The requisite assent of the stockholders might be shown by their conduct and acquiescence, and in this case it was thus shown by the facts stated in the opinion of the court.

[Cited in Clarke v. Thomas, 34 Ohio St. 63. Cited in brief in Ward v. Farwell, 97 Ill. 597.]

6. The amended charter authorizing the directors to increase the capital stock—the stock never having been increased beyond the amount authorized in the original charter—did not have the effect to discharge a non-assenting stockholder from his liability upon his unpaid stock.

This action is brought by the plaintiff [Joseph R. Payson], the assignee in bankruptcy of the Republic Insurance Company of the state of Illinois, against J. C. Stoever, to enforce the collection of an assessment of sixty per centum upon the par value of ten shares of stock in said company, of which he is alleged to be the holder and owner. The company was adjudged a bankrupt on a creditor's petition by the district court of the United States for the Northern district of Illinois, November 14, 1872, and the plaintiff was duly appointed assignee in bankruptcy, and a conveyance was made December 18, 1872, to him by the register under the 14th section of the bankrupt act [14 Stat. 522]. The assignee filed in the bankruptcy court a petition for assessment upon the unpaid stock of the stockholders December 30, 1872, and, after due consideration of the same, the court, in February, 1873, ordered, adjudged, and decreed that an assessment be made upon the capital stock and stockholders of sixty per centum of the par value of said stock. [Case No. 11,704.] The company was chartered February 15, 1865, by the legislature of Illinois, with a capital stock of $1,000,000, with authority to increase the same to not exceeding $5,000,000 at the discretion of the stockholders. This charter was subsequently amended (March 25, 1869), providing, among other things, that "the board of directors shall have power to increase the capital stock of said company from time to time in their discretion." The board of directors, January 9, 1868, voted to increase the capital stock of the company, by resolution, to $5,000,000, but at no time during the existence of the company was that amount of stock issued. The defendant held a certificate for ten shares of stock, dated November 8, 1868, reciting the payment thereon of twenty per cent. It is admitted that the shares owned by him were not part of the $1,000,000 first issued, but were part of stock issued in excess of this amount. At an annual and regular meeting of stockholders, January 13, 1869, a report was submitted, showing that $3,746,000 of stock had been issued at that time, and at this meeting $3,116,000 of stock was voted for directors, of which stock so voting $804,600 was represented out of the first $1,000,000 issued. This meeting was the regular annual meeting of the stockholders provided for by the by-laws of the company, which by-laws were adopted January 8, 1868, by the directors, and not by the stockholders of the company. The defendant received two dividends on the 10th of February, 1870, of $10 each, upon the stock owned by him, but never had, as he testified, any knowledge that the capital stock of the company had been increased beyond the $1,000,000, or that the charter had been amended. On all the stock issued the company declared four five per cent. dividends, as follows: June 30, 1868; January 13, 1869; July, 1869, and January, 1870. The whole amount of stock issued by the company before its failure was $4,900,000. At the time of the amendment of the charter, in March, 1869, the company had then issued stock to the amount of $4,459,300. The bankruptcy of the company

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

was occasioned by the great Chicago fire in October, 1871, in which it had risks and sustained losses to the amount of nearly $3,000,000.

The cause was tried to the court. The defendant's counsel rest the defence upon substantially three grounds: 1. That under the bankrupt act no right to enforce the liability of stockholders in respect to the unpaid stock passes to the assignee, but such liability must be enforced by creditors in their own names, or through a receiver appointed by a court of chancery. 2. The bankruptcy court has no authority to make an assessment, or call upon the stockholders, but if it has, the call in this case is made upon an erroneous basis, since it is made both with respect to liabilities and losses by fire, and with respect to matters for which, under the 6th section of the charter, the stockholders are not liable. 3. That the defendant's stock, for which payment is sought to be enforced, is wholly void, the same being stock which was issued in excess of the $1,000,000 by the directors, without the sanction of the stockholders, as required by the charter, and prior to the amended charter, to which amendment the defendant claims never to have assented.

[See Cases Nos. 11,704 and 11,705.]

Mr. Frost, of Miller, Frost & Lewis, and C. K. Davis, for assignee.

Mr. Gilman, Mr. Lamprey, Mr. Horn, Mr. Warner, and others, for defendant.

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

DILLON, Circuit Judge. The questions arising in this cause have been presented by counsel with a degree of thoroughness, research, and logical force rarely witnessed, and as an early determination of the cause is desirable, the court proceeds to announce its conclusions without waiting to find time to elaborate at any considerable length the grounds upon which its judgment rests.

1. The plaintiff, as the assignee in bankruptcy of the Republic Insurance Company, represents as against its stockholders the rights both of the bankrupt company and its creditors. The company being in bankruptcy, all the claims of its creditors must be established in the bankruptcy court, and its assets collected and distributed under the superintendence of that court.

Whether under its charter the company, if it had not been thrown into bankruptcy, could collect from the stockholders the full amount of their unpaid stock, or could only collect so much as might be necessary to pay "losses" proper as distinguished from "liabilities," it is not necessary to determine, for clearly the unpaid stock is liable to creditors for all debts and legal liabilities, and the assignee represents the creditors as well as the company. However it might have been before, creditors cannot, since the supervention of bankruptcy, bring bills in equity or other actions in their own names directly against the stockholders to enforce their liability with respect to their unpaid stock.

The liability on the part of the stockholders is one which is imposed for the benefit of creditors, and creditors must now secure the benefit of it through the assignee. And in respect to the assignee and so far as may be necessary to pay the binding debts and legal liabilities of the company, the principles sanctioned by the supreme court of the United States in the case of Ogilvie v. Knox Insurance Co., 22 How. [63 U. S.] 380, 387, apply here. "Stockholders," says Mr. Justice Grier, in that case, "who have not paid in the whole amount of stock subscribed and owned by them, stand in the relation of debtors to the corporation for the several amounts due by each of them. * * * The stock subscribed and owned by the several stockholders or partners constitutes the capital or fund publicly pledged to all who deal with them."

2. The assignee can only collect so much of the unpaid stock as may be necessary to satisfy debts provable in bankruptcy against the company, and the necessary costs and expenses of administration; and it follows that the necessity for the sixty per cent. assessment made by or under the direction of the bankruptcy court is not collaterally inquirable into in every or any action brought to enforce payment of such assessment. Such questions must be decided in that court. If more is assessed and collected than is necessary to pay claims against the estate, any stockholder may apply to that court for his proportion of the surplus. Upton v. Hansbrough [Case No. 16,801].

3. It is our opinion that the original charter of the company contemplated that any increase of the capital stock beyond $1,000,000 should be assented to by the stockholders as distinguished from the directors. It being admitted that the shares of stock owned by the defendant were no part of the $1,000,000 first issued, but were part of the stock issued by it in excess of the $1,000,000, and prior to the amended charter of March 25, 1869, this stock would not be legal, and no action could be maintained to recover the price of it unless the stock has become legal stock by matters subsequently occurring, or unless the defendant, under the facts proved, is estopped to set up this objection.

The legislature authorized a capital of $5,000,000, but required the assent of the stockholders to any increase beyond one million. The amount issued at no time had reached the $5,000,000.

No mode of procuring the assent of the stockholders to the increase of stock is prescribed by the charter. It is conceded that in a meeting of the stockholders of the original million of stock duly convened, a majority might determine upon such increase and bind the minority. On January 9th, 1868, the directors resolved upon an increase of the capital stock to five millions of dollars. On

November 6th, 1868, the defendant subscribed for his stock. On the 13th of January, 1869, there was a regular annual meeting of the stockholders, to which a report was made, showing that $3,746,100 of stock had up to that time been issued, and $3,116,000 of stock was voted at that meeting for directors. The evidence shows that over $800,000, or in round numbers, four-fifths of the first million of stockholders were present, in person or by proxy, and voted at this meeting for directors. No objection then, or ever, was made to the increase of stock, and the old stockholders and the new voted indiscriminately, and the proceeds of all sales of stock were treated and invested by the directors as capital until the company ceased to do business. Two dividends were made in 1869, and one in 1870, upon all the stock, which in each of those years exceeded four millions of dollars.

The defendant, in February, 1870, received two of these dividends. On the 25th of March, 1869, the charter was amended authorizing, inter alia, the directors to increase the stock. After this, as well as before, the directors repeatedly and always recognized the validity of all the stock which had been issued.

The defendant, it may be admitted, had no personal knowledge of any increase of capital stock, or of the passage of the amended charter, until after this suit was brought, although the agent who acted for him in his absence in respect to his stock had such knowledge.

The only ground of defence here is that the stock issued in excess of the $1,000,000 is void, because the holders of this first million of stock did not assent to the increase.

From the proofs in the case, we find that at lease four-fifths of the original million of stockholders did know of and assent as early as January, 1869, to this increase of stock, and are of opinion that the requisite assent of the stockholders can be shown by their conduct and acquiescence, and need not necessarily be established by any formal vote or resolution.

Inasmuch as during part of 1868, and all of 1869, 1870, and 1871, down to the great fire in Chicago, the company did business and declared dividends, on the basis of having nearly $5,000,000 stock out, a fact not disguised or concealed, but proclaimed to the world, the defendant, as a holder of a stock certificate, which he still retains, and receiving dividends, which he also retains, will not be permitted by the principles of law, in order to escape a liability imposed for the benefit of creditors, to deny at this late day that he is a stockholder in the company. Particularly ought this to be so in view of the amendment of the charter by the legislature giving the directors the power to increase the stock, and their subsequent action ratifying what they had previously done.

The original charter contemplating that stock might be issued to the extent of $5,000,000, and that amount never having been quite reached, the amendment of the charter was not of such a radical character as to discharge a nonassenting stockholder from his liability as respects his unpaid stock. This view has been recently taken by the United States circuit court for Indiana in the case of Payson v. Withers [Case No. 10,864].

In the conclusion of Judge Drummond in that case on this point we concur.

Judgment for the plaintiff.

[NOTE. For similar actions brought by the assignee against other delinquent stockholders, see Payson v. Dietz, Case No. 10,861; Payson v. Withers, Id. 10,864; Payson v. Coffin, Id. 10,858 and 10,859; Payson v. Hadduck, Id. 10,862.]

As to liability of stockholders, see Haskins v. Harding [Case No. 6,196]; Ashton v. Burbank [Id. 582].

PAYSON (UNITED STATES v.). See Cases Nos. 16,015–16,017.

Case No. 10,864.

PAYSON v. WITHERS.

[5 Biss. 269;[1] 2 Ins. Law J. 599; 5 Chi. Leg. News, 445.]

Circuit Court, D. Indiana. May Term, 1873.

LIABILITY OF STOCKHOLDERS—STATEMENTS MADE BY AGENTS—SOLICITING SUBSCRIPTIONS NOT ILLEGAL—INCREASE OF STOCK—EFFECT ON SUBSCRIPTION—LEX LOCI—ESTOPPEL.

1. In an action against a stockholder, brought by the assignee of a bankrupt insurance company, to recover an assessment on stock, it is not a sufficient defense to show ignorance on the part of the defendant as to the condition and circumstances of the company when his subscription was taken.

2. Statements made by agents of the company do not affect the liability of the defendant, as loose declarations made at the time cannot change a written contract.

3. The soliciting of subscriptions to the capital stock of a foreign corporation is not an act or agreement intended to be rendered inoperative by the act of June 17, 1852, of the state of Indiana.

[Cited in Lamb v. Lamb, Case No. 8,018.]

4. Where it is provided in the charter of a corporation that "the capital stock shall be $1,000,000, and may be increased to not exceeding $5,000,000, at the discretion of the stockholders," and where an amendment is made which declares "that the board of directors shall have power to increase the capital stock of said company, from time to time, in their discretion," a subsequent increase of the capital stock will not invalidate a subscription to the capital stock made previous to the passage of the amendment, and it makes no difference that the increase was made by the board of directors instead of the stockholders.

[Cited in Payson v. Stoever, Case No. 10,863.]

5. Every stockholder takes his shares subject to the lawful control of the legislature and of the board of directors.

6. Where a citizen of one state makes a contract to be executed in another he is bound by

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the laws of the state where the contract is to be performed.

[Cited in Nimick v. Mingo Iron Co., 25 W. Va. 199. Cited in brief in Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 18 S. W. 290.]

7. A stockholder who retains his stock, and continues to participate in the profits of the corporation without denial of his membership, cannot successfully repudiate his contract, holding that he is not obliged to pay an assessment upon the ground of certain irregularities in the increase of the capital stock of the corporation.

[Cited in Clarke v. Thomas, 34 Ohio St. 63; Duffield v. E. T. Barnum Wire & Iron Works, 64 Mich. 301, 31 N. W. 314.]

This was an action by Joseph R. Payson, assignee of the Republic Fire Insurance Company of Chicago, Illinois, against Warren H. Withers, to recover an assessment of $60 made on each of the ten shares of capital stock of the said insurance company held by him.

Baker, Hord & Hendricks and Charles E. Marsh, for plaintiff.

Morris & Withers, McDonald & Butler, Harrison & Hines, and W. H. Calkins, for defendant.

DRUMMOND, Circuit Judge. The cause of action, as set forth in the complaint, is, that on the 30th of July, 1868, the defendant became owner of ten shares of capital stock of the insurance company, and that the stock was issued and taken by the defendant upon the condition that twenty per cent. was to be paid in cash, and eighty per cent. was to be paid in case losses rendered its payment necessary; that these were the terms of the charter, and the conditions upon which the defendant became a subscriber to ten shares of the stock; and a certificate of stock for these shares was accordingly issued to him. The complaint proceeds to state that by the losses which occurred on the 9th of October, 1871, at Chicago, the company became insolvent; that a petition in bankruptcy was filed against the company in the district court of the United States for the Northern district of Illinois, and a decree of bankruptcy was rendered against it in that court; and that court had made an assessment of sixty dollars on each share of the stock, and required the assignee to collect the same. [Case No. 11,704.]

There is a general denial by the defendant, which puts the material allegations of the complaint in issue; and there are various special defenses set up in the answer, the effect of which is the matter for consideration. The first special defense is, in substance, that the subscription of stock was made by the defendant in Fort Wayne, in this state; that the company was domiciled and established in Illinois, and was, in fact, a corporation created by the laws of Illinois; that the agents of the company came to the defendant and made certain representations as to its condition, and the terms upon which the stock was to be subscribed, alleging that no more than twenty dollars per share would be assessed against him or ever called for. The defendant asserts that he was ignorant of the actual condition of the company, and of the circumstances connected with its organization and progress so far, and that he, relying upon the statements of agents, authorized his name to be entered as a subscriber upon the books of the company, and upon that condition.

Now, as to this defense, it will be observed that it does not meet the material allegations of the complaint, or answer them. It may be all true, still the agreement set forth in the complaint would create an absolute liability on the part of the defendant, as, by the terms of the charter, the stock was to be taken in the manner stated, paid for as set forth, and he agreed to these terms in writing.

This defense clearly, therefore, does not go far enough. The result would be, even giving it all the effect that could be claimed for it, to change, by loose declarations made by the parties at the time, a written agreement, which of course cannot be done according to the well-settled principles of law.

Another special defense is, that the subscription to the stock was made by the defendant in Indiana; that the agent of the company, who was then engaged in the general business of procuring subscriptions to the stock of the company in this state, did not comply with the laws of the state of Indiana prior to the commencement of its business; and, therefore, that the subscription was not operative as against the defendant. This is a special defense set up under the act of June 17, 1852, of this state, respecting foreign corporations and their agents; and the first section of that act declares as to corporations not incorporated or organized in this state, that the agents, before entering upon the duties of their agency in this state, shall deposit in the clerk's office of the county where they purpose doing business, a power of attorney, commission, appointment, or other authority, under or by virtue of which they act as agents. The second section declares what the agents of the corporation shall do, viz.: file with the clerk of the circuit court before commencing the duties of their agency, the authority of the board of directors authorizing citizens of this state to maintain actions in the state in relation to any contracts, and authorizing service of process. The third section declares that the service of process on agents shall be sufficient. And the fourth section, that foreign corporations shall not enforce any contracts made by their agents before a compliance shall have been made with the provisions of sections one and two of the act. The fifth section declares that any person who shall directly or indirectly receive or transmit money or other valuable things to or for the use of such corporation, or who shall in any manner make or cause to be made any contract, or transact any business for or on account of any such foreign

corporation, shall be deemed an agent of said corporation, and be subject to the provisions of this act relating to the agents of foreign corporations. These are the provisions of the law contained in the first, second, third, fourth and fifth sections. The sixth section, however, provides that the fifth section shall not apply to persons acting as agents for foreign corporations for a special or temporary purpose, and for a purpose not within the ordinary business of such corporations.

Now it is a question which lies at the threshold of the examination of this part of the case, whether the act which was done by the agent of this corporation and the agreement which was entered into by the defendant with that agent, was such an act or agreement as was contemplated by this law, and which it intended to render inoperative unless the agent had complied with its conditions. I am clearly of the opinion that it was not. Conceding that a state would have the power to prevent any of its citizens from subscribing within its own limits to the stock of a corporation of another state, it would require a clear and explicit declaration that such a subscription should be null and void except upon compliance with certain terms. This act relates to the usual business done by a corporation and by its agents, and does not refer to obtaining subscription to its stock. The ordinary business, for instance, done by the corporation in question here, was an insurance business. The obtaining of subscriptions was an act preliminary to the commencement of its business. When the subscriptions were obtained, and the corporation was set in motion and was made to perform its functions, then the ordinary business referred to by this act began—the issuing of policies of insurance and performing the general and other business connected with such corporations.

I do not think that it is a fair or reasonable construction of the language of this law that it intended to prohibit such a contract as this. It does not appear, in point of fact, by this special defense which I am now considering, that the corporation was doing any of this ordinary business. The language, I think, therefore, of this sixth section, intended to exclude any such agreement as was made by the defendant in this case, when it declared that it was not to apply to persons acting as agents for special and temporary purposes, or for purposes not within the ordinary business of such corporation.

Another special defense set up is, that the company, without the knowledge or consent of the defendant, on the 25th of March, 1869, obtained from the legislature of Illinois an amendment to its charter by which the directors had the right to increase the capital stock of the company to five millions of dollars, and thereby the original charter was so changed as to release him from his liability to pay for his stock. It is necessary, in order to determine the validity of this defense, to look into the charter and the amendment to see whether it is justly subject to the objection that is made by the defendant. The act incorporating the Republic Insurance Company was passed by the legislature of Illinois on the 15th of February, 1865. The first section of the act created certain persons and their successors and assignees a body corporate by the name of the Republic Insurance Company of Chicago. The second section was as follows: "The capital stock of said corporation shall be one million of dollars, and may be increased to not exceeding five millions of dollars, at the discretion of the stockholders, and shall be divided into shares of one hundred dollars each, which shall be considered personal property, and be assignable and transferable only upon the books of the company under such regulations as the directors shall establish." The third section provides that when one hundred thousand dollars were subscribed and certain conditions were complied with,—that they had organized by choosing three or more directors, and those directors had chosen a president, secretary and treasurer, and filed a certificate in the office of the clerk of the city of Chicago,—then the company was deemed fully organized. The fourth section authorized the corporation to make and put in execution by-laws and regulations. There are some other sections of the character usual in the charters of corporations of this kind, to which it is not necessary to refer. The eighth section declared that the stock and affairs of said corporation should be managed by three or more directors. Now this is, as far as it concerns any question involved in this special defense, all of the charter that need be referred to.

The amendment which is objected to and referred to in this special defense, was passed by the legislature of Illinois on the 25th of March, 1869, the first section of which authorized the company to purchase and hold such real estate as might be convenient for the transaction of its business, and also to purchase any estate that it might be necessary to purchase for the purpose of securing any loan or debt. The second section of the amendment was as follows: "The board of directors shall have power to increase the capital stock of said company from time to time, in their discretion." It will be recollected that the language of the second section of the original act was, that it might be increased to not exceeding five millions of dollars, at the discretion of the stockholders. This authorized it to be increased at the discretion of the board of directors. The amendment says nothing about the extent of the increase. The third section declared that the stockholders resident in any town or city within the United States might, at any annual meeting of such stockholders to be held in such

town or city, elect such number of members for a board of directors as such stockholders might be entitled to by the by-laws of the corporation. The fourth section authorized the board of directors to make by-laws. The original act was, that the corporation might have power to make and put in execution by-laws—probably no essential difference between the original act and the amendment in this particular. The amendment contains two other sections that have no bearing upon the question before the court.

Now so far as there are any changes made by the amendment of such a character as to affect the contract which the defendant had made in 1868 with the corporation, there are only two particulars to which it is necessary to refer. As I have said, by the original charter the capital of the company was to be increased to five millions of dollars at the discretion of the stockholders; by the amendment, the board of directors had the right to increase it. The original charter declared that certain notice should be given of the election of directors to each stockholder by public advertisement or personal notice, and that it should be by ballot, by a majority of the stockholders, allowing one vote for every share either in person or by proxy; and the amendment declared that certain persons, under the circumstances referred to in it, should meet and elect directors—as many as the by-laws would authorize. These seem to be the only substantial particulars under which it can be claimed that the amendment constituted such a change in the relation between the corporation and stockholders as to authorize any stockholder to claim that the contract which he had made to subscribe to the stock was vitiated; and the question is, whether these changes give any countenance to that position. I think they do not.

How the discretion of the stockholders to increase the stock should be made manifest, the original charter does not state. It declared that the stock and affairs of the corporation were to be managed by the directors, and there is great force, I think, in the argument, that inasmuch as the directors were the persons through whom the stockholders acted, that discretion might be manifested through the authorized action of the directors. But, however this may be, I do not think that the change of such vague and indefinite phraseology as this, as to the manner in which the capital of a corporation is to be increased, would give the right to a subscriber to the stock to declare that the contract which he had made for his subscription and under which he paid a certain portion, and agreed to pay the remainder when the necessity for its payment appeared, was at an end. It seems to me that it was one of the implied conditions upon which he entered into his agreement—that the power of the legislature might be exercised to vary in that way the manner in which the capital stock should be increased. It may be conceded that there are limitations to the power of the legislature in such a case as this; that the legislature may go so far in changing, altering, or revolutionizing the whole scope and spirit of the original charter by amendments, as to authorize a stockholder to say that he has not entered into that contract—that his obligations have ceased by the wrongful acts of the legislature; but while that is true, it is also true that, to a certain extent, the terms of a grant are subject to the control of the legislature, and every stockholder takes his shares subject to that control, and subject also to the control of those who manage its affairs, namely, the board of directors. And, therefore, when the legislature has acted in such a manner as this, and has merely declared that, instead of the stock being increased by the corporation at the discretion of the stockholder, it shall be increased by the resolution or act of the board of directors, it is not such a change, in my opinion, as would authorize a subscriber to say that his contract is at an end.

Then, as to the election of directors. It is true that there is, to some extent, a change made in the mode of electing directors; but it is to be observed that the original charter does not declare how many directors there shall be. It is three or more—no limit to the number of directors; and the amendment simply declares that the stockholders, within certain territorial limits, may have the power to elect such a number of directors as the by-laws may authorize. Now, certainly, there is nothing in the original charter to prevent these by-laws from declaring what number of directors there shall be, and what their qualifications, other than they must be stockholders as the original charter requires. There was, therefore, no such change by this amendment, in the original terms of the law, as to authorize a subscriber to the stock to declare his agreement or subscription at an end and his release from its obligation.

The other special defense, and I think the most important one presented in this case, is that which declares that this was a company incorporated by the legislature of Illinois with a capital stock of one million of dollars, and power to the stockholders at discretion to increase it to five millions of dollars; that the stockholders never increased the stock, but that the board of directors, in January, 1868, by resolution pretended to do so to the extent of five millions of dollars; and that the stockholders never consented to this increase; that the defendant subscribed for his stock in July, 1868, at Fort Wayne; that this stock was in excess of the one million of dollars of stock which was authorized by the original charter; and that he had no knowledge of the manner in which the capital stock had been increased. It will be seen, however, from what has already been said, that it can hardly be claimed, on the part of the defendant, that this change was of such a character, taking this special

defense in its largest extent, as to authorize him to declare his obligation at an end. And I have said, it may well be claimed that it was a power incident to the grant, for the legislature to authorize an increase of the capital stock by the directors, even if, under the terms of the original charter, the stockholders could not exercise that discretion through the directors.

It will not do when a citizen of the state subscribes to the capital stock of a foreign corporation to say that he was ignorant of the terms of the act which created that corporation. He is presumed to know what those terms are. They are created by the law of another state, and he, for the purpose of assuming his obligation, in a certain sense goes into another state and casts off for the time the vesture which his own state throws around him, and puts on that of the other state, and is bound by the obligations which the legislature of that state has imposed upon the corporation, and the privileges which it has granted, and the conditions and terms of the grant. All these he is presumed to know, just as much as when he makes any contract to be executed by him in another state. When he makes a contract in Indiana which is to be executed in another state, he is bound by the laws of the state where the contract is by him to be performed. The laws of Indiana have all ceased to operate upon that contract when he enters into it upon the condition and understanding that its terms and obligations are to be controlled by the laws of another state. So here this defendant, when he entered into this agreement, did it with reference to the laws of the state of Illinois—the special act of incorporation which was passed in February, 1865. The well know maxim, of course, applies to him in this case, just as it does in relation to any law of Indiana—that ignorance of the law does not excuse him.

But, however this may be in relation to this special defense, every difficulty there may be in the way is, I think, removed by the replication made to it, which alleges that after the passage and taking effect of the amendatory act, the directors affirmed their previous action increasing the stock of the company to five millions of dollars, and that the defendant did no act in repudiation or denial of his membership in the insurance company as a stockholder; but, on the contrary, until after the happening of the losses, the defendant continued to hold and retain his certificate of stock which had been issued to him by the company, and to participate in its affairs and profits, by aiding in the election of directors, and by receiving dividends declared on his stock. Now, this, I think, is a good reply to anything contained in this special defense.

It may be said, in conclusion, that the defense is not of a character to commend itself very strongly to the consideration of a court of justice. The company was unfortunate. Everything went on, as far as we can know—and we have the right to suppose so from the allegations contained in these pleadings—satisfactorily to the defendant until this misfortune happened. He made no complaint. He participated in all the advantages of the company, receiving dividends, and elected directors, but when the storm came—when this terrible fire swept away so many millions of property—and rendered this company bankrupt, and made it indispensable for those who had claims upon it to call upon the subscribers to the stock to meet their obligations in order to fulfill contracts of the company, then he complains—then he wakes up to all the various objections which are set forth in this answer.

Now under such circumstances, when this is the only fund that the policy-holders have to meet the losses which they have incurred, and the only way in which the bankrupt company itself can respond to their demands, it would seem unless there is an insuperable bar created by the law, that equity should be done in such a case as this. I see no such insurmountable obstacle in the way here to prevent the course of equity.

Decree for complainant.

[For other similar actions brought by the assignee, see Payson v. Dietz, Case No. 10,861; Payson v. Coffin, Cases Nos. 10,859 and 10,858; Payson v. Hadduck, Case No. 10,862.]

NOTE. A similar case came before Judge Dillon, Nelson, J., concurring, in the Minnesota district, in June, 1873, and he, after full argument and consideration, sustained the right of the assignee to recover the assessment on unpaid stock, and approved the above rulings of Judge Drummond. Payson v. Stoever [Case No. 10,863].

Case No. 10,865.

The P. C. SCHULTZ.

[10 Ben. 536.] [1]

District Court, E. D. New York. July, 1879.

TUG AND TOW—CONTRACT—SAFE PLACE—NEGLIGENCE OF MASTER—DELAY—COSTS.

1. Where a tug going up the Hudson river with several boats in tow, could not land one of the boats at the dock where it was destined in the then state of the tide, and left it at another safe place, to await the return of the tug on the next tide, and the boat having to be moved out of the way of other boats, was put by her master in a place where she took bottom before the next tide, and suffered damage for which action was brought, *held*, that it was not negligent in the tug to leave the boat in a safe place, where she did, to await the next tide.

2. It was negligent in the master of the tow to move his boat to an unsafe place, when there were other places open to him and known to be safe; and the libel must be dismissed.

3. The failure of the tug to return at the next tide showed a willingness to disregard the welfare of her tow, for which she should be refused costs.

4. A boat left by her tug to wait for her, in order to complete the towing contract, at a

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

place which though safe cannot be retained and from which the boat must move to an unsafe place, is not left in a safe place.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.
Benedict, Taft & Benedict, for claimant.

BENEDICT, District Judge. The evidence is sufficient to show that the contract made on behalf of the P. C. Schultz was to tow the libellant's canal-boat to Armstrong's dock, at Peekskill, but it was no part of the undertaking to place the boat there within any particular time. The weight of the evidence appears to be in favor of the assertion of the claimant, that when the tow arrived off Peekskill the tide had fallen so as to render it impossible then to place the boat at Armstrong's dock. This fact, however, did not render the performance of the contract impossible, or absolve the tow-boat from the obligation to take the canal-boat to Armstrong's dock. When the low state of the tide was found to render further progress toward's Armstrong's dock impossible at that time, it then became incumbent on the tow-boat, if, because of having in tow other boats bound further up the river, it was not advantageous to wait near Peekskill for the next tide, to place the libellant's boat at an adjacent safe place, and upon the next tide take her to the dock to which it had been agreed that the boat should be taken. No breach of contract was therefore committed when the libellant's boat was placed at Roy Hook dump, to await the return of the tow-boat on the next tide, provided that was a safe place for the boat to lie meanwhile. The evidence in regard to the character of Roy Hook dump as a safe place for a loaded canal-boat to lie is conflicting; but after careful consideration, I am satisfied that the boat could have remained at the dump in safety, if ordinary care had been exercised by her master. It is clearly shown that in the place where the canal-boat was left by the tow-boat there was abundant water for her safety, but subsequently the exigencies of another boat loading at the dump and outside of which the libellant's boat had been left compelled a change of position. If I was satisfied that the new position in which the libellant's boat was placed by her master, and where she afterwards sank, was as safe as any then and there available to her, I should consider the tow-boat responsible for the damage arising from the sinking of the boat in that place, because I am of the opinion that the tow-boat is chargeable under the circumstances with knowledge that the position she selected for the canal-boat was but temporary. A canal-boat left by a tow-boat to await the tow-boat's return in order to complete the towing contract, at a place which, although safe, cannot be retained, and from which the canal-boat must move to an unsafe place, is not left in a safe place.

In this instance it is proved by a witness called by the libellant, that the place to which the captain of the canal-boat moved his boat after the tow-boat had left, was one where she was certain to ground at the falling of the tide, and reasonable examination on his part, to say nothing of enquiry, would have informed him of the rocky nature of the bottom there. The case, as I view it, therefore, turns upon the question of fact whether, when the canal-boat was compelled to leave the place in which she was left by the tow-boat, there was another place there available to her where she could have remained in safety until the next tide. The evidence upon this point indicates that the boat could, without difficulty or expense, have been anchored in deep water where she would have been safe, and also that she could have been placed alongside the other boats at the dump where she would not have touched bottom; instead of which she was placed where, as the libellant's witness, Leach, says he knew she would sink, and where, in fact, she did sink, causing the damage complained of. Upon these facts, it must be held that the loss which the libellant has sustained was not caused by the failure of the tow-boat to perform the towing contract, but by the negligence of the master of the canal-boat in placing the libellant's boat in an unsafe place after the tow-boat had left.

Some stress has been laid upon the fact proved that the tow-boat having left the canal-boat at the dump on Friday morning, did not return until Sunday afternoon. If the disaster to the libellant's boat had been caused by the failure of the tow-boat to return in reasonable time for the purpose of taking the boat to Armstrong's dock, I should give a decree for the libellant; but the fact is that the canal-boat sank before the next tide, so that if the tow-boat had returned in time for the next tide, nothing could then have been done by her towards completing her contract. Performance of the contract had then been rendered impossible, by the negligence of the master of the canal-boat in placing his boat where she would strike upon rocks and sink. The failure of the tow-boat to return on the next tide under the circumstances, therefore caused no damage. The sinking of the canal-boat was, however, unknown to the tow-boat, and her failure to return to the canal-boat until Sunday afternoon indicates a disregard on the part of the tow-boat of her obligations towards the canal-boat left by her at the dump, which deserves condemnation and will be noticed by refusing costs.

If anything need be said in regard to the claim for breaking the rail when taking the canal-boat in tow, it is sufficient to remark that the damage claimed to have been done was very slight indeed, and the proof respecting it not clearly in favor of the libellant.

The libel will be dismissed, but without costs.

Case No. 10,866.

In re PEABODY.

[16 N. B. R. 243; [1] 9 Chi. Leg. News, 409.]

District Court, D. Colorado. 1877.

BANKRUPTCY — AUTHORITY OF REGISTER TO SET OFF EXEMPT PROPERTY—REGULARITY OF ORDER — APPLICATION BY ASSIGNEE FOR DISCHARGE — MISCONDUCT—COST OF KEEPING AND DISPOSING OF PROPERTY CHARGED WITH LIEN.

1. A register has no authority to set off exempt property to the bankrupt, nor to direct the assignee in the matter.

2. An ex parte order approving the schedule of property set aside to the bankrupt, or confirming a report of sale of assets, made on the day such schedule or report is filed, is irregular and therefore not binding upon the creditors.

3. The bankrupt court has power to set aside such orders at any time during the pendency of the proceedings, where an aggrieved party moves therefor within a reasonable time after notice.

4. Creditors are not bound to except to the schedule of exempt property within twenty days after it is filed, where the assignee has failed to file it within twenty days after the assignment.

5. Under the statute of Colorado a merchant is not entitled to an exemption of two hundred dollars worth of goods as "stock in trade;" he is entitled to a horse, as a "working animal," but not to a buggy.

6. On an application by the assignee for his discharge, any misconduct on his part in respect to the estate is a proper subject for examination.

7. Every fact which is relied on to establish fraud should be distinctly stated and verified; and the creditor raising the issue should give security for costs.

8. Where property taken by the assignee is charged with a lien, the reasonable cost of keeping and disposing of it, including the assignee's fees, should be charged upon it. No charge can be allowed for the services of an auctioneer unless it be shown that such services were necessary; nor can such fund be charged with attorney's fees for services rendered to the assignee in his contest with the lienor respecting such property.

[In the matter of David G. Peabody, a bankrupt.]

Blake & Jacobson, for assignee.

Thos. Macon, for Russell.

HALLETT, District Judge. In December last the assignee filed a report of sales made by him of goods belonging to the estate, and of certain property set off to the bankrupt as exempt, which report was on the same day approved by the judge then presiding in this court. Edward Russell, a creditor who obtained a lien upon all of the goods so sold, and some of the goods so set off, by judgment and execution against the bankrupt before the petition in bankruptcy was filed, now complains of this order of the court as having been irregularly entered, and moves to set it aside. He also objects upon several grounds to the report of the assignee, but these objections cannot be considered while the order approving the report is allowed to stand. To explain the force and effect of this order, it will be necessary to state some of the facts presented in the record. The petition in bankruptcy was filed in the district court of the Third district of the late territory, April 28, 1876, and the assignee was chosen and appointed on the 20th of May thereafter. On the same 20th of May, 1876, the register of that district made out and signed a paper in the form No. 20, adopted by the supreme court, which was doubtless intended to be a schedule of the property set aside to the bankrupt under the exemption laws. Upon examination, however, it will be found to have but few of the requisites of such a schedule. In the first place it was made by the register, the act (section 5045) and the general order (19) requiring that it shall be made by the assignee. It is true that the form No. 20 has the words "district judge (or register)" at the foot, apparently indicating that it is to be signed by one of those officers. But this is obviously a mistake of the draughtsman, for the act of setting apart exempt property cannot be performed by either the judge or register consistently with the provisions of the law. The property is in the possession of the assignee, and he only can deliver it. The act imposes upon him the duty of selecting the articles to be set apart to the bankrupt, and provides for reviewing his decision. The general order requires him to report to the court the articles set apart by him, with the value of each, within twenty days after receiving the deed of assignment, and provides that creditors may except to his report. Usually and properly this report is made to the register, who also hears the exceptions of creditors, and his decision, if unsatisfactory to either of the parties, is reviewed by the court. All this is utterly inconsistent with the notion that the register may set off the property to the bankrupt in the first instance; a notion which has no other foundation than the mistake made in appending unnecessary words to the form.

If it is claimed that this paper is a direction from the register to the assignee as to the property to be set off to the bankrupt, the reply is that the register had no authority to give such direction. His duty is confined to receiving and filing the schedule after it has been made by the assignee, and passing upon the exceptions, if any are made by creditors. The matter of designating the property which is exempt from the operation of the act is entrusted to the assignee, and his discretion cannot be controlled or supported by a direction from any source previously given. But if the schedule had been made by the assignee, it does not appear to have been reported to the court, as required by the general order. It was not filed with the register; nor with the clerk until December 22d, 1876, when it was approved by the court. It seems to have been kept by the assignee, for it is attached to his report made in Decem-

[1] [Reprinted from 16 N. B. R. 243, by permission.]

ber, which contains all his doings up to that time. But wherever it may have been it was not in the proper place, and creditors had no opportunity to except to it before it was aproved by the court. If a proper schedule had been filed with the register within twenty days after the assignment, as required by general order 19, and no exceptions thereto had been filed within twenty days thereafter, probably all creditors would be precluded from objecting at this time. For the protection of an assignee who has performed his duty fairly, creditors ought to bring forward their objections to the schedule, if they have any, at an early day, as the rule requires. But if an assignee withholds his report until long after the time specified in the rule has expired, he cannot, by an order obtained ex parte, shut off inquiry as to the regularity of his proceedings. These objections to the schedule appear to be substantial, and to demand the revocation of the order made by my predecessor.

Another objection to the schedule, prepared by the register, is found in the fact that there is no sufficient description of the articles set off, nor is the value of each given. This was corrected to some extent, but not fully, in a distinct schedule filed with the other in December. The goods set off as stock in trade, and the value of them, is well enough stated in that schedule, but the value of the other goods is stated in the aggregate, and the household furniture, books, and some other things are not in any way described. But this defect may not be a ground for vacating the order, and it is not material to our present inquiry.

In so far as the order of December 22d relates to the sale of the estate, the right of a creditor to be heard rests upon the same consideration. No one who is interested in the estate can be cut off from being heard by an ex parte order entered upon the application of the assignee. Justice is not administered in that way. When the matter to be passed upon has been submitted to a general meeting of creditors, and, if it has not been so submitted, if due notice has been given, an order may be given which will settle the rights of all parties, but without notice nothing can be done which will arrest investigation into the conduct of the assignee. It is true that a creditor is a party to a bankruptcy proceeding, and, as such, bound by all that is regularly done in the course of the proceedings. But confirmation of the acts of an assignee, without notice to the creditors of the estate, and without giving them an opportunity to be heard, is not regular or proper, and therefore they are not bound by it.

The power of the court to grant the relief asked was briefly discussed and perhaps seriously denied at the hearing, but there is little room for doubt on the point. Upon contested questions regularly decided, it may be that authority ends with the judgment which is given. But as to judgments by default, and all ex parte orders, the rule is otherwise. Harris v. Hardeman, 14 How. [55 U. S.] 334. In bankruptcy proceedings there are no terms of court by which authority to correct what has been done amiss can be said to be limited, and probably the court has full control for that purpose over the whole proceeding from the beginning until the end is reached.

Whether the motion to vacate the order was made in apt time is more doubtful. There is nothing of record to show when Russell was first advised of the order, unless indeed he was bound to take notice of the schedule within twenty days after it was filed. This would have brought knowledge of the facts to him early in January, and the motion was not filed until July. Such delay would be inexcusable in a case where the situation of the parties may change, and the assignee may suffer by the delay. But this is not the rule; for the assignee must file his schedule of exempt property within twenty days after the assignment to him, and if he does not do so the creditors may fairly suppose that no exemption has been claimed or made. It is only by diligence in putting in the schedule that the assignee can require the creditor to be diligent in bringing forward his objections to it. Under all the circumstances I am of the opinion that the order of December 22d ought to be set aside, and the report of the assignee of the property exempt from the operation of the act and of the sales made by him, as well as his disbursements, ought to be open to examination.

As affecting the extent of inquiry, it may be well to remark that a composition of the debts of the bankrupt has been had, under which it is understood that all of the debts have been paid excepting that of Russell, who is contesting these questions with the assignee. A portion only of the property set off to the bankrupt as exempt from the operation of the act was subjected to the levy of Russell's execution, and I suppose the discussion is to be confined to that portion. Something was said at the bar about the lien of the execution in the hands of the sheriff extending to all of the personal property, whether levied or not, but the question of lien as lately decided in this court and the circuit court, contained no feature of that kind. The demand was for payment from the fund obtained from the goods actually taken in execution, and the creditor cannot now enlarge his claim.

Referring to what was said respecting the schedule of exemptions made by the register, it may be proper to add that the report of the assignee, filed December 22d, contains a list of the property set off to the bankrupt, which will be referred to hereafter. In that list certain goods are described as "stock in trade," which were set off under the sixth subdivision of section 33

of the statute of the state (Rev. St. 380). That clause, with others, describes property which shall be exempt from execution, and reads as follows: "The tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value." Its meaning and effect has been considered by courts of other states, and is no longer doubtful. Grimes v. Bryne, 2 Minn. 89 (Gil. 72); Guptil v. McFee, 9 Kan. 30; Bevitt v. Crandall, 19 Wis. 581. It is applicable to miners and handicraftsmen, as distinguished from merchants and traders, and the bankrupt, as a merchant, was not entitled to its protection.

By the eighth subdivision of the statute before referred to, working animals of the value of two hundred dollars may be reserved by the debtor, and, under this clause, a horse was allowed to the bankrupt. It is contended that, being a merchant, the bankrupt could have no use for such an animal, but this is not apparent. The reservation was made by him as the head of a family, and his right to claim the property in that way is not denied. There are many ways in which a horse may be useful in supporting a family, whatever the occupation of the head of the family may be, and I cannot assume that this animal was not used for that purpose. If kept for pleasure, merely, he was not exempt. Burges v. Everett, 9 Ohio St. 425. But of this there is no evidence. Perhaps the description in the schedule is imperfect in not describing the animal as a work horse, and in not giving his value, but no complaint has been made on that ground. The buggy mentioned in the list is clearly not within the statute which specifies a farm wagon, cart, or dray. In some states it is held that the word wagon is used generically to signify every kind of vehicle with wheels, but to use the term farm wagon in the same sense would be very absurd. No other property mentioned in the schedule was taken in execution by Russell, and the inquiry on this point results in excluding from the list the "stock in trade" and buggy, which must be charged to the assignee.

As to the right of the creditor to call for an investigation into the conduct of the assignee in selling the property, no doubt is entertained. The latter has applied to be discharged from his trust, and the court is required to audit and pass his accounts. Section 5096. Any misconduct on his part in respect to the estate upon which Russell had, or now has a lien, is a proper subject for examination. But the charge of fraud is too vague and general to arrest attention. If the goods were sold for a nominal sum as stated, the value should be stated also, in order that the loss to the estate may be seen, and any agreement between the purchasers and the assignee respecting such sale should also be shown. So also, if goods were bid in for the benefit of the bankrupt and paid for out of the estate, the amounts so paid out should be stated. Every fact which is relied on to establish fraud should be distinctly stated in a way that may be controverted, and the whole should be verified by some one having knowledge of the circumstances. It is not intended that the person verifying shall testify to every fact as of his own knowledge, but that he shall exhibit such knowledge of the facts and circumstances as may afford reasonable ground to believe that the charge is made in good faith. The creditor should also give security for the costs which may be adjudged against him upon the hearing or trial of the issue. The practice in respect to an issue of this kind has not before been considered in this district, and the creditor will have leave to conform to the suggestions here made.

Objection is also made to charges for services and expenses which were mostly incurred in respect to the property on which the execution was levied. It seems that soon after the sheriff took possession of the property he was dispossessed by the marshal under process from the bankruptcy court, and thereafter the property was kept and sold by the assignee. We have recently ascertained that the creditor, by his execution and levy, secured a valid lien upon the goods, but that point was at first involved in great doubts. Conceding that, the jurisdiction of the bankruptcy court extending to the ascertainment and liquidation of the lien was clear and undeniable. In that view no reason is perceived for exempting the property from the reasonable cost of keeping and disposing of it, including the services of the assignee,—such as the rent of the building in which the goods were kept, the marshal's fees and expenses in taking charge of the goods and the like. As some of the charges may be excessive, and others unwarranted, the matter will be referred to the register to report what are properly chargeable to the goods claimed by Russell. No charge can be allowed for the services of an auctioneer, without showing that such services were necessary, and then only for a reasonable sum. The time for which the assignee was necessarily employed in caring for or disposing of the goods may be entered at a reasonable rate, which will be allowed by the court and submitted to the circuit judge for approval, pursuant to the amended general order of March last. The charge for attorney's fees stands in a different light. That charge is based upon services rendered to the assignee in his contest with Russell for the property which has been awarded to the latter. I do not find any principle upon which a litigant can be made to furnish sinews of war to his adversary, unless in case of husband and wife, where it is presumed that the wife may

have contributed to the husband's property. Aside from this the assignee was contending for the property in behalf of the general estate, which must therefore be responsible for the expenses so incurred. It would be strange indeed if the general estate could cast upon this special fund the expenses of the litigation in the same manner as if it had been successful in the contest. Surely is is enough for the creditor to pay his own attorneys.

If an issue is raised respecting the conduct of the assignee in selling the property the cause may remain until that issue shall be determined. If no such issue is to be presented it may be referred to the register to examine the assignee's report and ascertain the value of the property improperly set off to the bankrupt, and make the proper allowances for fees, disbursements, and services.

Case No. 10,867.

PEABODY v. DENTON et al.

[2 Gall. 351.] [1]

Circuit Court, D. Massachusetts. May Term, 1815.

EVIDENCE OF LOST NOTE — DEMAND OF PAYMENT WITHOUT PRODUCING NOTE—NOTARIAL COPY.

1. Of the evidence to prove a lost note see 1 Greenl. Ev. § 558, note 1, where all the cases are cited.

[Cited in brief in Boteler v. Dexter, 20 D. C. 27. Cited in Adams v. Baker, 16 R. I. 2, 11 Atl. 168.]

2. A notarial copy was permitted to go to the jury, as a fair ground for presuming, when taken in connexion with the testimony of a witness, that the paper exhibited to the notary was the same, which had been in the witness's possession, and acknowledged by one of the defendants.

[3. Cited in Moore v. Fall, 42 Me. 454, and in Morse v. Bellows, 7 N. H. 569, to the point that, when a demand is made of the maker of a note, the note itself should be produced, otherwise the debtor may well refuse to pay, on the ground that he has a right to have his obligations or contract, or to see it canceled, when he is called upon to discharge it.]

Assumpsit on a promissory note made by the defendants and two others, at Aux Cayes, in the year 1797, signed "Denton & Co." and "Nathan Brothers & Co." and endorsed by the payee, Endicott, to the plaintiff. The defendants pleaded: (1) The general issue; (2) non assumserunt infra sex annos; (3) actia non accrevit infra sex annos, &c.

At the trial, the original note was not produced, but a witness, on behalf of the plaintiff, stated, that in the year 1797, at the request of the plaintiff, he carried the note to Aux Cayes, to collect; that Hall and Brothers, the other promissors, having failed, he demanded payment of Denton, who admitted the note to be due; that he did not bring back the note, but lost it in some manner unknown to himself; that Endicott was a ship master in the service of the plaintiff, and in that capacity was in Aux Cayes about 1796 or 1797; that he did not recollect the note to have been endorsed by Endicott, but presumed it was so; that the note was never paid to him; that he conversed with Hall about the note, but did not remember to have shown it to him. The plaintiff also produced a letter from Denton to his agent, Wellman, dated Leeds, 29th of April, 1805, containing these words: "If you obtain payment of my ordinances, I wish you to pay the amount of the note in favor of Endicott." A paper was also offered in evidence by the plaintiff, which purported to be a notarial copy of the note declared on. It began as follows: "The following recorded by Captain Joseph Peabody, 17th May, 1797." Then followed a copy of the note and endorsements, with a certificate of the clerk of the common pleas for the county of Essex, that the whole was truly copied from notarial records deposited in his office.

Mr. Prescott, for defendants, objected to this paper's going to the jury. It could be evidence of nothing, but that a paper of similar tenor was shown to the notary. There was no evidence to prove, that the paper, thus exhibited and copied, was the same, which had been in the hands of the plaintiff's witness, for the witness did not recollect any date or sum, by which to identify it. Though, in the present case, the plaintiff's character was a sufficient guarantee against any fraudulent proceeding, yet the rules of evidence were necessarily general, and if a notarial copy be admitted as evidence, not only of the existence of the paper, but of its genuineness, it would be easy to fabricate a writing for the very purpose of founding a demand on the copy, at some distant time. At any rate, the copy could not be evidence of the amount of the note.

Mr. Saltnostall, for plaintiff.

STORY, Circuit Justice. I have no doubt, that the copy is admissible, to prove that such a paper was exhibited to the notary, though it could not of itself be evidence, that the paper was genuine. Connected with the testimony of the witness, however, it affords a fair ground of presumption, to be left to the jury, that the paper copied by the notary was the same, which the witness carried to Aux Cayes, and which was there recognised by Denton.

Mr. Prescott then objected to the competency of the whole evidence to support the plaintiff's action, contending that there was no proof of the signing of the note by Nathan Brothers and Co., and that the note might still be in existence, and be again demanded of the defendants by a bona fide holder.

[1] [Reported by John Gallison, Esq.]

But it was the opinion of THE COURT, that after so great a lapse of time, it was incumbent on the defendants to show, either that the note existed, or that it had been demanded of them; and that it must be presumed, that no demand would now be made.

Verdict for plaintiff.

NOTE. It appeared that the defendants were domiciled in a foreign country, which was a sufficient answer to the plea of the statute of limitations, unless it were shown by the defendants, that they had been within the country since the making of the note.

Case No. 10,868.

PEABODY v. GILBERT.

[5 Blatchf. 334, note.] [1]

Circuit Court, S. D. New York. July 14, 1866.

DEFINITION OF "BROKER"—BROKER'S TAX.

[This was an action by Augustus L. Peabody and others against Sylvester C. Gilbert and Sheridan Shook.]

NELSON, Circuit Justice. The opinion in the case of Clark v. Gilbert [Case No. 2,822] disposes of this case. The plaintiffs are bankers, and do business as such, by receiving stocks, bonds, &c., for sale, and by lending and advancing money on stocks, bonds, &c., and in default of repayment, sell the same, and, also, purchase and sell stocks, bonds, &c., on their own account, and not on commission, or for others. They also purchase and sell stocks, bonds, &c., for others, under certain stipulations as to risk, losses, and profits, which is the business of a broker, and the sales are subject to the broker's tax.

[In 5 Blatchf. 334, this case is published as a note to Clark v. Gilbert, Case No. 2,822.]

PEABODY (MASON v.). See Case No. 9,250.

Case No. 10,869.

PEABODY v. PROCEEDS OF TWENTY-EIGHT BAGS OF COTTON.

[2 Am. Jur. 119.]

District Court, D. Massachusetts. March Term, 1829.

ADMIRALTY JURISDICTION—DERELICT PROPERTY—UNCLAIMED PROCEEDS—RIGHTS OF SOVEREIGN.

[1. The rules and usages of nations in regard to the final disposition of the proceeds of property found derelict at sea, and which are not claimed by any owner, are made a portion of our maritime law by the provisions of the constitution of the United States, and the laws passed pursuant thereto, giving to the national courts power to adjudge, award, and decree respecting causes of admiralty and maritime jurisdiction.]

[2. Surplus proceeds of derelict property found at sea, remaining in the registry of the court for many years, after awarding to the salvors a proper compensation, will not, in the absence of statute, be awarded also to the salvors, nor will it be ordered to be paid into the treasury of the state, into which the property was brought, but the superior right is in the government of the United States, and the money will be ordered to be paid into the treasury thereof.]

Samuel Peabody and others, libellants of the proceeds of twenty-eight bags of cotton.

This libel was filed by Samuel Peabody, one of the surviving owners of the schooner Equality, in behalf of himself and another owner, and the representatives of a third owner, who had also been master of the vessel. The libel stated that August 27, 1806, the schooner found twenty-eight bags of cotton adrift at sea, abandoned by the owners, which the master took on board and carried into Salem; that the owners of the cotton were then and had ever since been unknown to the libellant; that a libel was filed in the district court by the salvors for salvage; that the court ordered the cotton to be sold, and adjudged that, after payment of costs, expenses, and duties, one moiety of the residue should be paid to the salvors, in the following proportions, viz. one-third to the owners of the schooner, one-third to the master, and one-third to the crew, and that the other moiety should remain subject to the further order of the court. The libel then averred that the last-mentioned moiety had remained in the court until the present time, awaiting such further order; and alleged that it had not been claimed by or allowed to any persons since that time, and that, from the great length of time which had elapsed since the cotton was found, more than twenty-two years, the libellant had good reason to believe, and did verily believe, that it would not be claimed by any other persons than himself and the other parties interested; and that he is advised that he and they are lawfully entitled to the said moiety, which he prayed should be decreed and paid over to him, for himself and the other parties interested.

Andrew Dunlap, Dist. Atty., appeared. and interposed a claim for the said remaining proceeds, as the right of the United States, denying the right of the libellants, and praying that the proceeds should be paid to the treasurer of the United States. The facts stated in the libel were not disputed.

J. Pickering, for libellants.

Andrew Dunlap, Dist. Atty., for the United States.

Mr. Pickering. The libellants claim the proceeds of the property in question as a derelict. It was found by them, on the high seas, twenty-two years ago; was duly sold under an order of this court, publicly advertised in the newspapers, and no owner has ever appeared. To constitute a case of derelict, it is not necessary, as by the civil law, that the goods should be voluntarily abandoned, without any further claim of property

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

in them. It is sufficient that they are found deserted or abandoned upon the seas, whether it arose from accident or necessity or voluntary dereliction. Rowe v. The Brig [Case No. 12,093]. It is true that the high court of admiralty in England has sometimes held that the abandonment must be made without hope of recovery. But it is observed by Mr. Justice Story, in the case just cited, that Lord Stowell has silently retracted that opinion (in the case of The Lord Nelson, 1 Edw. Adm. 79, and The Blendenhall, 1 Dod. 419), and that "certainly it is not recognized as the doctrine of this country." The learned judge then goes on to adopt the definition of Sir Leoline Jenkins, that derelicts are "boats or other vessels forsaken or found on the seas without any person in them." This principle is recognized in Moll. de J. Mar. bk. 2, c. 5, § 4. The remarks here made are also applicable to the opinions expressed in the case of Taylor v. The Cato [Case No. 13,786], where the court adopted the original rule of Lord Stowell; and also to the case of Wilkie v. Two Hundred and Five Boxes of Sugar [Id. 17,662]. Upon the facts proved in the present case, then, there can be no doubt that this is a case of "derelict," according to the modern application of that term. The claim to derelict property rests upon the general principles of natural law and the positive regulations of states. According to the principles of natural law, derelict property, or property found, whose owner is unknown, belongs wholly to the finder. Gro. De Jure B. lib. ii, c. 8, § 7; Puff. Law Nat. lib. 4, c. 6, § 13, and Barbeyrac's note 2; Enc. Meth. Jur.; 1 Bl. Comm. 295, 296; 2 Bl. Comm. 9, 402; 2 Wood. Lect. 391. The elementary writers, it is true, admit that this principle of natural law may be modified by express regulations; and several European nations have in fact established different rules, of which France, in particular, affords an example in Code Civ., art. 716. But the rules of different states have always materially differed from each other, as well as from the original rules adopted in the civil law. Groenewegen de Legib. Abrogat. p. 23.

The United States, however, have made no such regulation. As a confederacy, having no powers except such as are expressly surrendered by the several states (among which powers this is not included), they could not establish any regulation on this subject, so far as to affect the rights of the individual citizen who should happen to be the finder of property lost or abandoned. The right to dispose of such property, so far as respects the finder, must still belong to the sovereignty of his particular state. So far as regards foreign nations, it may be admitted that the United States may take cognizance of these cases as matters of admiralty or maritime jurisdiction; and that property found derelict on the ocean, the common highway of nations, should be adjudicated upon by the United States courts, which are the only tribunals authorized to decide such questions as against foreign states. But the ultimate right of property, as between individual citizens of the United States, must depend upon the laws of the individual states, to which such power is reserved by the principles of the confederacy.

If the property in question had been found upon the territory of Massachusetts, it would, on principles of natural law, belong to the finder; and the United States could make no claim to it; but the state, as a sovereign state, has provided by an ancient law that, after the lapse of a year and a day, the property of the original owner should be considered as devested, and disposed of in a specific mode. In England, goods found upon the land have been adjudged exclusively to the finder; as in the case of Armory v. Delamirie, 1 Strange, 505, where a chimney-sweeper's boy found a valuable jewel, and the court held that he was entitled to it against all the world, until the original owner appeared to claim it. Christian's note on 1 Bl. Comm. 299. Now it is difficult to perceive any distinction in principle, so far as regards the original owner and the finder, between property found on land and on the high seas. But it is suggested that the government of the United States should hold it, in preference to the finder, in order that it may be in the power of the owner to recover it; as the finder or his representatives may forever remain unknown, but the government can always be found. We say, in reply, that the government may deliver it to the finder upon adequate security, as in many other cases, if it has a right to retain the property at all.

But here again the question recurs, whether this is a right of the general government of the United States or of the particular states. We should further ask, if the government has the right to retain the property, for how long a time can it be held? Does the government acquire an absolute and perpetual right as against the finder? On the contrary, there must be a reasonable limitation in this as in all other cases. If, by our laws a possession of forty years would bar a claim even to real estate, it should seem that twenty-two years ought to bar any claim of the original owner in the present case. By the laws of Europe, which have been referred to respecting wrecks, the short period of a year and a day was a good bar against all the world; and by our state laws the same period is a good bar in the case of strays and goods lost on the land. In the case of Wilkie v. Two Hundred and Five Boxes of Sugar [Case No. 17,662], it is true that the court intimates that no length of time would be a bar; but the language there used must be taken with reference to the case then under consideration, in which, however, no very great length of time had elapsed.

Again, it is said, we are not to presume that the owner would have abandoned valuable property; but it may, on the other hand, be replied that it cannot be presumed he would have remained silent for twenty-three years, and give no public notice of his loss, which notice is not here pretended. The voluntary abandonment of property, like the relinquishment of debts, is not an uncommon thing; and the nonappearance of an owner, after such a length of time, is the strongest evidence of such abandonment. To make a case of derelict, however, it is not necessary that no owner should afterwards appear. The Aquila, 1 C. Rob. Adm. 40. In all the cases cited for the United States, either a very short time had elapsed between the abandonment and the adjudication, or a claim was made by a known owner immediately. If, then, there is any such thing as a limitation to claims of owners in these cases, the present is as strong a case as can be found for applying such limitation. It is also argued that the United States can make this claim, as successor to the prerogatives of the king of England, upon the authority of 3 Dane, Abr. 157. But in the same work it is said that there are numerous instances in which this doctrine has been held not applicable to the American colonies; and then we contend that the present is one of the latter cases, and that whatever rights of that kind the several states may have there is no such prerogative in the federal government. Among other instances, the United States have not claimed anything of the royal prerogative as to wrecks, but these have been considered as under the jurisdiction of the several states. If, therefore, the present claim of the libellants rested upon the law of wrecked property, it would still be the right of the finder to have it disposed of independently of any claim of the United States.

It is further objected that the claim of the whole property is one of a novel impression. But in the case of McDonough v. The Mary Ford, 3 Dall. [3 U. S.] 188, the supreme court of the United States intimate a doubt whether on the principles of abandonment they ought not to decree the whole of the property there in question to the American libellants; but, as the parties had not appealed from the decision of the lower court on that point, it could not be taken notice of on the appeal.

Mr. Dunlap argued that the claim of the libellants rested upon the principles of the title by occupancy, as described by the ethical and legal writers. The case at bar was, he admitted, one which at first view appeared strongly in favor of the libellants upon equitable principles, yet it must be decided by general rules of law; and, when the cause was examined to the foundation, it would, he believed, be found to rest upon those barbarous principles of the ancient law of nations in the iron age, by which a title was asserted to shipwrecked property, to the exclusion of the right of the unfortunate owners. The title by occupancy, except in the case of newly-discovered countries, no longer exists; it is totally unsuited to the present state of society, as its assertion must constantly tend to the violation of its peace. The laws of all civilized nations provide against the assertion of this title, which, however equitable it may appear in the elegant essays of ingenious and fanciful ethical and legal authors, is utterly inconsistent with the harmony of any well regulated society. Even the most learned authors, in their speculations on this subject, differ in their nice and scholastic hypotheses; Grotius and Puffendorf resting the right upon the foundation of an implied assent of all mankind that the first occupant of property should become the owner, and Barbeyrac and Mr. Locke denying any such assent, and founding the right upon the fact that the occupant has, by seizing the property, joined his labor to it, and thereby made it his own. It would seem that, when such learned doctors of the law disagree, the dispute must be about a fanciful matter, having no practical applicability to the common affairs of life or the general rules of human conduct. 2 Bl. Comm. c. 1. Burlamaqui, in his Principles of Natural Law, considers the state of property as wholly an "adventitious state," created by civil society, and restrained and regulated by its ordinances. Burlam. Nat. Law, c. 4, § 8. The right of inheritance and the right to dispose of property by will, which cannot be satisfactorily sustained by natural law, whatever may be the common notions implanted by education, rest upon this supposition that the permanent right to property is "an adventitious state"; and therefore Blackstone, in his second book, c. 14, has said that "all rules of succession to estates are creatures of the civil polity and juris positivi merely." The title by occupancy to lands never existed in England but in a few cases of rare occurrence, and now it is in those cases destroyed by statute regulations. 2 Bl. Comm. c. 16. It was therefore contended that the libel in the present case could not be supported upon the notions which had been proclaimed in former days relative to the title by occupancy.

As to the law relied on respecting property derelict, it was contended that there was no such thing at present in the sense of the word "derelict" in the civil law, and the ancient law writers,— a voluntary abandonment, without any further claim to property. This never happens in the present avaricious or needy age, unless in trifling cases, to which the legal maxim, "De minimis non curat lex," applies, or in cases of insanity, where the acts of the party

are null and void, and guardians will be appointed to recover and preserve the property. Gifts are often made from various honorable and generous considerations, but a gift does not create a derelict, for the donee, not the first finder, has the title. The modern description of property derelict is given by Sir Leoline Jenkins, the great admiralty judge of England, and has been adopted by the learned judge of the circuit court of the United States for this circuit. It is defined: "Property forsaken when the hope of recovery exists, although there may be no intention of attempting to recover it." Sir Leoline Jenkins' Works, p. 89; Rowe v. The Brig [Case No. 12,093]. Express dereliction, in the sense of the civil law, never applied to the case of goods thrown overboard in a storm for the preservation of life or property. In Justinian's Institute (Cooper's Ed. lib. 2, tit. 1, § 47) it is ordained: "But the law is not so in respect of things thrown overboard in a storm to lighten a vessel, for they remain the property of the owners, seeing it is evident they were not thrown away through dislike, but that persons in the ship might avoid the dangers of the sea." The law of England, the common law, never recognised any such thing as a derelict in the civil-law sense. It is said in the Doctor and Student (Dialogue 2, c. 31): "There is no such law in the realm of goods forsaken." It was therefore contended that there was nothing in the doctrine respecting derelicts to sustain the libel, and repel the claim of the United States for this money.

The chief legal authorities in support of the claim of the libellants are certain passages in Blackstone. In the Commentaries (volume 1, p. 293) it is said, if property "be found in the sea or upon the earth, it doth not belong to the king, but the finder, if no owner appears"; and in the second volume of the same work (page 402) it is laid down: "Whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure, for these, we have formerly seen, are vested by law in the king." It is evident that Blackstone is speaking of the fanciful case of voluntary abandonment as a foundation for the title by occupancy, for he rests the right of the finder entirely upon the supposition of voluntary abandonment by the original owner. Besides, the case of wreck is exempted from the operation of this theoretic rule. In a note to article 32 of the Law of Oleron, the right of the finder to goods thrown overboard in a storm is denied, for the owner, as the sea drives everything to the land, has still the hope of recovering such property. It is said to be "non in derelicto sed in deperdito." The right of the finder is only in cases of "abandonment through contempt;" that is, voluntary abandonment, to which Blackstone, in the remarks above cited, alludes. Again, it is held by the court, in the case of Warder v. La Belle Creole [Case No. 17,165], that "the cases of dereliction, in which the maxim of occupantis fiunt derelicta is founded, generally run on the principle of a voluntary abandonment by the owner with his free consent, and not on such a relinquishment as force, necessity, or danger compels." In this case, had there been a voluntary abandonment, and a case for the application of the principles laid down in Blackstone, the whole property would have been decreed to the libellants some twenty years since, when the property found was libelled, and a moiety only decreed for salvage. This distinction, which is maintained in argument on the part of the United States, is believed to be a solid one; and Blackstone himself recognises it, in his remarks upon treasure trove or hidden treasure, and bona fide vacantia, or goods found without any known owner. In his Commentaries (volume 1, p. 293) he says that "hidden treasure" belongs to the king, because by the hiding the owner has shown that it was not his intention to renounce his property. In the same volume (page 298) he says that bona vacantia, or goods in which no one can claim a property, by the law of nature belonged to the finder, but in settling the modern constitutions of Europe, to avoid strife, were vested in the sovereign power. Now, if hidden treasure never belonged to the finder, and bona vacantia by the law of nature did, the difference was because in the former case there was no voluntary abandonment, and in the latter case a voluntary abandonment was supposed. Here, then, Blackstone himself makes the distinction between the case of goods lost by necessity, and voluntary abandonment, and places the right of a finder upon the only ground which can support it, a voluntary renunciation by the owner of his property, which has been shown not to be in the case, when goods are thrown or washed overboard in a storm; that is, in the barbarous dialect of the ancient law, goods jetsam or flotsam. Were Blackstone to be understood otherwise, he would be grossly inconsistent; for he asserts, in volume 1, p. 298, that bona vacantia belong to the king, "because they are goods in which no one else can claim property." Now, in volume 1, p. 295, he says: "If anything be found in the sea or upon the earth, it doth not belong to the king, but the finder, if no owner appears." This inconsistency is the subject of remark by Mr. Christian in his notes on Blackstone's Commentaries, and it can only be reconciled by supposing, as has been contended in the argument, that Blackstone intended to allow the title by occupancy, only in the imaginary cases of voluntary renunciation by an owner of his property to the

first fortunate finder. It is apparent that this was his idea, from the passage in volume 2, p. 402, in which the right of the finder to movables which are "found upon the surface of the earth or in the sea, and are unclaimed by any owner," is put upon the ground that they "are supposed to be abandoned by the last proprietor, and as such returned into the common stock and mass of things." From this view of the subject, it was contended that the passages in Blackstone did not apply to the case of this libel, or sustain the claim which it propounded.

What is the definition and history of this title by occupancy? In relation to lands, it is defined in 2 Bl. Comm. p. 258, and in Co. Litt. 41b, Blackstone says: "Occupancy is the taking possession of those things which before belonged to nobody." Surely this could not have been the case with this cotton found in bales on the ocean, with marks and numbers, the indicia of the ownership of the unfortunate and unknown owner. Lord Coke says, where an estate is granted for the life of another man, and the tenant dies, he who first enters upon the land shall hold it during the continuance of the estate,—during the life of the person for whose life it was granted; and so where a tenant for life, in curtesy, in dower, grants over his or her estate and the grantee dieth, he who first enters shall hold the estate during the continuance of it, "because his title is by his first occupation." But, against the sovereign power, this title never could be set up. "Against the king there shall be no occupant," says Coke; "against the king there shall be no prior occupant," echoes Blackstone. It is manifest, therefore, that the title by occupancy, when it existed, was never suffered to prevail against the sovereign power, and consequently in this case cannot be sustained against the United States. But the title by occupancy has been long since abolished, as inconsistent with the peace and refinement of civilized society, and as a title by brute force, instead of law. It is now entirely done away by St. 29 Car. II. c. 3, and 14 Geo. II. c. 20. The note by Hargrave and Butler to the passage cited from Co. Litt. note 241, was referred to, as containing the ancient law and the modern law upon this subject. The case in 1 Strange, 505, was relied upon by the libellants. This case was where a chimney-sweeper's boy found a diamond ring, and a jeweller, to whom it was shown, took it from him, and substituted in the place of the jewel a stone of inferior value; it was ruled that the boy might sustain an action against the jeweller, and recover the value of the richest jewel which could be found to fit the socket in the ring, as the jeweller did not return the diamond. But this was a case between two individuals, in which no questions of sovereignty arose, in which no flowers nor thorns of prerogative spring up; and, whenever it is cited in the books, it is merely to establish the reasonable doctrine of the common law, that a mere possessor of property may maintain an action of trespass against a mere wrongdoer, who disturbs his possession. Williams' notes to 2 Saund. 47, were referred to.

In England and in this country,—certainly in New England,—the analogies of law are against the claim of property by the libellants because they were the finders, and in favor of the claim of the government or sovereign power. Take, for instance, the law respecting estrays: "Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives them to the king." 1 Bl. Comm. 296. Christian, in his note to this passage, assigns the true reason: "The law is probably founded upon general policy," as it "lessens the temptation to theft," and furnishes the owner with "the best chance of having his property restored to him." In Massachusetts, as early as 1698, it was ordained by the colony laws that "of lost goods whereof the owner is not known, public notice should be given, the goods appraised, and after a year, if no owner appeared, one half of the net proceeds disposed of to the finder for salvage, and the other half to public use." The same law continues, with modifications, to this day in Massachusetts. Laws Mass. Feb. 13, 1789; Id. June 13, 1815. A similar law exists in New Hampshire and in Maine. Acts N. H. Feb. 9, 1791; St. Me. 1821, c. 130, pp. 573–575; 3 Dane, Dig. Am. Law, c. 79.

What is the law of nations on this subject? The laws of the great commercial nations have certainly been against the claim of the libellants, and in favor of the principle of the claim of the United States. By the imperial constitutions of Rome, by the civil law, the right to property found shipwrecked was vested in the sovereign power. The edict of the first Christian emperor, Constantine, which has sometimes been attributed to one of the Antonines, shows it. Before this edict the sovereign, jure gentium, became entitled to shipwrecked goods, and this was the Rhodian law. The edict of Constantine (Leg. 1, lib. 11, De Naufrag.), declares: "What right has the sovereign to another's calamity, so that it should hunt after gain in such a woful case as this?" Now the right of the emperor certainly was not yielded in favor of the finder, that he might "hunt after gain in such a woful case," but it was yielded only in favor of the owner, and, if he did not come and claim in a year and a day, the proceeds of the goods went into the exchequer. By the decree of the Emperor Adrian, if anything was found within the imperial domain, half appertained to the finder, and the other half to the emperor. Just. Inst. lib. 2, tit. 1, § 39. In Laws Oleron, art. 30, it is enjoined that in case of shipwreck and goods found floating upon the sea, a salvage shall be paid to the finders, and the property shall be preserved for the owners a year; if they did not appear, the

goods were to be sold, and the money arising therefrom was to be given "among the poor" and for portions to poor maids and other "charitable uses." All this was ordered under the penalty of the malediction of "our mother, the holy church," whose battles in the crusades Richard I., the law giver at Oleron, had been piously fighting against those who were guilty of the sin of believing in their church, in whose bosom they had been educated.

In Dom. Civ. Law, bk. 1, tit. 8, § 2, we find the ancient law of France on this subject. It is laid down, with respect to shipwrecked goods found, that, if the owner do not appear within the given time, "the prince has a right in them, as he has in the kind of vacant goods." It appears, by Valin's Commentaries upon the Ordinance of the Marine of Louis XIV., that when shipwrecked property was found, and no owner appeared within a year and a day, it was ordained, by Francis I. of France, that one-third should be allowed to the salvors, one-third to the admiral, and one-third went to the king; and Louis XIV. placed under the protection of the crown all property saved from shipwreck. Valin. Ord. de la Mar. liv. 4, tit. 9, De Naufrages, etc. In Locc. De Jure Mar., is found the general law of the northern nations of Europe on this important subject. This writer says, respecting shipwrecked property found derelict or without an owner, that the larger part belonged to the national treasury, and a lesser portion was allowed to the salvors for their care and labor in preserving the property. This he speaks of as agreeable to equity and the laws of nations. Locc. lib. 1, c. 7, De Naufragiis, § 10. Selden, in his celebrated work De Dominio Maris, lib. 1, c. 24, mentions the right of the sovereign power to shipwrecked goods as the acknowledged modern law of nations. Bracton, also, though an early English common-law writer, has the reputation of having been well acquainted with the civil law and the law of nations, and he says that derelict property or property without an owner, as wrecked property, belongs to the treasury; and things of this nature, which formerly, by the law of nature, belonged to the finder, now belong, by the law of nations, to the sovereign power. Bract. lib. 1, c. 12. It would seem, therefore, to be clear that the general law of nations was against the libellants' claim, and in favor of that set up in this case, in favor of the sovereign power —the United States.

The law of England concurs with the general law of nations in relation to this subject. In Sir Henry Constable's Case, 5 Coke, 106, the court of king's bench say "that the king should have flotsam, jetsam, and ligan, where the ship perishes, or where the owner of the goods is not known." In the Doctor and Student it has been shown to be declared that there is "no such law in the realm as of goods forsaken," to divest the title of the owner in favor of the finder. By St. Westm. c. 4, passed in the third year of Edw. I., the English Justinian, it was provided, in case of wreck, that the goods were not to be forfeited either to the finder or king, "where a man, a cat, or a dog escaped out of the ship"; and, if the owner came and claimed within a year and a day, the property should be delivered to him by the king's sheriff, bailiff, or coroner; but, if no owner appeared, they remained to the crown. Lord Coke, in his commentary upon this statute, states that an opinion had been holden that, by the common law, "goods wrecked upon the sea were forfeited to the king." 2 Inst. 166. This statute was grounded on the law of Oleron, the humane principles of which did not extend to "Turks or other enemies of the Catholic faith," for every man was allowed to deal with such as rogues, and despoil them of their goods, without any punishment for so doing, as was ordained by "that valiant and religious prince" (as he is called in Molloy), Richard I., at Oleron, on his return from a crusade. Laws Oleron, art. 47; 1 Moll. de Jure Mar. c. 5; Beawes, 158; Weskett, 488; Sir Leoline Jenkins' Life, p. 88; Malyne, 120; 5 Burrows, 2738,—were referred to as authorities clearly against the finder's right, and in favor of the right of the sovereign power. The case of The Aquila, 1 C. Rob. Adm. 37, was referred to, as decisive of this question in England, in which case Sir William Scott held the doctrine that "in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired to the occupant himself, for the regulations of the state may have made alterations on the subject, and may, for reasons of public peace and policy, have appropriated it to other purposes, as, for instance, to the state itself." He further says: "I consider it to be the general rule of civilized countries that what is found derelict on the seas is acquired beneficially for the sovereign, if no owner appears"; and again: "In England this right is as firmly established as any one prerogative of the crown." A manuscript copy of proceedings in the high court of admiralty in England, in the possession of the district judge of Massachusetts, was referred to, showing that, in such cases, after a year and a day from the time of the decree for salvage, proclamation is made upon the royal exchange for the owner to come in and receive the residue in court, and upon his default the money is paid, under a decree of the court, into the exchequer.

If by the law of nations generally, and particularly the law of Great Britain, the right to this property is vested in the sovereign power, as a droit of admiralty, it is contended that in this country it is vested in the government of the United States. The colonies never had any droits of admiralty, for, from the nature of their relations to the parent country, they had nothing to do with the ques-

tions of peace and war, except with the Indians. The admiralty powers must necessarily be annexed to the national sovereignty, whose prerogative it was to decide questions of peace and war. The admiralty courts, in which questions arising under the laws of nations (for the correct decision of which the sovereign power is responsible to the world and to posterity), must have been and were established, and the judges appointed, by the crown, the sovereign over the colonies. Raw. Const. U. S. p. 18. In 3 Dane, Dig. Am. Law, 137, it is said: "Yet the king considered himself as entitled to treasure-trove, estrays, wrecks, etc., in America, if he should see fit to claim them; for he granted these, in 1639, to Sir Ferdinando Gorges, in the province of Maine; and as the king judged he had them to grant there, no doubt he held he had them to grant, if he saw fit, in adjoining British colonies in America." Also, in the same volume (page 140), the author further says: "On the whole, examining the English and colony laws, it will appear that of property found in the colonies, in or upon the land, the king only had wrecks of the sea cast on the shore; and, of goods or property found in or upon the high seas, he had jetsam, or goods cast overboard and sunk under water; flotsam, or goods afloat on the surface; and ligan, or goods sunk, but tied to buoys, etc., to save them; and to wrecks at sea. Now, in the United States, to these goods, now found on the high seas, and brought into them by the finder, and no owner known, the United States now succeed." [The Adventure] 8 Cranch [12 U. S.] 221, was referred to to establish the right of the United States to droits of admiralty, and also Const. U. S. art. 3, § 2, vesting in the government of the United States jurisdiction "in all cases of admiralty and maritime jurisdiction."

In this case, the great length of time which has elapsed since the property was found, without any claim of ownership, is relied upon by the libellants. But this does not strengthen their claim, for no length of time can divest the owner's right. In Wilkie v. Two Hundred and Five Boxes of Sugar [supra], the judge of the district court of South Carolina held that length of time gave no "better right" to finders than "accrued on the day subsequent to abandonment."

The claim of the libellants is one of a new impression,—perhaps the first of the kind ever made in an admiralty court; and to it the remark of Parker, the learned chief justice of the supreme judicial court of Massachusetts, in 17 Mass. 172, in another case, may be well applied: "This case must be considered an experiment to ascertain whether, under such a state of facts, an action can be maintained; no authority in favor of it has been found by the plaintiff's counsel, and this, of itself, is pretty decisive against the action."

It is not denied, but, on the contrary, is admitted, that the whole property saved may sometimes be decreed. But this can only be done in those cases where, in the opinion of the court in which the claim for salvage is preferred, the whole property would constitute but a fair compensation for the service rendered. Upon this principle it is that divers have usually the whole property saved allowed to them; and those who recovered the plate, in 1687, lost fifty years before, near the Bahama Bank, and whose case is related in 1 Moll. de Jure Mar. c. 5, were allowed the whole. But, in the case at bar, a moiety only was allowed, being, in the opinion of the court, a fair, full, and liberal compensation for the service rendered.

The reason why the law of nations vests in sovereign power the right to property so situated is a plain one,—in order that the original owner may be enabled to recover his property,—the sensible reason assigned by Christian in his notes to Blackstone's Commentaries, why estrays are in England the right of the crown. If property of this nature should, in addition to the liberal salvage always awarded, be distributed among the finders, when the owners might appear it could seldom be recovered; for the finders might be dead, and their estates administered upon, or insolvent, and unable to respond. But the government never dies, and is never insolvent; and to suppose that it would refuse to restore to an unfortunate owner his property, claimed at any distance of time, would be distrusting the humanity and justice of the times, the integrity of the people, and the honor of the government. Our government—and, it is to be hoped, that of any civilized people—would say, in such a case, with Constantine, "What right has the sovereign in another's calamity?"

DAVIS, District Judge. The libellants, owners of the schooner Equality, claim a sum remaining in court, part of the proceeds of twenty-eight bags of cotton, taken up at sea, on the 28th of August, 1806, by John Peabody, master of said schooner, and his crew, in her passage from Baltimore to Salem, and which were brought by them into the last-mentioned port. On the libel for salvage, in this court, the goods thus saved were ordered to be sold for the benefit of all concerned, and one net moiety of the proceeds of sale was decreed to the salvors, the residue to remain in court, subject to further order. By a subsequent order, part of the balance was directed to be paid to the salvors, so as to make their whole compensation equal to one-half the gross amount of the property saved. From the length of time elapsed since that decree, it is urged, in behalf of the libellants, that there is no probability of any claim being made, by the original owners, or by any person in their behalf or stead, and they pray that the sum thus remaining in court, being two hundred and twenty-five dollars and eighty-five cents, may be decreed to them, as their lawful right under the alleged circumstances of the case. This application is read-

ily entertained by the court, that a final and correct disposal of these proceeds may be made, and that a rule may be settled, in reference to some other balances remaining in the registry of the court, under similar circumstances.

There having been no decision, within my knowledge, respecting the disposal of such unclaimed property, in the courts of the United States, notice of this application was directed to be given to the district attorney, who has presented a claim in behalf of the United States. The points incident to the question have been very fully and ably argued by the counsel on both sides, and the court has listened, with satisfaction and improvement, to their elaborate arguments, supported or illustrated by numerous authorities, which their diligent and thorough examination has enabled them to produce.

In an examination of the questions occurring, respecting lost property, and of the rights and duties of the finder, we perceive a considerable diversity of opinion among elementary writers, and a variance in the practical rules and methods adopted by different nations; with features, in some instances, of singular scrupulosity or refinement. The Byblians, says Aelian, if they discover any lost article in the road, will not take it up, considering that such an act would be theft. Var. Hist. iv. I. According to the remark of a commentator on this passage, a similar sentiment prevailed in other ancient nations. Plato enjoins the same strict forbearance, in his book upon Laws,—"quae non deposuisti, ne tollas," was the doctrine of those ancient Puritans. We shall all readily agree with Puffendorf, in his remark on the doctrine, "nimia, sine dubio, scrupulositas." We see a tincture of these views in the Roman law. The distinctions are so nice, in the specification of circumstances and motives justifying or excusing the meddling with property casually lost, and by which the reproach and penalty of theft might be avoided, that he would be thought to act most prudently, who should leave it untouched. The sage Ulpian admits, that property derelict, or judged to be derelict, may be taken up, but it must be with a pure and sincere intention of restoring it to the owner, and without any mercenary motive or expectation of reward. "Quid ergo, si sugerga (id est, inventionis proemia) quae dicunt, petat? Nec hit, videtur fortum facere, etsi non probe petat aliquid." Dig. lib. 47, tit. 2, l. 43. The discriminating Greeks, in reference to what is comprehended under our term, "salvage," employed, also, another word, μηνυτρον—reward for discovery or for giving information. These specimens of their vocabulary, and the manner in which Ulpian introduces ευρετρα, would seem to indicate, that the Grecian law did not correspond with the maxims of Roman jurisprudence, in regard to the rights and duties of a finder of lost goods. The kind and neighborly duty enjoined on the Israelites (Deut. xxii. 1–4) in regard to a brother's ox or his sheep, going estray, and in regard to all lost things of their brethren, was held by the Jews, as we are informed by the learned Selden (De Jur. Nat. et Gent. juxta Discip. Ebr. lib. 6, c. 4) to be limited to their race, and they did not consider the direction obligatory on them, in relation to strangers. The rules of the common law and of natural law, as summarily expressed by Chancellor Kent, in his learned and valuable Commentaries on American Law, give nothing to the finder, in such cases, by way of reward; he can only demand of the owner an indemnity, a reimbursement of necessary expenses; but, if the articles found be not demanded in reasonable time and after due notice, they become the property of the finder, unless some other appropriation be directed by positive enactment. Such is the law of England, in regard to goods found on land, not coming under the denominations of "wreck," "estray," "waif," or "treasure-trove." In Massachusetts, and in other states, the disposal of lost goods, found on land, is regulated by statute, and there being no such statute provision respecting goods taken up at sea, as in this case, it is argued, that, no owner having appeared, after such great length of time, the residue belongs to the fortunate finder, or if it belong to the public, that the state of Massachusetts, and not the United States, should be considered as having the ultimate right to the property, in default of appearance of the original owner.

In regard to property shipwrecked, or goods thrown overboard in extremity, a very early and uniform solicitude appears to have been manifested. In this respect the character and expression of the civil law, are admirable, and highly honorable to the Roman jurists, who, generally, were imbued with the sentiment and spirit of a generous and elevated philosophy. A doubt may be reasonably entertained, whether the laws of Rhodes possessed the harsh and unsocial feature, in this respect, which some learned writers have asserted, or whether the commencement of just and humane dispositions in this particular, in the Roman law, is to be referred to so late a period as the reign of Constantine, or even to the earlier time of Antoninus. The goods saved by Captain Peabody and his crew, must be considered as either having been thrown overboard from some ship or vessel, in imminent peril, or swept from such vessel by force of the seas. Now, in regard to property found under such circumstances, humane, equitable, and suitable provision is found to have been made, in the civil law, and by the marine laws and usages of all commercial nations. The regulations and usages on this subject only differ as to the proportion that shall be given to the salvors, and as to the ultimate disposal of property, if no owner should appear; the nations, on the European continent, varying from a third to a half in the award of salvage. In England, there is no

fixed proportion; but a compensation is given, varying according to circumstances, always, however, with liberal reward to the encouragement of enterprise and exertion, in the exercise of which the whole commercial community have an obvious interest. Such also are the principles of allowance adopted in this country, in cases of salvage. The whole law on this branch of the subject is fully and ably stated by Mr. Justice Story, in the case of Rowe v. The Brig [supra].

In respect to the final disposal of the remaining proceeds of such derelict property, if no owner appear, it has been considered by approved writers and the current of foreign decisions, as accruing to the state; anciently it was devoted to some pious or charitable use. The Laws of Oleron (article 33), direct restitution of such property to the owner, or that it be given, devoutly, in alms, to the poor, "Jouxte le conseil de quelque sage homme discret selon la conscience." The Laws of the Hanse Towns, in the Revised Code of 1614, direct, that such goods be delivered to the principal magistrate of the city or to the oldest merchants, who are to award as salvage, from a twentieth to a quarter part of the property saved. Jus. Hans. tit. 10. No direction is given, as to the disposal of the residue, in case no owner should appear; but the article is considered as determining, definitely, the claim of the salvors. In Stypman's Jus Maritimum, and in Loccenius De Jure Maritimo, the ultimate right of the sovereign, in such cases, among the nations of Europe, is fully expressed.

The general maritime law, according to Loccenius, assigns the greater proportion of the property saved to the public treasury. "Derelicta tamen bona naufraga, quorum certo tempore non adparet dominus, pro majori parte fisco inferre, minorem partem inventori pro cura et custodia eorum adsignare, aequitati et juri gentium consentaneum videtur." Locc. De Jure Mar. c. 7. The French ordinance (of Louis XIV.) after determining the proportion to be awarded to the salvors, in such cases, assigns the remainder, if no owner appear within the time prescribed, one half to the admiral, the other half to the king, or his grantee. In England, the settled rule is, that such unclaimed residue is a droit of admiralty. It is sufficient to refer to the case of The Aquila, for the law, on this subject, in that country (1 C. Rob. Adm. 37): "The lord high admiral has the custody of derelicts found at sea, and if no owner appears, they become perquisites of admiralty; the finder can have no property in them, only a reward for his trouble, in preserving them; if no owner appears, or if the claimant cannot prove his property, the salvors have not acquired any right in the thing found, but they must be satisfied for their expense and trouble, from a sale of the ship and cargo." Such is the doctrine recognised in that case. "I consider it," says the learned judge (Sir W. Scott, now Lord Stowell) "to be the general rule of civilized countries, that what is found derelict on the sea is acquired beneficially for the sovereign, if no owner appear." There can be no doubt that such would have been the decision in courts of admiralty in the colonies, before the Revolution; the only question that can remain, therefore, would be as to the rule of law on the subject in our present national position. If we were to pay any regard to the maritime law, in this particular, as evidenced in the writings of learned jurists, and by the codes, usages, and customs of commercial nations, the whole property cannot be awarded to the salvor, unless it should be required for giving him an adequate compensation for his exertion, hazard, and expenses. My examination has not presented to me any instance, either in England or on the continent, where the whole property has, in any such case, been decreed to the finder, though such award, as has been intimated, might be allowable, where otherwise reasonable compensation would not be made. If the claim made by the libellants should be sustained, and become the rule of practice, in such instances, in our courts, we should form a singular exception, among commercial nations, on a subject upon which uniformity is obviously desirable. It is argued by the libellants' counsel that such must be the result, or that no other disposal can be made of such balances remaining in court until some positive legislative enactment shall have given express directions. But the rules and usages of nations, on this head, I consider to be a portion of our maritime law, giving authority to the national courts, by virtue of the constitution and the laws establishing and regulating those courts, to adjudge, award, and decree, respecting causes of admiralty and maritime jurisdiction, as such maritime laws and usages shall direct or authorize. In this conclusion, I am supported by Mr. Dane, who, in his very valuable work, A Digest of American Law, has, from just analogies, considered as accruing to the United States, what in cases of shipwreck and jettison would, in our colonial condition, in instances occurring in the colonies, have belonged to the crown. The views of the venerable author on this and the connected topics are referred to by Chancellor Kent, in his Commentaries on American Law, in a manner that would indicate that they were approved by that distinguished jurist. Lecture 36.

Such a disposal of property of this description appears to correspond with the reasonable and humane attention, which, with some exceptions, in barbarous times, has uniformly prevailed, respecting such instances of calamity. In the first place, a full and liberal reward is given to the salvors; the residue remains in court, for a time, for the benefit of the owner, and in case of his non-appear-

ance, is to be paid over to the state. The receipt of such property into the national treasury, we may presume, will be with views and dispositions suitable to the age and to our free institutions, rendering the whole law on this subject, in its administration by the United States, as the wise and benevolent would desire. Writers on the Law of Wreck occasionally quote Juvenal's sarcastic lines,

"Quicquid conspicuum, pulchrumque est æquore toto,
Res fisci est, ubicumque natat."

Whatever of such grasping spirit may have predominated, in times long past, or may have appertained to the claims of prerogative, no selfish or ungracious views belong to what is, in this case, conferred on the sovereign authority. I do not adopt the language of the English authorities, in this particular, without a degree of reluctance, that property found derelict on the seas is acquired beneficially for the sovereign, if no owner appear, provided it is to be understood, that such property becomes absolutely and irreclaimably vested in the sovereign, should no owner appear, within a year and a day from the time of the decree of salvage. It is more satisfactory to consider the sovereign authority as holding such property in trust, to be surrendered to reasonable claims which may be presented. The learned Vinnius, in stating the claims of the sovereign in cases of this description, informs us of the liberal practice in his own country after the legal time prescribed for the appearance of the owner has elapsed, and the money accruing from goods thus saved, deducting the allowance for salvage, is paid into the public treasury. "Hoc tempore elapso publicantur, et fisco acquisitae esse intelliguntur, qui tamen facile patitur eas redimi." In. quat. Lib. Inst. lib. ii. tit. 1.

This supplemental libel will be dismissed, and the requisite orders will be entered to transfer these proceeds, and other money remaining in the registry under similar circumstances, to the proper department of the government, on the principles and in the manner that have been indicated.

Case No. 10,870.

PEABODY v. UNITED STATES.

[See Case No. 10,869.]

PEABODY (VAN AMRINGE v.). See Case No. 16,825.

PEACO (UNITED STATES v.). See Case No. 16,018.

PEACOCK (UNITED STATES v.). See Case No. 16,019.

PEACOCK, The LOVETT. See Case No. 8,555.

Case No. 10,871.

PEACON et al. v. The AMAZON.[1]

District Court, S. D. Florida. April, 1872.

SALVAGE—COMPENSATION—MATERIALS SAVED AFTER ABANDONMENT.

[1. Thirteen vessels, several of the smaller class, carrying 81 men, went to the assistance of a bark ashore on the Florida Reef. They did everything possible to get her afloat, but her bottom gave way. With peril to the salvor vessels, the cargo of 660 bales of cotton, and the materials and stores were taken out, and landed at Key Largo, and reshipped, the labor occupying 14 days, part of the time day and night without cessation. *Held*, that 35 per cent. on the net value of the cargo and 45 per cent. on the materials saved, after deducting usual costs, charges, and expenses, was a reasonable salvage.]

[2. For brass stripped from the bottom of a bark and other small articles of materials saved from a stranded vessel after the entire abandonment by both the master and original salvors, where the amount is small, 60 per cent. allowed.]

[This was a libel in rem by Benjamin Peacon and others against the cargo and materials of the Norwegian bark Amazon for salvage.]

LOCKE, District Judge. This vessel, laden with 660 bales of cotton, bound from Galveston to Liverpool, went ashore on the Florida Reef about 2 o'clock on the morning of the 14th of March, 1872, and 13 salving vessels, several of the smaller class, carrying 81 men, went to her assistance. When they first reached her she lay upon a rough, rocky bottom, upon an exposed portion of the reef, with the wind and sea directly abeam, and thumping heavily. They immediately proceeded to carry out an anchor and chain, and do everything that was possible to relieve her from the rocks, but while so engaged the vessel's bottom gave way, she immediately filled with water, and further exertions to get her afloat were abandoned, and the salvors at once proceeded to save cargo, materials, and stores. The distance from this port and the necessity of immediate action were so great, that they took a large portion of the cargo to Key Largo, a distance of seven miles, landed it, and continued to save other portions from the wreck, until all of the cotton, excepting three bales, together with all of the stores and materials, have been saved and brought to this port, leaving a loss out of the entire cargo of but three bales of cotton, and all saved in as good a condition as the circumstances of the case would possibly permit. On account of many of the vessels being small, and on that account unable to bring cargoes of cotton, great additional labor devolved upon the salvors in the landing and reshipping, and, as is alleged, they were occupied 14 days in the service, a portion of that time, until the property was saved

[1] [Not previously reported.]

from the vessel, day and night without cessation. The value and efficiency of the services rendered, and the zeal and good faith with which they were performed, is unhesitatingly acknowledged by the respondent, and the only questions raised at all in the hearing were the value of the property saved, and the special peril to which the persons and vessels of the salvors were exposed. The first has been settled by an appraisement of the cargo and sale of the materials; and the facts of the weather, as alleged in the libel, have been admitted by the answer. The question of ordinary, special, or imminent peril is now but a conclusion to be arrived at from a knowledge of those facts, and the degree of peril may be measured and determined thereby; and although it may not be claimed that there was extraordinary or imminent peril, yet I think the facts shown would justify a conclusion that there was a certain degree, especially to vessels.

The only question remaining to be settled by the court now is what amount of salvage should be awarded in this case. The property saved is comparatively small, and a liberal salvage would little more than compensate the salvors for the actual labor performed. The large number of men employed will reduce the shares materially, and although, under the necessary circumstances of landing and reshipping, I am not prepared to say that one man was employed more than necessary, yet the necessity was brought about in a great degree by the size of the vessels and the lack of facilities that the salvors had at command, and I cannot increase, on that account, materially, the salvage allowed. It has been claimed by the respondent that, although the salvors did all that they could, yet their inability to bring the cotton to this port direct, and the necessity of landing it in boats and rolling it through the water on shore, had, to a certain degree, added to the damage, and should be considered. If damaged as claimed, this damage has been estimated in the appraisement, and the salvors suffer, in a percentage salvage, to that amount. It is not in a small percentage more or less of salvage given that injures or relieves commerce, nor is it in the salvage that is given on property that is saved and brought into port that the greater losses occur, but in the great value either of vessels or cargo that is never saved and brought in. The salvage, then, should always be comparatively higher, when given, where there is the least loss, —first, where a vessel is relieved without great injury; next, where as great a proportion of the cargo is saved as possible, and in as good a condition. And although in the latter case a higher percentage may be given than in the former, the amount of property saved and the extra time and labor performed will, in all cases, be found to compensate for that difference. I shall, therefore, in all decrees, endeavor to make it plain to the salvors that it is for their interest to save, if possible, vessels and cargo entire. Unfortunately for both parties, this case cannot be considered as belonging to the first class, but high up in the grade of the next.

Considering the facilities of the salvors, I consider this a meritorious case. The property has been saved from a total loss with much labor and in as short a time and with as little loss and damage as possible. The only question now is, to what amount, by the laws and usages of salvage, and the precedents of this and other courts, are the salvors justly entitled? It has been well remarked that "this question is alone within the discretion of the court"; but the discretion of the court is so restrained and limited by law, as established by precedent, that it becomes merely a question of law and its application, rather than a question of judgment; and by such law, so established, I shall at all times endeavor to be guided. Judge Marvin says: "On account of the necessity for the steady employment of a considerable number of men and vessels in the business of saving property shipwrecked on the southern coast of Florida, the court in this district has been in the habit of rewarding the services of the Florida wreckers with greater liberality than has usually been exercised with reference to similar services, either by other courts of the United States or by the high court of admiralty of England." The precedent of higher salvages having been long since established in this court, and I seeing no reason why the same practice should be abandoned or salvages reduced, do not consider myself compelled to go beyond its record to determine what the law would direct in such cases.

In an opinion delivered in the case of Pent v. The Ocean Belle [Case No. 10,961], by the judge who presided over this court from its establishment until 1863, and whose great learning and just and unquestioned decisions have given this bench a standing and reputation wherever commerce is known, he says: "The most usual rate of salvage in this court for saving cotton, where the ship was lost, has been 25 per cent. on the dry, and 40 per cent. on the wet, saved without actual diving, but taken from under water." Later, in the year 1865, in numerous cases, where vessels were lost and cargoes of cotton saved, the late lamented Judge Boynton, in view of the greater value of cotton, the great amounts of value saved, and the many persons, aside from the regular wreckers engaged in saving it, reduced these rates materially, but at the same time compensated the salvors for time, labor, and peril far greater than had these previous rates. My immediate predecessor, in decreeing salvage on property considerably less in amount and value, although harder to save, and saved in worse weather and in more peril from the brig Aquila, decreed 27 per cent. on the dry, 42 on the damaged por-

tion, and 50 on the materials. These were saved in worse weather and with more labor and risk in proportion to the net value; and this case is, I think, hardly a fair precedent. Returning to the usual rate of salvage for saving cotton, as declared in the case of The Ocean Belle [supra], and the increased value of the property as compared with the bulk saved and the labor of saving it, we may well inquire if there is any sound reason for not following, as nearly as we may be able, the usual rates there declared. In the same opinion the learned judge says: "It is believed that no vessel or cargo has been lost on this coast in many years in consequence of an insufficient supply of wrecking vessels and men to save them." Can the same truthfully be said now? If not, the danger of tempting too many to the business of wrecking cannot be declared to be imminent, and it may not be claimed that the rates of salvage should be reduced on that account. The circumstances of large values saved by the wreckers, the numerous wrecks, and the then unusually high price of cotton saved, together with the fact that most of that saved was not in danger of immediate loss or greater damage,—all of which, at the time of the decrees on the cargoes of The Waltham, Harwood, Nesmith, and others in the fall of 1865, served to induce and justify a reduction of the rates of salvage,—are none of them found in this case. It is true that the price of cotton is now higher than when the decree of The Ocean Belle was rendered, but the price of labor, the value of vessels and their equipments, and all of the actual necessaries of life have likewise increased, and I can see no good reason for reducing, in parallel cases, the rates established. These cases cited have been the most recent, and, in fact, the only recent, cases that may be justly claimed to be parallel.

Referring again to the case before the court, I think that 35 per cent. on the net value of the cargo and 45 per cent. of the materials saved, after deducting the usual costs, charges, and expenses, is a reasonable salvage. This does not amount to quite what Judge Marvin declares to be the usual rates, but is, as I consider, a fair and liberal salvage and reward for the services rendered. Of the small amount of brass stripped from her bottom, and other small articles of materials saved from the entire abandonment by both master and original salvors, I do not consider, in view of the small amount and labor in obtaining it, 60 per cent. to be too much. In this case, as well as several of the more recent cases decided in this court, the attention of the court has been called to the fact that many of the smaller class of the vessels have been employed, and but few of the larger class (such as were found here years ago), have been engaged, and suggestions desired in regard to the practicability of discriminating, in giving salvage, between vessels of the smaller class, or larger ones, more capable and efficient. Circumstances entirely distinct from wrecking have removed, in a great degree, this class of large and valuable vessels from the reef, and while I might desire to have them restored, the question naturally arises how is this end to be attained, and what effect would the discrimination suggested have? There is now a distinction made which reaches the masters and mates of the smaller vessels, and nothing now can be done but touch the per tonnage rate itself, or declare that the salvage of smaller vessels should be diminished or that of the larger increased. What can be done? I am not ready to believe that diminishing the salvage awarded to smaller vessels for valuable services would bring to our coast a large number of fine, efficient vessels, nor am I ready to say that I will, on account of large vessels, unconditionally increase the salvage decreed them. Small vessels are not capable of rendering as efficient service as larger, and where their services are less valuable, they consequently earn less; and I shall, at all times, discourage and object to the employment of smaller vessels to the exclusion of larger, but in the absence of larger, what is earned by them they are entitled to, being held at all times to a strict compliance as far as possible with the established rules of the court.

Decree accordingly.

PEALE (PERIN & GAFF MANUF'G CO. v.). See Case No. 10,981.

Case No. 10,872.

Case of The PEA PATCH ISLAND.

[See App. Fed. Cas.]

Case No. 10,873.

In re PEARCE.

[21 Vt. 611; 6 Law Rep. 261; 2 N. Y. Leg. Obs. 267.]

District Court, D. Vermont. July, 1843.

BANKRUPTCY — OBJECTION TO DISCHARGE — OMISSION FROM SCHEDULE—WHAT IS AN UNLAWFUL PREFERENCE.

1. The objection to a bankrupt's discharge, on the ground that he has not made a full disclosure of his property, involves a charge of fraud and perjury, and ought to be substantiated by direct testimony, or by such facts as afford unequivocal circumstantial evidence of it.

2. The fact that a bankrupt has omitted to state in his schedule demands due to him, which were really worthless, does not tend to prove him guilty of fraud.

3. A voluntary payment, or transfer, by an insolvent debtor, who is going on with his business, with a bona fide intention and expectation of saving himself from failing, and of paying his debts, is not an unlawful preference, within the meaning of the bankrupt law.

4. A voluntary conveyance, by an insolvent debtor, of a portion of his property, made in the

ordinary course of business, will not justify an inference, that the transfer was made in contemplation of bankruptcy; but it must appear, that the debtor acted in the anticipation of failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, on the ground of inability to pay his debts, and intending to defeat the general distribution of effects, which takes place under a proceeding in bankruptcy.

[Cited in Buckingham v. McLean, 13 How. (54 U. S.) 167; Doan v. Compton, Case No. 3,940.]

[Cited in Tisdale v. Norton, 8 Metc. (Mass.) 388.]

5. But where a debtor was irretrievably insolvent, and had actually failed and stopped business, his failure being notorious, and, when under immediate apprehension of being committed to jail for debt by one of his creditors, he transferred a part of his property to another creditor, without any request or demand on his part, to an amount exceeding his debt, and soon after became a voluntary bankrupt, it was *held*, that the transfer was such an unlawful preference, as ought to deprive the bankrupt of his discharge.

This was a petition by Alonzo Pearce, a bankrupt, one of the partners of the firm of Walbridge, Pearce & Co., for a discharge.

PRENTISS, District Judge. The objections filed in this case by the opposing creditors, although somewhat multifarious as well as numerous, may be classed under two general heads: 1. That the bankrupt has not made a full disclosure of his property in his schedule, but has fraudulently concealed property. 2. That he has given unlawful preferences to particular creditors by certain payments, securities, and transfers of property. These two general objections seem to comprise the whole case, as presented by the proofs.

1. Under the first head of objections, the concealment of property, an argument was urged with much earnestness by counsel, founded on the apparent difference between the state and condition of the partnership affairs, as exhibited by the inventory taken in April, 1840, and the state and condition of the partnership affairs, as represented in the bankrupt's schedules, filed in April, 1842. It was said, that, as the inventory showed a surplus of assets of between two and three thousand dollars over all liabilities, and the schedules show outstanding debts, now unsatisfied, of more than four thousand dollars, with no assets to pay them, it cannot be supposed, that so great a loss, being a difference of between six and seven thousand dollars, could arise in the course of the partnership business in the short period of two years; and therefore, it is said, it must be presumed, that property is wrongfully withheld. Upon this it may be observed, in the first place, that concealment of property involves, not only a charge of gross fraud, but also the crime of false swearing, and such being the nature of the charge, it ought to be substantiated, either by direct testimony, or by such facts, as afford unequivocal circumstantial evidence of it. It certainly ought not to be taken as true upon any slight or ambiguous presumptions, nor upon any state of facts, which do not clearly, and indeed almost necessarily, call for such an inference. Now, there are many ways, in which the supposed loss may be accounted for, without imputing any actual fraud to the bankrupt; such as by an over estimate of the property at the time of taking the inventory, —by debts turning out to be bad, which were then supposed to be good,—or by the general depreciation, which is known to have taken place in the value of property. There is no certainty, nor indeed any high improbability, that such are not the true causes of the loss; but, at any rate, it would be too much to say, in the absence of all proof on the subject, that the loss is to be imputed, not to any such supposable causes as these, but to positive fraud and wilful misconduct on the part of the bankrupt. But it is to be noticed, that the debts of four thousand dollars, still remaining unpaid, are, some of them, secured by mortgages on the property, and the property still stands as security for them; so that the loss is not so great as has been computed. Besides, it is to be remembered, that in November, 1840, all the property of the partners was attached; and goods and other personal property, estimated at $4,000, were sold on executions in December, 1840, for about $1,500. Here was a sacrifice at once of something like $2,500; and it is not too much to suppose, that, in the shifts and turns the partners were obliged to make under the difficulties then pressing upon them, other considerable sacrifices may not also have been incurred. But looking to the inventory, I should form a different opinion from that expressed by the counsel, as well as from that which seems to have been entertained by those who made the inventory. The inventory represents the joint and separate assets, that is, the partnership and private property, at $13,958, and the liabilities at $11,833, making the partners good for $2,867. But it is to be noticed, that, to make out this surplus, there was included in the account of assets a debt of $2,668 against the old firm of Walbridge & Pearce, when it is conceded, that that firm was insolvent at the time for at least $686. So that really there was no surplus. And my conclusion would be, considering the magnitude of the liabilites, and the nature of the assets, that the partnership and the individuals composing it were in fact then insolvent. Such, I think, is the fair conclusion, especially when it is considered, that the whole surplus made out consisted of a debt due from two of the partners themselves.

As to the small amount of demands set forth by the bankrupt in his schedule as belonging to the firm, it appears, that in the summer of 1840 notes to the amount of $2,000 were turned out to pay Henry Gassett & Co.

and certain other creditors; and that in November of the same year all the partnership accounts were assigned to Hicks & Dwinnell, to pay, first, certain debts due them and certain liabilities they then incurred as sureties; then to pay certain other creditors particularly named; and the residue, if any, to pay creditors residing in the county of Washington. This, it is to be observed, was an absolute assignment in trust to pay creditors, leaving no residuum whatever in the bankrupt and his partners; and Dwinnell testifies, that enough has not been collected out of the accounts to pay even the preferred creditors particularly named. It also appears, that in November, 1840, notes to the amount of $325 were assigned to Israel Dwinnell and Stephen Pearce, and notes to the amount of $350 to Shubael Wheeler, to pay or secure them for signing notes of an equal amount; and the balance, if any, in the hands of Wheeler, as well as the balance, if any, in the hands of Asa Alden, to whom it seems, there had been a previous assignment of notes, was on the fifth of August, 1841, assigned to Asahel Pearce, to pay a debt due him from the firm, of $334. These assignments, all of which, except the two first, are set forth in the bankrupt's schedule, go far to account for the demands of the firm, and to show how they have been disposed of. As to the demands of the old firm of Walbridge & Pearce, the bankrupt says, he did not insert them in his schedule, because most of them were outlawed, and he considered them of no value. Now I do not see how it can be said, that a bankrupt is guilty of fraud, or of a willful concealment of property, by omitting to specify in his schedule a mass of obsolete and worthless demands, upon which no action whatever can be maintained. The omission cannot be supposed to proceed from any fraudulent intent, or from any wilful design to conceal property, especially in this case, when it appears that these demands were afterwards delivered to the assignee under the bankruptcy. As to the goods in the store claimed by Dwinnell & Pearce, and the notes claimed as being assigned to them for goods taken by the bankrupt out of the store, the question depends upon the fact, whether the goods and notes belonged to Dwinnell & Pearce, or were in truth the property of the bankrupt. If they were not the property of the bankrupt, he was not bound to state them in his schedule, and indeed could not properly do so. The question, as I have said, is a question of fact, and must be decided upon the testimony taken in the case. Now Dwinnell & Pearce testify, that they purchased, of the goods sold on execution in December, 1840, to the amount of seven hundred dollars; that they afterwards purchased about five hundred dollars' worth of new goods; that they put all the goods into the store, and employed the bankrupt as their agent to sell them. They also say, that they gave public notice, by advertising in the public papers, that they had opened a store, and that the bankrupt was their agent to transact the business. They farther say, that the bankrupt had no interest whatever in the goods, but had liberty to dispose of goods to purchase in the company debts, on condition of turning out good notes, or other property, to pay the amount; and that he took out of the store, in the course of the year, goods to the amount of five hundred dollars, and in February, 1842, delivered them a written list of notes amounting to seven hundred dollars, in payment,—a copy of which list is annexed to the testimony. They also say, that the notes were delivered into their possession in February, but were afterwards left at the store, in the care of the bankrupt, to collect or secure for them. Some, they say they collected and secured themselves; and some, they say, never can be collected.

Such is the testimony of the witnesses on the part of the opposing creditors; and as the creditors cannot be allowed to discredit their own testimony, it must have its full weight in favor of the bankrupt. The effect of the testimony, as it appears to me, is to prove the goods to be in fact the property of Dwinnell & Pearce, and to make out a transfer of the notes to them before the filing of the bankrupt's petition; and of course he could not claim either the goods or the notes as his property in his schedule. There is, then, on fairly weighing the testimony, no evidence to support the objection of a wilful concealment of property.

2. The next inquiry is, under the second head of objections, whether the bankrupt has given preferences to particular creditors, so as to preclude him from a discharge. And here it may be observed, that it is unnecessary to go into any of the transactions which took place before the passing of the bankrupt act, because there is no evidence to warrant the conclusion, that any of the payments or transfers made before that time were made in contemplation of the passing of the law. The inquiry will of course be confined to transactions, which took place since the passing of the law, and to such transactions only, as have been specified and relied upon as preferences, and concerning which some proof has been given. All the transactions of this character, except one, appear to be quite free from difficulty. The payments to Town, Pearce, and Rich, rest solely and entirely upon the testimony of the bankrupt himself, whom the creditors have chosen to examine for the purpose of proving the payments. He says, that each of these payments was made on application and demand of the creditor; and that being the case, and the payments not appearing to be out of the ordinary course of business, they cannot, in my opinion, under the circumstances stated in regard to them, be treated as fraudulent preferences. But the payment or transfer to Dwinnell & Pearce is presented by the proofs

in a different aspect; and I confess, that with every disposition to view the transaction in the most liberal and favorable light, I have not been able to overcome the difficulties which attend it. It is evident enough, that the bankrupt and his partners, at the time this transfer was made, were irretrievably insolvent. About this there can be no question. It is also the fair inference, from the testimony, that the transfer was voluntary on the part of the bankrupt; for it seems, that he not only made and delivered the list of the notes to Dwinnell & Pearce without request, but that he afterwards sent the notes to them by a messenger, without any demand or solicitation on their part.

The question, then, is, was this transfer a preference, within the meaning of the bankrupt law? It is difficult, and indeed impossible, to reconcile all the decisions to be found in the books applicable to this question. In some cases it is held, that a payment by a debtor in insolvent circumstances, voluntarily made, is presumptive evidence of a preference; in others, it is held, that you cannot infer a contemplation of bankruptcy from mere insolvency. I think the latter the sounder and better opinion. I think, a transfer being voluntary and while the debtor is in a state of insolvency, when it is only of a part of his property, and does not appear to be out of the ordinary course of business, is not enough. I think it must appear, that the debtor, in making the transfer, though he did it voluntarily and while in fact insolvent, acted in contemplation of bankruptcy, that is, in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, on the ground of inability to pay his debts, and intending to defeat the general distribution of effects, which takes place under a proceeding in bankruptcy. A man may be insolvent, and yet go on with his business with the real hope of retrieving his affairs, and with a bona fide intention and expectation of saving himself from breaking or failing, and of being able to pay his debts; and a payment or transfer under such circumstances, though voluntary, would not be a preference within the meaning of the law. But in the present case, there was something more than mere insolvency. The bankrupt and his partners were not only hopelessly insolvent at the time of the transfer, but they had actually failed and stopped business. Their failure was complete and notorious some time before. Dwinnell, Pearce, and the bankrupt himself, in their testimony, all speak of the failure as having been complete and irretrievable. And in that condition of absolute insolvency and known actual failure, what does the bankrupt do? Why, instead of effecting a compromise with his creditors upon equal terms as to all, he voluntarily pays certain creditors in full, leaving a large mass of other creditors wholly unpaid. He transfers to Dwinnell & Pearce, without any demand or request on their part, notes to the amount of seven hundred dollars to pay a debt of five hundred, and does not so much as notice or set up any claim against them for his full year's services as their agent. And he does this, while under the apprehension and just on the eve of being committed to jail upon an execution in favor of one of his creditors, from which, it seems, he was afterwards discharged on taking the poor debtor's oath. He thus strips himself at once, of all his remaining property, except a mere trifle, and in about two months after, whether more or less does not distinctly appear, he files his petition in bankruptcy. If a transfer of property of such an amount, under such circumstances, followed up, as this was, in a short time after, with a proceeding in bankruptcy instituted by the bankrupt himself, is not held to be a preference given in contemplation of bankruptcy, with intent to defeat the equality among creditors secured by the bankrupt law, I do not see, but that the main object of the law might be defeated in every case of voluntary bankruptcy whatever; since the party in every such case is at liberty to choose his own time, and apply for the benefit of the law whensoever he pleases. It does not appear to me, that the question is in any way affected by what is stated to have been the agreement or understanding with Dwinnell and Pearce. They say, that the bankrupt had liberty to take up goods from the store on his own account, on the condition of turning out good notes, or other property, to pay for them; that is, any good notes or other property. There was no specific appropriation, by the agreement, of these particular notes to pay for the goods, but the agreement was general. Under it the bankrupt became a debtor to Dwinnell and Pearce for what goods he took up and charged himself with from time to time, with the right to pay in any good notes or other property; and Dwinnell and Pearce became his creditors, having a debt against him, with the same rights as other creditors.

Upon the whole, I do not see how this payment or transfer can be regarded in any other light, than as an unlawful preference within the sense and intent of the bankrupt law. The general character of the bankrupt, as well as his deeply embarrassed condition, would render it more desirable, as well as agreeable, to have been able to come to a different conclusion. But we must take the law as we find it; and as Lord Ellenborough said in another case, whatever may be the personal wishes or feelings of the court, it is not at liberty to disregard established principles, or sanction any transactions which a just construction of the law forbids. The consequence is, that a certificate of discharge must be refused.

PEARCE (EICKEMEYER HAT-BLOCKING MACHINE CO. v.). See Case No. 4,312.

PEARCE (MULFORD v.). See Cases Nos. 9,907 and 9,908.

PEARCE (NICHOLS v.). See Case No. 10,246.

PEARCE (SMITH v.). See Case No. 13,089.

PEARCE (UNITED STATES v.). See Cases Nos. 16,020 and 16,021.

Case No. 10,874.

The PEARL.

[Betts' Pr. Cas.]

District Court, S. D. Florida. May 6, 1863.

PRIZE—VIOLATION OF BLOCKADE—INTENT—EVIDENCE.

[1. A vessel bound on a voyage from Liverpool to Nassau, with an intention of merely touching at the latter port, and then proceeding to a blockaded port of a state in rebellion against the United States, is engaged in an attempt to violate the blockade, and is subject to capture before reaching Nassau as well as after leaving that port. Following The Dolphin, Case No. 3,975.]

[2. If an owner sends his vessel to a neutral port, with a settled intention to commence therefrom a series of voyages to a blockaded port, he thereby commences to violate the blockade and subjects his vessel to capture before she reaches the neutral port, notwithstanding that he may also intend to unload her there, discharge the crew, and give all other external manifestations of an intention to end the voyage at that place.]

[Cited in The Stephen Hart, Case No. 13,364.]

[3. Where a vessel was captured on a voyage from Liverpool to Nassau, and there was strong evidence, both in the circumstances and in the testimony of the crew, that she was to be used, after reaching that port, for voyages to blockaded ports of the states in rebellion against the United States, *held*, that it was not unreasonable to require the claimant, if innocent, to clear up the circumstances of the transaction by his own oath and the oaths of others connected with the contemplated business of the vessel.]

[4. In respect to merchandise found on board the vessel, and consigned, as stated in the bill of lading, to certain merchants in Nassau, who made claim to the goods, it would not be unreasonable to require them to furnish their own affidavits that they had ordered the goods, that they were shipped on their account for their risk and benefit, that they belonged solely to them at the time of shipment and of capture, and would still be theirs if restored, and that no enemy of the United States has any interest, directly or indirectly, therein. Nor would it be unreasonable to require them to furnish a sworn copy of their order to their English correspondents for the goods.]

[This was a libel against the steamer Pearl and her cargo to procure their condemnation as prize for attempting to violate the blockade.]

MARVIN, District Judge. This steamer, of the net burthen of 72.17 tons, William Jolly, master, having on board 10 bales of merchandise, supposed to be ready-made clothing, was captured by the United States ship Tioga, on the 20th day of January last, while ostensibly bound on a voyage from Liverpool to Nassau. The capture is said to have been made about 60 or 70 miles from Nassau.

A claim to the vessel has been interposed by the master on behalf of George Wigg, who is alleged to be a merchant residing in Liverpool, and to the merchandise on behalf of Henry Adderly & Co., merchants, of Nassau. It is understood that the delay in bringing the case to a hearing has been at the request of the claimants' proctor, in order to give him time to consult his clients and prepare further testimony.

I have already decided, in the case of The Dolphin [Case No. 3,975], that a vessel bound on a voyage from Liverpool to Nassau, with an intention of touching only at the latter port, and of proceeding thence to a blockaded port of the enemy, is engaged in an attempt to violate the blockade, which subjects her to capture, in the antecedent as well as in the ultimate stage of the voyage,—before arriving at Nassau, as well as after having left that port. I think the law also is that if an owner sends his vessel to a neutral port, with a settled intention to commence from such a port a series of voyages to a blockaded port, he thereby commences to violate the blockade, and subjects his vessel to capture, notwithstanding he may also intend to unlade the vessel at the neutral port, discharge the crew, and give all other external manifestations of an intention to end the voyage at such port. Where a deliberate purpose exists to violate a blockade, and measures are actually taken to accomplish that object, the law couples the act and the intent together, and declares the offense to be complete. The resorting, therefore, to a neutral port for the purpose of the better disguising the intention, or of procuring a pilot for the blockaded port, or of perfecting the arrangements, so as to increase the chances of a successful violation of the blockade, will not, in the least, extenuate the offense or avoid the penalty. These measures may increase the difficulty of discovering the true intention, but whenever it is discovered it will give to the transaction its true legal character. The leading authorities are The Columbia, 1 C. Rob. Adm. 154; The Neptunus, 2 C. Rob. Adm. 110; Yeaton v. Fry, 5 Cranch [9 U. S.] 335; The Richmond, 5 C. Rob. Adm. 325; The Maria, Id. 365; The William, Id. 385.

Now, it is a notorious fact that a considerable number of steamers, near the size of this, being swift sailers and drawing but little water, have lately come out from England to Nassau, and have entered at once upon the business of running the blockade at Charleston or Wilmington, and have continued regularly in that business until they have been captured. We do not hear of any of them engaging in any other business or trade. Indeed, it is very well known that there is no other business or employment at Nassau for steamers of the size of this, in which they can engage with a reasonable prospect of

clearing even the expenses of running. And to these considerations the facts that Charles Nelson, John G. Richardson, Thomas McWinnie, William McClellan, Joseph Carmaghan, William Latimer, and James Duffie, part of the crew of the vessel, concur in general terms in saying that, although they were hired only for a voyage to Nassau, yet they believed that the business of this vessel, after getting out to Nassau, was to be in running between that port and Charleston or Wilmington, and that some of them give as reasons for their belief the conversations had on the subject, and the circumstances attending the late purchase, in Glasgow, of the vessel by the present claimant. Some of them say, too, that there was a Confederate flag on board,—put on board in Glasgow, as a part of her fitting out. They generally concur in saying that it was the common opinion of the crew on board that the vessel was to be employed in running to Charleston or Wilmington, and that she was going out to Nassau for that purpose, and that, although they were not bound by their shipping agreement to go any further than to Nassau, yet it was understood, that they would have an opportunity there to reship in this vessel, or other vessels employed in that trade. Neither the master, the mate, nor any other witness examined, pretends to give any reason for the vessel's going to Nassau, nor any opinion as to what her voyage or employment was intended to be. The claimant, Mr. Wigg, simply says, in reference to the subject, in his letter to the consignee in Nassau: "You will have received instructions by regular mail in regard to this vessel." Now, it seems to me that the testimony, as it stands, taking all the facts together, raises a very strong presumption, that the owner was sending out this vessel to Nassau with the settled purpose that she should be employed in running between that port and the ports of Charleston and Wilmington in violation of the blockade. There is not a fact or a tittle of testimony in the case to rebut that presumption. But, the vessel being captured when really going from one neutral port to another, I am unwilling to pass a decree of condemnation without giving to the claimant the time and all the facilities he may desire to produce evidence to rebut the powerful presumption against him. He has it in his power, if innocent, to clear up the whole matter by his own oath, and by the oaths of others connected with the contemplated business of this vessel. If she was going out to Nassau for an innocent and lawful purpose, he can show it. He can state on oath and show what trade or business he intended she should be engaged in.

As to the 10 bales of merchandise, the claimants, Messrs. Henry Adderly & Co., may very reasonably be called upon to furnish their own affidavits at least that they had ordered these goods, that they were shipped on their account, and for their risk and benefit, and that the goods belonged solely to them at the time of shipment and at the time of capture, and are theirs still, and will be solely theirs if restored, and that no enemy of the United States has any interest, legal or equitable, directly or indirectly, in them. It would not be unreasonable to expect that they will also furnish a sworn copy of the order supposed to have been given to their English correspondent to send them these goods. See the case of The Concordia Affinitatis, 1 Hay & M. 289. The bill of lading states that the goods were shipped by George Wigg, the claimant of the ship, to be delivered to Henry Adderly & Co. No letter of advice relative to them, nor any invoice, is found among the papers. The claim filed by the master asserts that Adderly & Co. are the owners. If the master should be mistaken, the true owner of the goods, whoever he may be, is at liberty to file his claim, supported by a full affidavit of title. In whatever manner I may in the end decide this cause, it is pleasant to know that the parties, captors or claimants, if dissatisfied, may have a rehearing, a trial de novo, in the supreme court, where ample justice can be done them.

It is ordered that the claimant of the ship in this case be allowed to produce further evidence, by his own oath and otherwise, touching his interest therein, and the use he intended at the time of capture to make of the vessel after her arrival at Nassau, the trade or business he intended she should be engaged in, and for what purpose she was going to that port; and that the claimant of the goods have time to procure an affidavit of his right and title thereto, and to produce such other proof of neutral ownership as he may be advised.

[No proof was produced as directed, and on further hearing a decree was entered restoring the vessel and cargo to the claimants. From this decree the United States appealed to the supreme court, where there was a decree of condemnation against the merchandise as well as the ship. 5 Wall. (72 U. S.) 574.]

Case No. 10,875.

PEARL v. COVENTRY CO.

[Cited in Pearl v. Appleton Co., 3 Fed. 153. Nowhere reported; opinion orally delivered, and not recorded.]

PEARL (ELLICOTT v.). See Case No. 4,386.

PEARL, The (McKEE v.). See Case No. 8,849.

Case No. 10,876.

PEARL et al. v. OCEAN MILLS et al.

[2 Ban. & A. 469;[1] 11 O. G. 2; Merw. Pat. Inv. 223.]

Circuit Court, D. Massachusetts. Jan., 1877.

PATENTS — WHAT MAY BE CLAIMED IN REISSUE—PATENTABILITY—CHANGE OF FORM—FUNCTIONAL DIFFERENCE.

1. The complainant, Pearl, introduced certain improvements in the ring-spindle and bobbin previously used in spinning-machines, by reducing their weight and thereby diminishing the power necessary to run them. A modified form of the old ring-spindle was combined with a modified form of the old bobbin—the spindle being shortened in the blade and correspondingly lightened in the lower portion—the bobbin being a light shell with an additional central frictional adhesive bushing. A bushing at the top of the bobbin had no function in connection with the spindle, but was merely for purposes of strength, the lower and central bushings sustaining the bobbin. These alterations resulted in a considerable diminution of the power required. Many previous experiments, with the same end in view, had proved unsuccessful: *Held*, that the greatly improved result attending the change, when viewed in connection with the failure of the many experiments previously made to accomplish similar results by mere structural changes, has a great tendency to prove that these changes involve some functional difference beyond mere mechanical perfection and adjustment.

2. Where an inventor, in his original specification, has described a new and useful combination of a number of ingredients performing in combination certain functions less than he has claimed, he may, in the reissue, claim such combination of the less number described, suggested or substantially indicated, as his invention, but not included in the claim.

[Cited in Dederick v. Cassell, 9 Fed. 308.]

3. A reissue need not follow the exact language of the original patent, but may contain a fuller description of the invention, previously imperfectly described. Wells v. Gill [Case No. 17,393], commented on.

[Cited in Smith v. Merriam, 6 Fed. 718.]

4. Mere change of the form of a machine is the work of a constructor, not an inventor, and is not the subject of a patent without showing that some new or materially improved result is obtained.

5. In a claim, the words "the described," etc., are construed not solely with reference to the words in the specification, but with reference also to the limitations in the context of the claim.

6. Reissued letters patent No. 6,036, granted to the complainants September 1st, 1874, for an "improvement in bobbins and spindles for spinning-machines," *held* valid.

[Cited in Pearl v. Appleton Co., 3 Fed. 153.]

[This was a bill in equity by Oliver Pearl and others against the Ocean Mills and others, for the infringement of reissued letters patent No. 6,036, granted to complainants Sept. 1, 1874.]

Benjamin F. Thurston, D. Hall Rice, and Charles E. Pratt, for complainants.

Chauncey Smith, Jas. J. Storrow, and Wm. W. Swan, for defendants.

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

SHEPLEY, Circuit Judge. Reissued letters patent No. 6,036, were granted to the complainants September 1, 1874, for an "improvement in bobbins and spindles for spinning-machines." The bill in this case is brought for an alleged infringement of the reissued letters patent. The answer of the defendants denies infringement, and alleges that the patent is void on its face, for the reason that the difference between what the specification describes as old and that which it describes as new is not a difference which constitutes an invention patentable under the law; that the patent is void for want of novelty, because, in view of the state of the art existing at the date of the alleged invention, the device described in the specification is not new in the sense of the patent law, nor substantially different from what was previously known and in public use; that the reissue is void because not for the invention disclosed and intended to be covered by the original patent.

Before the improvement of Pearl, the ring-spindle and bobbin made by the leading spindle-makers, and as used and understood by manufacturers generally, had an established and approved form, size and weight, as represented by the Fig. 2 in the drawing of the original patent. The spindle was constructed to rest and revolve at its lower end in a step in the lower rail of the frame. It was supported by the bolster in the upper rail of the spinning-frame. Between the step on the lower, and the bolster on the upper rail, was attached to the spindle, the whirl, by means of which and its connections, motion was communicated to the spindle. Above the bolster the blade of the spindle projected about six inches, receiving and extending through the bobbin. The usual weight of the spindle was about twelve ounces, the proportion of the weight of the blade above, and the butt below the top of the bolster being about two and one-quarter ounces for the weight of the blade, and nine and three-quarters ounces for the weight of the butt. The wooden bobbin which was used in combination with this spindle was chambered or reamed out so as to leave a bore or central chamber of greater diameter than the spindle, except at the top and foot of the bobbin, where there were frictional adhesive bushings adjusted to keep the bobbin in the same relation to the spindle, and to enable the spindle to carry the bobbin with it in its rotation. This rotation, in practical use in spinning, was at the rate of five or six thousand revolutions per minute. Nearly one-half of the whole power utilized in running the machinery of a cotton-mill was expended in driving the spindles for spinning. Experiments had been made of removing a portion of the metal from the butt end of the spindles below the bolster, in the expectation that by thus reducing the weight of the spindles much less power would be required to drive them.

These experiments failed. Tested by the dynamometer, the spindles thus rendered lighter by the removal of some portion of the weight of that part of them below the bolster required more power to drive them than the old and heavier spindles. To overcome the tendency to gyratory motion in the comparatively unsupported blade of the spindle, it appeared requisite that a certain fixed proportional relation should be maintained between the respective weights of the blade and the butt of the spindle, and, as one of the conditions of economical spinning, involved, necessarily, the use of a bobbin of or about the length of six inches. Before the invention of Pearl, no substantial advance had been made in the efforts to modify the form of the spindle in common use, so as to effect a material saving of the power requisite to drive it with the required velocity of rotation.

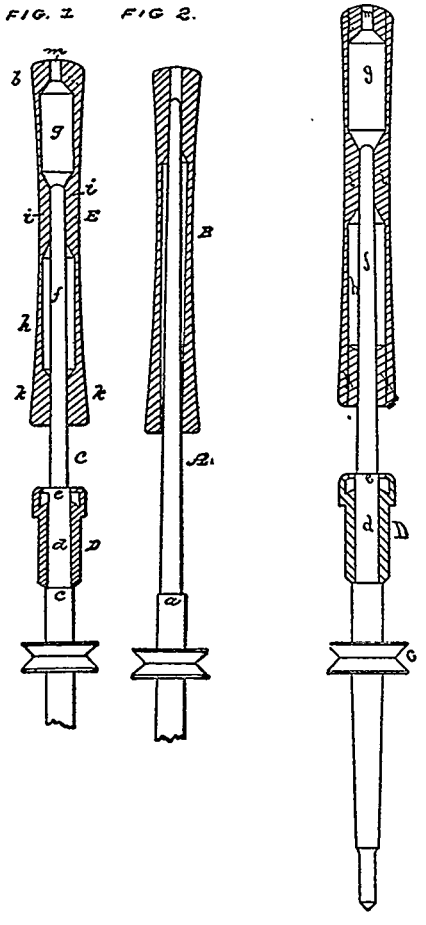
The device of Pearl consists in a combination of a modified form of the ring-spindles with a modified form of the bobbins, having frictional or adhesive bearings, uniting them to the spindles, and carried with it. This modified or improved spindle was shortened in the blade, and, instead of extending, as before, substantially to the upper end of the bobbin, was only made of sufficient length above the bolster to enable an adhesive bearing, which he provided in the centre of the bobbin, to hold the bobbin firmly on the spindle. He correspondingly lightened the lower part of the spindle and whirl below the bolster, without destroying the proper proportional relation of the parts of the spindle to each other, necessary to insure steadiness of rotation. He also modified the form of the bobbin, making it of a light or thin shell, retaining the lower frictional bushing or adhesive bearing at the bottom, and adding a frictional adhesive bushing in the centre of the bobbin, the lower and the central bushings sustaining the bobbin on the spindle, in place of the former mode of sustaining it by adhesive bearings at the top and bottom of the bobbin. He added a plug, re-enforce, or bushing also at the top of his bobbin, not having apparently any function in combination with the spindle, with which it did not come in contact, but only as one mode of strengthening the bobbin itself.

He describes his invention thus: "My invention relates, first, to certain improvements in the construction of bobbins having frictional or adhesive bearings uniting them to the spindle and carried by it, the object of this part of my invention being to make a very light bobbin, and strengthen its various parts so that it will not easily be crushed or broken; second, to an improved construction and combination of both the bobbin and ring-spindle, so that they can be successfully used with greater advantages of length of traverse, speed and steadiness of rotation than heretofore attained, and at the same time be much lighter, the object of this part of my invention being to greatly diminish the amount of power required to drive the spindle at any given speed, and to increase its efficient operation at the same time."

[Drawing of Patent No. 102,587, granted May 3, 1870 to O. Pearl, published from the records of the United States Patent Office.]

[Drawing of Reissued Patent No. 6,036, granted Sept. 1, 1874, to O. Pearl, published from the records of the United States Patent Office.]

FIG. 1. FIG 2.



After describing the spindles and bobbins in common use, and reciting the difficulties which had attended the attempts theretofore made to reduce the weight of the entire spindle below a certain standard, he proceeds first to describe the bobbin of his improved construction.

"This bobbin is made with a thin and light shell or band of wood, and has a lower adhesive or frictional bearing k, and a middle one, i, and is also bushed at the upper end by a plug, re-enforce or bushing, l, and the bearings k i and bushing l are united to, and combined with the shell of the bobbin, and strengthen it in all directions from being broken. The adhesive or frictional bearings k i are made to sustain the bobbin on the spindle in one position with relation to the

latter, and so as to enable the spindle to carry the bobbin with it in its rotation."

He then describes his improved ring-spindle.

"My improved ring-spindle, instead of extending substantially to the upper end of the bobbin, as heretofore, is only made long enough above the upper bolster D, to enable the adhesive bearing i at the centre of the bobbin to hold the latter firmly upon it, as shown. I am thus enabled to remove a large portion of the upper part of the blade of the spindle above the bolster, and the tube of the bobbin projecting beyond the shortened blade of the spindle, resting, by its adhesive central bearing, upon the latter, and being both light and rigid, retains its length and the position which it had before the spindle-blade was shortened, while the traverse of the spinning-frame and the length of the bobbin remain as before.

"By thus dispensing with the length and weight at the top of the spindle above the bolster, while the length of the bobbin and traverse of the frame remain as before, relatively, I am enabled to lighten the lower part of the spindle and whirl below the bolster, many times the weight taken from its blade above, without destroying the proper balance of the spindle and its consequent steadiness of rotation, and by these means I accomplish the ultimate effect, which is the purpose of this improvement, of enabling the spindle to be run steadily at high speed with much less power than heretofore, thus diminishing the expense and increasing the production at the same time."

The claims of the patent are for: "(1) The described ring-spindle, having its blade from the bolster D upward shorter than the bobbin and combined with the bobbin, constructed substantially as described, by means of the adhesive bearings, as and for the purpose set forth. (2) The combination of the bobbin, the intermediate adhesive bearing i, and the blade of the spindle made shorter than the bobbin from the bolster D upward, substantially as described. (3) The described bobbin, provided with the central adhesive bearing i, the chambers g h, and the adhesive foot-bearing k, substantially as described. (4) The described bobbin, provided with the central adhesive bearing i, the two chambers g h, and the upper and lower end bushings or heads, substantially as described."

The spindle and bobbin used by the defendants is substantially like the spindle and bobbin described in the Pearl patent, omitting from the bobbin the bushing 1 at the other end of the bobbin, being the upper bushing referred to in the fourth claim of the reissued patent. It clearly embraces the combinations covered by the first, second and third claims, and as clearly does not embrace the combination in the fourth claim. The construction of the claims contended for by the defendants, which makes the described bobbin in all the claims necessarily require a bobbin which has the lower, central and upper bushings described in the specification, cannot be sustained, in view of the evident intention to describe, in the first claim, a combination of the shortened ring-spindle with a bobbin having the central and lower adhesive bearings described; in the second claim, to describe the combination of the shortened ring-spindle with a bobbin having the central intermediate adhesive bearing; in the third claim, to describe a bobbin having the elements of the central adhesive bearing, the adhesive foot-bearing and the two chambers above and below the central bushing; and, in the fourth claim, the bobbin having the central adhesive bearings, both the upper and the lower end bushings, and the two chambers.

There is no difficulty in understanding the elements of the combination claimed in each one of these claims, and the words "the described bobbin" must be construed, not solely with reference to the words in the specification, but with reference also to the limitations in the context of the claims.

A careful comparison of the reissued patent in this case with the original fails to show that the reissued patent embraces, in its description or claims, anything which was not suggested and substantially indicated in the original. Nor is any combination claimed in the claims of the reissue of fewer elements than in the original, where such combination is not clearly described as the invention of the patentee in his original specification. The upper bushing 1 is not described in the original patent as an essential element in the combination, but only as a re-enforce to strengthen the bobbin to avoid the danger of breaking or crushing it in the operation of putting it on or taking it off the spindle, and its connection with the other elements which go to make up the combination (either of the elements of the improved bobbin or the combined improved bobbin and improved spindle) may be regarded rather as an aggregation that a combination, as the re-enforce 1 has no part in the combined function of those other elements, the combination of which constitutes the invention described alike in the original and the reissue. When in the specification of the original patent the inventor describes a new and useful combination of a number of ingredients, performing in combination certain functions less than he has claimed, he may in the reissue claim such combination of the less number which he has described, suggested or substantially indicated as his invention, but failed to include in his claims, and the reissue need not describe it in the exact language of the original, but may contain a more full and exact description of the same invention, imperfectly described in the original. There is nothing in the decision in Wells v. Gill [Case No. 17,393] in conflict

with this statement of the principle of patent law.

The positions taken by the defendants in this case, that the difference between what is described in the specification as old and what is described as new, is not a difference which constitutes a patentable invention, and that the device set forth in the specification, in view of the state of the art, is not new in the sense of the patent law, have been very elaborately and ably presented to the court in arguments embodying a very careful analysis of all the elements and ingredients of the old and the new devices and combinations.

Considering first the difference between what is described as old and what is described as new in the specification, it is contended that these differences consist only in changing the location of the upper adhesive bearing from the top to the central portion of the bobbin, and that when this change of location is made, the shortening of the spindle by cutting off the superfluous part above the bearing, which performs no function, is one of mere mechanical skill, obvious to any mechanic, and not requiring invention. Mere change of the form of a machine is the work of a constructor, not an inventor; such a change cannot be deemed an invention. Winans v. Denmead, 15 How. [56 U. S.] 340. Mere changes of form or location in a mechanical structure are not the subject of a patent, without showing that some new or materially improved result is obtained. Sargent v. Larned [Case No. 12,364].

No more difficult task is imposed upon the court in patent causes than that of determining what constitutes invention, and of drawing the line of distinction between the work of the inventor and the constructor. The change from the old structure to the new may be one which one inventor would devise with the expenditure of but little thought and labor, and another would fail to accomplish after long and patient effort. It may be one, which one whose mind is fertile in invention will suggest almost instantaneously, when the skilled hand of the constructor will fail to reach the apparently simple result by the long and toilsome process of experiment. It may be one which, viewed in the light of the accomplished result, may seem so simple as to be obvious almost to an unskilled operative, and yet the proof may show that this apparently simple and obvious change has produced a result which has for years baffled the skill of the mechanical expert, eluded the search of the discoverer, and set at defiance the speculations of inventive genius. The change described in the specification of Pearl is a change in the form of the spindle and a change in the form of the bobbin. It involves in the case of the bobbin a change of the location of the upper adhesive bearing from the top to about the centre of the bobbin. Without a knowledge of the results accomplished by these changes they might, at first glance, appear to be merely structural changes. Nothing has a greater tendency to prove that these changes involve some functional difference, beyond mere mechanical perfection and adjustment, than the greatly improved result attending the change when viewed in connection with the failure of the many experiments previously made to accomplish similar results by mere structural changes like those, for example, of diminishing the weight of the spindle in all its parts. It does seem impossible to reconcile the greatly improved results attained by the invention of Pearl with the theory that no functional, but only a mere structural, change was effected. Even if Pearl fails to describe accurately the precise law which governs the proper relations and proportions of the parts of the spindle as affected by the elements of leverage, gravity, friction, centrifugal force, and the transverse strain in one direction upon the spindle, yet if he has obtained the practical result, and taught others how to accomplish it, he has made a patentable invention, however imperfectly he may understand the philosophy of it. And the defendants have none the less availed themselves of his invention, although by adding another change (whether structural merely or functional) by bringing the upper bolster nearer to the bobbin, they have still further improved upon the old device.

Whether, in view of the state of the art as developed by the evidence, as distinguished from the devices described as old in the specification, there was anything patentable in the device described as new by the patentee, will now be considered in connection with the evidence introduced to prove anticipation.

Defendants set up prior knowledge and use by Richard Garsed, at Frankford, Pennsylvania; H. N. Gambrill & Sons, at Melvak, Maryland; J. & W. Slater, at Jewett, Connecticut; William P. Green & Sons, at Norwich, Connecticut; Russell Chace, at Washington Village, Rhode Island; and Hugh Bone, of Ellicott City, Maryland. All of these six different devices, admitting for them all that is claimed, were bobbins without any of the adhesive bearings described in the patent of complainants, but rested loosely on the spindle-blade, being driven with it by means of pins projecting from a button or collar attached to the spindle. Neither one of these devices embraced the combination described or claimed in either claim of the reissued patent. There is a mass of testimony on both sides in relation to a bobbin assumed to have been used by Amasa Houghton, at the Attawaugan Mill, in Killingly, Connecticut, and at Wauregan, Connecticut. Within the reasonable com-

pass of an opinion, it would not be possible, without great prolixity, to give an analysis of all the conflicting testimony in relation to the Houghton bobbin. All that can be conveniently stated are the conclusions to which, upon such analysis, the court has arrived. They are, first, that no such bobbins as are described by Houghton were used, otherwise than experimentally, at the Attawaugan Mill, and that whatever use there was at the Wauregan Mill of the Houghton bobbin, was subsequent to June, 1868, the date when Pearl is proved to have perfected his invention. These conclusions render unnecessary any discussion as to the question of their effect, if they had antedated the invention of Pearl.

There remains to be noticed only the Winchendon spindle and bobbin, in which I do not find either separately or in combination any of the elements of the Pearl invention. The spindle was not shortened, neither was any central adhesive bearing provided in the working part of the Winchendon bobbin. The Winchendon bobbin had a bulb or head added above the top of the old Whitin spindle to the old Whitin bobbin, above the old upper adhesive bearing, which bulb or head was not made to receive and did not receive the yarn or constitute a working-part of the bobbin. No yarn was laid upon this head, and the proof is clear that this addition of a chambered head above the top of the spindle and above the upper adhesive bearing did not diminish but increased the quantum of power requisite to drive the spindle. It is claimed that the same relation of the spindle to the bobbin is attained in the Winchendon device by adding to the length of the bobbin, as in the Pearl device, by shortening the spindle. But the fact that in one case there is involved an increased, and in the other a diminished expenditure of requisite power, and that this difference grows out of a greater or less tendency to gyratory motion in one case or the other, proves that in one case the change from the old Whitin spindle was functional, and in the other merely structural, and, as before remarked, the relation of the operative parts of the Winchendon spindle and bobbin remained the same substantially as in the old Whitin spindle and bobbin in common use.

The conclusion is, that the defendants have infringed the first, second, and third claims of the complainants' patent, and a decree is to be entered, in favor of the complainants, for an injunction and account, as prayed for in the bill.

[For another case involving this patent, see Pearl v. Appleton Co., 3 Fed. 153.]

PEARL (UNITED STATES v.). See Case No. 16,022.

Case No. 10,877.

PEARPOINT et al. v. GRAHAM.

[4 Wash. C. C. 232.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

ASSIGNMENT FOR BENEFIT OF CREDITORS — BY PARTNER — FRAUDULENT ASSIGNMENT—SCHEDULE OF PROPERTY—PREFERENCES—RELEASE.

1. How far one partner may dispose of or assign away the partnership property and effects? Quære, if he can assign away the whole without the assent of his partner, and what is evidence of such assent.

[Cited in Bowen v. Clark, Case No. 1,721.]

[Cited in Dana v. Lull, 17 Vt. 394; Deckard v. Case, 5 Watts, 24; Egberts v. Wood, 3 Paige, 524; Hannaman v. Karrick (Utah) 33 Pac. 1042; Howell v. Harvey, 5 Ark. 270; Kirby v. Ingersoll, 1 Doug. (Mich.) 485; Steinhart v. Fyhrie (Mont.) 6 Pac. 372.]

2. An assignment by a debtor of all his effects, for the benefit of such of his creditors as should release their debts in sixty days from the date of the assignment. In what case it would be, and in what cases it would not be fraudulent.

[Cited in Halsey v. Fairbanks, Case No. 5,964; The Watchman, Id. 17,251; Brashear v. West, 7 Pet. (32 U. S.) 615.]

[Cited in Atkinson v. Jordan, 5 Ohio, 297; Grover v. Wakeman, 11 Wend. 200, 209.]

3. Such an assignment would not be fraudulent merely for want of a schedule of the property assigned.

4. A debtor who is insolvent, may prefer one creditor to another.

[Cited in Ashby v. Steere, Case No. 576; Marsh v. Bennett, Id. 9,110.]

[Cited in Gordon v. Cannon, 18 Grat. (Va.) 404; Howell v. Edgar, 3 Scam. 421. Cited in brief in Skipwith v. Cunningham, 8 Leigh, 278.]

5. The offer to release, made by a creditor to the trustee, under an assignment for the benefit of such creditors who should release within a particular time, the trustee having undertaken to prepare and have ready a release, and who failed so to do, is not sufficient to entitle the creditor who did not execute the release, to come in under the trust.

[Cited in Collier v. Davis, 47 Ark. 344, 1 S. W. 686; Armstrong v. Hurst (S. C.) 18 S. E. 153. Cited in brief in Grant v. Levan, 4 Pa. St. 426.]

6. Acceptance of the trust by the trustee, who was also a creditor, will not entitle him to the benefit of the trust, if he has failed to execute the release in time.

[Cited in National Union Bank v. Copeland, 141 Mass. 266, 4 N. E. 795.]

7. The day on which the assignment was made, is to be excluded. The general rule as to "from the date," and "from the day of the date," stated.

[Cited in Barber v. Chandler, 17 Pa. St. 50. Cited in brief in Kimm v. Osgood's Adm'r, 19 Mo. 60; Lebus v. Wayne Ratterman Co. (Ky.) 21 S. W. 652. Cited in State v. Mounts, 36 W. Va. 190, 14 S. E. 410. Cited in brief in Taylor v. Jacoby, 2 Pa. St. 496. Disapproved in Warren v. Slade, 23 Mich. 5. Cited in Weeks v. Hull, 19 Conn. 379, 382; Knowlton v. Culver, 2 Pin. 246, 1 Chand. 214.]

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

8. If any of the creditors release on the sixty-first day, the preceding day falling on Sunday, he is too late. He should have released on the sixtieth, or on some prior day.

[Cited in Shefer v. Magone, 47 Fed. 873.]

[Cited in brief in Page v. Weymouth, 47 Me. 241.]

9. Preparing a deed of release before the expiration of the sixty days, is not sufficient; if it was not executed within the limited time.

In equity.

WASHINGTON, Circuit Justice. This is a suit in equity brought by Pearpoint and Lord, to recover a debt due to them by Stephens & Co. out of the estate of that company, in the hands of Peter Graham, their trustee. Previous to the assignment made to Graham, Horatio Bigelow of Philadelphia, and Robert Stephens, Jr., of Charleston in South Carolina, were co-partners in trade, under the firm of Stephens & Co. in Philadelphia, and that of Robert Stephens, Jr., & Co. in Charleston; and on the 10th of April, 1816, Bigelow, at Philadelphia, executed an instrument, not under seal, in the name of Stephens, & Co. by which he assigned to Peter Graham all the estate of every kind of the said Horatio Bigelow and Robert Stephens, Jr., in their said co-partnership under both firms, in trust for each and every of the creditors of the said Bigelow and Stephens in their said co-partnership under either of their firms, who should, within sixty days from the date of the said instrument, execute, in favour of the said Horatio Bigelow and Robert Stephens, Jr., a full and complete release of all demands, the amount of their several and respective debts, if the said estate should be sufficient to pay the said creditors, in full; but if not sufficient to pay them in full, then so much of the said debts as the said estate should be sufficient to pay, the same being divided rateably among all such creditors as should have executed such release, according to the amount of their respective debts; and after payment of the said debts in full, to pay over the surplus of the said estate, if any should remain, to the said H. Bigelow and Robert Stephens, Jr. On the 24th of the same month and year, Robert Stephens, Jr., at Charleston, by an instrument under seal, signed in his separate name, but professing, in the body of the instrument, to be made by Robert Stephens, Jr., and Horatio Bigelow, trading under the firm of Robert Stephens, Jr., & Co. in Charleston, assigned to Depeau, Dun & Co. agents for Peter Graham of Philadelphia, assignee of Stephens & Co. certain specified effects for the general benefit of all the creditors of Stephens & Co. and Robert Stephens, Jr., & Co. On the 8th of June, 1816, the plaintiffs, by an instrument reciting the assignment of the 10th of April, executed by Stephens & Co. gave a general release of all demands against the said Horatio Bigelow and Robert Stephens, Jr. On the 10th of the same month and year, Peter Graham, Renault, and other creditors of Stephens & Co. by a deed reciting the assignment of the 10th of April, and referring also to the assignment of the 24th of April, released all their several and respective demands against the said H. Bigelow and Robert Stephens, Jr. Peter Graham, the trustee, by a notice published in one of the gazettes of this city, informed the creditors of Stephens & Co. that an instrument of release would be prepared, to be executed by such of the creditors as were willing to avail themselves of the benefit of the assignment. In consequence of which —— Bettle, one of the creditors, prior to the expiration of the sixty days, called at the counting house of Graham, and offered to execute the release; but he was informed that the instrument was not then prepared; and it is not pretended that this offer was repeated, or that he, at any time afterwards, executed a release. The release of Graham, the trustee, Renault, and of others of the creditors, which bears date the 10th of June, and was in fact executed on that day, was drawn at their request on the 8th of the same month, and was then ready for execution.

Upon this state of the case, the following points have been raised in opposition to the claim of the plaintiffs to be paid their debt in full, by the other creditors of Stephens & Co.; (1) That the assignment of the 10th of April is void. First, because one partner cannot dispose of the whole of the partnership effects, and thus by his own act dissolve the partnership, contrary to the terms of the association, without the assent of his co-partners. And secondly, because an assignment by a debtor of all his effects for the benefit of his creditors, upon a condition which they may at their election accept or reject, is fraudulent and void. (2) If the assignment should be considered as valid, it is then contended, that it should be construed to be for the benefit of all the creditors, whether they released within the sixty days or not. (3) If this construction should not prevail, it is still contended by the counsel for Bettle, that his offer to release, before the expiration of the sixty days, was tantamount to a release duly executed; and by the counsel for Graham that his acceptance of the trust amounted to an agreement to accede to the conditions of it, so far as his individual claim as a creditor was concerned. (4) That the release by Graham, Renault, and others, was executed within the sixty days, and that at all events, the order given on the 8th of June for the draft of the release was tantamount to an agreement to release, and was binding on them.

1. The first reason assigned why this deed should be declared to be void, was enforced with great power by the counsel for the general creditors. It is undoubtedly true, that each partner is possessed, not only of his own share and interest in the partnership effects, but of the whole; and therefore he has a power to dispose of the whole to third

persons, who deal with him in relation to the partnership concerns. Without such a power, the trade of co-partners could not be carried on, and it consequently becomes of necessity incorporated into the nature and being of such an association. But it may admit of serious doubt whether one partner can, without the consent of his associates, assign the whole of the partnership effects,° (otherwise than in the course of the trade in which the firm is engaged) in such manner as to terminate the partnership. An assignment of all the effects to trustees for the benefit of the creditors of the concern, would seem emphatically to be of this character. Such is its obvious design, and such must be its necessary consequence. Now it is perfectly clear, that one partner can not, by withdrawing himself from the association before the period stipulated between the partners for its continuance, either dissolve the partnership, or extricate himself from the responsibilities of a partner, either in respect to his associates, or to third persons; and if this be so, it would seem that he could not produce the same consequence by any other voluntary act of his own. This is not like those cases where, by the act of God, or by the operation of law, the partnership is dissolved, as by the death or bankruptcy of a partner.

It is unnecessary, however, to pursue the further consideration of this question; nor is it my intention to express any opinion upon it; because I am of opinion that the assignment of the 10th of April, 1816 is to be considered as the act of the firm, performed by Bigelow, either with the knowledge and assent of his partner, or with his subsequent approbation. The assignment executed by Robert Stephens, of the 24th of the same month, to the same trustee, for the same purposes, and with a full knowledge of the first assignment, as acknowledged in the instrument itself, amounts, in my opinion, to a full ratification of the assignment made by his partner. If the two instruments are consistent with each other, it seemed to be acknowledged by the counsel for the general creditors, that the latter may be considered as a ratification of the former. Now, I am of opinion, that no two instruments can more entirely harmonise with each other than these. Both of them are intended to provide for the creditors, and there are strong reasons for believing that both embrace all the partnership effects, although some difference of opinion as to this was expressed by the counsel. But if even the latter should be less comprehensive than the former, the only consequence would be, that the former would operate upon the whole, and the latter upon the specified parts; but they would not necessarily be in opposition to each other. The first assignment is made for the benefit of such of the creditors as should, within the sixty days, execute releases; after the expiration of that time, the property not appropriated to the use of the creditors who had released, would have resulted to the co-partners, and become subject to the claims of the creditors who did not choose to release; the second assignment then disposes of such resulting interest to the same trustee, for the equal benefit of such creditors. I do not therefore agree with the counsel, who argued that the first assignment having disposed of all the partnership effects, the second was void, having nothing to operate upon; because I think the two instruments may well stand together. Besides, who is it that makes the objection to the validity of the first assignment? Not the partners, or either of them; but the general creditors, who, in relation to this matter, cannot, I think, be heard.

The second reason assigned against the validity of the first assignment is, that being made upon a condition which the creditors might or might not comply with, it is fraudulent and void as to all the creditors of the latter description; because, unless the condition was agreed to by the creditors, and until it was, the property was vested in a trustee without a consideration paid by him, and the resulting equitable interest still remained in the debtors; and yet, during the whole of this interval, the property is attempted to be withdrawn from the just claims of the creditors. That an assignment in trust for the benefit of such creditors as should release their debts, is founded upon a good and valuable consideration, is undeniable; and the only remaining inquiry is, whether it is bona fide? It is easy to imagine cases in which the fairness of such an assignment might be justly questioned. Suppose for instance no time is limited; or a very distant period named, within which the condition may be complied with. The creditors may not choose to accede to the condition, and they are clearly under no obligation to do so. Is the estate to remain to an indefinite period in this situation, sheltered from the claims of the creditors, and in the mean time enjoyed by a mere volunteer, not the choice of the creditors, and who may waste and convert it in such a manner as ultimately to defeat or impair the rights of the creditors? I know of no case which goes as far as this; and, upon principle, I should feel strongly disposed to consider such a case as tainted with fraud. In the case of Butler v. Rhodes, 1 Esp. 236, the assignment was made in trust for the creditors who had then agreed to the proposed composition, of whom the plaintiff was one; and the only point decided was, that the debtor, having been induced by the agreement of the plaintiff to receive the composition, to part with all his property for the benefit of his creditors, he should not be permitted to retract, and to impeach the assignment. In that case, it will be observed, that the assignment was not only absolute, but was made with the assent of the creditors, and of the particular creditor who was plaintiff in the suit, in derogation of his own

agreement. Lippincott v. Barker, 2 Bin. 174, was the case of an assignment by surety, who was unable to pay his debts, to one of his creditors, of all his estate, in trust for such of his creditors as should, within four months from the date, execute a general release of all demands against him, to be distributed ratably amongst them, and the residue, if any, to himself. Two days after the execution of the deed, the creditors were called together, and all of them but one or two met, and assented to the assignment; in consequence of which the debtor gave possession of the property assigned to the trustee. The plaintiff was one of the assenting creditors, and the court decided that the plaintiff was bound by his assent to the assignment, and could not be permitted to act in opposition to it. In the opinion delivered by the chief justice, he notices, with approbation, the case from 1 Esp., and observes that he can see no good reason why the creditors should not be entitled to the benefit of the assignment from the time they agreed to accept it.

Upon this case, I observe, that some months were allowed for the creditors to accept the assignment upon the terms which it prescribed; and that two days elapsed before it was accepted by parol, and eight before the releases were in fact executed. If the condition of executing releases is, per se, an evidence of fraud, then the deed was void as soon as it was made; and the subsequent acquiescence and compliance with the terms of the assignment, by a part of the creditors, could not give it validity. This case then proceeds upon the ground that the assignment was valid, notwithstanding the conditions. In the case of Hatch v. Smith, 5 Mass. 42, the same condition of a release by the creditors was imposed; and no time was prescribed within which it was to be performed; but nearly all the creditors signed the conveyance, as the evidence of their assent, before it was executed by the debtor; and, consequently, it is precisely the same case in principle with that of Butler and Rhodes. But where a reasonable time is limited, within which the trust property is to vest in those for whom the beneficial interest is intended, or will be relieved from the operation of the assignment, I can perceive no reason for imputing fraud to such a transaction. It is true that during that period the property is, or may be, protected from the claims of creditors; but it is so protected for the benefit of those very creditors, and consequently for an honest purpose. It cannot, in short, be said to be made with intention to defraud, or to delay creditors, when its professed object is to put it in the power of the creditors to accept, or to reject, the benefit intended them; and, in the latter case, to leave the property subject to their rights, in like manner as it would have been, had the assignment not been made. What should be considered as a reasonable time for the performance of the condition, would, in general, depend upon the circumstances of the case. But the fair object of the limitation being to afford an opportunity to the creditors to accept or to reject the terms on which the trust is created, the time should not exceed what may be thought necessary for that purpose. In the case of Lippincott v. Barker, the time limited was four months. In this it is only about the half of it. I did not understand the counsel for the general creditors to object to the validity of this assignment, upon the ground of its giving a preference to the creditors who should release, or for the want of a schedule. It will be sufficient therefore to observe, that one creditor may legally obtain a preference over the other creditors upon general principles of law; and that all the cases which deny this right, proceed upon the spirit of the bankrupt laws, which contemplate an equal distribution of the bankrupt's estate, and of which he cannot deprive them by an assignment made in favour of a preferred creditor, upon the eve of a bankruptcy. As to the want of a schedule, it may be admitted that an assignment of all the debtor's effects, without a specification of property, is, generally speaking, an indicium of fraud, but nothing more. In Twyne's Case [3 Coke, 80], it was an item in the list of circumstances to establish the fraudulent intent. But if the assignment be made for a valuable consideration, if possession accompanies the transfer, and the transaction is in all other respects fair, I do not understand that the mere circumstance of a want of a schedule will render it fraudulent.

2. The argument under this head I understand to be, that the assignment of the 10th of April ought to be so construed as to include all the creditors, as well those who declined to exercise releases within, or subsequent to the expiration of the sixty days, as those who complied literally with the prescribed condition. I have examined this instrument with great attention, and with the best disposition to give effect to this construction, if the words would bear it. But to my apprehension this is impossible. The creditors, for whose benefit the assignment is made, are described to be such as should execute, in favour of Bigelow and Stephens, a release within sixty days from the date of the assignment, and that the distribution of the effects is to be made rateably among all such creditors as should have executed such release. All those creditors then who declined making such releases within the time prescribed, are clearly without the provisions of the assignment; and if all the creditors had declined to accept the assignment upon the prescribed terms, it is most obvious that it would have been inoperative as to them after the expiration of the sixty days.

3. I now come to the examination of the particular claims of those creditors who did not execute releases within the prescribed period, but who indicated an intention to do

so. First, as to Bettle. He offered to execute a release within the sixty days, in the way pointed out by the trustee, but was informed by him that the instrument was not prepared. This offer, it is contended by the counsel for this creditor, was equivalent to performance; and, in support of this argument, the case of Lippincott vs. Barker, as also the general principles of law are relied upon. Upon neither of these grounds can this argument be sustained. As to the first, it will be sufficient to observe, that the creditor who was decided by the court to be bound by his agreement to accept of the proffered composition, did so before possession of the assigned effects was delivered to the trustee; and they were properly held to be bound by their agreement, made for a valuable consideration, which passed at the time from the debtor, although that agreement was only by parol. But in this case, Bettle was no party to the contract between the debtor and the trustee, and had entered into no engagement which could be construed into a consideration for the assignment. It was perfectly voluntary with him, whether he would accede to the terms of the assignment or not; and his offer to do so, being made without consideration, he was at all times at liberty to abandon it if he thought proper. If therefore he was not bound by the offer, it is most obvious that the other party to the contract was not bound.

The second ground taken in support of this argument, is not more tenable. The trustee had no authority to prevent any creditor directly from executing a valid release to Stephens & Co. and consequently he could not do it indirectly, by not preparing an instrument of release for the creditors to execute, or even by refusing to receive a release, if it had been tendered. The release was not to be given, or even delivered to the trustee; if regularly executed to Stephens & Co., the right of the creditor so releasing to claim his ratable proportion of the funds from the trustee was complete. The offer of the trustee to prepare a release for the creditors to execute was in his personal, and not in his fiduciary character; because the trust imposed no such duty upon him. All that he had to do was to convert the effects assigned to him into money, and to distribute the same amongst such of the creditors as should have executed releases to Stephens & Co. within the sixty days. Every thing beyond this was merely an act of supererogation, not required by his contract. The general principle of law, therefore, which considers the offer of a party who is bound by contract to perform a certain act in order to entitle himself to a benefit, or to avoid a loss dependent upon performance, as equivalent to performance, is altogether inapplicable to the case of this creditor; because, in the first place, he was under no obligation to execute this release; and, in the next, there was no refusal to accept of a release; and even if there had been, it would not have proceeded from the persons who could be bound by the consequences of it; they were Stephens & Co. for whose benefit it was intended. The claims of Graham, Renault and others, come next to be considered. In favour of Graham, a preference is claimed by his counsel over his associates in the release of the 10th of June, upon the ground that his acceptance of the trust amounted to an agreement to accede to the conditions of it, so far as his individual claim as a creditor was concerned. To maintain this ground, it should have been shown that the acceptance of the trust deprived this creditor of the unquestioned right of election, which the other creditors had, to accept or to reject the benefit intended them by the assignment, upon the prescribed condition, and imposed upon him an absolute obligation to accept. But this is not pretended. It is clear that he was bound by nothing expressed in the contract; and as little ground is there for raising an implied contract to bind him. That he did not so consider it himself, is perfectly obvious from the release which he thought it necessary to give, after he had made up his mind to accede to the terms of the assignment. In the cases before referred to, in which the trustee, being one of the creditors, was held to be bound, he had given his assent expressly to the terms of the assignment.

4. The next question is, whether the release executed by Graham and others, of the 10th of June, entitles them to come in under the assignment? It is contended by their counsel that they are so entitled upon two grounds: (1) Because, excluding the day on which the assignment was made, the sixtieth day would have fallen on the ninth, which happening to be Sunday, that day should also be erased from the calculation, and then the sixty days terminated on the 10th of June. (2) Because the order given on the 8th of June for the draft of the release, was tantamount to an agreement to release, which was obligatory upon these creditors on that day.

As to the first reason, my opinion coincides in part with the counsel who urged it. The distinction between the expressions "the date" and "the day of the date," when used to describe a period at which an interest is to commence, or time to be computed, has long been a vexed question; and remains so in some measure at this day. The decision of the court in the case of Pugh v. Duke of Leeds, Cowp. 714, has by no means left the subject free from doubt; nor is it easy to draw from it any precise rule applicable to cases in general in which these expressions occur. The expressions used in the deed under consideration are "from the date of the said instrument;" and the first question is, whether the day of the date, is to be included or excluded? After a very laborious examination of all the cases, I think the following principles may be considered as settled.

Where the computation of time is to be made from an act done, the day on which the act is performed is included; because the act is the terminus a quo the computation is to be made; and there being in contemplation of law no fraction of a day, (unless when an inquiry as to a priority of acts done on the same day becomes necessary) the terminus is considered as commencing at the first moment of that day. Thus is the rule laid down in Clayton's Case, 5 Coke, 1, and recognized in the cases of Castle v. Burditt, 3 Term R. 623; Rex v. Adderley, Doug. 463; Bellasis v. Hester, 1 Ld. Raym. 280; Norris v. Hundred of Gautris, 2 Rolle, Abr. 520, pl. 8. The only exception to this rule, which is recollected, is established by the law merchant, which considers the day on which a bill of exchange, made payable at so many days sight is accepted, as excluded. Where the expressions are "from the date," I understand the rule to be, that if a present interest is to commence from the date, the day of the date is included; but if they are used merely to fix a terminus from which to compute time, the day is in all cases excluded. Thus a lease for so many years, habendum a datu, is of the first description, and the day of the date is included. But if the deed had been dated at a day past, and the habendum was "from the date," the day would be excluded, because no present interest passed, and the expressions were merely used for computing time. So the enrollment of a deed of bargain and sale under the statute 27 Hen. VIII. c. 16, which provides that such deeds must be enrolled within six months next after the date of the said instrument, if enrolled on the last day of the six months, excluding the day of the date, is in time. Dyer, 218, b. It is not necessary to refer to other cases as illustrations of the rule, to which I recollect no exceptions. The reason of the rule is perfectly intelligible and sensible. It is, that where words of equivocal meaning (which these are admitted to be) are made use of, and there is no index from the res gestæ to show the intention of the party who used them, the construction shall be made most advantageous for him in whose favour the instrument is made. In the case of the lease first mentioned, the day of the date is included, for the purpose of vesting in the grantee an estate in possession, rather than one in expectancy, which is most beneficial to the grantee. In the other cases, the day is excluded for the same reason; as it either prolongs the interest of the grantee, or enlarges the time in which he is required to do an act. This reason, it must be admitted, does not apply to a bill of exchange made payable so many days after date, where the day is excluded, though to the disadvantage of the person in whose favour it is drawn; but this case, like that before noticed, depends upon the custom of merchants; and though it is not within the reason of the rule, it is nevertheless within the rule itself, the date being referred to merely to denote the period from which the time of payment is to be computed. For these reasons I am of opinion that the day on which this deed was made is to be excluded. The next question under this head is, whether excluding the day of the date, the release being executed on the tenth, was not too late: and the opinion of the court is that it was. It is contended in support of this release, that the sixtieth day falling upon a Sunday, the release might properly be executed on the tenth, the ninth being excluded in the computation of time. I cannot accede to the idea that this day is to be excluded. No case was cited by the counsel, and I have met with none to warrant this position. There can be no question but that the release would have been valid had it been executed on the ninth, although it was Sunday; and the most that can be contended for is, that they were not bound to execute it on that day. But they had the whole sixty days in which they might have executed it; and it was therefore incumbent on them to do it at some time within that period, when it would have been proper for them to do it. The execution of the release was a condition precedent, and required a rigid performance. It might have been executed at any time before the expiration of the sixty days; but an execution after the expiration of that time is dehors the contract, and can upon no principle be said to be a performance of the condition, upon which alone they could claim any benefit under the assignment.

As to the second reason, it may be sufficient to observe that the opinion in relation to Bettle's claim is, if correct, conclusive against these claimants. They had not even offered by parol to execute a release, and were under no obligation to do it at any time in consequence of their order to the scrivener to prepare an instrument for them to execute.

Upon the whole, it is the opinion of the court that the plaintiffs are entitled to a decree for the amount claimed by them, the correctness of which amount is not disputed.

Decree accordingly.

Case No. 10,878.

In re PEARSON.

[2 N. B. R. 477 (Quarto, 151);[1] 2 Am. Law T. Rep. Bankr. 66.]

District Court, N. D. New York. 1869.

BANKRUPTCY—VOTING FOR ASSIGNEE—APPOINTMENT BY REGISTER.

There is no such thing known to the law as an informal vote. Where a vote by creditors at a first meeting results in no choice of an assignee, it is the duty of the register to inform the creditors that the choice devolves on the judge, un-

[1] [Reprinted from 2 N. B. R. 477 (Quarto, 151), by permission. 2 Am. Law T. Rep. Bankr. 66, contains only a partial report.]

less there be no opposing interest. An appointment of an assignee by the register, although no objection was made at the time, adjudged irregular, and appointment annulled.

[Cited in Re Herrman, Case No. 6,426.]

At the first meeting of creditors in this case, fifty of the creditors, representing about one thousand dollars of claims, voted for John G. Crocker for assignee; while some twenty creditors, representing some ten thousand dollars of claims, voted for M. C. Comstock for assignee. The register then stated to the creditors that as there was no choice made, it would be his duty to appoint an assignee; and the counsel for the creditors who voted for Comstock said that if any creditors had objections to make they had better make them. No creditor having made objection, the register then appointed Mr. Comstock. Subsequently, the creditors who voted for Crocker, obtained an order that the register report the proceedings had at the meeting, and that Comstock show cause why his appointment should not be rejected. On return of the order to show cause, J. T. Spriggs, Esq., for Comstock, read the register's report, showing the proceedings substantially as given above, except that he reported that there was no formal vote, but only an informal vote, or an expression of opinion, by the creditors, as to this preference. Affidavits were also read in support of the report, except that they stated that there was, as they understood, a formal vote.

George Gorham, Esq., for the creditors who voted for Mr. Crocker, read affidavits by many of those creditors, by which it appeared that they did not desire Mr. Comstock as assignee alone; that they did not intend at the meeting to waive their right to object, and understood from the register that it was his duty to appoint, if there was no choice, whether there was an opposing interest or not.

Counsel raised the point that, taking the register's report to be correct, the appointment was improperly made because there had been no vote; and that until a vote had been had there could be no failure to choose, so as to warrant an appointment.

HALL, District Judge, said that there was no such thing known to the law as an informal vote; that a vote was had in this case; that there had been no choice; and that it was the duty of the register to have stated to the meeting that the duty of appointing an assignee devolved upon the judge, unless there was no opposing interest, and that any creditor had the right to object to the register's making the appointment; that there certainly was an opposing interest in this case, and the appointment by the register was irregular. The appointment of Mr. Comstock by the register was therefore annulled, and an order was made appointing both Mr. Comstock and Mr. Crocker joint assignees, and providing, if either failed to accept it in five days, that the one accepting should act alone.

Case No. 10,879.

PEARSON v. JAMISON.

[1 McLean, 197.] [1]

Circuit Court, D. Kentucky. Nov. Term, 1833.

EXECUTORS—DELEGATION OF POWER TO SELL—SALE BY HEIR AT LAW.

1. Where an executor, by the will, is empowered to sell real estate in the best mode in his judgment, for the interest of the estate, he cannot delegate the power to another.

[Cited in Clinefelter v. Ayres, 16 Ill. 333. Cited in brief in Tatum v. Holliday, 59 Mo. 423. Distinguished in Whittier v. Winkley, 62 N. H. 338.]

2. It is a case of special trust and confidence, and is personal to the executor.

3. Where a sale was made under such circumstances and the consideration paid, the heir at law may sell the same estate; the first sale being void.

In equity.

Mr. Haggin, for complainant.

Mr. Wickliffe, for defendant.

OPINION OF THE COURT. The bill states that John Jamison, who owned several tracts of land in the Western country, made his will, authorizing his executor to sell all, &c. The executor conferred authority on a person by the name of John Jamison to sell the land, who did sell, or rather contracted to sell, and gave bond for a conveyance of twelve hundred acres in the Green river country, and the purchaser shortly afterwards entered into possession and still remains in possession. Afterwards a certain John Jamison, who was heir at law to the deceased, having attained full age, sold the same tract to the complainant; and in 1815 made a deed of conveyance for the same. E. B. Pearson found the defendant in possession. The land was afterwards redeemed by the complainant from a sale for taxes. He had no covenant from the heir upon which he could sue at law; he therefore files his bill to cancel the contract with Jamison and recover back the money paid as the price of the land, and the amount paid to redeem for tax sales, &c.

The answer insists that the sale by the attorney of the executor was not valid, and that the contract made with the complainant is valid, &c.

The following is a copy of that part of the will which applies to the case: "It is my will and desire that all debts due to me of every description whatever, as well as all the real property which I possess (except, &c.) shall be a fund in the hands of my executor, hereinafter named, for the payment

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

of my just debts; and I hereby give to him a full and complete power and authority to dispose of the real property aforesaid, in the best mode he may find convenient or may judge proper for the interest of the estate in the payment of all my just debts," &c. John McNeal, Esquire, was made executor. If the sale made by the executor be invalid, it would follow, that the sale made by the heir at law is valid; and that there is no ground on which this court can rescind the contract, set forth in the bill, with the complainant. The power vested in the executor is a power coupled with an interest; but it was a case in which the testator reposed special confidence in the executor. He was to sell the land in the best mode, in his judgment, for the interest of the estate. It was then a special case of trust and confidence. Not only was there confidence reposed in the integrity of the executor, but also in his capacity for the business, and in his judgment. And this is a case where the agent or executor cannot make an appointment of any other individual to execute the trust. The time and manner of the sale, as also the price at which the land shall be sold, are subjects which are to be acted on and decided by the executor, and not by any other person, whom he shall substitute for this purpose. Where a particular act is directed to be done which does not require the exercise of judgment, a substitution is admissible. Because the particular thing is directed to be done, and there is no discretion to be exercised on the subject. But the case under consideration is widely different from this. The testator reposing special trust in the judgment of his executor, directed his real estate to be sold, in the mode that the executor should think best, for the interest of the estate. The discretion of the executor only, could govern in the exercise of this power. And we think that the sale made by the agent of the executor was not binding, in not having been made within the scope and meaning of the power given in the will. Sugd. Powers, 175; Id. pp. 391–398, c. 6, § 3; Maddison v. Andrew, 1 Ves. Sr. 57; Witts v. Boddington, 3 Brown, Ch. 95; Cole v. Wade, 16 Ves. 27. And by the decision of this point, in this way, it follows as a matter of course that the sale to the plaintiff by the heir at law, is valid.

The court, therefore, entered the following decree: It seems to the court that the power conferred by the testator, John Jamison, to his executor, McNeal, to make sale of the lands, was personal and could not be exercised by proxy. That the contract, therefore, by John Jamison, as the agent of McNeal, the executor, for the sale of the tract of land in the bill mentioned, is void, and passed no interest to Haines or his assignee, and can, therefore, oppose in law no obstruction to the recovery of the land, by the complainant, of the tenants in possession. It is therefore decreed and ordered that the bill of the complainant be dismissed.

PEARSON v. The TANGIER. See Cases Nos. 12,265–12,267.

PEARSON (SPURR v.). See Case No. 13,268.

Case No. 10,880.

In re PEASE et al.

[6 N. B. R. 173.] [1]

District Court, D. Massachusetts. Dec. 5, 1871.

BANKRUPTCY—STAYING PROCEEDINGS.

There is nothing illegal in endeavoring to produce all the claims against the estate of a bankrupt for the purpose of staying the bankruptcy proceedings altogether; failing in this, the purchaser should nevertheless be allowed to prove the claims purchased as though he were an original creditor.

In bankruptcy.

LOWELL, District Judge. The register has certified to me, by consent of parties, the question whether a claim offered for proof in the name of Clark & Smith, ought to be admitted. The case will decide many others pending in the same bankruptcy proceedings. After the petition in bankruptcy was filed, the father-in-law of one of the bankrupt firm, undertook to buy up all the debts in order to settle the case out of court and save the "name and disgrace" of bankruptcy. Failing in this, the case proceeded and the debt now offered for proof is one of those which had been bought. The original creditors made the deposition after the assignment was agreed on, and at the time it was completed, and handed it to the purchaser, together with an order for the dividends; and it is in the interest of the purchaser that it is now offered for proof. The form adopted is that which was usual in Massachusetts, when the insolvent law was in operation in that state.

In the absence of agreement by the opposing creditor, I suppose his objection to be, either that no such assignment can lawfully be made after the bankruptcy, or that this debt was procured for the purpose of influencing the proceedings. In Re Murdock [Case No. 9,939], I gave my views upon the first point, and I have seen no reason to change them. In my opinion an assignee of a chose in action can prove it, and for the reasons there stated. It is more regular and the true mode of proving, that the holder should himself make the affidavit; else the statement that the claim was not procured etc., becomes merely illusory, for it is not made by the party who has bought the claim, and might be entirely true in respect to the affiant, and false as to the real party in interest.

The other question is one of fact mainly; that is, whether the debt was bought for the purpose of influencing the proceedings. There is no evidence that it was, but abundant evidence that it was not bought for that

[1] [Reprinted by permission.]

purpose. It was bought for the purpose of staying the proceedings altogether if all could be bought, but there is nothing either illegal or immoral in this.

The debt is admitted to proof.

Case No. 10,881.

In re PEASE.

[13 N. B. R. (1876) 168.] [1]

District Court, D. Minnesota. 1876.

BANKRUPTCY—PROOF OF CLAIM AGAINST PARTNERSHIP AND PARTNERS—DISTRIBUTION.

1. If a creditor holding a note against a firm, proves it against the estate of two of the partners who took the assets and agreed to pay the firm debt, he may prove for the balance against the estate of the other partner, and share pro rata with his creditors.

[Cited in Re Webb, Case No. 17,317; Re Lloyd, 22 Fed. 89.]

2. The rule in regard to the distribution of the assets of a firm, does not apply where one partner alone is bankrupt.

A stipulation containing a statement of facts has been filed, from which it appears, that "three parties named Pease, Sherman, and Hall were partners in Minneapolis under that firm name, carrying on the business of dealing in paints, oils, and glass. As such copartners they contracted a debt to D. F. Freeman & Co., and gave a firm note for the amount, signed Pease, Sherman & Hall. Afterwards the partnership was dissolved, R. S. Pease retiring. Sherman and Hall continued doing business under that firm name, and agreed with Pease to pay all outstanding debts of Pease, Sherman & Hall. This agreement, however, was unknown to Freeman & Co., and they never released Pease. Afterwards Pease started in business at Minneapolis on his own account, in the same line as the firm of which he had been a member. Afterwards the firm of Sherman & Hall was forced into bankruptcy, and Freeman & Co. proved against their estate the debt evidenced by the note of Pease, Sherman & Hall, and realized from the assets of said Sherman & Hall about twenty cents on the dollar of said debt, and no more, eighty per cent. of said debt being still unpaid. Afterwards Pease goes into bankruptcy individually, and said Freeman & Co. ask to prove against his estate the said eighty per cent. of their debt against Pease, Sherman & Hall, which remains unpaid after exhausting the estate of Sherman & Hall. It is admitted that at the time Pease retired from the firm of Pease, Sherman & Hall, he took nothing of the assets, and sold out his interest in the firm at that time for one dollar."

Charles D. Kerr, for creditors.

S. R. Thayer, for assignee.

NELSON, District Judge. It seems to me the equities are with the creditors of the old firm of Pease, Sherman & Hall. The dissolution of the firm, the subsequent bankruptcy of Sherman & Hall, who continued the business after Pease retired, and finally the bankruptcy of Pease, do not change the liability of the respective members of the old firm of Pease, Sherman & Hall to their creditors. The right of these creditors to pursue Pease after they had received a portion of their indebtedness from the estate of Sherman & Hall must be admitted. There is no pretense that they released him from his liability, though the assumption of the debts of the old firm by Sherman & Hall placed them under an additional and personal liability for all the debts of Pease, Sherman & Hall, which could have been recovered of them by the creditors, had they been solvent. Now, how does this case stand? Sherman & Hall, who took all of the assets of the old firm, have been declared bankrupts, and their estate has paid the creditors of that firm twenty per cent. There is a dissolution of the old firm, and all of the assets are disposed of, and Pease, who retired, is individually bankrupt. We thus have a firm dissolved, no assets, and all the partners insolvent and in bankruptcy, without any voluntary or in invitum proceedings being instituted to declare them bankrupt as a firm. Under such circumstances, in my opinion, the individual creditors of Pease have no rights prior to the creditors of the old firm of which he was a member. Their claims have been duly proved, and they are entitled to share pro rata with the other creditors. The equity rule in regard to the rights of firm and individual creditors does not apply, for the reason that no proceedings have been instituted against the partnership under section 5121 of the Revised Statutes.

The creditors of the old firm can therefore share pro rata with the individual creditors of Pease to the extent of the unpaid portion of their claims.

[1] [Reprinted by permission.]

PEASE (DWIGHT v.). See Case No. 4,217.

Case No. 10,882.

PEASE v. McCLELLAND.

[2 Bond, 42.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1866.

BILLS AND NOTES—INNOCENT HOLDER — FAILURE OF CONSIDERATION—NOTE GIVEN FOR HORSE IN UNSOUND CONDITION.

1. Where a negotiable note is transferred by indorsement to a third person who is ignorant of any infirmity affecting its validity, and the indorsement is before the maturity of the note, the indorsee is an innocent holder, and may recover against the maker, although as to him there has been a failure of consideration.

2. An indorsee of a note given in payment for a horse, in the sale of which there was a fraudulent concealment of the animal's unsound condition, is not an innocent holder of the note, if the proof shows that he and the seller were the

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

owners of the horse, and that in the sale the seller acted as his agent.

3. If, at the time of the sale of a horse, the animal is subject to a disease known to the seller, which he conceals, and which was not discoverable by the buyer with ordinary vigilance, the sale is fraudulent.

[Cited in Wafer v. Harvey Co. Bank, 46 Kan. 610, 26 Pac. 1036.]

[This was an action at law by George B. Pease against J. M. McClelland.]

John C. Grannis and Corwine & Walker, for plaintiff.

George E. Pugh, for defendant.

OPINION OF THE COURT: The case submitted to the jury is an action on a promissory note for $500, dated November 9, 1859, payable one year after date to the order of Lyman W. Pease, and by him indorsed to the plaintiff. The defense is, that the note was given in payment for a horse purchased by the defendant of said Lyman W. Pease, in the sale of which a fraud was committed by him in the concealment of a disease of which the said Pease had knowledge, and which rendered the horse of no value. The defendant insists there was an entire failure of the consideration for which the note was given, and that he is not therefore liable to pay it. It is urged, however, by the counsel for the plaintiff, that he is the holder of the note by indorsement from L. W. Pease, without notice of any fraud in the sale of the horse, or any failure of consideration, and that the defendant can not avail himself of this defense in this action. Where a negotiable note is transferred by indorsement to a third person who is ignorant of any infirmity affecting its validity, and the indorsement is before the maturity of the note, the indorsee is an innocent holder, and may recover against the maker, although as to him there has been a failure of consideration. In this case it does not appear from the evidence whether the note was indorsed before or after its maturity. This, however, is an inquiry which does not seem to be material in this case. If the jury find from the evidence that Lyman W. Pease, who sold the horse to the defendant, was a part owner with the plaintiff, and acted for him as his agent in the sale of his interest, he may be viewed as legally a party to the sale, and can not claim the rights and immunities of an innocent holder of the note. The jury have heard the testimony of the defendant on this point. If credited by the jury, he proves that at the time of the sale the plaintiff owned an interest of one-half in the horse, and that his son was the owner of the other half, and acted as agent for his father in the sale of his interest.

The important and perhaps the only question in the case is, whether a fraud was perpetrated in the sale of the horse. If there was an intentional concealment of an essential infirmity in the horse, affecting his usefulness and value, the jury will probably have no difficulty in reaching the conclusion that both L. W. Pease, the son, and George P. Pease, the father and the plaintiff in this suit, both had knowledge of and were implicated in the fraud. And, as often decided by courts, fraud vitiates all transactions among men; and if it attaches to the sale of the horse in question, the note on which this suit is based is a nullity, and no recovery can be had on it. The court does not propose to recite in full the evidence given by the parties on the question of fraud. It will be obvious to the jury there are some material discrepancies in the facts stated by them and other witnesses. The defendant insists that the animal, at the time of the sale, was subject to a disease known to the seller, which he concealed, and which was not discoverable by the buyer with ordinary vigilance. If the jury find this to be the truth, there can be no question that a gross fraud was enacted. The conclusion of the jury will depend greatly on the credit they shall give to the testimony of the defendant, given by him as a witness. He states that at the sale he discovered no ailment or deficiency in the horse, except a crack in one hoof, which he did not deem important, and that Pease assured him there was nothing else that was wrong with him. He also swears he put the horse in a buggy, and after driving him about five miles he became exceedingly lame in one of his forelegs, and broke out into a profuse sweat; and that after keeping him in pasture for six months, and trying him a second time, he failed in the same way. He also says, under oath, that he considers the horse of no value. The witness Kirkpatrick states that some time before the sale to defendant he noticed the lameness of the horse on one occasion, and inquired of Pease, the father, what was its cause. To this Pease replied he did not know, but was fearful it was rheumatism, as his sire had died of that disease. He requested the witness to say nothing about it. On the other hand, the jury have the deposition of the plaintiff, in which he denies that the horse was subject to any disease at the time of the sale, and was in every respect entirely sound, except the crack in the hoof. The case is with the jury.

The jury returned a verdict for the defendant.

Case No. 10,883.

PEASE v. The NAPOLEON.

[1 Newb. 37.] [1]

District Court, D. Michigan. 1854.

ADMIRALTY — APPLICATION TO SET ASIDE SALE — LACHES.

1. Where a party, applying to a court of admiralty to set aside a sale, is guilty of inexcus-

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

able laches in making his application, the motion will not be granted.

2. As to whether there are circumstances or not, under which the court would set aside a regular sale in admiralty. Quere?

3. Where the party applying to set aside a sale, knew of the institution of the suit before sale, knew of the sale within two weeks after it took place, and yet delayed making his application for nearly six months, his laches is inexcusable.

The propeller Napoleon had been libeled in admiralty, and a decree made in favor of the libelant [George B. Pease], and for a sale of the vessel. A writ of venditioni exponas had been issued, and the vessel duly advertised and sold, the proceeds paid into court, and an order of distribution made. Subsequently, L. M. Dickens, claiming an interest in the vessel as mortgagee, appears in court, and moves that the sale of the said propeller be set aside.

Hovey K. Clark, for Dickens.

(1) All courts have power over their own process, to prevent its becoming the instrument of fraud. Act Cong. 1793, § 7 [1 Stat. 335]; Adm. Rule, 46; Poultney v. City of Lafayette, 12 Pet. [37 U. S.] 472, 475.

(2) Whenever there is fraud, actual or constructive, in the sale of property under the process of a court, it will interfere to right the wrong. 1 Story, Eq. Jur. §§ 187, 262; 1 Clarke, Ch. 101, 475; 13 Wend. 224; 3 Johns. Ch. 424; 2 Paige, 339; 1 H. W. Green, Ch. [2 N. J. Eq.] 214, 216; 26 Wend. 142.

(3) If any of these causes exist for setting aside a sale, the order will be granted, unless the party resisting shall show himself to be a bona fide purchaser without notice of prior equities. 2 White & T. Lead. Cas. Eq. pt. 1, p. 79; [Wormley v. Wormley] 8 Wheat. [21 U. S.] 421.

James V. Campbell, for respondent.

(1) No judicial sale will be set aside for mere inadequacy of price.

(2) No sale will be set aside after confirmation, unless under very extraordinary circumstances, and most of the authorities deny that it can be done at all.

(3) That an adult cannot have a sale set aside unless there has been a fraud committed by the purchaser or master, or some surprise created by the purchaser or master, whereby he was prevented from attending and bidding at the sale.

(4) That a sale will never be opened where third parties have obtained rights. Gardiner v. Schermerhorn, 1 Clarke, Ch. 101; Williamson v. Dale, 3 Johns. Ch. 290; Livingston v. Byrne, 11 Johns. 566; Requa v. Rea, 2 Paige, 339; Lansing v. McPherson, 3 Johns. Ch. 424; Tripp v. Cook, 26 Wend. 143; Aubrey v. Denny, 2 Moll. 508. If Mr. Dickens had made out a fraud of the worst kind, he could not obtain relief against any one, (1) because of lapse of time; (2) because of want of interest. Adm. Rule, 40; The Avery [Case No. 672]; The New England [Id. 10,151]; Hudson v. Questen, 7 Cranch [11 U. S.] 1; Broweler v. McArthur, 7 Wheat. [20 U. S.] 58; 4 Kent, Comm. 138, and cases cited; Tannahill v. Tuttle (Sup. Ct., 1854) 3 Mich. 104.

WILKINS, District Judge. The complainant filed his libel in May, 1853, for the recovery of a debt due by the propeller, and proceeded with the cause to a decree of condemnation and sale. After publication regularly made in the state paper pursuant to the order of the court, daily for twenty days, she was sold by the marshal on the 24th of August, 1853. An intervening libel by Grant & Barron as mortgagees, was presented and filed the 27th of June, 1853, claiming a sum exceeding $1,800. Another intervening libel was presented and filed October 1st, 1853, for the balance of the proceeds then in the registry, and a decree obtained favorable to the claimant on the 26th October, 1853. Report of sale was made by the marshal on the 5th of September preceding, with confirmation and the distribution of the proceeds in liquidation of the original claim and the costs which had been incurred. These incidents in the progress of the case, with the dates of their occurrence, are all important in the determination of the motion under consideration to set aside the sale. On the 10th of March, 1854, more than six months after the sale by the marshal, and nearly the same lapse of time after the decree of distribution, Lewis M. Dickens presents his affidavit, exhibiting the following facts, on which he seeks the intervention of the court. He shows that on the 15th of October, 1852, the propeller Napoleon was jointly owned by John R. Livingston and Sheldon McKnight, the latter being the owner of one-third: that the said Livingston being indebted to the said Dickens in the sum of $1,500, mortgaged at that time his interest in the vessel to the affiant, conditioned for the payment of the said debt on the 1st of November, 1853, which was duly recorded in the office of the collector of the district of Mackinaw: that McKnight, by an agreement in writing, in which he expressly assumed to pay the debt specified to the affiant, purchased from the said Livingston in June, 1853, his two-thirds interest in the vessel, and that the said Livingston, at the same time, executed to him a bill of sale for the same: that McKnight personally attended the marshal's sale, and procured a bid for $250 in the name of Henry N. Walker: that the notice of sale, published in the Free Press, was obscure, and not calculated to attract attention: that the affiant, although aware of the libel proceedings on the part of the complainant, yet had not the remotest expectation that a sale of the vessel would be permitted: that he had no notice of the sale until the 16th of September, 1853, twenty-two days subsequent thereto, and thirty days antecedent to the decree in

favor of Cole's intervening libel for a distributive share of the proceeds of the sale.

Without intimating an opinion whether or not, or under what circumstances, this court would set aside a regular sale in admiralty, on the application of a third party interested in the vessel, I am clearly of opinion that the facts disclosed in this affidavit, would not warrant such interference. Was there a case of fraudulent collusion between McKnight and the complainant as to the institution of the original proceedings and their prosecution to the sale of the vessel, made apparent, or any ground laid to suppose such? Could a reasonable inference be drawn, that Mr. Walker in the purchase of the Grant & Barron mortgage on the 15th of July, 1853, acted as the trustee of McKnight, and also bore that relation as a bidder at the sale; or that Sheldon and Douglass were not bona fide purchasers, this court might possibly interfere. Yet, all these facts should have been brought to the notice of the court, at an earlier period; and it was certainly in the power of the affiant, by appropriate application, to have obtained from the court a record recognition of the existence of his mortgage prior to the sale, and an order that the same should be subject thereto. And at the October term after the sale, he should have moved to set it aside. His laches in the matter is inexcusable. He knew of the institution of the suit in time to intervene before sale, so that his interest might be protected. He knew of the sale within two weeks after it occurred and before its confirmation. Yet he permitted Mr. Whiting, as he alleges, to lull him into security by the advice, on which he acted, "to let the matter stand as it then was, and see how it would come out." But, apart from all this, Walker's and Sheldon's affidavits are conclusive. The first, repudiating entirely any inference that he was the trustee of McKnight, and the second, showing the fairness of his purchase and the actual cash payment of more than $8,000. Moreover the affiant, by his own statement, is not remediless. He is able to prove the agreement of McKnight to pay this mortgage, and Mr. Walker swears as to his knowledge of McKnight's circumstances, and his present ability to respond to much more than that amount. Dickens lost his lien on the vessel by his own neglect.

Motion refused.

PEASE (PECK v.). See Case No. 10,894.
PEASLEE (ATKINS v.). See Case No. 603.
PEASLEE (AUSTIN v.). See Case No. 666.
PEASLEE (CLARK v.). See Case No. 2,831.
PEASLEE (FLORIO v.). See Case No. 4,890.
PEASLEE (FORMAN v.). See Case No. 4,941.
PEASLEE (FOSTER v.). See Case No. 4,979.
PEASLEE (GANT v.). See Case No. 5,212.

Case No. 10,884.

PEASLEE v. HABERSTRO.

[15 Blatchf. 472; [1] 8 Reporter, 486.]

Circuit Court, N. D. New York. Jan. 21, 1879.

WRITS—SUMMONS—SEAL OF COURT—CLERK'S SIGNATURE.

1. A summons, in a common law action, in this court, must be signed by the clerk, and be under the seal of the court.

[Cited in Dwight v. Merritt, 4 Fed. 615; U. S. v. Rose, 14 Fed. 682.]

2. Section 911 of the Revised Statutes of the United States, which prescribes that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof," is not inconsistent with, or repealed by, the subsequent provision, in section 914, that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held."

[Cited in Dwight v. Merritt, 4 Fed. 615; U. S. v. Rose, 14 Fed. 682; Pentlarge v. Kirby, 20 Fed. 899; Paine v. Warren, 33 Fed. 358; Wolf v. Cook, 40 Fed. 437; U. S. v. Turner, 50 Fed. 735.]

[This was an action at law by Charles A. Peaslee against Joseph L. Haberstro. Heard on motion to set aside the summons.]

William F. Cogswell, for plaintiff.

Tracy C. Becker, for defendant.

WALLACE, Circuit Judge. The motion to set aside the summons in this action must be granted, upon the ground that the summons was not signed by the clerk or under the seal of the court. Section 911 of the Revised Statutes of the United States prescribes, that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof." This provision is not inconsistent with, and, therefore, is not repealed by, the subsequent act of congress (Act June 1, 1872, § 5; 17 Stat. 197), now embodied in section 914 of the Revised Statutes, which enacts, that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held." Giving due effect to the later act, the practice, and forms and modes of proceeding, in the courts of the United States, in common law actions, is to conform to, and be regulated by, that of the state courts, when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the

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

statutes of the United States are silent, the practice of the state courts will prevail, but, when those statutes speak, they are controlling. If the summons in this case had been signed by the clerk, it could be amended as regards the seal. As it is, there is no summons in the nature of process known to this court. The summons is set aside.

PEASLEE (ROSS v.). See Case No. 12,077.

PEASLEE (WARREN v.). See Case No. 17,198.

PEASLEE (YZNAGA v.). See Case No. 18,196.

PEAY (SCHENCK v.). See Cases Nos. 12,450 and 12,451.

PECHOLIER (LATAPEE v.). See Case No. 8,101.

Case No. 10,885.

Ex parte PECK.

[3 Blatchf. 113.] [1]

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

WITNESS—EXAMINATION BEFORE COMMISSIONER—ATTACHMENT FOR CONTEMPT—GROUNDS.

1. On a motion for an attachment against a witness, for refusing to answer a question put to him on his examination de bene esse, before a United States commissioner, on a subpœna duces tecum, as a witness in a suit pending in another district, under section 30 of the act of September 24, 1789 (1 Stat. 88), it must be shown that the commissioner has jurisdiction in the matter, and that the witness resides more than 100 miles from the place of trial of the action, and that the matter in regard to which the witness refuses to testify is material and relevant to the issue in the case.

[Cited in U. S. v. Tilden, Case No. 16,522; Re Allis, 44 Fed. 217.]

[Cited in Wyatt v. People (Colo. Sup.) 28 Pac. 964.]

2. Where it appears that the subpœna for the attendance of the witness before the commissioner was issued without any preliminary evidence having been given before him showing the case to be one in which a de bene esse examination could be lawfully had, the want of such proof will be a vital objection to the issuing of an attachment.

3. Although, on the trial of a case, a witness may be compelled, by subpœna, to produce, under oath, papers within his control, which are proved to be material to the questions in issue, yet congress has provided a different mode for enabling the parties to a suit to obtain papers which are in the possession of a third person, and it is doubtful whether that object can be legally effected by the de bene esse examination of a witness out of court.

[Cited in U. S. v. Tilden, Case No. 16,522.]

This was a motion for an attachment against Elisha Peck, for an alleged contempt in refusing to answer questions put to him on his examination de bene esse, before a United States commissioner in New York, on a subpœna duces tecum, as a witness in a suit pending in the circuit court of the United States for the district of Connecticut.

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

William Fullerton, for the motion.

BETTS, District Judge. An objection is made to the granting of this motion, on the ground that it does not appear that the witness resides more than one hundred miles from the place of trial of the action. Act Sept. 24, 1789, § 30 (1 Stat. 88). The question involved has been before this court several times recently, and has received careful attention. The severe measure of an attachment is only to be allowed when it is clearly necessary. It must first be made clearly to appear that the commissioner has jurisdiction in the matter, and that the witness resides more than one hundred miles from the place of trial of the action. These facts must be established by the applicant for the attachment. It must also be shown that the witness was called to testify to facts material and relevant to the issue in the case. The court will interfere in this summary way only to aid the plain demands of justice, and will not attach a witness for neglecting to testify, without evidence that his testimony is pertinent to the case, and such as the party is entitled by law to demand. In this case, the object seems to be to obtain access to papers in the possession of the witness, to be used in the case. Although, on the trial of a case in court, a witness may be compelled, by subpœna, to produce, under oath, papers within his control, which are proved to be material to the questions in issue, yet congress has provided a different mode for enabling the parties to a suit to obtain papers which are in the possession of a third person, and it is doubtful whether that object can be legally effected by the de bene esse examination of a witness out of court.

It appears that the subpœna in this case was issued without any preliminary evidence having been given before the commissioner, showing this to be a case in which a de bene esse examination could be lawfully had. The want of such proof is a vital objection to the issuing of an attachment. The attendance of the witness cannot be exacted by the high compulsory writ of attachment, unless the magistrate has clear cognizance of the matter.

Motion denied.

Case No. 10,886.

In re PECK.

[9 Ben. 169; [1] 16 N. B. R. 43.]

District Court, D. Vermont. May 24, 1877.

PROOF OF DEBT—SECURED CLAIM—TRUSTEE PROCESS—LIEN.

Where a claim proved against a bankrupt's estate was contended against by the assignee, as a claim not to be considered secured by reason of an attachment by trustee process, served upon the bankrupt as trustee, more than four months before his petition was filed: *Held*, that such an

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

attachment being created a lien under the laws of Vermont, upon the funds in the hands of the trustee, although without notice to the principal debtor, is a lien under mesne process, and is saved by the bankrupt law [of 1867 (14 Stat. 517)].

By JOHN L. EDWARDS, Register:

[2] [To the Honorable District Court within and for the District of Vermont: The undersigned register begs leave to report that on the 8th day of October, A. D. 1875, Horatio S. Loomis of Montpelier, in the county of Washington, administrator of Roswell R. Keith, late of said Montpelier, deceased, took out his writ of attachment in due form of law against the said J. Q. A. Peck as principal debtor, and therein summoning Alonzo T. Keith of said Montpelier, as trustee of the said J. Q. A. Peck, and said writ was dated on said 8th day of October, and made returnable to the county court then next to be holden at Montpelier, in the county of Washington on the second Tuesday of March, A. D. 1876, and in said writ the plaintiff declared specially upon three promissory notes—one for six hundred and sixty-one dollars and fifty-four cents, dated March 8, 1864, on demand and interest annually; one for one thousand four hundred and thirty-four dollars and forty-two cents, dated May 31, 1873, on demand and interest annually; and one for four thousand three hundred and thirty-five dollars, dated March 17, 1864, on demand and interest annually. On which first-named note was indorsed March 14, 1870, twenty-five dollars, and said last described note was indorsed May 15, 1866, seventy-nine dollars and ninety-seven cents, also September 1, 1874, the sum of three thousand one hundred and fifty dollars and five cents. The plaintiff also declared in a count in general assumpsit, and demanding in damages nine thousand dollars. Said writ was duly signed by Luther Newcomb, clerk of said county court, and directed to any sheriff or constable in the state. And afterwards on said 8th day of October, the said plaintiff delivered said writ to D. W. Dudley, deputy sheriff within and for the county of Washington, to serve and return as the law requires. And said Dudley, as such deputy sheriff, on the 9th day of October, 1875, served the same writ on the said A. T. Keith, trustee, by delivering to him a true and attested copy of said writ with his, the said Dudley's return thereon, and on the second day of March, 1876, the said Dudley, as such deputy sheriff, made further service of said writ on the said J. Q. A. Peck, by attaching as his property one chip, and on the same day delivered to him, the said J. Q. A. Peck, a true and attested copy of the original writ with his, the said Dudley's return indorsed thereon. And for greater particularity a copy of said writ and officer's return thereon is hereto attached and made a part of this report and marked "A." Said writ was duly returned to the term of court when and where it was made returnable, and said cause was duly entered upon the docket of said court and continued from term to term of said court, and is now pending in said court. The trustee appeared in said court and filed his disclosure, a copy of which is hereto attached and marked "B." On the 29th day of June, A. D. 1876, the said J. Q. A. Peck filed his petition in bankruptcy, in the district court of the United States, and was thereafterwards on the same day duly adjudged a bankrupt, and said petition having been duly referred to a register, a first meeting of creditors was held on the 28th day of July, 1876, at which Joel Foster, Jr., was duly elected assignee of said bankrupt's estate, and said election was thereupon confirmed by the district court. On the 28th of July, 1876, the said Horatio S. Loomis, as administrator as aforesaid, proved said three promissory notes in said bankruptcy at the sum of eight thousand and fifty-nine dollars and fifty-three cents, and claiming in said proof that said three notes were secured by said trustee process, so served upon said trustee as aforesaid. The assignee claiming that said proof should be modified so as to stand as a proof without security, and having made application to the undersigned register to hear and determine that matter, due notice was given said assignee and the said H. S. Loomis that said register would hear such matter at the office of Fifield, Pilkin & Porter in Montpelier, in the county of Washington, on the 8th day of March, 1877, at 10 o'clock a. m. At which time and place the said H. S. Loomis, as administrator as aforesaid, appeared before me with his counsel, Charles H. Heath and Homer W. Heaton, and the said Joel Foster, Jr., also appeared by himself and his counsel, C. W. Porter, when a full hearing was had touching the modification of said proof.

[From the evidence submitted to him the register finds the foregoing facts and that there is a large sum due from the said Alonzo T. Keith to the said J. Q. A. Peck, which said Keith holds as trustee of said Peck, precisely how much did not appear from the evidence. The said H. S. Loomis, as administrator as aforesaid, claimed that said proof should stand as made, and that he hold a lien upon the funds in the hands of the said Alonzo T. Keith by virtue of the service of said trustee process upon him more than four months before the filing of said petition in bankruptcy. It was claimed on the part of the assignee that no lien attached to said funds in the said Alonzo T. Keith's hands for the reason that said trustee's writ was not served upon the said J. Q. A. Peck till within four months next before the filing of said petition in bankruptcy. I find that the said J. Q. A. Peck had no knowledge of said trustee process whatever, till said writ was served upon him as above stated on the second day of March, A. D. 1876, and for this reason it was also claimed that no lien was created.

[2] [From 16 N. B. R. 43.]

From the foregoing facts the register decides that said proof ought not to be modified and that it stand as a secured claim as proved.

[The register would recommend, if the court sustain the ruling of the register, that the parties be ordered to proceed in the county court, where said cause is pending, and ascertain by the judgment of that court the amount due from the said A. T. Keith to the said J. Q. A. Peck, embraced in said suit, provided this can be done so as not to cause an unreasonable delay in settling the estate of the bankrupt in the district court. So that if there is more due from the said A. T. Keith than sufficient to liquidate the plaintiff's claim in that suit, the balance may be available to the assignee in the bankrupt's estate.

[All which is respectfully submitted.] [2]

[By JOHN L. EDWARDS, Register:

[Since said report was recommitted to me, such proceedings have been had in the county court in Washington county, where said cause is pending, that the amount in the hands of the trustee has been fixed upon, and that amount it is agreed by counsel is four thousand three hundred and sixteen dollars and three cents, less trustee's costs, taxed and allowed at nine dollars and five cents, leaving in the hands of said trustee on which said lien is claimed four thousand three hundred and six dollars and ninety-eight cents. All which is respectfully submitted.]

Chas. H. Heath and H. W. Heaton, for creditor.

C. W. Porter, for assignee.

WHEELER, District Judge. With reference to the question certified in this cause by the register, it seems that the bankrupt act expressly saves liens by attachment on mesne process, made the prescribed length of time before proceedings in bankruptcy, from being dissolved by them. The attachment of a debt by trustee process in this state creates a lien that is so saved. Stoddard v. Locke, 43 Vt. 574. That has not been questioned in argument here, but it is insisted that to perfect the lien so that the time would begin to run, there should be service upon or at least actual notice to the principal debtor. But this is governed by a positive provision of the law that applies exactly to the cases described in it and to no others, and leaves no room for construction. The state law under which the lien is created does not require service on nor notice to the defendant in the process, to have the lien attach. Service on the trustee is sufficient for that, if the subsequent proceedings are followed out to judgment. After service on the trustee the lien on the funds in his hands exists and is valid, unless there is some lapse in the proceedings that discharges him from them. This lien is a lien by attachment on mesne process from the beginning and falls within the description of those saved by the bankrupt act; and the holder of it appears to be entitled to have it saved under the act. Such an attachment is of itself a sort of constructive notice to the defendant, the same as an attachment of chattels is. For by looking after his debt he would find that attached in the hand of his debtor, as by looking after his chattels he would find them attached in the custody of the officer.

For these reasons this court is of the opinion that the decision of the register is correct.

[2] [From 16 N. B. R. 43.]

Case No. 10,887.

In re PECK.

[3 N. B. R. 757 (Quarto, 186).] [1]

District Court, S. D. New York. April 26, 1870.

BANKRUPTCY — CERTIFICATION OF QUESTIONS NOT MATERIAL TO POINTS IN ISSUE.

Where an action had been commenced in the superior court of Connecticut against a firm doing business in New York, attachment laid, judgment recovered, and execution issued, without the consent or privity of said firm, in part for money loaned, and the balance upon promissory notes for money loaned, a portion of which (about fifteen thousand dollars) fell due subsequent to the commencement of said action, Q. 1. Is it lawful for the plaintiff to continue his action in said superior court for the purpose of condemning the property attached, and for perfecting his lien thereon—or is it the duty of plaintiff to discontinue said action? 2. Is it the duty of the plaintiff to release said lands from the lien of said attachment? 3. Ought plaintiff to amend his deposition for proof of debt, and, if so, in what manner? 4. Ought the real estate attached to be sold subject to the lien thereon, and, if so, in what manner? *Held*, the questions are not certified by the register as being upon any point or matter which has arisen in the course of proceedings before him, and are not within the first subdivision of section 6 [of the act of 1867 (14 Stat. 520)].

By ISAAC DAYTON, Register: I, Isaac Dayton, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to said proceedings, and were, by Charles N. Judson, Esq., attorney and counsel for John J. Cisco, one of the creditors of said bankrupt, stated for the opinion of the court thereon. The facts, as submitted to me, are as follows: On the 10th day of June, 1868, John J. Cisco, of the city of New York, commenced an action in the superior court of the state of Connecticut against Bronson Peck, then doing business in said city of New York, under the firm name of Bronson Peck & Co.; and on the 11th day of June, 1868, attached certain lands situated at Greenwich, in the state of Connecticut, valued at less than fifteen thousand dollars, as the property of said Bronson Peck. That said Bronson Peck had, for ten years prior to the

[1] [Reprinted by permission.]

commencement of said action, carried on business in said city of New York, either in his own name, or under the firm name of Bronson Peck & Co.; and that at the time of the commencement of said action, said John J. Cisco was aware that said Bronson Peck and said Bronson Peck & Co. were in an embarrassed condition in their business matters. That in October, 1868, said John J. Cisco recovered judgment in said action by default against said Bronson Peck for the sum of forty-three thousand eight hundred and ninety-eight dollars and four cents, or thereabouts; and thereupon, to wit, on the 15th day of October, 1868, the aforesaid lands were set off, in accordance with the laws of the state of Connecticut, on execution issued upon said judgment against said Bronson Peck, at a valuation of seven thousand two hundred and twenty-five dollars. The sheriff's fees on said execution being the sum of one hundred and fifty-five dollars and seventy-two cents. That said action was commenced, said attachment was laid, said judgment was recovered, and said set-off was made, without the consent or privity of said Bronson Peck, or said Bronson Peck & Co., and without any collusion or connivance on his or their part. That the debt for which said judgment was recovered, and the lands set off as aforesaid, was in part for money loaned said Bronson Peck, or said Bronson Peck & Co., and the balance upon promissory notes given for money loaned said Bronson Peck, or said Bronson Peck & Co., a portion of which latter, to wit, of the sum of fifteen thousand dollars, or thereabouts, fell due subsequent to the commencement of said action, but prior to October 1st, 1868. That at the commencement of the December term, in the year 1868, of said superior court of Connecticut, a motion was made in behalf of said Bronson Peck to open said judgment, and to permit said Peck to defend said action, and afterwards, to wit, on or about the 1st day of March, 1869, said judgment was opened, vacated, and set aside upon condition of trial upon the merits, and no plea in abatement to be filed or received. And that said action is now upon the calendar of said superior court, waiting to be tried, but the trial thereof is delayed by injunctions from said superior court, obtained by said Bronson Peck, or by his assignee in bankruptcy, John Todd; and that the attachment on said land is still undischarged of record. That on the 31st day of December, 1868, and more than six months after the commencement of the action as before set forth, said Bronson Peck filed his petition in this court to be declared a bankrupt, and thereafter, on said petition, was duly declared a bankrupt, and on the 2d day of March, 1869, John Todd was appointed assignee of the effects and estate of said bankrupt; and on the 13th day of March, 1869, said assignment was duly recorded in the record office of the town of Greenwich, state of Connecticut aforesaid. That on or about the 16th day of February, 1869, and prior to the decision of the motion to open said judgment, as hereinbefore set forth, said John J. Cisco made and filed with the register in charge of said bankruptcy, his deposition for proof of debt without security, alleging therein, "That Bronson Peck, the said bankrupt, is justly and truly indebted to him in the sum of thirty-six thousand eight hundred and twenty-eight dollars and seventy-six cents, and interest from October 15, 1868, being the amount unpaid of a judgment obtained in the superior court of the state of Connecticut, by him against the said bankrupt, said judgment so recovered being for the sum of forty-four thousand and fifty-three dollars and seventy-six cents, recovered October 15, 1868, of which the sum of seven thousand two hundred and twenty-five dollars was paid upon an execution issued upon said judgment." That said amount so alleged to be due included the amount of the sheriff's fees on execution in the set-off as aforesaid; and that said proof of debt was made in good faith, and in the belief that the recovery of the judgment and the set-off of the lands aforesaid were valid and legal proceedings under the laws of the state of Connecticut. That on the 4th day of January, 1870, said Bronson Peck received from the district court of the Southern district of New York a discharge from all his debts. That said John J. Cisco has offered to have the value of said real estate ascertained by agreement with said assignee, or to have the same sold subject to his lien, if any he may have thereon, and to have his deposition for proof of debt amended in accordance with the facts hereinbefore set forth, but said assignee has refused to assent thereto. That in accordance with the first division of the 6th section of the act entitled, "An act to establish a uniform system of bankruptcy throughout the United States," the said John J. Cisco asks the opinion of the court as to his duty in the premises.

The question of law submitted for the opinion of the court is as follows: "First. Is it lawful for said John J. Cisco to continue his said action in said superior court for the purpose of condemning the property attached as aforesaid, and for the purpose of perfecting his lien thereon, or is it the duty of said Cisco to discontinue said action? Second. Is it the duty of said John J. Cisco to release said lands from the lien of said attachment? Third. Ought the said John J. Cisco to amend his deposition for proof of debt, and, if so, in what manner? Fourth. Ought the real estate attached as aforesaid to be sold subject to the lien of said John J. Cisco thereon, and, if so, in what manner? John J. Cisco, by Charles N. Judson, his Attorney, 167 Broadway, N. Y."

BLATCHFORD, District Judge. The within questions are not upon any point or mat-

ter which has arisen in the course of any proceedings before the register, and are not so certified by the register. They are, therefore, not within the first subdivision of section 6.

Case No. 10,888.

PECK'S TRIAL.

[This was an impeachment proceeding, and was tried before the senate of the United States.]

PECK (ARNOLD v.). See Case No. 561a.

Case No. 10,889.

PECK et al. v. BURNS et al.

[5 Ben. 537.] [1]

District Court, S. D. New York. Feb., 1872.

COLLISION AT SEA—STEAMER AND BARK — LIGHTS —CHANGE OF COURSE OF BARK.

1. The bark C. was sunk in a collision with the steamer K., at sea, about 240 miles from New York, the collision occurring about 7:30 p. m., on September 1st, 1864. The bark was sailing nearly west, with the wind northeast, at a speed of about seven knots an hour. The steamer's course was nearly east. The bark had no lights set, but she was seen on the port bow of the steamer, whose helm was at once ported. Her helm was then put hard aport, and her engine was stopped and backed, because the officer in charge saw that the bark had starboarded. The bark did starboard after she saw the steamer, and the excuse given for it was, that she saw the steamer's white and green lights about a point on her starboard bow, and did not see the steamer making any change. *Held*, that, as the officer in charge of the steamer saw the bark on his port bow, coming on a parallel course, it was not wrong for him to port.

2. On the evidence, the bark starboarded after the steamer had ported. It was a fault in her to so change her course.

3. Having changed her course, it was not for her to criticise closely the movements of the steamer in extremis, and she must make out satisfactorily that it was wrong for the steamer not to steady or starboard, instead of continuing to port.

4. She had failed to establish this, and must be held in fault for the collision.

[This was a libel by William M. Peck and others against John Burns and others to recover damages for the loss of libellants' vessel, caused by a collision with respondents' steamship.]

W. Tracy, for libellants.
D. D. Lord, for respondents.

BLATCHFORD, District Judge. On the 1st of September, 1864, at about half past 7 o'clock, p. m., the bark Czarina, while on a voyage from Palermo, in Sicily, to New York, and the steamship Kedar, while on a voyage from New York to Liverpool, came into collision with each other, about 240 miles from New York, the steamer, with her stem, striking the starboard side of the bark. The bark soon sank, with her cargo, her crew being saved. The libellants, as owners of the bark, bring this suit to recover for the loss of the vessel and of her charter money for the voyage.

The libel alleges, that the bark was sailing, on a northeasterly wind, on a course nearly due west, and at the rate of about seven knots an hour; that the steamer was on a course nearly east; and that the collision was occasioned by the improper and unskilful and negligent management of those navigating the steamer, in not avoiding the bark.

The defence, on the merits, on the part of the steamer, is, that the bark was discovered a very short distance ahead of the port bow of the steamer; that it was after dark; that the steamer had her usual lights set, namely, a white light at her masthead, a green light on her starboard side, and a red light on her port side, all of which were burning brightly; that the bark took no measures to warn the Kedar of her proximity; that the bark had no lights set, and no lookout; that she was not discovered until she was just ahead of the steamer's port bow; that, as soon as she became visible from the steamer's forecastle, she was reported by one of the lookouts, and the steamer's helm was immediately put hard aport, and her engines were reversed; that the steamer had two men stationed as lookouts on her forecastle, and officers and men stationed on deck and in the engine room, in such manner as to change her course, or stop her almost instantly, on the approach of danger; and that the collision happened through the carelessness and mismanagement of those in charge of the bark, and especially by reason of their omission to set the lights usual in sailing vessels, and of their omission to show a light to warn the steamer of the approach of the bark, after the steamer's lights became visible, and of their omission to set a proper lookout, and of their putting the helm of the bark astarboard shortly before the collision.

It is very much to be regretted that the testimony of the witnesses in this case, on both sides, was not taken at an earlier day after the collision, when their recollections were more to be relied on. The witnesses from both vessels have been examined by depositions in writing. Although the collision happened on the 1st of September, 1864, the libel was not filed until the 7th of February, 1866. The witnesses from the steamer comprise eight persons, all of whom were examined in May, 1868. The witnesses from the bark comprise three persons, one of whom (Morse) was examined in September, 1869, the second (Peavey) in February, 1870, and the third (Cotter) in July, 1870.

Goffin, the chief officer of the steamer, was the officer of the deck, and on the

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

bridge. The other persons on her deck, all of whom have been examined, were two men on the lookout at the bow, two men at the wheel, and the third officer at the con compass. Goffin says, that the first he heard was, one of the men on the lookout reported something white, and then, immediately, a vessel on the port bow, or nearly ahead; that he answered "all right," and then, in the same breath, ordered "port," and immediately afterwards, "hard aport," and then immediately cried out down the engine room, which was near at hand to him on the bridge, "stop her," and "reverse, full speed;" that these orders were immediately attended to; and that, immediately after that, the collision took place. As soon as the bark was reported, Goffin looked at her through his glass, she then being about a point on his port bow. He made her out to be a vessel. He then gave the order to port. He then observed her again, and saw that she was coming with a free wind, with her yards almost square, and in a direction almost parallel to the course of the steamer. He afterwards noticed that the bark had starboarded her helm and changed her direction, and he then, and because of that, gave the order to hard aport. He gives, as his reason for porting, and not starboarding, that the bark was on his port bow and coming in an almost parallel direction. When, after porting, he saw that the bark had starboarded, he says he did not then steady or starboard, because the vessels were too close, and he thought he saw less danger in porting hard aport. He says there would have been no collision if the bark had not starboarded, because the porting of the steamer, the bark keeping her course, would have carried the steamer clear of the bark to the southward. No light from the bark was visible to the steamer. The weather to the eastward, to the view of the steamer, was dark, cloudy and hazy. The steamer had lost a great deal of her speed before she struck the bark. The bark was struck abaft of her fore rigging, the steamer still swinging on her port helm, and the blow angling forward on the bark. The steamer had fallen off five or six points by her porting, and the bark had fallen off several points by her starboarding.

It is not disputed that the bark did starboard after discovering the steamer. On the proofs, the bark exhibited no light before she starboarded. Her excuse for starboarding is, that she saw the steamer's lights about a point on her starboard bow, and saw the white and green lights, and starboarded because she did not see the steamer making any change. Having done this, she charges it as a fault on the steamer, that the steamer did not starboard instead of porting. Undoubtedly, if the steamer had, in the first instance, starboarded instead of porting, and the bark had either kept her course or starboarded, there would have been no collision. But, seeing the bark, as he did, on his port bow, and coming on a parallel course, which was, in fact, her course before she starboarded, it was not wrong in the officer of the Kedar to port. On the whole evidence, it must be held that the bark starboarded after the steamer had ported. It was wrong in the bark to starboard. It was her duty to keep her course. The only fault which the libel alleges against the steamer is, that she did not avoid the bark. She made the proper manœuvre seasonably to avoid her. The lookouts on the steamer were proper and vigilant. The effort made to avoid the bark was thwarted directly and palpably by the starboarding of the bark. The bark having so starboarded wrongfully after the steamer had ported, it is not for the bark to criticise closely the movements of the steamer in extremis. The peril was brought, not by the porting of the steamer, but by the starboarding of the bark. Having brought herself into that peril, the bark must make out very satisfactorily that it was wrong in the steamer not to steady or starboard, instead of continuing to port. This the bark has, in my judgment, failed to do. The steamer stopped and reversed as quickly as possible after she discovered that the bark had starboarded, and she discovered that as soon as it took place. When the steamer first ported there was nothing to indicate a necessity for slackening her speed, or for stopping or reversing. The bark was on her port bow, and coming on a parallel course.

I can discover no fault in the steamer, and, therefore, dismiss the libel, with costs.

PECK (FLETCHER v.). See Case No. 4,865.

PECK (JOHNSON v.). See Case No. 7,404.

Case No. 10,890.

PECK v. LAUGHLIN.

[8 Wkly. Notes Cas. 188; 14 Phila. 531; 37 Leg. Int. 18; 21 Alb. Law J. 94.]

District Court, E. D. Pennsylvania. Dec. 29, 1879.

ADMIRALTY—JURISDICTION—BREACH OF CONTRACT TO PURCHASE CARGO.

[Admiralty will not take cognizance of a libel for a breach of a contract to purchase a cargo for a vessel with her funds, although such contract is contained in a charter party stipulating for the carriage of the cargo.]

[Cited in The New Hampshire, 21 Fed. 927.]

Libel, upon a charter party, by Peck and others against Laughlin, the master of the schooner Clytie.

Upon September 8, 1877, the schooner was discharging cargo at Marseilles, France. Fitz Bros., of Boston, ship brokers, being desirous of effecting a charter for a cargo of salt, but not being the agents of the vessel, telegraphed the master as follows:

"Can charter Hyers Boston eight. Fitz."

To this telegram the master telegraphed answer as follows:

"Fix Boston Hyers eight. Laughlin."

Upon September 10th Fitz made and delivered to Peck & Sons, the libellants, a charter party on behalf of the vessel, stipulating for the carriage of a cargo of salt from Hyers to Boston, and stipulating, moreover, that the salt should be purchased with the vessel's funds, and thereupon telegraphed the master again as follows:

"Purchase, ship's funds, cargo Hyers best white salt, same as shipped here $\frac{\text{this}}{\text{last}}$ year. Draw J. Peck & Sons, with bill of lading and invoice. Fitz."

The master had no knowledge of the charter party being made, except from the foregoing telegrams. He proceeded to Hyères, endeavored to purchase a cargo of salt upon the credit of a draft on libellants, and, supposing he had succeeded, wrote, upon September 13th, to Fitz Bros. as follows:

"I have bought the salt on account of Peck & Sons, and will draw on them as soon as the salt is aboard and bill of lading signed, and will forward invoice and B. L., that Peck may insure if he wants to. Shall commence to load the 20th inst. Laughlin."

This letter was duly received and shown to libellants. Soon after its date, the master, finding that he could not purchase the salt upon the credit of the draft, and having no ship's fund at his disposal, sailed without cargo, and so notified Fitz Bros. This suit was brought by Peck & Sons, who alleged damage by reason of their having acted on the letter and telegrams. There was a dispute as to Fitz's agency, but the facts were found for the respondent.

W. W. Wiltbank and J. Warren Coulston, for libellants.

Henry R. Edmunds, for respondent, denied the jurisdiction.

BUTLER, District Judge. But if the facts were as stated by the libellants no recovery, in my judgment, could be had here. The complaint is substantially for the breach of a contract [by the master of a vessel] to purchase salt. Such a contract is not maritime, and this court has not, therefore, jurisdiction over any complaint growing out of it. That it is joined to a contract of affreightment, and found in a charter party, can make no difference, I think. Incidental matters connected with a maritime contract, over which a court of admiralty would otherwise have no cognizance, may thus be drawn within its jurisdiction. But this contract to purchase salt was not an incident of the contract to carry it. Its performance was preliminary to the latter taking effect. The plaintiff had no cargo to which the contract to carry could be applied, and both parties knew this. It was to take effect when the defendant made the purchase stipulated for, and could not before. The books show no instance of the exercise of admiralty jurisdiction, I believe, over failure to keep such a contract; but, as I think, several cases to the contrary. Alberti v. The Virginia [Case No. 141]; Waterbury v. Myrick [Id. 17,253]; The Tribune [Id. 14,171]; L'Arina v. Manwaring [Id. 8,089]; Willard v. Dorr [Id. 17,680]; Torices v. The Winged Racer,—Oct., 1858,—[Id. 14,102].

The libel must, therefore, be dismissed. Decree accordingly.

Case No. 10,891.

PECK v. MIAMI COUNTY et al.

[4 Dill. 370.] [1]

Circuit Court, D. Kansas. 1876.

INDIAN TREATY—EXEMPTION OF LAND FROM TAXATION—DURATION OF EXEMPTION.

Lands patented to the Indian reservees, under the treaty with the Miami Indians, June 5, 1854 (10 Stat. 1092), are liable to be taxed by the state authority after the title has passed from the Indian reservee to a citizen.

[This was a bill in equity by Clarence I. Peck, against the board of county commissioners of Miami county, Charles Giller, clerk of said board, and others.]

On demurrer to the bill of complaint. The plaintiff seeks to enjoin the collection of certain taxes and for relief against tax sales already made. The bill and demurrer present the single question: Are the lands described in the bill, and which are the property of the plaintiff, who is a citizen of the United States, not an Indian, and which lands he acquired by regular and legal conveyances from Miami Indians, to whom the same were granted by treaty June 5, 1854, under such terms as not to be taxable while held by the Indians, taxable by the state of Kansas in the hands of the complainant? The treaty of June 5, 1854 (10 Stat. 1092), contains the following: "All selections herein provided for, shall, as far as practicable, be made in conformity with the legal subdivisions of the United States lands, and immediately reported to the agent of the tribe, with apt descriptions of the same, and the president may cause patents to issue to single persons or heads of families for the lands selected by or for them, subject to such restrictions respecting leases and alienation as the president or congress of the United States may impose; and the land so patented shall not be liable to levy, sale, execution, or forfeiture: Provided, that the legislature of a state within which the ceded country may be hereafter embraced, may, with the assent of congress, remove these restrictions." The bill is founded upon the proposition that this a condition or exemption annexed to the land, and runs with it, and passed to the complainant (a citizen of Illinois) by virtue of the conveyance of the land to him.

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

B. F. Simpson, for plaintiff.

James D. Snoddy and W. R. Wagstaff, for defendants.

DILLON, Circuit Judge. The only question in the case is whether lands patented to the reservees under the treaty with the Miami Indians of June 5, 1854 (10 Stat. 1092), are exempted from taxation under the authority of the state of Kansas, after the title has passed from the Indian patentee, and become vested in a citizen. The plaintiff is the owner of certain land by title derived from an Indian patentee under the treaty. The treaty contained a provision that the lands patented to the reservees "shall not be subject to levy, sale, execution, or forfeiture." It is settled that while these lands remained the property of the Indian reservees, they are exempt, by the true construction of the above clause in the treaty, from taxation by the state. Kansas Indians, 5 Wall. [72 U. S.] 760. Does this exemption continue after the Indian has aliened the lands to a citizen? This is the only question. It has been argued by counsel with marked ability, but I do not consider it necessary to discuss it in extenso. It has been thoroughly considered in the supreme court of Kansas (Commissioners of Miami Co. v. Brackenridge, 12 Kan. 114), and decided against the position on which the plaintiff's bill rests. True, the decision of that court on such a question has no authoritative weight here, but the reasons for its judgment are so well stated, and are so satisfactory to my mind, that I content myself with referring to the opinion of Brewer, J., as expressing the views which I have formed upon considering the arguments presented by the respective counsel in the case before me. The demurrer is sustained, and the bill dismissed.

Decree accordingly.

NOTE. See Mackey v. Coxe, 18 How. [59 U. S.] 100; Mungosah v. Steinbrook [Case No. 9,924]; Gray v. Coffman [Id. 5,714]; U. S. v. Payne [Id. 16,014].

Case No. 10,892.

PECK et ux. v. NEIL.

[3 McLean, 22.] [1]

Circuit Court, D. Ohio. July Term, 1842.

CARRIERS OF PASSENGERS—STAGE PROPRIETORS—SKILL AND PRUDENCE OF DRIVERS—CHARACTER OF EQUIPMENT—COLLISION WITH ANOTHER STAGE—EXEMPLARY DAMAGES.

1. A stage proprietor is responsible for the skill and prudence of his drivers.

[Cited in Farish v. Reigle, 11 Grat. 705.]

2. He is also bound to procure good stages, harness, and well broke horses. If, for want of such preparation, an injury is done to a passenger in the stage, the proprietor is responsible. Or if the drivers do not act with skill and prudence in driving the stage.

[Cited in brief in Andrews v. Capitol N. O. & S. W. R. Co., 29 D. C. 139.]

3. Although the accident may have occurred through the recklessness of the driver of another stage, who may be liable, and also his employers—yet if the driver of the stage to which the accident occurred be in any respect wanting, in the exercise of skill and prudence, his principals are liable.

[Cited in brief in Lake v. Milliken, 62 Me. 241. Cited in Ricker v. Freeman, 50 N. H. 433; Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 633; Board of Com'rs of Sullivan Co. v. Sisson, 2 Ind. App. 319, 28 N. E. 374.]

4. Damages will be assessed for the injury received.

5. Where there has been great recklessness by the driver, exemplary damages should be given.

[Cited in Brown v. Evans, 17 Fed. 914.]

[This was an action at law by William L. Peck and wife against Neil, to recover damages for injury sustained by Mrs. Peck.]

Goddard & Vinton, for plaintiffs.

Ewing, Swan & Stanbury, for defendant.

OPINION OF THE COURT. This action is brought for an injury done the plaintiff's wife, by the overturning of the stage through the carelessness of the driver, the defendant being the proprietor. The plea of not guilty was filed by the defendant. In the summer of 1840, there were two stage lines on the route between Marietta and Zanesville, Ohio. One carried the mail. Neil's line was run in opposition to the mail line. On the 2d of August, Peck and wife took Neil's line of stages at Zanesville, for Marietta. The stages left Zanesville at about the same hour. The accommodation sometimes passed the mail stage whilst retained at a postoffice. The horses in both lines were driven rapidly, often at their full speed, against the remonstrances of the passengers in Neil's line. When within about six miles of Marietta, the mail stage overtook the other about a quarter of a mile before they reached a hill; the driver of the mail requested the other driver to give half the road and he would pass him. The driver answered, that he was not so anxious for a race as that. The mail driver then turned his horses to the right, whipped them, hallooed, and this started the horses in the other stage, which had been moving rather slowly. The horses in the accommodation stage did not go fast, but jumped; the driver struck the off-wheel horse, in order, as he alleged, to bring him nearer the tongue, and give half the road to the other stage. The driver says he pressed the lever, and Donaldson, who sat with him, raised the reins, and, with the driver, pulled them. The other coach inclined to the left, until the wheel of the mail coach locked in the fore-wheel of the other stage, broke its double-tree, and threw the stage and horses over a precipice, which severely injured Mrs.

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

Peck. Several physicians state that her health, by this injury, has been permanently impaired, her arm disabled, and several of them say that the injury has made her life uncomfortable, and that it will, in all probability, shorten her life. There was evidence conducing to show a concerted arrangement between the two drivers in regard to racing, and it was fully proved that the horses in both stages were driven over the greater part of the route in a most rapid and reckless manner, against the remonstrance of the plaintiff, Peck. One of the passengers, occasionally, rather encouraged the driver.

On the evidence, THE COURT charged the jury, that to exonerate the defendant from liability, he must show that every precaution was used by his agent to prevent the injury which occurred; that every omission of duty by the driver, which in any degree increased the risk of the passengers, subjected the defendant to damages for an injury done them; that although the upsetting of the stage may have been caused immediately by the driver of the mail stage, for which he and his employers were liable to damages, still if Neil's driver, under the circumstances, did not use all the means which a skilful and prudent driver could and would have used to prevent the injury done, the defendant is liable. Every person who establishes a line of stages for the conveyance of passengers, and who holds out inducements to persons to travel in his stages, for which a compensation is charged, is bound to have skilful and prudent drivers, good coaches and harness, and well broke horses; and the utmost skill and prudence of the driver, under the circumstances, must be exercised to avoid accidents. This, and nothing short of this, will exonerate the defendant from liability to damages in this case. If the driver of the defendant's stage did not say or do any thing to provoke a reckless competition with the driver of the mail stage, and if, on the contrary, he evidently sought to avoid such competition, and if, when the driver of the mail stage attempted to pass him, he did all that could be reasonably expected from a skilful and prudent driver to prevent the upsetting of his stage, the defendant is not liable, however serious the injury may have been to the wife of the plaintiff. The culpability and utter recklessness of the driver of the mail stage are clear, and whatever may be the result of this case, he and his principals should be made to feel that they cannot, with impunity, sport with the lives of passengers in their own or an opposition line.

The damages are to be measured mainly by the injury done. Where a case is extremely aggravated by the recklessness of the driver, a jury will feel authorised to assess exemplary damages, to prevent such conduct in future. But, where these circumstances do not exist, and the driver, though somewhat in fault, has generally conducted himself well, the jury will feel inclined to give no more damages than may repair the injury received. These are to be ascertained by the expenses incurred, the loss of time and the suffering which has been endured. The want of skill of the driver may be shown, at the time of the accident, or at any prior time; but his good or bad conduct can only be looked at, at the time the accident occurred, or as connected with the accident. The enterprise and great efficiency of the defendant, as a stage proprietor, is known and acknowledged. His exertions have done much to facilitate travelling throughout Ohio and other states. But, still, this does not excuse him, where one of his agents has been the means of inflicting an injury upon a passenger in the stage.

The jury returned a verdict for the plaintiffs, and assessed their damages at five thousand dollars. Judgment was entered on the verdict.

[For an action brought by William L. Peck to recover damages for injury personally sustained in the same accident, see Case No. 10,893.]

Case No. 10,893.

PECK v. NEIL.

[3 McLean, 26.] [1]

Circuit Court, D. Ohio. July, 1842.

CARRIERS OF PASSENGERS—CHARACTER OF INJURIES—DAMAGES.

This action was brought by the plaintiff [William L. Peck] for an injury done him by the upsetting of the stage, at the time described in the above action of Peck v. Neil [Case No. 10,892]. The evidence was substantially the same, as to the conduct of the driver, and the upsetting of the stage. The case was submitted to the same jury, and the extent of the injury was the only difference between this and the other case. There was much difference of opinion among the witnesses as to the extent of the injury; some of them stating that the injury received by the plaintiff, on the head, had materially affected his mind. Others did not agree with this, and considered the injury as not so serious.

THE COURT instructed the jury, as in the other case. They found for the plaintiff, and assessed his damages at twenty-five hundred dollars. Judgment was entered on the verdict.

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

Case No. 10,894.

PECK v. PEASE.

[5 McLean, 486.] [1]

Circuit Court, D. Michigan. June Term, 1853.[2]

TERRITORIAL GOVERNMENT OF MICHIGAN—POWER TO ADOPT BUT NOT TO ENACT LAWS—CHANGE MADE IN ACT UPON ADOPTION—CORRECTION.

1. The governor and judges in the first stages of the territorial government of Michigan had power to adopt the laws of the respective states, but had no legislative authority.

2. A law adopted from Vermont in 1820, was adopted in the statute of limitations, in which the word "or" was used instead of the word "and," giving the benefit of the statute to a person beyond the limits of the state, whereas the Vermont statute required the person not only to be beyond the limits of the state, but of the United States. In 1825 a commission to revise the laws, which was authorized to alter, or report new bills, &c.—the report included the law in question, with others, and in 1827 all the laws in force were published by authority—there being no alteration in this act. There was another revision of the laws in 1833, which was again published by authority, making no alteration in this act. *Held*, that under the circumstances the court could not look back to the law of Vermont to correct any error on the first adoption of the law.

[This was an action at law by John Peck, survivor, etc., against William C. Pease.]

Mr. Barstow, for plaintiff.

Mr. Emmons, for defendant.

OPINION OF THE COURT. This is an action of debt, brought on a judgment rendered in the territorial court of Michigan in 1836. There are counts in the declaration on a promissory note. Among other defences, the defendant pleaded the statute of limitations. The plaintiff replied that he was beyond seas, to wit: in the state of New York, to which replication the defendant demurred. The 10th section of the act of limitation of 1820, which act was adopted by the governor and judges of the territory, provides, "that this act shall not extend to bar any infant, feme covert, person imprisoned, or beyond seas, or without the United States," &c., from bringing either of the actions before mentioned within the term before set and limited for bringing such actions, calculating from the time such impediment shall be removed. The limitation of all actions on judgments was eight years next after the rendition of such judgments; on promissory notes attested, eight years; if not attested, six years. The above section was printed in the act of 1820, and in all the revised laws up to 1838, and no doubt has arisen as to its construction. The words "or beyond seas," have been uniformly construed to mean, without the state, by the courts of Michigan and of the United States, sitting within the territory of the state of Michigan. But it is alleged that within a few years, on the examination of the records in the office of the secretary of state, it is found that the words "beyond seas" were erased in the original bill, as appears from a note on the margin of the record, though they are copied in the body of the record. And the secretary of state certifies, that the marginal note appears to have been made in the same handwriting, with the same ink and pen as the body of the record. Omitting the words erased, the saving clause would read, "or without the United States," which would exclude the plaintiff from the benefit of the statute, as he avers himself to be a citizen of New York.

Under the first grade of the territorial government of Michigan, the governor and judges were authorized by the ordinance of 1787, to "adopt" laws of the original states, for the government of the territory, and the law in question seems to have been adopted from the state of Vermont. They had no legislative power, consequently they had no power to modify or alter the laws they adopted. The words used in the Vermont law are, "or beyond seas, without the United States." To be within the exception, it is admitted, an individual must not only be beyond seas, but without the United States. The words "beyond seas" in the Vermont statute must have been used for some purpose, and they should not have been erased from the adopted statute. The production of the original bill as adopted by the governor and judges, would be more satisfactory than the record of it. I am not aware that there was any law requiring this record, or making a certified copy of it, evidence. But be this as it may, conceding that this bill when reported was as certified from the record, it becomes a serious question whether that can now be held as the law. There can be no doubt, that a case may arise in which the original bill as enacted or adopted may be referred to, to correct an error in the printed act. And in such a case the court are to judge by inspection, and not a jury. It is true that an issue of nul tiel record is sometimes, in New York, and perhaps in other states, concluded to the contrary; but the variance is much more appropriately referred to the court. And so in regard to variance between the printed statute, and the original enrolled bill. If a question of fraud arises in regard to the alteration, it should be referred to a jury.

On the 21st of April, 1825, the legislative council of Michigan appointed certain individuals to revise the laws of the territory of Michigan, and they were required to examine all the laws then in force, and to revise, consolidate, and digest the same, upon the following principles: First. All the acts upon the same subject shall be digested into the same act. Second. The principles of the existing acts may be preserved, or such alterations or additions may be made as the said commission may deem expedient. Third. Acts not considered necessary by the commission may be omitted, and deficiencies may

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

[2] [Affirmed in 18 How. (59 U. S.) 595.]

be supplied by new acts, &c. On the 27th of December, 1826, the commissioners made their report to the legislative council of the territory, and they say: "Aware of the importance of the trust confided to them, and of the deep interest the community necessarily has in its faithful execution, they have been solicitous and persevering in their endeavors so to amend, simplify, and generally to improve the statutes, as that most of the evils and inconveniences under the present system may be removed." And they further say: "Upon the principles of existing acts, and in making such alterations and additions as the commission might deem expedient, they have, according to the direction of the legislative council, exercised fully the powers with which they were invested." "Considerable alterations and several additions have been made in many of our present statutes, wherever practical evils have already been found to arise in the protection of private rights," &c. "Great care, however, has been taken, in making such alterations, not to infringe upon principles long established, and which in their application have generally been found convenient and salutary," &c. "They have, in a few instances, altogether omitted a statute, and in many others have found it necessary to report those which were entirely new." On the 29th of December, 1826, Mr. Dole, of the legislative council, moved that said commissioners be discharged from the duties imposed by the resolutions of the legislative council of the 21st April, 1825, and that the report now before the council be accepted; and the motion was decided in the affirmative. The legislative council, on the 13th of April, 1827, by a resolution, required the governor to have a proper index, and marginal notes prepared for the volume of laws passed at that session; and also a translation and explanation of such Latin or technical words and phrases as may appear to require the same, &c. And there was annexed to the volume of laws, reported by the commissioners, and published by the legislature, the explanations and notes required by the resolution. At the last term of the court, when this question was before us, in recognizing the printed act as the law, we relied chiefly on this revision of the statutes. At the present term, on an application to the court to reconsider their former decision on this subject, I was startled at the assertion confidently made, that there was no evidence in the acts of the legislative council which showed a sanction or adoption of the laws revised; although ever since the publication of the volume, it had been received and acted upon by the courts of the state and of the United States, as containing the laws of Michigan. And it was said that the revision referred to was nothing more than a reprint of the laws. This announcement, made by gentlemen of the bar, was so novel and startling, that in my own mind I at once determined to inquire into the facts asserted. I am exceedingly gratified that this re-investigation has been had, as it has convinced us, beyond a doubt, of the soundness of our former decision.

We are requested to defer any action on this question, as it is pending before the supreme court of this state, and in a short time must be decided by that tribunal. And we learn that a similar question has been decided informally, on the circuit, by one of the judges of the supreme court. On further examination, it seems that no such decision has been made by one of the supreme judges of the state, and this court would not do the injustice to any member of that court, to consider as a decision, a casual remark, not intended by him to be a judgment of the court. This court have shown no unwillingness to follow the settled construction of the statutes of the state, by the supreme court of Michigan. In one case, at least, we have done so, by overruling our own deliberate convictions, elaborately expressed, before the state court had given an opinion. I refer to the general act incorporating banks in Michigan.

In no proper sense can the question before us be considered the construction of a state statute. The act of limitations, as it formerly stood upon the statute book of the state, is clear and ambiguous. It has uniformly been construed in the same way, first, by the territorial and afterward by the state courts of Michigan. And the attempt is now made to go back to the adoption of that law, under the federal jurisdiction, to show that it was inaccurately printed. This, in our judgment, can be of no importance; if the revision of the laws under the resolution of the 21st of April, 1825, was sanctioned by the state. The power of commissioners was limited only by their discretion, and extended to all public acts then in force in the territory. And in their report they say that they have fully exercised the powers vested in them. Some acts they modified, they made additions to others, and some they reported entirely new. Some acts were reported without change. Now in regard to such acts, the judgment of the commissioners was as much exercised as where alterations were made. They examined these acts, and believing their provisions to be salutary, they reported them without modification. They were reported by the commissioners, adopted by the legislature, and published as laws in the volume of 1827, and they have been so received and acted upon by all the public authorities from that time to the present. It is objected that the laws contained in this volume have not been formally enacted and adopted. The report was "accepted" without alteration; the laws were reported as laws, having the forms of enactments, and they were "accepted" as such. Whether the word "adopted" would have been a more appropriate word, can be of no importance. The word "accepted" is sufficiently significant. It shows the sanction of the legislative council to the laws as reported, and the future action

of the same body, in the printing and distribution of the volume, and the subsequent recognition of the laws by the public authorities of the country, state and federal, puts to rest all question as to their validity.

The validity of laws reported by the commissioners depends upon the sanction given to them by the legislative council. No law contained in that report can derive any force from its original adoption by the governor and judges. The commissioners had power to reject or modify those laws, or to substitute others in their place. If the origin of the law may be examined as a test of its validity, what is to be the test of those laws altered by the commissioners, or of those which they originated? Such an idea is inadmissible. The laws derive their validity from the action of the commissioners, sanctioned by the law-making power. And this applies as well to laws reported without alteration, as to those altered or originated by them. If validity be not imparted to them in this manner, who can measure the extent of injury which must result to society? For nearly thirty years the laws reported by the commissioners have been the basis of contracts—of judicial action. Rights in the territory and in the state have grown up under their protection. If all of them are to be declared void, except those adopted by the governor and judges, as they must be if they never had the legislative sanction, and especially those altered by the commissioners, and those which they originated, no one can see the effect on established rights. To avoid such consequences, under the circumstances, and after so great a lapse of time, the doctrine of presumption might be relied on. Acts of parliament have been presumed—not because such acts had been passed, but on the ground of public policy. No such presumption is necessary in the case before us. We have the action of the legislative council adopting the reports of the commissioners. The rules ordinarily applied in a legislative body, in acting upon the report of a committee, had no application in this case. The laws reported were matured in form and substance, and required only the legislative sanction to give effect to them: and that was given. The signature of the governor, if necessary, would be presumed. This whole proceeding in regard to the adoption of the laws by the governor and judges, and also, the action of the commissioners, and the legislative action of the council, took place under the authority of the United States: and, we suppose the courts of the United States are the proper tribunals to determine the effect of such a procedure. In this respect, the state courts would not seem to have the power to establish the rule of construction which this court will follow, as of an ordinary statute of the state.

By the act of April 13, 1827, the legislative council of the territory declares, "that all acts in force on the first day of November last, are repealed, with certain exceptions." And by the second section of that act, it is declared "that all acts passed since the first day of November last, shall be in force and take effect on the 1st day of January next." This embraces the acts reported by the commissioners, and sanctioned by the legislative council, and is conclusive. The statute of limitations was reported by its title in the form as originally adopted, and this sanctions the form as it now stands. And whether it was altered by commissioners or not can be of no importance. The provisions, as they stand, were sanctioned by the report, and we can not look behind it for the law. Admit the mistake occurred, as alleged, originally in copying the law, this report of the commissioners is binding, and embodies the law, as authoritatively published in the laws. And afterwards, in the year 1833, there was a second revision of the laws, in which the section of the statute in question was again adopted and authoritatively published, and remained and was acted on as the law of Michigan until the year 1838. To hold that, under such circumstances, we must go back to the first adoption of this law by the governor and judges, would disregard the rights of parties for many years, and, as it seems to us, the settled rules of construction.

It is alleged by counsel that in the case of Brown v. Brown [Case No. 1,993], there was a decision in this court adverse to the one made in this case. In that case the statute of limitation was pleaded. The plaintiff replied that she was beyond seas, to wit: in the state of New York, the defendant demurred, and at the October term of 1841, the court held that the words "beyond seas" were equivalent to beyond the jurisdiction of the state. The demurrer was therefore overruled. At the June term, 1845, an affidavit being made in the same case, and certified copies produced, showing that the words "beyond seas" had been erased from the original bill, as appeared from the record of it in the secretary of state's office, the counsel agreed to set aside the former judgment, and entered a judgment sustaining the demurrer. This was done by the counsel without argument, and without calling the attention of the court to the subject. An entry thus made is not an authority to be cited in other cases. There was, in fact, no judgment of the court. Counsel, however agreed, can not consent to a decision, without a judgment of the court, so as to make it an authority. On inquiry, we are informed that in 1827 laws were adopted by the governor and judges, by copying them into a record, and that no original bills were made out. The record was, in effect, the original bill, so adopted. And it appears that the commissioners under the act of 1827, where no alterations were made in acts, reported them by their titles.

We adhere to our former decision in overruling the demurrer in this case, and hold that the statute of limitations adopted in 1820

by the governor and judges, had the force of law, after it was reported by the commissioners, as all other laws embraced in that report, not by virtue of their original adoption, but in virtue of their being so reported and adopted by the law-making power. The motion to reconsider the decision of the last term is overruled.

[The judgment of this court was affirmed by the supreme court, where it was carried on writ of error. 18 How. (59 U. S.) 595.]

Case No. 10,895.

PECK et al. v. SCHULTZE et al.

[1 Holmes, 28.] [1]

Circuit Court, D. Massachusetts. Nov., 1870.

PARTNERSHIP—INJUNCTION AGAINST ATTACHMENT OF PARTNERSHIP PROPERTY IN SUIT AGAINST A PARTNER.

A court of equity will not, on bill of the members of a partnership, decree the return of partnership property attached in a suit of a creditor of one of the partners against him, and enjoin the attaching officer from further interfering with the property, unless it appears that it is needed to satisfy the claims of the partnership creditors, or that the partner sued has not an interest in the surplus which may remain after payment of the partnership debts.

Bill in equity by [Albert M. Peck and another], two partners, to compel the return of certain liquors, alleged to be the property of the partnership, attached and seized by [Emil Schultze] the marshal, one of the defendants, in an action at law brought by the other defendants against one of the partners to recover the amount of a claim against him; and to enjoin the marshal from further interference with the property. The defendants demurred to the bill, and the cause was heard on the demurrer.

R. M. Morse, Jr., and E. P. Brown, for complainants.

Oliver Stevens, for defendants.

SHEPLEY, Circuit Judge. The bill of complaint alleges that the complainants are copartners under the name and style of A. M. Peck & Co.; that they are the owners of a large quantity of domestic liquors; that the defendant, George L. Andrews, the marshal of the United States for the district of Massachusetts, has attached the liquors upon a writ in favor of Emil Schultze and Robert Sailer against Albert M. Peck, claiming that the liquors were the property of said Peck; that he unjustly detains the liquors, and threatens to remove them from complainants' store. Complainants pray for a decree that Andrews may return the liquors, and for an injunction to restrain him from further interfering with said property.

By the rules of law as formerly held in England, the sheriff, under an execution against one of two copartners, took the partnership effects, and sold the moiety of the debtor, treating the property as if owned by tenants in common. Heydon v. Heydon, 1 Salk. 392; Jacky v. Butler, 2 Ld. Raym. 871. The law is now well settled in England, that a separate creditor can only take and sell the interest of the debtor in the partnership property, being his share upon a division of the surplus, after the partnership debts are paid. Fox v. Hanbury, Cowp. 445; Taylor v. Fields, 4 Ves. 396. This latter rule is the one now more generally adopted in the United States.

The rule in Massachusetts, giving a priority to the partnership creditor in such cases, was settled in the case of Pierce v. Jackson, 6 Mass. 242, and has been uniformly followed since. Allen v. Wells, 22 Pick. 450. The effect of this rule, that the only attachable interest of one of the copartners at the suit of a separate creditor is the surplus of the joint estate that may remain after the discharge of all the joint demands upon it, necessarily creates a preference in favor of the partnership creditors in the application of the partnership property.

The creditor of the individual partner may attach his interest in the partnership property; but the attaching officer will be bound in the application of the property, or its proceeds on execution, to give priority to the partnership creditor.

In the case of Cropper v. Coburn [Case No. 3,416], the complainants, forming a partnership under the style of Hemsley & Cropper, brought their bill in equity against a creditor of one of the parties and the officer who had attached the property of the firm, for a private debt and liability of Francis Hemsley, one of the partners. The bill in that case alleged that large claims and debts and liabilities were outstanding against the firm of Hemsley & Cropper, and more than sufficient to absorb all the partnership property of said firm and the interest of said Hemsley in said copartnership; and that, after the payment of said partnership debts, no surplus or interest would remain to the credit of said Hemsley; and that the merchandise attached was required to pay and discharge the debts and liabilities of the copartnership.

The demurrer to this bill was overruled, on the ground that, as the allegations in the bill were admitted by the demurrer, it appeared that the partner against whom the suit was brought had no ultimate interest in the partnership property. As the validity of the attachment must depend upon the debtors having such an interest in the property that something would pass by a sale of his interest on execution, and in this instance there was no interest to sell, it follows that, by the rule of law established in Massachusetts, there was no interest to attach.

The bill of complaint in this case does not contain any averments that there are any partnership liabilities, or that the assets of the firm are needed to satisfy the claims of part-

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

nership creditors; nor is there any averment that the partner against whom the suit is brought has not an ultimate interest in the partnership property, and a share of the surplus which may remain after the payment of partnership debts and liabilities. If he has such an interest, it may lawfully be attached and sold on execution.

The bill in this case does not present a case for relief in equity, and the demurrer is sustained. Bill dismissed without prejudice, and with costs for defendants.

Case No. 10,896.

PECK v. WILLIAMSON.

[1 Brunner, Col. Cas. 398;[1] 1 Car. Law Repos. 53.]

Circuit Court, D. North Carolina. 1813.

JUDGMENT OF STATE COURT — CONCLUSIVENESS IN OTHER STATES—CONSTITUTIONAL LAW—FAITH AND CREDIT OF STATE RECORDS.

1. The judgment of one state court is not conclusive in a suit instituted upon it in another state.

2. While full faith and credit must be given to the acts of one state in another, the effect thereof may be prescribed by congress.

Debt on a judgment recovered by the plaintiff against the defendants [R. and T. Williamson] in the supreme court of Massachusetts. Among other points involved in the case was the much agitated question as to the effect which a judgment obtained in one state should have when suit is instituted upon it in another state. It was contended on behalf of the plaintiff that the judgment was as conclusive to every purpose as if it had been rendered in the court where suit was brought; and this by the express provision of congress under the constitution. On behalf of the defendant it was urged that the judgment was merely prima facie evidence of a debt, liable to be rebutted by other testimony, agreeably to the well-known rule of the common law in respect to foreign judgments.

R. Williams, for plaintiff.

D. Cameron and Mr. Gaston, for defendants.

MARSHALL, Circuit Justice. As this very important question has not yet been decided in this court, nor in the supreme court of the United States, my brother judge and myself feel ourselves at liberty to pronounce that opinion which our own judgment dictates. To us it appears very clear that the constitution makes a pointed distinction between the faith and credit, and the effect, of a record in one state when exhibited in evidence in another. With respect to the former, the constitution is peremptory that it must have full faith and credit; with respect to the latter, it provides that congress may prescribe the effect thereof. Unless congress had prescribed its effect, it should be allowed only such as it possesses on common-law principles. In our opinion congress have not prescribed its effect. To suppose that they have is to believe that they use the words "faith and credit" in a sense different from that which they have in the clause of the constitution upon which they were legislating. It is very doubtful, however, whether this opinion would receive the sanction of the supreme court. A different one has been delivered by Judge Cushing in the federal court of Virginia. Judge Washington has also recently decided in favor of the conclusiveness of such a judgment; and from the case cited at the bar, from the New York Term Reports, such appears to be the opinion of Judge Livingston. The defendant, being permitted to impeach the consideration of the judgment, introduced very strong testimony for that purpose, upon which the jury with the approbation of the court found a verdict for the plaintiff for a sum far short of that which he had recovered in his original judgment.

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

PECK (ZANE v.). See Case No. 18,200.

PECKHAM (BARSTOW v.). See Case No. 1,064.

PECKHAM (BOUTOUR v.). See Case No. 1,707.

Case No. 10,897.

PECKHAM v. BURROWS.

[3 Story, 544.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1844.

BANKRUPTCY—PREFERENCES—CREDITOR'S KNOWLEDGE OF DEBTOR'S INSOLVENCY.

1. Where A and B, partners, made certain conveyances to a certain creditor of the bulk of their property, to the amount of $36,000, being at the same time indebted to an equal amount—and subsequently became bankrupts; it was *held*, that such a conveyance was "in contemplation of bankruptcy," and in fraudulent preference of creditors.

[Cited in Ashby v. Steere, Case No. 576; Rison v. Knapp, Id. 11,861.]

2. To constitute a conveyance "in contemplation of bankruptcy," it is not necessary, that the professed creditor should know of the debtor's insolvency, or should co-operate with him to obtain a priority of payment.

[Cited in Ashby v. Steere, Case No. 576; Case v. Citizens' Bank of Louisiana, Id. 2,489; Casey v. La Societe De Credit Mobilier, Id. 2,496; Roberts v. Hill, 24 Fed. 574.]

Bill in equity. The bill in substance set forth, that on the 20th day of September, A. D. 1842, a petition was filed in the district court within and for the district of Rhode-Island sitting in bankruptcy, by the Franklin Foundry and Machine Company of Providence, creditors of said John F. Phillips &

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

Son, against said John F. Phillips & Son, in which it was alleged that said John F. Phillips & Son had become bankrupts under the act aforesaid, by committing the acts following, viz:

On the 25th day of January, 1842, by making a fraudulent conveyance, assignment, sale and other transfer of their lands, tenements, goods and chattels, and evidences of debt. On the 9th day of June, 1842, by removing their goods, chattels and effects, and by concealing them, to prevent them from being levied upon, and taken in execution, or by other process. That said petition was continued in said court from time to time, until the 27th day of May, A. D. 1843, when the said John F. Phillips & Son were by said district court declared bankrupt, under the said petition, and your plaintiff [Samuel W. Peckham] was, by consent of parties, appointed by the said court assignee of said J. F. Phillips & Son, according to the provisions of said bankrupt act [of 1841 (5 Stat. 440)]. That on the 25th and 29th days of January, A. D. 1842, (the said firm of John F. Phillips & Son being then insolvent, and knowing their own insolvency, and in contemplation of bankruptcy, having liabilities outstanding against them of a greater amount than the aggregate value of their company property, and of the private property of the individual members of said firm,) the said John F. Phillips,—and John F. Phillips and John G. Phillips, under the firm of John F. Phillips & Son,—and John G. Phillips, did make conveyances to John R. Burrows of said city of Providence, then a creditor of said firm, of the greater and more valuable part of their private and company property, consisting of certain real estate, situated in said city of Providence, and in the town of Warwick, in said Rhode Island district, and of certain real estate situated in Swansea, in the Massachusetts district, with a factory building, cotton house, dwelling house and other buildings thereon standing, and of a large quantity of cotton and woollen machinery in said factory building: the said property being nearly the whole of the visible property of John F. Phillips, and of John F. Phillips & Son, and of John G. Phillips, upon which they obtained credit, and with which they carried on business. That the said conveyances were made to the said John R. Burrows, by way of mortgage, to indemnify and save harmless him, the said John R. Burrows, of, and from all loss or damage, interest, costs or expenses, arising from, out of, or by reason of any indorsement or guaranty by the said John R. Burrows, made at the request and for the accommodation of said John F. Phillips & Son, of any and all notes and drafts theretofore made and executed by him, the said John F. Phillips, or by John F. Phillips & Son, or at any time thereafter, to be made and executed by him the said John F. Phillips, or by John F. Phillips & Son. That the said conveyances were made by the said John F. Phillips, and the said John F. Phillips & Son, and the said John G. Phillips, for the purpose of giving the said John R. Burrows, being a creditor and endorser as aforesaid, a preference and priority over the general creditors of said John F. Phillips and John G. Phillips, and are therefore a fraud upon said bankrupt act, and utterly void; and your orator claims that the property thus attempted to be conveyed, should be sold, and the proceeds thereof distributed among all the creditors of said John F. Phillips and John F. Phillips & Son, according to the provisions of the act aforesaid. But that the said John R. Burrows, well knowing the premises, but contriving to defraud the other creditors of said John F. Phillips and John F. Phillips & Son, and John G. Phillips, and to prevent them from realizing any dividend out of the proceeds of the property conveyed as aforesaid, still claims to hold the same by the conveyances aforesaid, and for the purposes therein named, against equity and good conscience, and contrary to the provisions and true intent and meaning of said bankrupt act.

The bill prays that a decree may be passed declaring the said conveyances to be a fraud upon said bankrupt act, and utterly void, and ordering the same to be delivered up into the custody of the court to be cancelled, and that the complainant and the creditors of the said John F. Phillips, and John F. Phillips & Son, and John G. Phillips, may have such other and further relief in the premises as is agreeable to equity and good conscience, and in conformity with the true intent and meaning of said bankrupt act.

The answer in substance stated, that the said conveyances in said bill mentioned, were made on the 25th and 29th days of January, A. D. 1842, and the said petition filed on the 20th day of September, A. D. 1842, more than two months subsequent to said conveyances. And this defendant further saith, that at the time the said conveyances were made, he did not know or believe, that said John F. Phillips & Son, or either of them, had committed any act of bankruptcy, or that they, or either of them, intended to take the benefit of the bankrupt act. That said transaction was made in good faith, and under the following circumstances:

That the said John F. Phillips is connected by marriage with this defendant; that early in the year 1838, the said firm of John F. Phillips & Son, entered upon the business of manufacturing, and at that time requested this defendant to become their accommodation endorser. This defendant then made inquiries, from which he received a high estimate of the business abilities of said John F. Phillips, and also obtained from him the promise, (which was frequently renewed) to mortgage any or all of his property whenever requested by this defendant. Thereupon this defendant engag-

ed to become the accommodation endorser of said John F. Phillips & Son. But the extent and amount of said endorsements were not fixed or limited by any agreement or understanding between the said John F. Phillips or John G. Phillips, or either of them, and this defendant. That this defendant continued to endorse for said firm, and to large and increasing amounts, until the failure of said firm, without receiving any compensation therefor,—without any contract for compensation. That this defendant never knew or believed, previous to said failure, that said firm were not able and willing to meet all their liabilities, and to pay all just claims against them, whenever they fell due. That in the month of December, A. D. 1841, and for the space of several weeks, at various times subsequent, he requested said firm and the members thereof, to make the said conveyances. That the cause, and the only cause which induced this defendant to make said requests, was this. That one of the children of this defendant had been suffering under a disease, which affected the mind, and which would (as the defendant feared and anticipated) leave the child deprived of reason, and for life helplessly dependent. Your defendant therefore desired to place this small property (which he estimated at about ten thousand dollars,) in a position as secure as the laws could make it. He asked that, in accordance with the business practice of this community, and the frequent offers and promises of said Phillips, the said conveyances should be made to him for the reason above mentioned, and for that reason only. That he made this request several times during the six weeks preceding the date of the said conveyances. That the said Phillips delayed the same, without giving any reason therefor, other than the occupation of his time by his business engagements. This defendant further saith, that he had determined not to endorse for said firm, or either or both of them, to an amount greater than ten or twelve thousand dollars. That this, his intention, had never been expressed, nor according to his best knowledge and belief had it been made known in any way to the said John F. or John G. Phillips. That he found the extent of his endorsements unexpectedly increasing; from about five thousand dollars at the time of said conveyances, to about sixteen thousand at the time of the said failure. That his business began to be embarrassed by the extent of his said endorsements, that his reciprocal endorsers, Joseph Burrows & Son, intimated to this defendant, that dissatisfaction with his endorsing to such an amount for said Phillips. That the business in which the said Phillips was engaged, and value of his factory property, was greatly depressed and constantly falling in the market. This defendant, therefore, expressed to the said Phillips his unwillingness to increase the amount of his endorsements, about the first day of April. That this was the first time he had ever expressed, or in any way intimated such a disposition to the said Phillips. That the said Phillips called in a mutual friend, and the three made an examination of the said Phillips's business, in the course of which the said Phillips stated that, during the ensuing sixty days, he could put into his business ten thousand dollars. That the said Phillips at this time, namely, on the evening of the 4th day of April, 1842, strongly urged this defendant to continue to endorse his paper, and to increase the amount. That the said friend, a business man and manufacturer, told this defendant that he could safely do so, after having made the said examination into Phillips's business. But this defendant was unwilling, from the reason existing in his family, from the inconvenience to his own business, and the dissatisfaction and embarrassment to his endorser, as well as the unfavorable prospects of business, to increase his endorsements, and absolutely refused then, and for the first time, so to do.

This defendant further denies all charges of collusion, confederacy and fraud in said bill contained. He saith, that at the time said requests were made, and said conveyances executed, he supposed and believed that said Phillips & Son were solvent, and according to his best information and belief, said Phillips & Son entertained the same opinion. That said conveyances were reluctantly made by said Phillips & Son, upon the request of this defendant. That the said Phillips was surprised at the refusal of the said Burrows to increase the amount of his liabilities, and strongly urged this defendant to continue his endorser.

The defendant prays that the said bill be dismissed with his costs.

Mr. Whipple and Hazard & Jenckes, for plaintiff.

Tillinghast & Bradley and A. C. Greene, for defendant.

STORY, Circuit Justice. Upon the argument in this case it was admitted by the defendant's counsel, that they did not contest the general principles of law stated on the other side, so far as they were properly applicable to the case. The main, if not the whole controversy, therefore, turns upon matters of fact. I have considered these matters deliberately, and am, on the whole, of opinion, that the conveyances stated in the bill and answer, as executed by the bankrupts, were made by them in contemplation of bankruptcy or insolvency, and with a design, in that event, to give a preference to the defendant over all his other creditors, in fraud of the bankrupt act of 1841 (chapter 9).

The facts are somewhat complicated, and I am not aware, that any useful purpose would be subserved, at least, so far as my

own judgment is concerned, by minutely examining them at large. I wish, therefore, merely to state, that the evidence satisfactorily establishes to my mind, that the bankrupts were, at the time of those conveyances, either absolutely insolvent, or in a state so nearly approaching it, that they must have contemplated insolvency as in a high degree probable, if not inevitable; and that these conveyances were designed, in that event, to secure a preference to the defendant, as their drawer and guarantor, a preference over all their other creditors. These conveyances, as we shall presently see, cover a very large proportion of all the property of the bankrupts. They were then owing large debts, fully equal in amount to their property, which were then due or soon to become due; and, without the aid of the defendant to sustain them by his endorsements and credit, they could not go on in business. It was under these circumstances that the conveyances were made. Now, nothing can be clearer or better founded in reason and common sense than the rule, that every man must be presumed to know and comprehend the natural results of his own conduct. He, who being deeply in debt, and therefore embarrassed for want of sufficient means, which are, used moderately, applicable to his relief, applies to another person for present and future aid and succour, and conveys to him the title of all his property, in order that this aid and succour may be instantly given and constantly continued, as it must be to be effectual, cannot but know, that he is in imminent danger of stoppage in his business, and of being reduced to immediate insolvency; and by such conveyances he does in fact give, and must be presumed to intend to give a preference and security to that person in that very event over all his other creditors. What is this, but making the conveyance in contemplation of bankruptcy or insolvency, with an intent, in that event, to give that person a preference over all other creditors? I confess, that in my view of the facts, with the deep indebtment of the bankrupts, and the involved state of their assets, I do not well see, how a reasonable hope could be indulged of escaping bankruptcy. It was confessedly inevitable, if the aid or succour of the defendant as endorser, or guarantor, was subsequently, at any time, withdrawn. It is not an unimportant fact, that these conveyances were made upon the very eve of the period when the bankrupt act was to come into full and complete operation. They were made on the 25th and 29th of January, 1842; the bankrupt act took full effect on the 1st of February, 1842; and the bankrupts actually failed in the beginning of April following,—that is, within little more than two months after the conveyances were executed. How it is possible, under such circumstances, to escape the conclusion, that a total stoppage of business was then in the open vision of the bankrupts as a probable, nay, a certain event. unless the aid of the defendant, or some other responsible endorser or guarantor, could be obtained, I profess not to be able to understand. No new or extraordinary events, changing the fortune of the bankrupts in any essential manner, are shown to have occurred in the intermediate period between the close of January and the beginning of April. The effort, therefore, of the bankrupts, was a desperate effort to relieve themselves from the embarrassments of debts which were daily pressing more and more heavily upon them. The very conveyances show, that they were not made merely as an indemnity to the defendant to cover past responsibilities, but that they were designed also to include future responsibilities, which should be incurred by them. He was to sustain the credit of the bankrupts, as far as he might or would, in the struggle to avert the impending dangers; and when he stopped his endorsements and guaranties, they must sink, and they did sink, under the superincumbent weight of their debts.

The learned counsel on the opposite side differ widely in their views of the evidence. There are three points which seem to be the most important, and should be examined with a close and scrutinizing care. First, what, at and about the close of January, 1842, was the actual amount of the debts of the bankrupts; secondly, what was the true and real value of their assets at the same period; thirdly, what was the amount of the property included in the conveyances to the defendant. Now, it seems to me clear, from the evidence, that the debts of the firm were upwards of $36,000, at the time of these conveyances. The assets of the firm did not, at that time, according to the estimates of the bankrupts themselves, exceed that amount. But, in point of fact, the basis of this very statement is not a satisfactory one; for it is an estimate of the value of the property at its cost, and not at its then marketable value. Indeed, there is no proof whatever, that the property could then have been turned into cash to meet the debts, as they became due, at any prices, which would have paid the debts. It would have been a most extraordinary circumstance, if the property would not, under the circumstances, have fallen far short of the amount of the debts, if sold, or if the sales could have been effected without great sacrifices. And, then, as to the amount of the property of the bankrupts not included in their conveyances, it was manifestly very small. The estimate of the property of the bankrupts at the time of those conveyances, as made by themselves, was about $36,000; and from what I have been able to gather from the schedules in the case, (which are so obscure and ill digested that I have not been able to arrive at any very precise conclusion,) all the property not included in

these conveyances does not exceed two thousand dollars, and seems apparently much less. So that here we have the bankrupts, owing at the time of these conveyances $36,000, the full amount of all their assets, and indeed, upon all reasonable calculations, far more, who convey to the defendant, their indorser and guarantor, the bulk of their property nominally for the consideration of $5,000, but in reality for his existing liabilities to that amount for them, and also for future liabilities to be incurred by him on their account. So that, stripped of its artificial form, we here have an indebtment of the bankrupts to the full extent of all their means, to say the least of it, with a possibility of escaping from immediate insolvency and stoppage of their business only by future credits, to be given to them by the defendant at his pleasure, and those credits avowedly to be given upon the basis of a direct preference over all the other creditors, in case of that very insolvency and stoppage of business. It is difficult for me to perceive a more clear case for the application of the act of congress to conveyances made "in contemplation of bankruptcy, and for the purpose of giving a preference and priority over the general creditors of the bankrupts."

I have thus stated my impressions of the force and results of the evidence in the case. I regret that it is so inexact and imperfect in its actual presentation. I should have thought, that the case might well have been referred to a master to ascertain the exact amount of the debts of the bankrupts on the 25th and 29th of January, 1842, the exact marketable value of all their assets at the same period, and the exact amount of property not included in the conveyances of the 25th and 29th of January, 1842. I am still willing to do so, if the parties desire it. But upon the actual posture of the evidence, it seems to me, that the conclusions, which I have already suggested, are fully maintained, and I have, therefore, not thought myself at liberty to put the parties to the expense of a reference to a master, unless they should be anxious to have it made.

One other point has been suggested at the argument, which it is proper to notice: and that is, that even supposing that the bankrupts did make these conveyances in contemplation of bankruptcy, for the purpose of giving a preference and priority over the other creditors, yet unless the defendant knew of that fact, and was a party to the arrangement, with that knowledge, he is to be treated as a bona fide purchaser for a valuable consideration without notice, and as saved out of the provisions of the second section of the bankrupt act. In my view of the present case, that point does not arise; for it is impossible for me to doubt, that the facts connected with these conveyances were not such as necessarily to put the defendant upon full inquiry as to the debts, the resources, and the situation of the bankrupts. He could not but know, that they were in a state inevitably leading them to bankruptcy, unless he sustained them by future large credits as well as by his past credits. If, under such circumstances, he chose to shut his eyes, and to make no inquiries, but to place confidence in the hopes of the bankrupts, he must take the consequences of his own voluntary confidence and indolent indifference. He took the conveyances, knowing that they contained the bulk of the visible property of the bankrupts, and that it rested solely with him whether they should stop business or not; and he was not bound to sustain them by new credits for any certain period or for any certain amount.

But I am strongly of opinion, that, upon the true policy and interpretation of the second of the bankrupt act, it is not necessary for the preferred creditor to have any knowledge or co-operation with the bankrupt in arranging a preference in contemplation of bankruptcy. It is sufficient, that the bankrupt himself intends such a preference in contemplation of bankruptcy, to bring the case within the provisions of the act. All conveyances made by the bankrupt in contemplation of bankruptcy, for the purpose of giving any preference or priority over the other creditors, are by the express terms of the act declared to be void. The second proviso in the section is a limitation merely upon the proviso of the act, and does not apply to the preceding enacting clause.

Upon the whole, my opinion is, that the plaintiff is entitled to a decree, declaring the conveyances of the 25th and 29th days of January, 1842, to be fraudulent in the sense of the bankrupt act and void, and that the plaintiff is entitled accordingly to the relief which is sought by the bill.

Decided accordingly.

Case No. 10,898.

PECKHAM v. DOYLE.

[Cited in Re Doyle, Case No. 4,052. Nowhere reported; opinion not now accessible.]

PECKHAM (FERGUSON v.). See Case No. 4,741.

Case No. 10,899.

PECKHAM et al. v. LYON.

[4 McLean, 45.] [1]

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

POWER OF ATTORNEY — DEPARTURE FROM TERMS OF THE POWER—INTENTION—WITNESS—INTEREST IN CONTROVERSY—RELEASE.

1. A letter of attorney which authorizes an agent to purchase a certain steamboat from A.

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

B. and to draw bills on the principal for such amounts, and payable at such times as should be agreed upon between them, does not authorize the agent to purchase the boat from other persons.

2. The principal appears to have placed a special trust and confidence in A. B., as to the amount to be paid and the times of payment; and this can not be dispensed with by the agent.

3. The intention of the parties can not be shown different from the written power.

4. The agent who, contrary to the power, associates himself as one of the purchasers of the boat, is interested in the purchase, and can not be used as a witness.

5. A release of all claims on him, by the plaintiffs, under the special counts, does not restore his competency. As a joint purchaser he is liable for the boat, and may be made liable, if the defendant shall not be bound.

At law.

Joy & Porter, for plaintiffs.
Mr. Fraser, for defendant.

OPINION OF THE COURT. This is a motion for a new trial. The action was brought to recover the amount of the several bills of exchange, drawn by G. M. Mills, payable to the order of Peckham and Borden, and directed to John Almy, Esquire, attorney for Messrs. Charles H. Carroll and Lucius Lyon, amounting to six thousand dollars. These bills were drawn under a letter of credit, of which the following is a copy:

"Hemon Walbridge, Esq.—Sir: George M. Mills is hereby authorized to purchase the steamboat belonging to you and others, for such sums of money, and payable at such times, as shall be mutually agreed upon between you and him. And he is authorized to draw on me as the agent and attorney of Charles H. Carroll and Lucius Lyon, by drafts or otherwise, as said payments become due; which said drafts will be duly honored. Yours, etc., J. Almy, Attorney for Charles H. Carroll and Lucius Lyon. Detroit, Sept. 12, 1836."

The declaration contained special counts against Lyon, as acceptor of the bills, and also the common counts for goods sold, money, etc. It was proved that Almy was authorized by Carroll and the defendant to give Mills the letter of credit. That he was sent with it to Toledo, to buy a steamboat called the Caledonia, afterwards Don Quixotte. That this steamboat was, at the time the letter was written, owned by Hemon Walbridge and others, but that Walbridge had sold his interest to plaintiffs, who were the other joint owners with Walbridge, at the time the letter was written. That Mills exhibited his letter of credit to the plaintiffs, made a trade with them for the boat, drew the drafts in payment, and gave them, with the letter of credit, to the plaintiffs, who thereupon agreed to deliver the steamboat to him. This was proved to be the steamboat he was sent to purchase. She was wrecked in going to the place of destination, and never came into possession of the defendant. It was also proved that Mills bought the boat for the joint benefit of himself, and Carroll and Lyon. That with the assent of Carroll and Lyon, he had paid for one quarter of the boat by an exchange of his property consisting of a house and lot at Tremoinsville, and had drawn the drafts upon which the suit is brought, for the other three-fourths of the purchase money. This was all understood by Carroll, Lyon, Almy, and Mills, and the matter was subsequently arranged between them, when the stock in the boat should be divided, after its arrival at Grand river. A full release had been executed to Mills by the plaintiffs, of all liability to them upon the drafts, in consequence of a verdict, etc. Almy's handwriting and signature to the letter of credit were proved; and it was also proved that he had authority to give the letter, etc. The drafts were then offered in evidence, but were objected to on the ground that Mills had exceeded his authority under the letter of credit, in this, that he had made his contract with Peckham & Borden, the plaintiffs, whereas, by the letter of credit he was only authorized to settle the terms as to price and terms of payment, with Hemon Walbridge alone. And the court sustained this objection.

The plaintiffs' counsel then offered to prove by Mills, that the letter was given with the supposition that Walbridge was the part owner of the boat, and that the object of the letter was to buy the boat, and that the form of the letter was accidental, and that it was not the intention of the party, to limit him to contract with Walbridge, but to give him full authority to buy the boat. To this evidence the counsel for the defendant objected, upon the ground, that no parol testimony could be given to explain this written instrument, which was unambiguous; and also upon the ground that it contradicted the written instrument. The objection was sustained by the court, and the testimony was not admitted. The plaintiffs then offered Mills as a witness, to prove that Lyon had subsequently recognized the contract made by Mills, and had acted as the owner or part owner of the boat under the contract. The witness was objected to, on the ground that it appeared from the testimony, he himself was one of the joint purchasers under the contract, and of course was jointly liable for the full payment of the purchase money. The court sustained the objection, and refused to admit the witness; whereupon the plaintiffs voluntarily suffered a nonsuit.

On the above rulings of the court, the motion for a new trial is made. The bills were objected to, on three grounds: 1st. That they were not drawn in strict accordance with the letter of credit given in evidence, which letter was directed to Hemon Walbridge, Esquire, and contemplated a mutual agreement to be made between him and Mills, in reference to the boat, to authorize the drawing of the bills. Where the words of a power are ex-

plicit and no doubt can arise on their construction, it would be a dangerous principle to establish, that a court may construe them differently, in accordance with the supposed intention of the parties. The letter of authority was not only directed to Walbridge, but it was intended that the contract should be made with him, and not with others who had an interest in the boat. The language is: "Mills is hereby authorized to purchase the steamboat belonging to you and others, for such sums of money, and payable at such times, as shall be mutually agreed upon between you and him." Now here was evidently a confidence reposed in Walbridge exclusively, not only as to the price of the boat, but also as to the times of payment. This trust was not extended even to the partners of Walbridge. Much less can it be fairly construed to extend to any persons who might own the boat. Where the power is thus restricted, it is not for a court to say the restriction was unwise, or that the persons giving the power, authorized a thing to be done, different from the clear import of their words. Such a rule of construction would assume a power rather to make contracts than to construe them.

On the supposition that Almy was fully authorized to act in the premises, in saying that the bills should be honored, it might be construed as an acceptance in advance, or an obligation to accept. But what bills did he, as the agent of Carroll and Lyon, say should be honored? They were such as to amount and times of payment, as should be mutually agreed upon between Mills and Walbridge. The letter of authority is susceptible of no other construction. It will be observed that the special counts are not founded on the delivery of the boat, or on an express acceptance of the drafts, but an acceptance from the obligation imposed by the letter of attorney to Walbridge. Now if the drafts drawn were not the drafts contemplated by the above letter, under what pretence can it be said they were bound to accept them? Mills interposed himself as a party, not contemplated by the power. Carroll and Lyon may have agreed to this arrangement, but it was not within the power of attorney, and to that we must look exclusively, to ascertain whether Carroll and Lyon were bound to accept the bills. If they were not so bound, then there was no acceptance, and this action can not be maintained. [Edmondston v. Drake] 5 Pet. [30 U. S.] 636; [U. S. v. Bank of the Metropolis] 15 Pet. [40 U. S.] 395; [Grant v. Naylor] 2 Pet. [27 U. S.] Cond. R. 95 [4 Cranch (8 U. S.) 224]; 10 Johns. 180; 3 Wils. 539; 6 Cow. 354; 8 Wend. 494; 9 Wend. 54, 68; 4 Cow. 645; 2 Johns. 48; 5 Johns. 59; 7 Johns. 393; 10 Johns. 180; 10 Wend. 57; 7 Wend. 315.

The objection is not without force, that a contract to bind the principal, should be made in his name; and in this view, if the obligation to accept the bills was binding on any one, it must have bound Almy to accept. This, however, is rather a technical ground, and it does not seem to be necessary to rely on it.

The above positions are met by the plaintiffs on the ground that the intention of the purchasers was carried out, and that is to be regarded in giving a construction to the letter of attorney. The intention of the parties can never be disregarded, but how is that intention to be ascertained? The only safe rule is, to ascertain the intention from the language used by the parties. 1 Term R. 703; 2 Bing. 522; Chit. Cont. 212; 4 Maule & S. 422; 6 Maule & S. 9, 12. Mills was, clearly an interested witness. He was released from liability on the special counts only, which set out the bills drawn by him. He had an interest of one-third of the boat, and was interested in sustaining the contract he made, by which he might exculpate himself from responsibility under the power. The boat in question was unfortunately wrecked, and the contest is, who shall suffer the loss. The case turns, as before remarked, on the letter of attorney, and the acts done by Mills in the purchase and drawing of the bills.

Upon the whole, we feel ourselves bound to overrule the motion for a new trial.

PECK, STOW & WILCOX CO. (GROSJEAN v.). See Case No. 5,841.

PEDEE, The (MAAS v.). See Case No. 8,652.

Case No. 10,899a.

In re PEDERSON.

[Betts' Scr. Bk. 220.]

District Court, S. D. New York. June 9, 1851.

SEAMEN—EXTRADITION—TREATY OF JULY 4, 1827.

[Where a Swedish seaman deserted in a port of the United States, and afterward voluntarily returned to his country, thus placing himself under the control of his own government, that government, by a subsequent official act, authorizing him to emigrate to the United States, is precluded from demanding his surrender as a deserter, under the provisions of the treaty of 1827, art. 14 (8 Stat. 352).]

A habeas corpus and certiorari were issued to bring the body of Lars Pederson before the court, and also for a return of the proceedings before Commissioner Nelson in his case. It appeared from the papers that Pederson was one of the crew of the Swedish brig Lina, and shipped on board her in Norway on a voyage to the United States and back. In November, 1849, it is alleged, he deserted the vessel in New Orleans; and being now found in this city, the vessel being in this port, he was arrested at the instance of the Swedish consul under the provisions of the treaty between the United States and Sweden and Norway, and of the act of congress passed to carry into execution the treaty stipulations.

It was proved before the court that in 1850 Pederson had returned to Norway, and the port from which he shipped, and where the owners of the Lina reside, and in June of that year, with the knowledge of the said owners, obtained a passport from the local authorities of that place to leave Norway for the United States, and that he embarked at the same port for New York in a Swedish vessel with his family, and removed to New York for his permanent residence, where he now lives, and had resided eight months or more, when arrested for such desertion.

BETTS, District Judge, held that the object of the treaty between the United States and Sweden and Norway, ratified July 6, 1827, (article 14), was to provide for the restoration of deserters from the vessels of the representative nations, within the ports of each other, to the authority of the country to which they belonged. Neither country assumed the duty of compelling a deserter to serve out his contract on board the vessel from which he deserted. The great national policy intended to be subserved by the stipulation is to have seamen restored to the country where they belong, and their obligation to continue with a particular vessel, or the sufficiency of their excuse for leaving her, are not matters either power takes jurisdiction over, or undertakes to decide, further than to ascertain the fact that they are attached to such vessel, properly documented, when their arrest and surrender is claimed. On their arrest as deserters they are delivered to the consul of the government claiming them, to be sent home in such vessel as he may elect. The local authority accordingly interferes only in case the facts proved show the seaman claimed is still prima facie under his shipping contract, so that the master of the vessel could rightfully enforce his service on board if the man was within his control, and that he is withdrawn from that authority only by his act of desertion. The judge observed he was not required to say whether this right of reclamation could be exercised at any period, however long after the desertion occurred, because, in the present case, the reason upon which the United States assumes to interfere to arrest a deserter had been fully satisfied by his voluntary return to Sweden, where he belonged, and by his thus placing himself under the control of his own government. That government, by a public official act, subsequently authorized him to emigrate to the United States. Whatever effect that permission may have upon the civil rights of the master or owners of the Lina, in respect to the violation of his contract with them by Pederson, it precludes the government of Sweden now demanding the surrender or extradition of this man by the United States as a deserter from the Swedish flag. The United States, aside from its solicitude to fulfill with fidelity every treaty engagement, would be impelled to execute on its part, promptly and strictly, mutual stipulations with other countries, so advantageous to its own navigation and trade, as those securing the return home of seamen who desert her service. But she could not expect that foreign governments will interest themselves to replace within her power such seamen when they have been allowed to expatriate themselves, after returning and placing themselves under her authority subsequent to the desertion. The judge decided that the case before him did not authorize the detention of the prisoner, and ordered him discharged from his arrest.

PEDRICK (FELLOWS v.). See Case No. 4,724.

Case No. 10,900.

PEDRICK v. FISHER.

[1 Spr. 565.] [1]

District Court, D. Massachusetts. May, 1859.

MARINE INSURANCE—INSURABLE INTEREST—PRIMAGE ON FREIGHT—LOSS OF VESSEL—INSURANCE ON FREIGHT.

1. The right of a master of a vessel to primage on freight, is an insurable interest.

2. The owners are not bound to insure such interest.

3. Where the owners had promised the master five per cent. primage on freight as collected, and they had made insurance on the freight, and the vessel was lost, and no freight earned, but the owners collected their insurance, *held*, that the master could not maintain a suit for primage.

In this case, the respondents, owners of the ship Troubadour, appointed Pedrick the master, and in their letter of appointment and instructions, they say that "the ship and freight are insured by the year,—ship valued at $70,000, and freight valued at $25,000, on board or not;" and also, "for your services you are to have $25 a month, and five per cent. primage on the freight as collected." The vessel sailed from Newburyport, on March 12th, 1854, with no cargo on board, and was wrecked on the 24th of the same month, and was a total loss, and the owners collected their insurance on the freight. Pedrick, the master, did not insure his primage, and in this libel seeks to recover from Fisher & Co. five per cent. of the amount of insurance received by them, on two grounds: (1) That if Pedrick had an insurable interest, the relation of owners and master made the owners agents of the master, so far as to make it their duty to insure the master's primage, without special request, and liable to him in damages for their neglect, if they did not so insure; and (2) that as they had agreed to give the master five per cent. primage on the freight as collected, and had collected $25,000 insurance on freight, this was equivalent to collecting $25,-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

000 on freight, and entitled the master to recover five per cent. of it, as his primage.

B. F. Hallett, for libellant.
S. W. Bates, for respondents.

SPRAGUE, District Judge, held that Pedrick had an insurable interest, either under the name of primage, or wages, or commissions, but that the owners were not bound to insure it for him, without request; and that the letter of instructions contained no promise, express or implied, on the part of the owners so to insure; and that if they had insured without the master's authority, he would not have been liable to them for the premium paid; and, on the second point, that no freight having been earned, and none collected, no primage was to be paid; that money received from insurance, as indemnity, was not to be deemed freight collected; that the amount, in fact, obtained from the insurance companies, was by virtue of a distinct contract between the owners and the companies, to which the master was not a party, for which the owners alone paid the consideration, and of which they alone were entitled to the benefit. Libel dismissed.

PEDRICK (SHAKERLEY v.). See Case No. 12,699.

Case No. 10,901.

PEDRO v. ALLEN.

[1 Lowell, 435.] [1]

District Court, D. Massachusetts. March, 1870.

SEAMEN—DISCHARGE—LAY—DEDUCTIONS — COSTS.

1. A mate was shipped for a whaling voyage of three years at a certain lay and a "bonus" of two hundred dollars, paid him at the time of shipment, and receipted for as a bonus "to perform the voyage." He served faithfully for fourteen months, and was then discharged with the master's consent upon terms satisfactory to both, one of which was that he should have his lay up to the time of his discharge. *Held*, the owners could not deduct from the mate's lay a proportionate part of the bonus as a set-off or recoupment, on the ground that he had not performed the voyage.

2. Costs given the libellant because the owner had refused to pay until the expiration of a credit which he had given for the oil.

[This was a libel by F. Pedro against H. M. Allen for wages.]

A. S. Cushman, for libellant.
C. T. Bonney, for respondent.

LOWELL, District Judge. The libellant served as second mate and afterwards as mate, on board the respondent's brig Pocohontas on a whaling voyage, and his lay is agreed to be $352.07, which is his proportion, by the articles, for the time he served, unless something is to be deducted for his not having performed the whole voyage. The contract was for three years, and he was discharged at Fayal, at his own request and with the master's consent at the end of fourteen months, and instead of receiving two months' extra wages, paid the amount of such wages to the consul as part of the contract of discharge; of which no one complains. He says his agreement was to ship at the one-twentieth lay and two hundred dollars "bonus"; and when the shipping articles were signed, he received the two hundred dollars. The receipt which he signed calls it a bonus, and adds "to perform the voyage." He swears that he did not read the receipt, and supposed he was merely acknowledging the payment of his bonus. It is admitted that the ordinary meaning of a bonus is an advance or premium to be paid at the time of shipment; and that it is usually given to secure the services of some skilful and well known whaleman. The respondent says that in this case it was merely another mode of paying wages, and that a recoupment or deduction ought to be allowed for the part of the voyage which was not performed. Upon the evidence it seems to me that the contract was that the libellant should have a bonus, and that the understanding of course was that the voyage was to be performed. I do not know that the receipt departs from the implied contract in this respect. But this agreement was subject to death, sickness, and other contingencies, one of which was the discharge of the officer on terms satisfactory to the master. In such a case he appears to me to have performed his voyage until it ended by common consent, and that the owner of the brig has no reclamation to make. The American doctrine, and I have no doubt the true doctrine, is, that freight prepaid, as such can be recovered back if the voyage fails; but I do not know that this rule has ever been applied to advance wages. There are, then, two objections to this recoupment. One, that it was an absolute payment of which the owner took the risk, like advance wages. The other, that the settlement with the master upon terms carefully agreed on, may be presumed to have foreclosed this demand, as it was not mentioned; and as both parties appear to have understood that the libellant was to have his proportionate lay.

The question of costs depends on whether the libel was vexatiously brought without due notice, or too hastily. The letters filed in the case show that on the 5th of November, the respondent said he would settle with the libellant as soon as he could sell the oil; on the 20th of the same month, that he had sold it on sixty days' time; on the 24th, that he should not settle until he got his money. The libel was filed on the 21st of December. I cannot hold it to be premature. The seamen are not to take the risk or wait the expiration of a credit. The oil is not theirs, and they cannot control its sale. The owner may dis-

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

count what is necessary for paying cash; but if the seaman insists on payment, he must indemnify himself by such discount. I suppose that in settling the agreed facts in this case, such a deduction was made. If not, it might have been if the libel was brought before the end of the sixty days, as I suppose it was.

Decree for the libellant for $352.07 and costs.

PEDRO, The (ENGLEHART v.). See Case No. 4,489.

PEDRO, The (MALONE v.). See Case No. 8,995.

Case No. 10,902.

In re PEEBLES.

Ex parte WATKINS.

[2 Hughes, 394; 13 N. B. R. 149.] [1]

District Court, E. D. Virginia. April and June, 1875.

PLEDGE — SECURITIES DEPOSITED WITH NOTE — GENERAL LIEN—EQUITABLE RULES IN BANKRUPTCY COURT—HOMESTEAD EXEMPTION.

1. Where collaterals are deposited for securing a particular note in a banking company, by a shareholder who also owes it other notes, the collaterals consisting in part of the shares of the company, and in part of other securities, and the charter and by-laws of the company give a general lien upon the shares of its shareholders for all debts due by them to the company, and the maker of the notes afterwards becomes a bankrupt, *held*, that the company, upon the shares of stock pledged, has a general lien for the satisfaction of all the notes of the shareholder.

2. The remaining securities are bound for the other notes due, on the principle of equity that the equities being equal between the company and the general creditors in bankruptcy of the maker of the notes, the possession of the securities by the company gives it preference.

3. A bankruptcy court must rule as a court of equity would do upon such a pledge of collaterals, unless it can be proved that the pledge of them was made by the bankrupt under circumstances that would render the preference void under the 35th section of the general bankruptcy act (Rev. St. U. S. §§ 5128, 5129).

4. The homestead exemption, provided by sections 1, 5, 16, 17, c. 183. of the Code of Virginia, is good against the lien of an execution on personal property, and a court of bankruptcy will grant the homestead exemption in goods on which the execution lien attached before the adjudication of the bankrupt, and this certainly where there was no levy or sale.

In bankruptcy. On the 3d day of November, 1874, Lemuel Peebles, the bankrupt, made his negotiable note to the Petersburg Savings and Insurance Company for eighteen hundred dollars, expressing in the body of the note that he deposited 168 shares of the capital stock in the said company, twenty shares of the Atlantic, Mississippi and Ohio Company, and a bond to him of J. W. Pool for $916.52, as collateral security, "with authority to sell the same at public or private sale, or otherwise, at the option of the directors of the said company on the non-performance of this promise." On the 21st day of December, 1874, he filed his petition in bankruptcy, and was thereupon duly adjudicated a bankrupt. On the 7th day of January, 1875, Thomas G. Watkins was appointed his assignee. At the time of making the negotiable note mentioned, Peebles owed also a stock note to the company for $1,848, also a note of $1,250 indorsed by another person, also three notes amounting to $1,000, indorsed by three other persons, also a note of $2,300, and one of $900, indorsed by another person. The total value of the collaterals deposited with the $1,848 note was $4,020, by estimate.

The charter of the Petersburg Savings and Insurance Company contains the following provisions: "The said company shall have power to make and ordain such ordinances and regulations, and generally to do any act and thing necessary to carry into effect this act, or to promote the object and design of the corporation. Every stockholder not in debt to the company, may, at pleasure, in person or by attorney, assign his stock on the books of the company, or any part thereof, not being less than a whole share, but no stockholder indebted to the company shall assign or make a transfer of his stock, or receive a dividend until such debt is paid or secured to the satisfaction of the board of directors." The by-laws of the company contain these provisions: "In all cases of transfer of stock, all debts due or to become due to the company shall first be paid or satisfactorily secured. The interest of any stockholder of this company shall be liable for the payment of any and all debts which may be due from him at any time to the company, either as principal or indorser, and in case there shall be more than one debt, the board of directors shall have the power to prescribe which one or more of such debts shall be paid out of the stock of the indebted member."

The assignee files his petition here, charging that the company intends to make sale of the collaterals it holds from Peebles, pay themselves the note of $1,848 secured by them, and apply the surplus to the liquidation of the remaining notes in which Peebles is interested. The assignee complains that his rights will thereby be prejudiced, claiming that the surplus of the proceeds arising from the sale of the collaterals, after payment of the $1,848, now belongs of right to him as a part of the assets of the estate distributable pro rata among all general creditors of Peebles. The question is, whether the banking company has a lien upon the collaterals for the satisfaction of the other notes of Peebles due to it after the payment of the petitioner's note (for $1,848), for which they were expressly pledged. This question has been much litigated. The Roman law gave a lien upon the chattels pledged for one

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 13 N. B. R. 149, contains only a partial report.]

debt for the satisfaction of all the debts held by the pledgee against the pledgor. But the rule of the common law of England and of this country is different. Lord Mansfield, in Green v. Farmer, 4 Burrows, 2221, stated the law of the subject in the following terms: "The convenience of commerce and natural justice are on the side of liens, and, therefore, of late years, courts lean that way; (1st), where there is an express contract; (2d), where it is implied from the usage of trade; or (3d) from the manner of dealing between the parties in the particular case; (4th), where the defendant acts as a factor." This is still the law; that is to say, there is no lien at common law which gives the holder of pledged personal property a lien upon it beyond the especial object for which it was pledged, except in the cases mentioned by Lord Mansfield. Equity, indeed, often extends the lien beyond the special object, when the general principles governing in courts of equity allow it. But in courts of law the rule is laid down in 4 Burrows. This condition of the law of the subject has made it necessary to resort to statutory provisions wherever the lien is sought to be secured; and it has become a practice to give by statute this lien, in cases where it did not exist at common law. The present case does not fall within any of the exceptions mentioned in Green v. Farmer; and if the banking company has a lien at all upon the collaterals in its hands beyond the note for $1,848, it has it only by virtue of its charter and by-laws. Do these give the lien which it claims? They certainly do in terms as to the 168 shares of the company stock, and the only question is, will this court enforce the provisions of the charter and by-laws? The decisions in this country construing the charters and by-laws of corporations on this subject of liens are conflicting, and if there were no particular precedents imperative upon this court there might be room for doubt what the decision in the present case ought to be. But the supreme court of the United States has passed upon this question in Bank of Georgetown v. Laird, 2 Wheat. [15 U. S.] 390, and in Brent v. Bank of Washington, 10 Pet. [35 U. S.] 596. It has decided that "the lien of a bank, under its charter, on its shares, for a debt due from their owner, is superior in equity to a lien acquired from the owner by a third person, and is not waived simply by taking other security for the debt."

In the case at bar it was contended that the taking of the collaterals expressly as security for the $1,848 note, and of indorsers as specific security on the other notes, was a virtual waiver of the lien which the banking company might otherwise have had on the collaterals for the security of the other notes. But the law is otherwise. Two points were decided in 2 Wheat. [15 U. S.] 390, where the case was essentially the same as the present one, viz.: (1st.) That the provisions of the company's charter giving a general lien upon its shares are valid; and (2d), that taking other security for the debts to the bank does not waive the lien given by the charter on the stock of the bank itself. Under that, as well as under the well-settled general law, I must hold that the charter and by-laws of the Petersburg Savings and Insurance Company did create a lien upon the shares of the company owned by Peebles beyond the note for which the collaterals deposited by Peebles were given for the satisfaction of all the other notes due by Peebles to the bank. It is not necessary to decide whether the by-laws of this company are valid in claiming power for the directors of the company "to prescribe which one or more of several debts due the bank shall be paid out of the stock of the indebted member." As between the company and Peebles himself, this power may be valid, but as between the bank and third persons interested in the apportionment, I incline to the opinion that this provision of the 11th by-law of the company is ultra vires and invalid. See Bullard v. National Eagle Bank, 18 Wall. [85 U. S.] 589. If this were a suit at law it is plain that the provisions of the charter would be held to give a lien upon the 168 shares of the capital stock [of the company] [2] for all the notes of Peebles, but there was no lien on the other collaterals for any other notes than that for $1,848. If it were a suit in equity the equities of the stockholders of the banking company on one hand and of the other creditors of Peebles on the other being equal, and the company having the legal title, the court would have to decree for the company as to all the collaterals.

The only question is, whether the same principles obtain in a court of bankruptcy as in a court of equity. I see nothing in this case to induce a different decision in bankruptcy from such as would have to be given if the case were before the court as a court of equity. It is not alleged or pretended that there were any circumstances attending the deposit of these collaterals with the company by Peebles which make it a case of preference under the 35th section of the bankruptcy law. There is no allegation or proof that there was any contemplation of bankruptcy by Peebles at the time, and knowledge of insolvency and intention to defraud the act on the part of the company. Unless such circumstances are alleged and proved, I do not see how this court, as a court of bankruptcy, can give any other decision than that which it would be bound to give if the case were before it on its equity side. My opinion is, that the charter of the company and its by-laws give the company a lien upon the shares of stock which it holds, for the payment first of the debt for which they were expressly pledged, and after

[2] [From 13 N. B. R. 153.]

that, of any and all other debts of Peebles to the company due or to become due which it held at the time.

I am also of the opinion that the equities of the company in the remaining collaterals being equal to that of the other creditors of Peebles, and the company having legal title and possession, these other collaterals should follow the same course. I will give an order accordingly. See [Bank of Georgetown v. Laird] 2 Wheat. [15 U. S.] 390; [Brent v. Bank of Washington] 10 Pet. [35 U. S.] 596; 2 P. Wms. 207; Ang. & A. Corp. §§ 570–575, and cases there cited; 4 Burrows, 2221; Story, Eq. Jur. § 1034; 7 East, 224; 2 Kent, Comm. 584. The cases in [Bank v. Lauier] 11 Wall. [78 U. S.] 374, and [Bullard v. National Eagle Bank] 18 Wall. [85 U. S.] 594, turn upon the special provisions of the law of congress relating to national banks, which are different from the provisions of the charter of the Petersburg Savings and Insurance Company, and do not affect the decisions in [Bank of Georgetown v. Laird] 2 Wheat. [15 U. S.] 390, and [Brent v. Bank of Washington] 10 Pet. [35 U. S.] 596.

This cause was again heard, on the 2d June, 1875, on the bankrupt's petition for a homestead exemption, as to which the following were the facts of the case: At the November term, 1874, of the circuit court of the city of Petersburg, T. L. Johnson sued out an execution against the goods and chattels of one Nelson and Lemuel Peebles (this bankrupt) jointly, which went into the sergeant's hands on the 5th December, 1874. On the 21st December, 1874, Peebles filed his petition in bankruptcy, and was thereupon duly adjudicated a bankrupt. Afterwards, to wit, on the 30th December, 1874, the execution was levied by the sergeant upon certain personalty of Peebles, specified in the return of the sergeant made at the March rules of 1875, which personalty would otherwise be exemptable in lieu of a homestead exemption to said Peebles.

[W. W. Crump and Meade Haskins, appeared for assignee, Thomas G. Watkins, who also took part in the argument.

[Wood Bouldin, Jr., for the banking company.] [3]

HUGHES, District Judge. The only question arising on the branch of the case now before me is, whether the bankrupt's claim of exemption in lieu of homestead is good against an execution lien, where the levy was not made until after the adjudication in bankruptcy. As the levy after that time was void, see Bump, Bankr. (9th Ed.) p. 217, and cases there cited (the estate of the bankrupt having passed into the custody of the federal court bound by liens, but free from all interference by the officers of other courts), the more direct question is, whether the homestead is good in this case against the lien of an execution. This question must be decided upon the laws of Virginia, for the homestead is given by the national bankruptcy law only in cases where it is given by the law of each state. The constitution of Virginia provides that "every householder or head of a family shall be entitled to hold, exempt from levy, seizure, garnisheeing, or sale under any execution, order, etc., real or personal property not exceeding $2000 in value," to be selected by himself. It authorizes the legislature to provide how this benefit may be obtained and enjoyed, by any law which "shall not defeat or impair the benefit" of the provision. In pursuance of this authority, the legislature has provided, with some minuteness, the manner in which the benefit shall be claimed and secured in respect to the householder's real estate; but has not made such explicit special provisions as to personalty, doubtless from the impracticability of doing so. But it has provided, in respect to personalty, in sections 16, 17, c. 183, of the Code, how the householder may, after execution sued out and levied, and even after sale, secure from sale, or after sale, any personalty which he may select and designate as an exemption, to the amount allowed by law. Section 5 of the same chapter of the Code, provides in effect that though this personalty may be subject to the lien of mortgages, deeds of trust, or executions, the "claim of the homestead" shall be good against such "last-named liens." It seems to me, therefore, to be trifling with the subject to contend, in view and in despite of the express language of section 1, art. 11, of the state constitution, and sections 1, 5, 16, 17, c. 183, of the Code, that the lien of an execution, whether levied or not, certainly when not legally levied, is good against the homestead. Courts, of course, have no more right than private citizens to disregard the statute law of the land, and the arbitrary individual judgment of a judge can be no more rightly exercised against a plainly written and constitutional law than that of a private citizen.

The goods mentioned in the pleadings in this case must be set apart to the bankrupt, notwithstanding the execution lien held by T. L. Johnson. See Payne v. Drewe, 4 East, 523; Angel v. Smith, 9 Ves. 335; Taylor v. Carryl, 20 How. [61 U. S.] 594; Hagan v. Evans, 10 Pet. [35 U. S.] 400; Harmar v. Dennie, 3 Pet. [28 U. S.] 292; Weswall v. Sampson, 14 How. [55 U. S.] 52; Davis v. Anderson [Case No. 3,623].

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[3] [From 13 N. B. R. 149.]

PEEBLES (COLLINS v.). See Case No. 3,017.

Case No. 10,903.

PEEK et al. v. FRAME et al.

[9 Blatchf. 194; 5 Fish. Pat. Cas. 113.] [1]

Circuit Court, S. D. New York. Oct. 26, 1871.

PATENTS—INFRINGEMENT—AGGRAVATED CONDUCT OF DEFENDANT—INCREASE OF DAMAGES.

In this case, which was an action at law, for the infringement of letters patent, the plaintiff having had, at the trial, a verdict for $5,000, the court, regarding the conduct of the defendant as peculiarly aggravated, increased the damages to $7,500, as being a sum sufficient to cover the expenses of the trial, and something more, for the time and trouble of the plaintiff.

[Cited in Welling v. La Bau, 35 Fed. 304.]

[Motion for increase of damages in an action at law.

[Suit brought upon letters patent for an "improved machine for sawing thin boards," etc., granted to John Myers and Robert G. Eunson, May 23, 1854 [No. 10,965] and extended for seven years from May 23, 1868. The plaintiffs [Eben Peek and Gilbert J. Bogert] were the owners of the patent for that part of the city of New York lying west of Broadway and Eighth avenue. At the trial (before WOODRUFF, J.) the plaintiffs had a verdict for $5,000. They now made a motion for judgment in their favor for such sum as should be proper, above the amount found by the verdict, not exceeding three times the amount thereof.] [2]

The motion was founded upon an affidavit, made by one of the plaintiffs, setting forth the following facts: The plaintiffs bought their interest in the patent in 1864, and paid therefor a considerable sum of money for the original term, and afterwards for the extended term. The machine described in the patent is one of very great speed and efficiency, and two or three of the machines are capable of doing the whole resawing business of the west half of the city of New York. At the time the plaintiffs purchased such interest, the defendants Nichols and Robbins owned a right to use one of the machines in said district, and the plaintiffs, in order to render their interest in the patent profitable, purchased from those defendants, in January, 1865, all their interest under the patent, paying a considerable sum of money therefor. In December, 1866, those defendants made an arrangement with the defendant Frame, to put into operation, in their place of business, which was directly opposite the place of business of the plaintiffs, a machine substantially like the patented machine. Frame set up the machine, and the other defendants furnished him with power to run it, and the profits of running it were divided between them. The defendants also cut down the price of resawing from $4.00 per thousand feet, to $2.50 per thousand feet, and diverted many customers from the plaintiffs' establishment to their own. The plaintiffs were obliged to reduce the price of their resawing to $3.00 per thousand feet. The defendants were, at the very commencement, notified by the plaintiffs not to use the infringing machine, and threatened with a suit. After fruitless negotiations for an arrangement, this suit was brought. It was defended by a combination of infringers, formed by the defendants, who made up a common purse to resist the rights of the plaintiffs, and of other owners of rights under the patent. The trial of the suit was delayed by the defendants. At the trial, the plaintiffs proved, that the defendants had diverted from them up to December, 1868, a large specified quantity of lumber, on which the plaintiffs lost a profit of $2.00 per thousand feet; that, by reason of the reduction, by the plaintiffs, of the price of resawing, caused by the infringement, the plaintiffs had lost the sum of $1.00 upon every thousand feet of a specified quantity of lumber, which they had themselves sawed; and that such damages in all amounted to over $8,000. Large amounts of business had been diverted by the defendants from the plaintiffs, of which the plaintiffs could not prove the particulars, because they were known only to the defendants. The plaintiffs incurred an expense, in conducting this suit, of upwards of $1,500. Since the trial in this suit, the patent had been sustained, on final hearing, in a suit in equity, in this court, against these defendants (Myers v. Frame [Case No. 9,991]), at a further expense to the plaintiffs of $800.

Frederic H. Betts, for plaintiffs.
Keller & Blake, for defendants.

WOODRUFF, Circuit Judge. I regarded the conduct of the defendants, as disclosed on the trial, as peculiarly aggravated, and find no reason for changing my opinion. The damages ought to be increased by a sum sufficient to cover the expenses of the trial, and something more, for the time and trouble of the plaintiffs. Let the damages be increased to $7,500.

[Subsequently the case was heard upon a motion for the allowance of costs. Case No. 10,904.]

[For other cases involving this patent, see note to Myers v. Frame, Case No. 9,991.]

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

[2] [From 5 Fish. Pat. Cas. 113.]

Case No. 10,904.

PEEK et al. v. FRAME et al.

[5 Fish. Pat. Cas. 211.] [1]

Circuit Court, S. D. New York. Dec., 1871.

PATENTS—COSTS WHERE SOME OF THE CLAIMS ARE VOID—DISCLAIMER.

1. The mere fact that the plaintiff has obtained a verdict in an action on the case for the

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

infringement of a patent, is not conclusive that he is entitled to costs; for if the verdict be rendered in pursuance of section 9, Act 1837 [5 Stat. 194], for the infringement of valid claims, while other claims are rejected as void for want of novelty, the plaintiff can not recover costs.

2. Nor does the fact that, since the verdict, the plaintiff has disclaimed one or more of the claims of the patent, deprive him of his right to recover costs. Such a disclaimer might be a ground for a new trial, but so long as the verdict remains in force the plaintiff is entitled to the benefit of it.

3. A disclaimer is necessary only where the thing claimed without right is a material and substantial part of the machine invented.

4. If the disclaimer be of immaterial matters, it would seem that the filing of it does not affect the plaintiff's right to costs.

[This was an action by Eben Peek and others against John Frame and others.]

Motion for the allowance of costs in an action at law referred to in the report of the case of Peek v. Frame [Case No. 10,903]. It appeared that after the verdict was rendered, the plaintiff had filed a disclaimer to some of the claims of the patent in suit, and it was insisted that this was equivalent to a verdict against those claims upon the trial, which would have deprived the plaintiff of the right to recover costs.

Frederic H. Betts. for plaintiffs.
Keller & Blake, for defendants.

WOODRUFF, Circuit Judge. The papers submitted to me are wholly insufficient to show that the plaintiffs are not entitled to costs herein. The brief of the plaintiffs' counsel recites some facts, but they are not decisive. On the one hand, the mere fact that the plaintiffs obtained a verdict is not conclusive that they are also entitled to costs; for they may have obtained the verdict under and in pursuance of section 9 of the act of 1837, which warrants a recovery for an infringement of what is, in fact, new, and claimed as the plaintiffs' invention, notwithstanding the patentee has also, through mistake, without fraud or intent to deceive, claimed something which is not new.

If this verdict was rendered for an infringement of valid claims, and it appeared that other claims were rejected in pursuance of that section, then, although the plaintiffs obtained a verdict, they are not entitled to costs. But if the verdict was, in fact, upon all the claims, in affirmance of the validity of each, and of the novelty of the inventions claimed in each, then the plaintiffs are entitled to costs.

On the other hand, the mere fact that the plaintiffs have, since the trial and verdict, disclaimed one or more of the claims made in the patent, is not alone conclusive that the plaintiffs are not entitled to costs. If the verdict was rendered as secondly above suggested, upon all the claims, affirming their validity, and the novelty of the invention claimed in each, then what the plaintiffs may have said or done, by disclaimer or otherwise, does not deprive them of the effect of the verdict; and so long as it remains in force, not set aside, it is conclusive between the parties. The fact of disclaimer is high evidence, in such case, that the verdict was wrong, and that the plaintiff should only have recovered on the parts of the invention or patent therefor, which are not disclaimed, and such evidence might warrant a new trial. But while such a verdict stands, it is conclusive.

And, finally, there is no evidence before me showing that, under the opinion in Hall v. Wiles [Case No. 5,954], the disclaimer, or the admission which it imports, would, if made during the trial, have affected the plaintiffs' right to costs. In that case, it is held that a disclaimer is necessary only where the thing claimed without right is a material and substantial part of the machine invented. What has been disclaimed in this case does not appear by the bill of costs, nor by the plaintiffs' brief, and, of course, not by my minutes of the trial, and nothing else is before me.

Precisely what order I am expected to make on these papers is not very clear; but treating the matter as a motion for costs on the verdict, I can only say that no sufficient ground for withholding costs, which ordinarily follow a verdict, appears or is shown. If I could treat it as an appeal from taxation (which it is stated to be in the brief submitted, though the accompanying bill of costs has not yet been taxed), I must then say that no sufficient facts are laid before me to warrant any interference therewith.

[For other cases involving this patent, see note to Myers v. Frame, Case No. 9,991.]

Case No. 10,905.

PEELE et al. v. MERCHANTS' INS. CO.

[3 Mason, 27.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

MARINE INSURANCE—RIGHT TO ABANDON—INJURY—LESS THAN HALF VALUE—UNDERWRITER'S RIGHT TO POSSESSION.

1. Policy on ship Argonaut and cargo at and from Leghorn to her port of discharge in the United States. Ship sailed on her voyage being owned and bound to Salem. She was cast away, in March, 1820, on a ledge of rocks near Portsmouth harbour (New Hampshire), and immediately bilged. She was in such a desperate situation, that it was nine chances out of ten that she would be totally lost and wrecked in twenty-four hours. In this situation the owners abandoned to the underwriters. There was no verbal acceptance of the abandonment, but the underwriters declined any further agency of the owners, sent their own agent to take possession of the vessel, sell her if he deemed best and act as he chose in all respects as to the vessel; but directing the agent not to meddle with the cargo (specie), which had not been abandoned. The owners never meddled with the ship after the abandonment; but the agent of the underwriters took exclusive possession, and by most extraordinary good fortune and good weather she was gotten off and carried to Portsmouth in

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

about a week. She was injured to about one half her value, and the necessary repairs could not be made in a period short of three months, which was a longer period than the usual length of the voyage insured. After the vessel was got off, the underwriters offered to return her to the owners. They refused to receive her. The underwriters then repaired her in three months under their own agent, and when repaired offered her again to the owners. The latter again refused to receive her; and never authorized the repairs in any shape. They adhered to their abandonment as good, and that henceforth they had nothing to do with the ship. *Held*, that the owners had a good right to abandon under the circumstances, even if the injury was less than one half the value.

[Cited in Columbian Ins. Co. v. Ashby, 4 Pet. (29 U. S.) 145; Northwestern Transp. Co. v. Continental Ins. Co., 24 Fed. 177.]

[Criticised in Bosley v. Chesapeake Ins. Co., 3 Gill & J. 468, 470; Deblois v. Ocean Ins. Co., 16 Pick. 309. Cited in Prince v. Ocean Ins. Co., 40 Me. 487; Snow v. Union Mut. Marine Ins. Co., 119 Mass. 595; Thompson v. Mississippi M. & F. Ins. Co., 2 La. 228.]

2. In estimating that half value, there was not to be a deduction of one third, new for old, as in case of partial loss; the half value, which authorized an abandonment, was half the sum, which the ship, if repaired, would be worth, after repairs made. If the ship when repaired would not be worth double the amount of the repairs, the owners had a right to abandon.

[Cited in Northwestern Transp. Co. v. Continental Ins. Co., 24 Fed. 177.]

[Disapproved in Deblois v. Ocean Ins. Co., 16 Pick. 310, 311. Cited in brief in Lockwood v. Sangamo Ins. Co., 46 Mo. 72. Cited in Taber v. China Mut. Ins. Co., 131 Mass. 250. Cited in brief in Wallace v. Ohio Ins. Co., 4 Ohio, 242.]

3. The underwriters had no right to take possession of the ship, either to move her or to repair her, without the consent of the owners. These acts of taking possession, &c. after the abandonment, were, in point of law, an acceptance of the abandonment, since the underwriters could not be justified in them, except as owners of the property.

[Cited in Gloucester Ins. Co. v. Younger, Case No. 5,487; Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 433, 10 Sup. Ct. 941; Northwestern Transp. Co. v. Continental Ins. Co., 24 Fed. 177.]

[Cited in Badger v. Ocean Ins. Co., 23 Pick. 358. Cited in brief in Ellicott v. Alliance Ins. Co., 14 Gray, 318; Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402. Cited in Northwestern Transp. Co. v. Thames & M. Ins. Co., 59 Mich. 234, 26 N. W. 344; Peele v. Suffolk Ins. Co., 7 Pick. 256.]

4. An abandonment once made and accepted is irrevocable by either party without the assent of the other.

[Cited in Humphreys v. Union Ins. Co., Case No. 6,871; Copeland v. Phœnix Ins. Co., Id. 3,210; Northwestern Transp. Co. v. Continental Ins. Co., 24 Fed. 179.]

This was a suit by libel [by Willard Peele and others against the Merchants' Insurance Company] on the admiralty side of the court, founded on a policy of insurance.

Nichols & Webster, for plaintiffs.

Saltonstall & Prescott, for defendants.

STORY, Circuit Justice. This cause has been here heard upon the merits, the respondents having appeared under a protest to the jurisdiction, and meaning to insist upon that objection, if there should be an appeal to the supreme court, they have filed a general denial, putting the material facts in issue, and thus brought the entire law as well as facts before the court for consideration. Upon the subject of jurisdiction I have no more to say, than that I have seen no reason to change the opinion which I expressed several years since, that originally and of right the jurisdiction did belong to the admiralty. Whether it is become obsolete by disuse, or by the preponderating authority of the common law courts, so that it cannot and ought not now to be exerted by our courts of admiralty, is a question upon which I have no right even to conjecture what will be the judgment of the appellate court. I have, indeed, hitherto supposed the point rather of theoretical than practical importance, presuming that from private convenience, the benefit of a trial by jury, and the confidence that is so justly placed in our state tribunals, the insured would almost universally elect a domestic forum. I shall most cheerfully acquiesce in any judgment which may be ultimately pronounced on the point of jurisdiction; but entertaining, as I do most sincerely, the opinion, that this court is rightfully possessed of it, I feel myself compelled by a sense of duty to entertain the suit, and to give my deliberate judgment, however unavailing it may be, upon the great and interesting points which have been presented at the bar. I cannot, indeed, but express my deep regret, that the cause has come before this court at all, and especially under circumstances of so much embarrassment and difficulty. My own situation in relation to it is somewhat delicate and perplexing. But every consideration of this sort becomes trivial, when put in comparison with the serious thought, that a very small sum only was originally in controversy; and that there is an almost moral certainty that the whole property will perish before the suit is finally terminated, so that a total loss, with all the expenses and charges of litigation, must be borne by the unsuccessful party. I may add too, that the case appears to be contested upon principle; that the conduct of the parties is perfectly fair; and that there is not the least reason to impute to either, any desire to avail themselves of any rule of law, which is not founded in general justice and equity, and which may not consist with the most liberal good faith in matters of insurance.

The policy on which the suit is brought, bears date on the 6th of December, 1820, and insures for the plaintiffs "thirty thousand dollars on the ship Argonaut, valued at $12,000, and on property on board—viz, $4,000 on the vessel, $26,000 on the property on board, at and from Leghorn to her port of discharge in the United States." The loss is alleged to have been total, by reason of the perils of the sea, stranding and shipwreck. The material facts, as disclosed in the testimony (for there

is some contradiction upon collateral matters) appear to me to be these: The ship sailed from Leghorn on the 2d of February, 1821, in perfectly good order, on her voyage to the United States, having on board a cargo consisting of specie dollars, bags of rags, tile, &c. &c. Nothing material occurred until Saturday the 24th of March, when the vessel, about three o'clock in the morning, went ashore upon Gerrish's Island, near Portsmouth, in New Hampshire. The accident was not in the slightest degree attributable to any fault or negligence of the master or crew, but was occasioned entirely by mistaking the light on the Isle of Shoals for Boston light (both being revolving lights, and the former having been erected since the departure of the ship on her voyage), and also by mistaking Portsmouth light for Baker's Island light, and Boon Island light for Cape Ann light. The place where the ship went on shore was surrounded by breakers, and there being a heavy swell, and the ship having gone head upon the rocks, she strained very much, and thumped very hard, so that it was very difficult to stand upon deck. Every effort was made to get the vessel off, by the crew; and guns being fired for assistance, in the morning they procured it, and landed the specie. About noon the same day, the weather moderated, and lighters were got alongside, and they began to discharge the cargo. In the afternoon of the same day the vessel bilged, some of the planks of the bottom were broken, and large holes made in them, and the tide ebbed and flowed into her within four or five feet of the deck. During the night, on the ebb tide, they got out as much of the cargo as they could. On Sunday a storm commenced about 10 o'clock a. m., and the impression of the master and other persons on board being that the ship would go to pieces, every effort was made to save as much as possible. There were at this time eighty or ninety people on board; and they cut away the running rigging without unreeving it, and cut the sails from the yards in any manner they could for the purpose of saving them, the ship being then considered in imminent danger. About one o'clock that day, the master and all the crew quitted the vessel, deeming it very hazardous to their lives to remain on board, and leaving there a part of the cargo. In the afternoon of the same day the weather moderated, but no attempt was made to get out any more of the cargo on that day. On Monday morning, the 26th of March, they went on board again, and continued to discharge the cargo. During all this period no hopes were entertained of saving the vessel, and her situation was generally deemed one of extreme hazard. The situation where she lay was very much exposed to the sea, and if the wind had blown heavily from any quarter between southwest and northeast she must inevitably have gone to pieces. Different estimates were formed of her value at this time, but the opinion of the best judges was, that she was worth little more than her materials; and the chance of being gotten off was considered very small, so much so that the premium to insure it was by none valued at less than fifty per cent, and by many intelligent and skilful witnesses was valued at from seventy-five to ninety per cent. Capt. Ramage, of the United States schooner Porpoise, who went on board of the ship on Saturday, in a letter addressed to the owners on the 25th of March (Sunday), and which reached them the same evening, described her situation as follows: "I left her about 7 o'clock last evening, bilged, with eight feet of water in her hold, about a mile and a half to the eastward of the light, and lying on a ledge of rocks, thirty or forty yards from the shore. It is very doubtful whether she can be saved." The substance of this information was communicated to the underwriters the next day, soon after the abandonment. On Monday morning about 10 o'clock, with the knowledge of her previous situation, the plaintiffs, as owners, abandoned the ship to the various underwriters by whom she was insured, and among others, to the respondents; to the Suffolk Insurance Company; and to the New England Marine Insurance Company. The cause assigned in the letter of abandonment was, that the ship was shipwrecked on Gerrish's Island. The abandonment was first handed by Capt. Silver, one of the owners, to Mr. Balch, president of the Merchants' Insurance Company, with a statement of the fact that he had come to abandon the ship. Mr. Balch made no definite reply, opened and perused the letter, and then inquired of Capt. Silver about the situation of the ship, and the cause of the disaster. Capt. Silver, among other things, stated, that Capt. Wheatland, one of the owners, had gone down to Portsmouth, and that he had a paper approving of that proceeding, which he wished Mr. Balch to sign. Mr. Balch expressed his satisfaction that Capt. Wheatland had gone down, but said it was of no consequence for him to sign the paper, for they should of course approve of Capt. Wheatland's proceedings, and the presidents of the offices had had a meeting that morning, and had agreed to send an agent of their own. In like manner, abandonments were made to the other companies, the presidents of which referred to Mr. Balch as the person by whom the business was principally to be conducted. No objection was made by either of the presidents, to the acceptance of the abandonment; and on the other hand no assent, except so far as it may be inferred from the other facts, was given to it. The general practice in these offices is, for the president not to accept abandonments, though from their station, they are generally the medium through which communications are made to the insured. Capt. Silver asked for a copy of the agent's instructions, which Mr. Balch directed his clerk to give him. The following is a copy of those

instructions, signed by the presidents of the three offices:

"Boston, March 26, 1821. Joshua Blake, Esq.—Dear Sir: The ship Argonaut having been stranded on Gerrish's Island, near Portsmouth, and abandoned to the insurers, we have consulted together, and appoint you the agent of the companies we represent, to act and do what is needful in this business. With regard to giving instructions, we have only to say, that we leave to you to attempt to get the ship off, or to sell her as she lies; to sell the materials there, or to send them to Boston; and generally to exercise your own discretion, in which we doubt not you will do whatsoever shall be most for the interest of all concerned. The cargo has not been abandoned—you therefore can have no controul of that; but still we wish you to do all in your power to make the loss as small as possible. Shall be obliged by your informing us, when convenient, what is the situation of the property. Respectfully, &c."

Mr. Blake further states, that at the same time he received a memorandum, as part of his instructions, but which was not seen by the plaintiffs, which after stating certain particulars respecting the ship and cargo, and suggesting what it might be best to do, in case the ship was got off, or was sold, adds: "Capt. Wheatland, one of the owners, is there, and it will be proper to consult him in what concerns the cargo, as he has not abandoned the cargo. If the loss should prove to be less than fifty per cent. on the ship, the abandonment will not take effect. The ship's provisions belong to and make a part of the ship." Mr. Blake went to Portsmouth, saw the state of the ship, and returned to Boston on Thursday morning, leaving a Mr. Hawkes as the agent for the underwriters, with authority to endeavour to get the ship off, and proceed in every respect as to him should seem best for the preservation of the ship and property, during his absence, or until another agent was appointed by the underwriters; and this agency was confirmed by the three presidents by the mail of the next day. Mr. Hawkes accordingly set to work with forty or fifty men, and eventually succeeded, by great exertions, and the use of rags, beef, &c. in stopping the principal leaks, and getting the vessel off, though the weather was unfavourable, and with the assistance of about twenty boats, on Friday, the 30th of March, towed her up to a wharf in Portsmouth. There were several holes in the bottom of the ship, lying principally within the space of six feet. From the time of the abandonment, the ship owners ceased to have any thing to do with the ship; they never assented, and were not asked by the underwriters to assent, to the appointment of Mr. Blake or Mr. Hawkes as agent, and the whole proceedings to get the ship off, were exclusively directed by the underwriters and their agents, at their own cost and expense. The expense of getting off the ship was about $907. On Monday, the 2d day of April (a week after the abandonment), and not before, Mr. Balch, in behalf of the Boston companies, informed the plaintiffs by letter that the ship was got off, offered to make a compromise, and wished them to take the ship and repair her. He added, "Should we not agree in this, it is our intention to have the ship repaired as soon as practicable, and to return her to you." This letter was never answered. About the 8th of April, the underwriters sent an agent to Portsmouth, to make an estimate of the necessary repairs to put her in as good order as she was before, who estimated the gross amount, making the most liberal allowance, at $5,412. As soon afterwards as could conveniently be done (about the 20th of April), the repairs were begun, under the direction of a skilful and intelligent agent; and all the repairs were made by him according to his best judgment, with suitable instructions from the underwriters, and were completed about the 19th day of June, 1821. The underwriters on the 23d of June, wrote a letter to the owners, stating the fact, that the vessel was repaired, and offered to deliver her to them. The plaintiffs on the 26th of June, replied, rejecting the offer, and relying on their abandonment as accepted, and offered to execute a further transfer, reciting according to the laws of the United States, the certificate of registry. They also declined to agree to the proposal of a sale of the ship without prejudice, assigning as a reason the insufficiency of the repairs, &c. To this letter the defendants replied on the next day, (the 27th June) denying any acceptance of the abandonment, and expressing surprise at the assertion, and added: "On your informing us that the ship was ashore and bilged, and in a situation in which it was not probable she could ever be got off, and that you therefore wished to abandon; under the impression that your information was correct, we sent an agent with full powers to act as he should think proper, after he should have ascertained the facts; but on his arrival he found the facts materially different—the ship was not bilged, although her keel was badly chafed, and she leaked badly; nor was she in so desperate a situation as we had been led to believe. He therefore took measures immediately to get her off, and easily succeeded, and carried her to the wharf, where she now lies." The plaintiffs replied to this letter on the 9th July, declining any further correspondence. The defendants again wrote the plaintiffs on the 28th July, stating, that an offer had been made for the ship of $11,000, and that the agent thought he could get $12,000, if he was authorized to sell her, and proposed giving him authority to sell her. No reply was made to this letter, and here the correspondence closed. The ship yet remains at the wharf in Portsmouth; and recently, the leak, which after the repairs continued for many months, has ceased, but the place where it is, and the manner in

which it has stopped is unknown. Such appear to me to be the material facts of the case. There is, indeed, upon minor points, a diversity of testimony, which has employed the diligence and zeal of the parties; but which in my judgment bear so remotely upon the great points of the cause, that I have not thought it necessary to sift it with minute accuracy. As to the question of the sufficiency of the repairs, that is so dependent upon practical skill in nautical affairs, that if the cause were to turn upon it, I should, according to the known course of the admiralty, refer it to experts to report upon the whole evidence, what in their judgment is the true posture of the case in this respect.

The questions made and discussed at the bar with great diligence, learning and ability, from which I have derived no small share of instruction, and have been taught the intrinsic difficulty of the subject, are first, whether the plaintiffs had a right of abandonment upon the 26th of March, unuer all the circumstances of the case; secondly, whether, assuming that there then existed no such right, there was an acceptance on the part of the underwriters, of the abandonment tendered by the plaintiffs, so that they are now bound to pay as for a total loss. As preliminary to the first enquiry, I think it important to notice a difference between the courts of this country and those of England, in respect to the right of abandonment. With us, an abandonment once rightfully made, is conclusive between the parties, and the rights flowing from it are not divested by any subsequent events, which change the situation of the property, and make that, which was a total loss at the time of abandonment, a partial loss only. And the right of abandonment is to be decided by the actual facts at the time of the abandonment, and not merely by the information of the assured; and consequently, if the facts do not then warrant it, no prior or subsequent events will give it any greater efficacy. This is the established doctrine, as I take it, of all, or at least of the principal commercial states (Wood v. Lincoln & K. Ins. Co., 6 Mass. 479; Adams v. Delaware Ins. Co., 3 Bin. 287; Jumel v. Marine Ins. Co., 7 Johns. 412); and has been solemnly settled, upon the fullest deliberation, by the supreme court of the United States (Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch [8 U. S.] 29; Marshall v. Delaware Ins. Co., 4 Cranch [8 U. S.] 412). Whether this decision has given entire satisfaction to the profession, is more than I can presume to say; and whether at a future time it may be fit to undergo a revision, as has been intimated at the bar, I pretend not to determine. I can only say, that the decision already made, is conclusive upon my present judgment; and so far as I have been able to comprehend the grounds on which it rests, it appears to me founded on sound reasoning, public convenience, and the great principles of equity, which regulate the contract of insurance. The rule in the English courts is, as we all know, very different. There it has been held, that if an abandonment be rightfully made, it is not absolute, but may be controlled by subsequent events; so that if the loss has ceased to be total at any time before action brought, the abandonment becomes inoperative. M'Carthy v. Abel, 5 East, 388; Bainbridge v. Neilson, 10 East, 329; Patterson v. Ritchie, 4 Maule & S. 393. The cases in which this doctrine has been asserted, do not to my humble judgment, present any solid reasons to support it. They appear to me to trench very much upon the true principles of abandonment, and to be supported by analogies not very exact, or very cogent. And I find that they have struck the comprehensive and discriminating mind of Lord Chancellor Eldon in the same manner. Smith v. Robertson, 2 Dow. 474. The doubts which he has thrown out have not been as yet satisfactorily answered. And it is no slight recommendation of the American doctrine, that it stands approved by the cautious learning of Valin, the moral perspicacity of Pothier, and the practical and sagacious judgment of Emerigon. 2 Valin, Comm. 143, lib. 3, tit. 6, art. 60; Pothier, c. 3, note 135; 2 Emerig. c. 17, § 6, p. 194. And see Roccus, Ins. note 66.

It appears to me that this distinction has not at all times been sufficiently adverted to in our examination of the later English cases. Some of the remarks to be found there have a tacit reference to this doctrine; and many things thus receive an easy explanation, which it would otherwise be found somewhat difficult to reconcile with our stricter notions on the subject of abandonment. It has been said too at the argument, that abandonments are not to be favoured; that they have been liable to great abuses, and that courts of law are not disposed to enlarge the practice. See Lord Ellenborough's remarks in Bainbridge v. Neilson, 10 East, 329, 343. I am very much inclined to believe, that of late years this consideration has had quite as much weight as it deserved; and it is by no means clear, if the spirit of the cases decided by that great man, Lord Mansfield, had been fairly followed, that much uncertainty as to the law would not have been done away, and many fruitful sources of litigation dried up. At present there is enough of doubt and obscurity as to the right of abandonment in cases of sea damage, stranding, shipwreck, and loss of the voyage by the ship, to encourage expensive suits, and to lead one to the conclusion, that it were far better for the question to be settled upon some general principle in any way, than to remain in its present condition.

The plaintiffs contend that they had a right to abandon, (1) because the ship at the time was cast ashore and bilged, and in so dangerous a situation that the chance of recovery was desperate; (2) because she was injured by the accident to more than half her value, which of itself constituted a technical total

loss. Much minute criticism has been employed upon the language of the witnesses in describing the state of the ship; and I observe that the underwriters in their letter of the 27th of June, lay great stress upon the circumstance, that at the time of the abandonment the vessel was represented to be bilged; and it has been strenuously argued that she was not in fact bilged. It appears to me that in the nautical sense of the phrase she was bilged, understanding that phrase to import in common usage, as well as in the opinion of lexicographers, that state of the ship, in which water is freely admitted through holes and breaches made in the planks of the bottom, occasioned by injuries, whether the ship's timbers are broken or not. But waving all question on this point, what in fact was the situation of the ship at the period of abandonment? She lay on a ledge of rocks on a dangerous and exposed shore. Her bottom was broken through, so that the tide was freely admitted into her hold through several holes. Her cargo was from necessity discharged. Her sails and rigging were cut from the masts, and all her furniture was removed for safety. The master and crew had deserted her, expecting her to go to pieces, and her situation was one of extreme hazard. The chance of getting her off was small; and if gotten off, the expense of this, and the necessary repairs, must be very great. I do not say it would be one half her value, for that is a point which will be hereafter considered. The repairs alone, in the opinion of an agent of the underwriters, who at a subsequent period examined the vessel after she was in safety, and with the best means of judgment, would be upwards of $5,000; and in point of fact, the repairs actually made fell very little short of that sum; and the expense of getting the vessel off was upwards of $900; and if the first attempt had not been successful, might greatly have exceeded that sum. So that in addition to the other facts of the case, we have that of actual injury and expense to an amount nearly equal to half the valuation of the ship in the policy. And I may add to all this, that the requisite repairs could not at that season of the year be made in a period much short of three months, a period equal to the usual length of the voyage insured. Under such circumstances, I must say, that if there ever was a case for an abandonment upon a stranding or shipwreck, call it as you may, where the damage was less than fifty per cent. and the vessel was in extreme peril, yet if gotten off was repairable, scarcely could a stronger case be wished or imagined than the present. Still, if the law be otherwise, it is certainly not for me to attempt to ingraft a new principle into the doctrine of insurance. I am content on this, as on all other occasions, as a duty best fitted to my humble talents, to administer the law as I find it, and to give the parties, who stand upon their rights, the fullest benefit of that law. I will take occasion here also to remark, that we are not to judge of this case by subsequent events, except so far as they operate by way of evidence upon the preëxisting state of the ship. The right of abandonment depended altogether upon the facts as they then were, and upon the conclusions which reasonable men ought then to draw from them in the exercise of a sound discretion.

It has been very justly stated, that a total loss in the contemplation of law does not necessarily suppose the actual destruction of the thing insured. It may technically exist, when the thing is in safety, but is for the time being lost to the owner, or taken from his free use and possession. Such are the common cases of total losses by capture, by embargoes, and by restraints and detainments of princes. On the other hand, it is as clear, that the mere occurrence of these accidents does not constitute a total loss, if, in point of fact, the peril has passed away at the time of the abandonment. Lord Mansfield, upon one occasion said, "no cases say that the bare existence of the hull of the ship prevents the loss from being total." Milles v. Fletcher, 1 Doug. 231. And on another occasion he observed, alluding to the objection, "it might as reasonably be argued, that if a ship sunk be weighed up again at a great expense, the crew having perished, the insured could not abandon, nor the insurer be liable, because the body of the ship was saved." Goss v. Withers, 2 Burrows, 683, 697. See, also, 2 Emerig. Ins. c. 17. § 2, p. 181; 1 Emerig. Ins. c. 12, § 13, p. 400. On the other hand, Lord Ellenborough has told us, that "there is not any case nor principle, which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of the abandonment." Anderson v. Wallis, 2 Maule & S. 240, 248. I lay great stress on these last words, because it is manifest from the case, that they were used with reference to a technical total loss, and shew that the right of abandonment does not always depend upon the certainty, but upon the high probability of a total loss either of the property or voyage, or both. And in one of the latest cases ever decided by the same learned judge, he uses expressions indicating a perfect coincidence with the opinion of Lord Mansfield. He there observed, "the mere restitution of the hull, if the plaintiff may eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reduced to an average loss." M'Iver v. Henderson, 4 Maule & S. 576, 584. See, also, Bell v. Nixon, 1 Holt, N. P. 423. I think, therefore, that it may be assumed as a position not now controverted, that the existence of the ship does not prevent the loss from being considered total to the owner. Peters v. Phœnix Ins. Co., 3 Serg. & R. 25.

What then is the criterion by which we are to ascertain when a total loss of a ship has

taken place, so as to justify an abandonment? Or, to bring it down more closely to the present case, what is a total loss in cases of sea damage, stranding and shipwreck? It is stated, and the position seems incontrovertible, that the mere stranding of the ship is not of itself to be deemed a total loss, so as to entitle the insured immediately to abandon. Marsh. Ins. (Condy's Ed.) bk. 1, c. 13, § 1, p. 582. The reason is obvious. It may occasion but a slight injury easily repaired, and the vessel may be gotten off with a small expense, and the retardation of the voyage be trivial and unimportant. But the stranding may be attended with circumstances which would justify an abandonment, even though the hull of the ship should not be materially damaged. As, if she should be driven by a violent hurricane (such as occurs in the tropical climates, and sometimes even in our own) upon a high and sandy beach, or other place, so distant from the shore, or the means of adequate relief, that the expense of removal would exceed the value of the ship. Such a case is evidently contemplated in the treatises where the general doctrine is asserted. Id. bk. 1, c. 13, § 1, p. 582; 1 Emerig. c. 12, § 13, pp. 407–411; 2 Emerig. c. 17, § 2, pp. 180, 181; Poth. Ins. note 116; 2 Valin, Comm. lib. 3, tit. 6, art. 46, p. 102. And see Fontaine v. Phœnix Ins. Co., 11 Johns. 293. But although a mere stranding will not justify an abandonment, yet, it is said, a stranding which is followed by shipwreck, or which in any other way renders the ship incapable of prosecuting the voyage, will. Marsh. Ins. bk. 1, c. 13, § 1, p. 583. That again is a proposition, which in part depends upon what constitutes a shipwreck in contemplation of law. If the definition of Mr. Marshall (Marsh. Ins. bk. 1, c. 13, § 1, p. 582) be assumed as correct, that shipwreck, is when the ship is so broken, disjointed, or otherwise injured, that it no longer exists in its original nature and essence, (for though the wreck may remain, yet the ship is lost) there can be no doubt of the doctrine. A learned judge in our own country has given a somewhat different definition, which it has not been denied at the argument, would constitute a good cause of abandonment. He says, "A ship becomes a wreck, when, in consequence of the injury she has received, she is rendered absolutely innavigable, or unable to pursue her voyage without repairs exceeding the half of her value." Wood v. Lincoln & K. Ins. Co., 6 Mass. 479, 482. The accuracy of this definition has been questioned, as it points rather to the circumstances which constitute a total loss justifying an abandonment, than to the nature of the injury and state of the ship. Innavigability is by foreign writers distinguished from shipwreck; and the former is often applied to the ship, when in consequence of accidents, she is incapable of being repaired, or the repairs would cost as much as a new ship. 1 Emerig. c. 12, § 12, p. 399; Id. § 38, pp. 575, 591. Emerigon appears to me to have defined the term in a manner more comformable to its nautical, as well as legal sense. After giving the etymology of the term "naufrage" (naufragium), he says, there are two kinds of shipwreck; the first, when the ship is submerged or sunk so that no permanent vestige remains upon the surface of the water; the second, when the ship, being stranded, has an opening through which the sea water is admitted so as to fill her hold, although she does not absolutely disappear. Id. c. 12, § 12, pp. 400, 403; Id. § 13, pp. 408, 409. In both cases he considers the owner entitled to abandon, not, as was intimated at the bar, upon any peculiar provision of the French ordinance, for that ordinance allows abandonment in cases of shipwreck generally, leaving the import of the term to be ascertained by usage as in other cases, but upon the just principles of interpretation. That the first kind of shipwreck enumerated by Emerigon, is in our laws equally as in the French law, a good cause of abandonment, cannot be reasonably doubted. In the case of Goss v. Withers, Lord Mansfield, in his reasoning already cited, puts the point as clear to illustrate the right of abandonment. In Anderson v. Royal Exch. Assur. Co., 7 East, 38, 42, which was a case of submersion of ship and cargo, Lord Ellenborough said, that during the time of the submersion, the cargo might have been treated as a total loss; and in Davy v. Milford, 15 East, 559, 564, where this case was cited, he manifestly applied the same doctrine to the ship, declaring that during the submersion the ship ceased to exist for any useful purpose. The latter kind of shipwreck stated by Emerigon, is that alone upon which we might pause, as necessarily constituting a case for abandonment. If our law were like the French, there would be an end of the present controversy, for the facts of this case bring it completely within the definition of Emerigon. But I take it to be clear, that our law does not turn upon niceties as to the meaning of the word shipwreck; and that if a shipwreck does occur without material injury to the vessel, so that she may be repaired in a reasonable time at a moderate expense, and resume her voyage, no right of abandonment attaches. So that after all, whether a right of abandonment exists or not, is to be judged from all the circumstances of the case, and not from any arbitrary meaning attached to a particular word, or a particular posture of the ship.

The cases on this subject are not perhaps easily reconcilable in their full extent; but it appears to me important to review them for the purpose of ascertaining what at least is the leading principle. The first is Goss v. Withers, 2 Burrows, 683, which it is material on many accounts to consider. There was an insurance in that case, and the suit was brought on both policies; the declaration in that on the ship (which was a valued policy)

alleged a total loss by capture; that on the cargo, a total loss by jettison and capture. The judgment, therefore, of the court, must be considered as applied to both, reddendo singula singulis. The insurance was at and from Newfoundland, to her port of discharge in Portugal or Spain without the Streights, or England. The ship sailed on her voyage, was captured by the French and her crew taken out, and afterwards was recaptured and brought into Milford Haven, in England, and immediate notice was then given to the insurers, by the insured, with an offer of abandonment. Before the capture, the ship suffered so much from a storm, that she was disabled from going on her destined voyage, without going into port to refit—part of the cargo was thrown overboard in the storm, and the rest was spoiled while the ship lay at Milford Haven, after the offer to abandon and before she could be refitted. Lord Mansfield, after stating that the loss was total by the capture during its continuance, said, that the subsequent recapture was at best saving only of a small part,—half the value must be paid for salvage—the disability to pursue the voyage continued—the master and mariners were prisoners—the charter-party was dissolved, and the freight, except pro rata, lost. The ship was necessarily brought into an English port; and what might be saved, might not be worth the expense of saving it. He afterwards added, that the loss as to the ship could not be estimated, nor the salvage of one half be fixed, by a better measure than a sale. In such a case, there was no colour to say that the insured might not disentangle himself from the unprofitable trouble and further expense, and leave the insurer to save what he could. The parts of the opinion which I have selected, are manifestly addressed to the case of the ship, and they demonstrate the opinion of the court, that though the hull was safe and reparable in a home port, yet as the salvage was one half, and the expense of repairs considerable, and the voyage was in fact lost, the abandonment was good, thus combining all the facts as the ground of decision.

Then came Hamilton v. Mendes, 2 Burrows, 1198, which was a valued policy on the ship, and on goods on board, on a voyage from Virginia or Maryland, to London. The vessel was captured on the voyage, and was retaken and brought into Plymouth; and afterwards the plaintiff offered to abandon, but the underwriter refused it, and offered to pay the salvage and losses, and charges occasioned by the capture. The ship afterwards came to London, where the cargo was delivered to the freighters, and the ship sustained no damage by the capture. The plaintiff claimed for a total loss, on account of the capture, and the court held it a partial loss only. Lord Mansfield among other things said, "It does not necessarily follow, that because there is a recapture, therefore the loss ceases to be total. If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expense is necessary; if the insurer will not engage in all events to bear that expense, though it should exceed the value, or fail of success; under these, and many other like circumstances, the insured may disentangle himself and abandon, notwithstanding a recapture." He then proceeded to show, that none of these circumstances occurred in the case before the court, and in this respect it was distinguishable from Goss v. Withers. I know very well, that Lord Ellenborough, on a late occasion, (Falkner v. Ritchie, 2 Maule & S. 290, 293,) complained of the looseness and generality in these expressions, as inclining him to pause upon them, and referred to Pole v. Fitzgerald, Willes, 641, as fit to be resorted to, in order to purify the mind from these generalities. On this I have only to observe, that these cases have been acted upon for more than a half century, and have never been shaken. And as to Pole v. Fitzgerald, whatever may be its authority, seeing that it was opposed by the judges of the king's bench, at the head of which there then presided one of the greatest insurance lawyers of his day, it may be well doubted if some of the dicta in it now stand commended to the judgment of the profession. See the observations of Lord Eldon in Brown v. Smith, 1 Dow. 350, 358. And if I do not mistake, Lord Ellenborough himself, on more than one occasion, has reposed his judgment upon the authority of these very cases.

Then came the case of Milles v. Fletcher, 1 Doug. 231, which was an insurance on the ship and freight from Montserrat to London. The vessel was captured on the voyage, and part of her cargo was taken out. She was afterwards retaken and carried into New York, where the captain on his arrival found that part of the cargo was washed overboard, and part of the residue was damaged, and the ship was leaky, and could not be repaired without unloading. The owner had no storehouse at New York, to store the cargo, nor any agent there. No sailors were to be had, and the only way of paying the salvage was by selling part of the cargo. The expense of repairs would have exceeded the value of the freight by £100. There was an embargo on all vessels at New York till the 27th of December, and the ship by her destination was to have arrived at London in July. Under these circumstances, the master, after consulting his friends, sold ship and cargo. The latter was paid for; but the person who had contracted to buy the ship, ran away, and she was left in a creek at New York. The owner afterwards, on information, abandoned, and it was held a total loss. Lord Mansfield, in delivering the opinion of the court, affirmed the doctrines already stated by him in the

former cases, and relied on them as grounds of decision. He considered the case as one of a total destruction, and not a partial stoppage of the voyage; that it was best to sell the ship, that the expense would have exceeded the freight, and that the expense of bringing her home, might have been more than she would have sold for in London; and therefore he considered that the loss continued total, notwithstanding the recapture. It is material in this case to observe, that the contract of sale of the ship was not consummated; that the damage done her was not pretended to exceed half her value, but only exceeded her freight for the voyage; and that she was left by the master in a state of safety at New York, and continued so, for aught that appears, up to the time of abandonment. Here then was a case, where the injury was less than fifty per cent. of the value, and yet from other circumstances the abandonment was held to be good.

The case of Furneaux v. Bradley (Park. Ins. c. 9, p. 219), followed. The insurance was on the ship, in port or at sea, for six months, from 18th July, 1777. The ship was in government service, bound from Cork to Quebec. She arrived there, but the season being far advanced before she was ready to return, she was removed into the basin; but on the 19th November she was driven from thence by a field of ice, and damaged by running on the rocks. Her condition was not examined till April following, after the expiration of the policy. She was then found to be bilged, and much injured, but not thought irreparably so. In the progress of the repairs, difficulties arose from the want of materials, and the captain, after consulting the merchants and agents, sold her. An account was made up, charging the insurers with the whole amount, and crediting them with the sums for which the ship sold as salvage. After argument, the court held that the loss in November should be taken as an average, and not as a total one; that the ship should be considered as damaged on the 19th November, but not totally lost. The grounds of this determination are not stated in the report; but there seems no reason to doubt its correctness. The question turned altogether upon the quantity of damage done in November; and the court thought it merely partial. There does not appear to have been any abandonment, nor could it have been well made for any injury sustained subsequently to the 17th of January, when the policy expired; and without an abandonment in a reasonable time, there could be no recovery for a total loss. See Mitchell v. Edie, 1 Term R. 608; Da Costa v. Newnham, 2 Term R. 407; Martin v. Crokatt, 14 East, 465; Davy v. Milford, 15 East, 559; Bell v. Nixon, 1 Holt, N. P. 423. The voyage was not lost by the accident, for the vessel did not intend to return that season, and before, by the opening of the river in the spring, the voyage could be resumed, the policy had expired. The court clearly did not consider, that if the voyage had been lost, an abandonment would not have been good; for that would have been contrary to their prior as well as subsequent decisions. Chief Justice Parsons has commented on this case with the same views. Wood v. Lincoln & K. Ins. Co., 6 Mass. 479, 485, 486.

The next case was Manning v. Newnham, Park. Ins. c. 9, p. 221. See Marsh. Ins. 586; s. c. 2 Camp. 624, note. It was an insurance on ship, cargo, and freight, at and from Tortola to London, warranted to depart before a particular day, and free of particular average. The ship was a Dutch prize, and sailed on the voyage under convoy, and on the second day afterwards was compelled, in consequence of leaks occasioned by stress of weather, to return to Tortola. A survey was there had, and the ship declared unfit to proceed to London, and that she could not be repaired at Tortola, or any of the English West India Islands. No ship could be had at Tortola, to bring the whole or the greater part of the cargo to London; and the cargo did not appear (as one of the reports states) to have received any special damage; and was sold for £700 within the sum in the policy, which was above £12,000. The ship, and the whole of the cargo, was sold accordingly at Tortola. The assured claimed for a total loss, and the jury found a verdict in his favour. On a motion for a new trial, it was overruled. Lord Mansfield said. "If by a peril insured the voyage is lost, it is a total loss. In this case, the ship has an irreparable hurt within the policy; this drives her back to Tortola, and there is no ship to be had there, which could take the whole cargo on board. It is admitted there was a total loss on the freight, because the ship could not perform the voyage. The same argument applies to the ship and cargo." The ground of decision, therefore, was, that the voyage as to the ship was lost by the impossibility of her being repaired in that or the neighbouring ports, so as to complete the voyage; but the question of the quantity of injury received by the storm, was not made in the cause. I am aware that Lord Ellenborough, in Anderson v. Wallis, 2 Maule & S. 240, 246, seems inclined to doubt this case, but I find that in another case he distinctly acceded to its authority. Wilson v. Royal Exch. Assur. Co., 2 Camp. 623.

The case of Cazalet v. St. Barbe, 1 Term R. 187, 190, 191, was a policy on the ship from Wyberg to Lynn. In the course of the voyage the ship received damage to the amount of forty-eight per cent., which sum the underwriters paid into court. She arrived at her port, and so performed her voyage, but on arrival she was not worth repairing. The question was, whether the

plaintiffs had a right to abandon; and the court held that they had not, as, by the express finding of the jury, the loss was a partial loss of forty-eight per cent. Willes, J., said, "There had been no loss either of the ship or the voyage; but being an old ship, she suffered so much that she was not worth repairing." Buller, J., said, "It has been said that the insurance must be taken to be on the ship as well as the voyage; but the true way of considering it is this, it is an insurance on the ship for the voyage; if either the ship or the voyage be lost, that is a total loss; but here neither is lost." Da Costa v. Newnham, 2 Term R. 407 (and see Parsons v. Scott, 2 Taunt. 363), deserves some attention. It was an insurance on the ship from Leghorn to London. In the course of the voyage she met with an accident, and was obliged to put into Nice to repair. Advice thereof was transmitted to the owner, and that it was necessary to unload the vessel, and that a considerable expense must be incurred. The information was communicated to the underwriters, and an altercation arose between the owner and the underwriters, he being desirous of abandoning altogether, and they insisting upon the vessel's being repaired, and telling him to pay the tradesmen's bills. He consented at last that the repairs should be done, but refused to advance the money; in consequence of which it became necessary to take a large sum on a bottomry bond. Before the repairs the crew were discharged, and several were hired on daily pay. The ship was refitted and resumed her voyage and gained freight, but on her arrival at her port of discharge, the underwriters having refused to take up the bottomry bond, she was obliged to be sold to pay the debt, and was sold for 600 guineas, so that she never came freely into the owner's possession. Under these circumstances, Buller, J., at the trial, directed the jury that there had not been a total loss at Nice, for though the plaintiff had offered and was entitled to abandon, yet in truth he had not abandoned. But he thought, that as the subsequent injury had occurred to the plaintiff, from the neglect of the underwriters to pay the bottomry bond, which was only £600, and she was therefore sold for 600 guineas, the underwriters were bound to pay the whole amount of the insurance. On a motion for a new trial, the court held the direction right. Ashurst, J., said, "At that period the plaintiff might have abandoned, if he pleased, for the ship was then in a situation not worth repairing, and that was notified to the underwriters; but he did not abandon as he might have done; and upon their insisting that the vessel should be repaired, he undertook the management of it; but that was at the risk of the underwriters." The other judges of the court sustained his reasoning. It is material to observe in this case, that the ship does not appear to have been injured more than one-half her value; and she was repaired, and actually performed her voyage. It is true that one of the learned judges declared that she was not worth repairing; but that might have been (as in Cazalet v. St. Barbe,) although injured less than one-half in value; and although she sold for less than the bottomry bond, that is not decisive of the cost of repairs, for it included other charges; and the verdict was founded upon the ground, that in the event the plaintiff was entitled to recover as if the loss had been total. It is perhaps difficult to ascertain, what was the precise ground on which the court held the plaintiff originally entitled to abandon. It may have been, that the damage exceeded fifty per cent.; or that in the predicament of the ship she was not worth repairing; or that the underwriters refused to make the necessary advances.

Parsons v. Scott, 2 Taunt. 363, was an insurance on the ship, which was captured, and afterwards liberated, and returned to England, not having performed her voyage, and an abandonment took place. Upon the first argument, Chief Justice Mansfield admitted, that if a capture has occasioned the loss of the voyage, although the ship remains in such a state that she may be repaired, and may again be taken possession of by the owner, yet it is a total loss. But he said the question was, what shall be deemed a loss of the voyage; and adverting to Goss v. Withers, remarked, that Lord Mansfield took various circumstances into consideration; the nature of the commodities, the defeating of the voyage, the amount of salvage, the captivity of the crew, and the loss of the freight. Lawrence, J., admitted that the dicta in the authorities went the length of asserting generally, that wherever the voyage is defeated by any of the perils insured against, there is a total loss; but that he could find no authority applicable to the case of a ship in the hands of the owner in the country where he resides. He added, that in Manning v. Newnham, a loss of the voyage as to the ship did arise, though not as to the cargo. On the second argument, the court held that there was no total loss. I advert to this case, to show that the cases alluded to were not attempted to be overthrown, but their authority admitted, and the case before the court was distinguished from them.

Shortly afterwards came the case of Martin v. Crokatt, 14 East, 465 (see, also, Bell v. Nixon, 1 Holt, N. P. 423), which was an insurance on the ship and goods from Carlscrona in Sweden, to Deptford or London, warranted free of particular average, &c. The ship on the voyage was run foul of by another vessel in a gale of wind, and from that and other perils of the sea, received so much damage as to be obliged to put into Warberg Roads, a small fishing place in

Sweden, where she was surveyed, and reported to be incapable of proceeding on her voyage, without a thorough and very expensive repair. The assured, without giving notice of abandonment, laid the intelligence before the underwriters, and required their directions; but they refused to interfere. Upon which the insured directed a sale of ship and cargo, (which latter was undamaged) for the benefit of all concerned; but the proceeds of the sale, after deducting the expenses and salvage, left a small balance against the insured. It was contended, that as the damage, which in the event had turned out a total loss, was occasioned by a peril insured against, and the voyage was thereby defeated, it was to be treated as a total loss, with benefit of salvage. But Lord Ellenborough thought at the trial, that as there was no abandonment, it could not be treated as a total loss, since the ship continued to subsist in specie in the place whither she was carried. And this opinion was upon argument supported by the court. Lord Ellenborough then said, that where the thing subsists in specie, an abandonment is necessary; and if upon the happening of such a peril, which suspends the voyage and induces the necessity of repairs, the owners choose to make it a total loss upon the loss of the voyage, or the probable estimate of the expenses of repairs, absorbing the value of the thing insured, they ought to abandon, to enable the underwriters to elect whether or not they will incur such expenses.

In Thomson v. Royal Exch. Assur. Co., 1 Maule & S. 30, which was a policy of insurance on bottomry on the ship, at and from St. Christophers to London, it appeared that the ship was much disabled by storms in the voyage, and narrowly escaped foundering at sea; but was towed into Falmouth. A survey was then made of the state of the ship, and the expense of repairs, when it was found that it would amount to £3,200, and after their completion she would be worth only £2,000. The owners therefore broke her up and sold her. Her value, when she left St. Christophers, having been £4,000. The decision turned upon the point, that in cases of bottomry there must be an absolute destruction of the thing to entitle the insured to recover. And Lord Ellenborough, in noticing the distinction between a policy on the ship, and on the bottomry bond, said in the former case, if the voyage be lost, or the ship be reduced to such a state, that she cannot proceed without refitting, the expense of which would greatly exceed her value, the insured may abandon and recover as for a total loss. The language of the learned judge without doubt referred to the case before him, which was treated as clearly a technical total loss of the ship. And yet if the value at the time of departure on the voyage be taken, and a deduction be made from the necessary repairs of one third new for old, it is manifest that the damage was less than one half of that value.

Another case, which I think it necessary to notice, is Thornely v. Hebson, 2 Barn. & Ald. 513, when in consequence of severe injuries occasioned by storms, the ship was deserted by the crew, and afterwards was taken possession of by volunteers from another ship, and brought into port, and a moiety decreed as salvage, and the ship sold to pay it. In a suit on a policy on the ship, the court held that the owners had no right to abandon and recover for a total loss, because it did not appear that they had made any exertions to pay the salvage, and thus prevent the sale of the ship. Upon this case I have only to observe, that I do exceedingly doubt its authority, for the injury and loss to the owner in every event must have exceeded half the value. See Marine Ins. Co. of Alexandria v. Tucker, 3 Cranch [7 U. S.] 357. It has been supposed at the bar, that this case establishes the doctrine, that desertion of the ship at sea, in consequence of perils insured against, does not authorize an abandonment. I cannot admit this conclusion, for the abandonment was not made until after the ship was recovered, and had arrived in port. There is not a single dictum in any English case, which shows that an abandonment during the time of such desertion would not be good, whatever might be the effect of a subsequent recovery upon the title of the plaintiff.

Falkner v. Ritchie, 2 Maule & S. 290, is a strong case. The insurance was on a ship at and from Cadiz to any ports or places on the coast of Africa, during her stay and trade there, and thence to Cadiz and Lisbon. The vessel sailed on the voyage, and arrived on the coast of Africa, and the crew, while the master was on shore, seized the ship, and carried her to South America. There, after plundering, they deserted her except one black man, and she was there taken possession of by part of the crew of a British ship of war, and afterwards sent to England. Part of her rigging was gone, and she could not be made fit for the voyage again without considerable expense, and providing a crew and stores. The owners abandoned, but the underwriters refused the abandonment; and the court held the loss to be a partial loss only, upon the ground, as it should seem, that there was a retardation or suspension only, and not a destruction, of the voyage, as to the ship. And Lord Ellenborough asked, what the loss of the voyage had to do with the loss of the ship. In respect to this case it is not necessary to say much. It does not appear to me to be reconcileable with Brown v. Smith, 1 Dow. 349, in the house of lords, where, under circumstances very similar, it was holden by the highest authority, that the insured had a right to abandon as for a total loss.

The latest case is McIver v. Henderson, 4 Maule & S. 576, where the insurance was upon the ship at and from Liverpool to Sierra Leone. The ship sailed on the voyage, and was captured by the French; part of her crew were taken out, and part of her cargo plundered and thrown overboard, and also the greater part of her stores, and provisions, and guns, and all the ammunition. The captors then gave her up to the master of a Portuguese schooner, which they had previously captured and burnt, who finally arrived with her at Fayal. The Portuguese master here claimed the ship as a donation, and instituted proceedings in the court there to enforce it. Pending the proceedings, the original master obtained leave to sell, and did sell the remaining part of the cargo, and ultimately a decree of restitution to him was decreed, from which decree the other party appealed. The proceeds of the sale of the cargo were applied in part to the payment of expenses, and the remainder the master was obliged to leave in the hands of a Portuguese, to answer the Portuguese master's further appeal, in order to obtain a release of the ship. The original voyage, from the loss of the cargo and the other causes, and the want of stores, which could not be procured at Fayal, became impracticable, and the ship returned to Liverpool. When she left Fayal, she could not have been sold there for more than £600, but was worth, to be sold at Liverpool, £1,300. The expense of navigating her from Fayal to Liverpool was £221, and the sum deposited at Fayal to abide the event of the appeal was £427. After the decree of restitution, and pending the appeal, the owner abandoned; and the question was, if the owner was entitled to recover for a total loss; and the court held that he was. Lord Ellenborough, after the remarks which I have already quoted, said, "The voyage is lost, the cargo which was to be conveyed in the ship is wholly gone, she is stripped of a great part of her necessary equipments, stores and furniture, and the ultimate recovery of any thing is uncertain, and attended with the trouble, expense, and hazard of litigation. The loss at the time of the abandonment was and still continues total." It appears to me that this case leaves the law on the subject of abandonment exactly where Goss v. Withers, Hamilton v. Mendes, and Mills v. Fletcher, had placed it.

These, I believe, are all the material cases which are to be found, bearing on the point before the court. I have forborne to touch on any, which exclusively applied to cargo, being of opinion with Chief Justice Tilghman, that there is a great difference between an insurance on ship and on cargo, and that some confusion has been introduced from blending them. The cases which have been reviewed, do, as I think, authorize the conclusion, that the question of the right of abandonment of the ship is to be judged of by all the circumstances of each particular case; and that no such general rule has as yet been established, as that the injury to the ship by the perils insured against, must in all cases exceed one half her value, to justify an abandonment. At all events, I think I may say, that there is no English case, in which, under circumstances like the present, an abandonment of the ship has been adjudged void.

I do not think it necessary to comment at large on all the American cases cited at the bar; but shall content myself with a reference to a few, which have been supposed most strongly in point. The fair conclusion from Fontaine v. Phœnix Ins. Co., 11 Johns. 293 (see, also, Bell v. Nixon, 1 Holt, N. P. 423), seems to me to be, that which the reporter has drawn, that if a vessel, after being stranded, should be deemed a wreck, or her situation desperate, it will justify an abandonment, though she should be got off by other persons, and repaired for a sum less than half her value. And the circumstances of that case bear a very strong resemblance to that now before the court. The case of Goold v. Shaw, 1 Johns. Cas. 293, turned upon the point, that the ship could have been repaired for less than half her value, and might have performed her voyage, which was broken up merely on account of the deterioration of the cargo. It stands therefore on the same ground as Alexander v. Baltimore Ins. Co., 4 Cranch [8 U. S.] 370. But the case which has been pressed with the most earnestness upon the court, as decisive of the merits of this, is Wood v. Lincoln & K. Ins. Co., 6 Mass. 479. The opinion there delivered by the late learned chief justice, is certainly entitled to great weight and consideration, from the elaborate manner in which the subject is discussed. I have not the slightest inclination to doubt the authority of that case, upon its own particular circumstances. At the time of the abandonment there does not appear to have been any serious injury to the vessel; she was merely upset, and at high water was nearly covered; and it was not until after the abandonment, that she was disengaged from the rock and sunk in deep water. She was afterwards weighed and carried to her home port of destination, which was only five miles distant. The learned judge himself, in commenting on the circumstances, observed, "that it was not stated, that she received any essential injury by this accident, or that an attempt to weigh her, and prepare for finishing her voyage, would have been hazardous, or very expensive." In the present case, on the contrary, the vessel was essentially injured, and in a very perilous situation; and the repairs must be very expensive, and of such a nature too, that they could not be completed under a long period of time, as long as the usual period of the whole voyage insured. The learned judge also laid stress upon the circumstance, that the vessel at the time of the abandonment was stranded, but not sunk in deep water. He

added, that it did "not appear that the plaintiff made any attempt to weigh the vessel, or offered the defendants to make any, if assured of the reimbursement of his expenses." That also did not occur in the present case, because the vessel was thought in a desperate state, nor was it requested or offered on the other side. No objection was made to the abandonment, and so far from a desire being manifested at that time to have the insured undertake to get the vessel off, the underwriters declined the further agency of one of the owners, and appointed their own agent, under the supposition that the case, if not hopeless, at least was extremely hazardous. Agreeing then, as I do, to the authority of the decision in Wood v. Lincoln & K. Ins. Co., I may be permitted to say, that the material facts are unlike those of the present case; and that the court in that case, rely in their judgment upon the non-existence of circumstances, which cogently press upon us in this. Having said thus much upon the merits of that decision, I hope it will not be deemed a want of due reverence and respect, to declare, that although in much of the reasoning, (which is indeed drawn from obvious sources) I entirely concur, there are dicta in that opinion to which in the large sense in which I understood them, I cannot yield my assent, and to which I am sure, if the points had been directly in judgment, the learned judge would have given a more exact consideration. It is not however my intention now to comment on these dicta. It is stated in the opinion, that if the vessel be injured by the stranding beyond a moiety of her value, or if the stranding be at such a season of the year that the ship cannot be got off in a reasonable time and repaired, so that her voyage is defeated, the owner may abandon. But language is afterwards used, from which it has been inferred, that even in such cases, if the underwriters offer to bear all the expenses, whatever may be the event, and a fortiori, if they themselves undertake to get off the vessel, and repair her in a reasonable time, at their own expense, and are successful in their purpose, the owner cannot abandon. If this be the proper meaning of the passages referred to, I should pause upon the law thus asserted. But if the meaning be, that in a doubtful case, where the expense of repairs must be great, though not with certainty one-half; or where by the stranding and delay consequent thereon, the voyage may be, but not in all probability must be, lost; if the underwriters offer to bear all the expenses of the experiment, the owner cannot abandon, there seems much reason for admitting such an offer as a material ingredient, in considering whether the owner has a right to abandon. In this view it would comport with the doctrine, as I comprehend it, in the English authorities; for there the absence of such an offer is relied on as auxiliary to the other circumstances, to show that the owner in a doubtful case is entitled to abandon. But the offer itself has never been relied on, to defeat an indisputably vested right of abandonment. See Hamilton v. Mendes, 2 Burrows, 1198; Milles v. Fletcher, Doug. 231; Da Costa v. Newnham, 2 Term R. 407. There is the more reason in our law for adhering strictly to the doctrine, because the right of abandonment must depend upon the facts, and the judgment upon those facts, at the time when it is made. It cannot remain in suspense, or be divested by subsequent events. If the facts then present a case of extreme hazard, and of probable expenses exceeding half the value of the ship, the party may abandon, although in the event, it turn out that the ship is gotten off at a less expense. Fontaine v. Phœnix Ins. Co., 11 Johns. 293; Robertson v. Caruthers, 2 Starkie, 571. I take the language of Lord Ellenborough, in Anderson v. Wallis, 2 Maule & S. 240, 248, to convey the correct notion of the law on this subject. An absolute total loss is not necessary to justify an abandonment. It is sufficient, if at the time it be in the highest degree probable, to sound judgments acting upon all the facts. And it is indeed most manifest, that the case of Wood v. Lincoln & K. Ins. Co., did itself proceed, not upon any single fact, as decisive one way or the other, but upon all the circumstances taken in combination. The whole reasoning too of courts of law, in all the cases where it has been decided that an abandonment must be made in a reasonable time after knowledge of the loss, and what that reasonable time is, demonstrates in the fullest manner the opinion, that the assured is to act, not upon certainties but on probabilities, and that if he should wait until an unfavorable result, he will not then be entitled to turn the loss into a technical total loss. Marsh. Ins. bk. 1, c. 13, § 2, p. 589; Park. c. 9, p. 239.

The case of Hart v. Delaware Ins. Co. [Case No. 6,150], cited in Marsh. Ins. (Condy's Ed.) 281b, 562, has been supposed to indicate a rule on this subject more broad than that which appears to me ever to have been entertained in the British courts. If the case be correctly reported, the court on that occasion is supposed to have held, that the insured had a right to abandon the ship, if the injury exceeded one half of her value, unless the underwriters offered at all events to pay the amount of repairs; and if they did, then the abandonment would not be good. This doctrine, at least to me, is new. On what authorities it rests, I have not been able to learn, from the short note in Mr. Condy's edition of Marshall on Insurance. If it rests on Hamilton v. Mendes, Milles v. Fletcher, or Da Costa v. Newnham, with the highest possible deference for my learned brother, Mr. Justice Washington, I am not able there to find a warrant for it. The point is not directly before the court, as it was a policy on freight. It does not appear that the ship was abandoned, and if the underwriters offered to repair her, and she might have gone upon the voyage, the loss of freight was by the volun-

tary act of the owner, and not from the perils insured against. The case of Ritchie v. United States Ins. Co., 5 Serg. & R. 501, proceeded upon the authority of that of Hart v. Delaware Ins. Co., and may well be supported upon other distinct grounds.

I know of no judgment where it has been held, that in a case of capture, embargo, or blockade, the right of the insured to abandon, can be intercepted by an offer of the underwriters to indemnify and pay all the expenses. And indeed, if it could be by such an offer, then an abandonment in all such cases would be perfectly nugatory, for the policy always imports on the part of the underwriters an agreement to this effect. And yet, if the principle be correct, I do not perceive why it is not equally as applicable to a case of capture as of sea damage, to a case of blockade as of shipwreck. It is said indeed, that the contract of insurance is a contract of indemnity only; and therefore if the underwriters will bear all the expenses there is no ground to claim more, and if all the expenses are paid, the insured is completely indemnified. This is true in a general sense, sub modo, but not universally. The insured by the same law has a right of abandonment, and this right is the result of the construction of the same contract, which is called an indemnity. If the insured abandon for a just cause, he is entitled to recover for a total loss, and that is deemed by the law his just indemnity; and he is not obliged to take the remnants and surplusses of a lost voyage or adventure, and claim of the underwriters merely the average or expenses incurred by the calamity. The cases are familiar in the books, where the insured has successfully insisted upon his right to a total loss, notwithstanding an offer of payment of all charges incurred. The difference may be and often is, very material to the insured, whether he is obliged to take the property upon the payment of damages and expenses, or to abandon it and recover for a total loss. As I understand the law, it has given to him, and not to the underwriters, the option to abandon or not; and if he does abandon in a proper case, he may stand upon his rights uncontrolled and uncontrollable by the other party. It appears to me, meaning to speak with all deference for other judgments, to be introducing a new element of discord into the law of insurance, to allow the right of abandonment to be a shifting right, dependent upon the will of both of the parties, and to be defeated by any act of one, after it has rightfully attached by the act of the other. And I am yet to learn how it is, that an offer made at the time of abandonment to pay all expenses, can have more efficacy than the same offer, incorporated as it is, in the original terms of the policy. The insured is in no case bound to abandon. He may in all cases elect to repair the damage at the expense of the underwriter; and if he acts bonâ fide and with reasonable discretion, there is no decision yet pronounced, which declares that he shall not be entitled to a full compensation, however great it may be, even if it should equal, or even exceed, the original value of the ship. And until such a decision is made, the direct terms of the policy seem strong enough to justify such a claim. But if the doctrine be otherwise, which I cannot admit, still it does not apply to the present case. Here, no request was made to the owners to repair the ship, and no offer to bear all the expenses, whatever might be the event. It is true, that a week after the abandonment, when the ship was off the rocks and lying at the wharf in Portsmouth, such a request and offer were made. But that was clearly too late. If an offer is to have any effect, it must be made at the time of the abandonment, with reference to the state of facts then existing. The underwriter cannot lie by and profit by the event. He must decide recenti facto upon the notice and application to abandon; and if he does not then make the offer, he waives all right of benefit from it. In the present case, it cannot be denied that there was the most ample time for deliberation, and as early as Thursday morning the most ample knowledge of all the facts, by the underwriters, through their own special agent. Even if it were possible to contend, that the right might be in suspense up to this period, any subsequent delay was unreasonable and unjustifiable.

The American cases then may be dismissed without farther commentary, since they furnish no new rule on the subject of abandonment; at least none which applies to circumstances like those of the case at bar. We are therefore driven back upon general principles, and must extract them, as we may, from the current of authorities, to aid us in the present inquiry. The right of abandonment has been admitted to exist, where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests by sovereign authority; where there is a present total loss of the physical possession and use of the ship, as in case of submersion; where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired for the voyage in the port, where the disaster happens; and, lastly, where the injury is so extensive, that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value. None of these cases will, I imagine, be disputed. If there be any general principle, that pervades and governs them, it seems to be this, that the right to abandon exists, whenever from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she

will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost. See the opinion of the court in Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch [8 U. S.] 41; Marshall v. Delaware Ins. Co., 4 Cranch [8 U. S.] 207. Try the Argonaut by the test of such a rule, and it is not difficult to come to the conclusion, that the plaintiffs had a good cause of abandonment.

But if this rule, or the application of it, should be deemed doubtful; still I have the right to stand upon the ground, which every other judge has assumed and acted on, and decide this case upon its own circumstances. There is no case, as has been already sufficiently shown, which in terms or in effect decides the present. Each has been decided upon its own peculiar circumstances, and by reference to the analogies of the law. I am not for extending the right of abandonment beyond the principles already settled; neither, on the other hand, am I for shutting out from the benefit of those principles new cases, simply because they do not go quatuor pedibus with former cases. New cases, as they arise, must be settled, as Goss v. Withers and Milles v. Fletcher were settled before our time, by general reasoning applied to the nature of the contract, and the general convenience and policy of the commercial world. We are not to stand upon the niceties of special pleading, or the exact weight of every one of the ingredients. There must be, or there never will be an end of litigation, some broad line of distinction to govern us. I have deliberated with as much patience and caution, as I am able, upon the present case; and under all its circumstances, I cannot resist the conclusion, that, at the time, they fully justified the abandonment; and the abandonment, once well made, was forever conclusive upon the parties. Let me again enumerate these circumstances. The ship was stranded, and bilged, and sunk, in an exposed situation upon a ledge of rocks, and in imminent danger. Her cargo was unavoidably discharged for safety, and forever separated from her. Her sails and rigging were cut away, with a view to the pressing necessity of saving them. The master and crew had deserted her as helpless and hopeless. The voyage must be suspended for a long time, as long as the voyage insured. The expenses of attempting to get off the ship must in every event be considerable, and might be very heavy. The chance of success was exceedingly doubtful, and dependent upon the most uncertain of all things, the winds and weather, in a proverbially variable season of the year. The reparation of the actual injuries was, in the most favorable view, so expensive, that it was not expected to cost much less than half the value of the ship; and these injuries were necessarily liable to augmentation from every delay and unfavourable change of weather. I do not say, that all these circumstances are necessary to constitute a case for abandonment. They are of various import and cogency. But as they exist in the case, I use them in combination, to show, that the voyage with that ship was not worth farther pursuit, the expenses being very high, the dangers imminent, the benefit uncertain, and the present value of the ship estimated by competent judges little more than the value of her materials. To use the strong language of Lord Ellenborough, already cited (Davy v. Milford, 15 East, 559, 564), the ship at the time "had ceased to exist for any useful purpose," as much so, as if there had been a total submersion; and a total loss was "in the highest degree probable" (Anderson v. Wallis, 2 Maule & S. 240, 248). I think too, that the delay of the voyage, though inevitable from the accident, was in itself unreasonable with reference to the nature and objects of such a voyage, and the right of the owner to the present beneficial use of his property. I adopt the reasoning of Chief Justice Marshall, in Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch [8 U. S.] 29, 45. See, also, Marshall v. Delaware Ins. Co., 4 Cranch [8 U. S.] 207. "There are," says he, "situations, in which the delay of the voyage, the deprivation of the right to conduct it, produce inconvenience to the insured, for the calculation of which the law affords and can afford no standard. In such cases there is for the time a total loss." And I am unable to persuade myself, that so long as the doctrine prevails, that a ship may exist, and yet in contemplation of law be totally lost, a case of stranding so pregnant with distress, injury, danger, and hopelessness as the present, can be displaced as a case of abandonment. I am much deceived, if some of the cases already quoted are more calamitous or pressing in their circumstances, where learned judicial minds have not hesitated to pronounce for the right of abandonment. Let me add also, that according to my impression of the established law, if the abandonment had not been made at this time, but had been postponed, until the vessel had become a technical wreck, or had been got off at an expense exceeding three-fourths of her value, the plaintiffs could not then have elected to abandon, for they would not have had a right to lie by and speculate upon events. The delay to abandon would have been fatal. See Marsh. Ins. bk. 1, c. 13, § 2, p. 589; Martin v. Crokatt, 14 East, 465; Mitchell v. Edie, 1 Term R. 608; Da Costa v. Newnham, 2 Term R. 407. So that the plaintiffs must either have abandoned at the time when they had notice of the loss, or they would have been forever concluded. Surely the law cannot have placed them in such

peril, and yet have deprived them of the only means and the only time in their power of asserting a right, which it yet contemplates as unquestionable at some time pending the calamity. If the present cause stood therefore upon this point alone, as at present advised, I should be unable to extricate myself from the conclusion, that the plaintiffs are entitled to recover for a total loss.

But I may be wrong in this judgment, whatever may be my confidence in its soundness, and I proceed to the next point so fully argued at the bar, and upon which the parties are entitled to my opinion. It is not denied, and if it were, it is so well established by the general current of authority, that it may be considered as a fixed rule, that if the ship be injured by perils insured against, so as to require repairs to the extent of more than half her value, the insured is entitled to abandon as for a total loss. The rule seems to be founded upon this consideration, that a ship so much injured is not worth repair, and therefore she may be abandoned as innavigable, and infected with a fatal infirmity. It was in its origin undoubtedly borrowed from the French law. It is to be found stated in Le Guidon, one of the earliest treatises on Insurance (chapter 7, arts. 1, 9), and is there applied to the case of goods. It is there said, that the merchant may abandon, where there is a shipwreck of the whole or of a part, when there is an average, that exceeds in damage a moiety of the merchandize, when there is a capture by friends or enemies, an arrest of princes, or other like disturbances in the voyage, or such deterioration of the merchandize that it cannot be carried to the place of destination, or it is only worth the freight or a little more. While I agree, however, with Mr. Justice Lawrence (Parsons v. Scott, 2 Taunt. 363, 372), that the passage is in terms applied to goods only, I cannot admit, that it is restrained to them, or is not in sense and reason equally applicable to the ship. And in point of fact we all know, that it has been applied in the common law authorities indifferently to each (Goss v. Withers, 2 Burrows, 683; Park. Ins. (6th Ed.) c. 9, p. 194; Condy, Marsh. Ins. c. 13, § 1, pp. 568, 571; Hamilton v. Mendes, 2 Burrows, 1198; Gardiner v. Smith, 1 Johns. Cas. 141; Vandenheuvel v. United Ins. Co., 1 Johns. 406; Abbott v. Broome, 1 Caines, 292; Hart v. Delaware Ins. Co. [Case No. 6,150]; Condy, Marsh. Ins. 281, note, 562, note; Peters v. Phœnix Ins. Co., 3 Serg. & R. 25; Ralston v. Union Ins. Co., 4 Bin. 386; Patrick v. Commercial Ins. Co., 11 Johns. 9–14; Wood v. Lincoln & K. Ins. Co., 6 Mass. 479; Coolidge v. Gloucester Mar. Ins. Co., 15 Mass. 341; Weskett, tit. "Abandonment," § 23). Valin has recognised the rule itself in the most emphatic manner, and it was probably his authority, that gave it a decisive currency in our jurisprudence. The French ordinance (article 46) having among other things declared, that abandonment should be lawful in case of a total loss of the effects (perte entière des effets assurés), Valin in his Commentary does not hesitate to adopt the doctrine of Le Guidon, and to declare it is a total loss of the effects within the article, when the damage exceeds the moiety of their value. 2 Valin, Comm. lib. 3, tit. 6, des Assur. art. 46, p. 101. Emerigon (2 Emerig. c. 17, § 2, p. 176, etc.) has found great difficulty in reconciling this doctrine with the strong terms of the article; but it stands commended by the sober judgment of Pothier (Poth. Assur. note 118). I dwell upon the origin of the rule the more freely, because in the exposition and application of it, this circumstance may not be inconsequential. It might seem at first view, that the rule being agreed, nothing would remain on this point, but to inquire into the fact, whether the repairs and expenses are a moiety of the value of the Argonaut. But we are here met with two difficulties on points of law, which it is singular, considering the antiquity of the rule, should not have been long since definitively adjudged, as it is impossible that they should not often have arisen. The first difficulty is, as to the mode of ascertaining the value of the ship. The second is, as to the mode of ascertaining the quantum of expense or injury. Is it to be the actual cost of the repairs, or the actual cost, deducting one-third new for old? In other words, is it the supposed damage to the ship estimated in the ordinary way, or by the actual loss on cost to the owner.

Upon the first point, it is contended by the defendant's counsel, that the valuation in the policy is conclusive, and affords the only just means of ascertaining the value, it being as between the parties the agreed value of the ship. The plaintiffs deny this doctrine, and insist upon the actual value at the time of the loss, as the true value. Nothing is more familiar, or more clearly settled, than the doctrine, that the valuation in the policy is conclusive in case of a total loss; but it is inapplicable for the purpose of ascertaining the quantum of injury (for it is quite another question as to the quantum of payment to be made by the underwriters) in case of a partial loss of goods. When the policy is on goods, the invariable rule is, to ascertain the quantum of injury by the difference between the price of the sound and damaged goods; and the reasons of the rule have been expounded with so much force and accuracy, that it would be a waste of time to repeat them. Johnson v. Sheddon, 2 East, 581; Marsh. Ins. c. 14, § 2. In what respect does the case of the ship differ from the case of the goods, as to the ascertainment of the damage? Can the valuation in the policy be a more correct guide in the one case than in the other? The question in each case is necessarily the same; what is the present value of the property, compared with its value before the injury, and the purpose is the same, to fix the extent of damage sustained by the

accident. One should suppose, that this was the true measure of the damage in all cases, in which it is attainable. The valuation in the policy at the commencement of the voyage cannot in the case of the ship, any more than of the goods, accurately measure the proportion of the damage, because the value may in the mean time have essentially changed; and yet it is that proportion, which is the object of inquiry. It is true, that there is much greater facility in applying the rule to goods than to a ship, because the sale of sound goods of the same quality is so frequent, that the deterioration of the damaged goods is readily ascertained by a like sale. But a sale of the ship is not only difficult in most cases, but would defeat the very object of the voyage, and the comparison cannot be made with other sound ships, but must be derived from a conjectural valuation of the same ship in her sound state. These are important differences, but they do not impair the correctness of the principle. They prove, not that the value at the time of the accident is a wrong basis, but that the value must be ascertained in some other manner, than by a sale. Consider what is the real object of the valuation. It is to decide, if the ship be worth repair. The law deems her worth repair, unless injured more than half her value. At what time? Surely at the time of the injury, and not at the commencement of the voyage; for to that period only can the question of worthiness of repair apply. If the policy were an open policy, there would be no pretense to look to the value at the commencement of the voyage, for it might be according to events a third greater or less than at the time of the stranding; and thus the right of abandonment might depend, not upon the proportion of present value, but upon the value at a former period. The ship might be damaged three-quarters of her present value, and yet an abandonment would not be good; and on the other hand, she might be damaged only one-third of her present value, and yet it would be good. It does not strike me, that such a state of things is consistent with the true meaning of the rule as to the half value. Then, as to the bearing of the authorities on this subject; I have looked into all the cases, and I cannot find an instance, in which the doctrine as to the half value of the ship is referred to any other period of the voyage, than that of the happening of the calamity, or the subsequent arrival in port. In short, to the very time, when the question arises of reparable or not. The very point arose in Fontaine v. Phœnix Ins. Co., 11 Johns. 293, and the learned Chief Justice Kent ruled at the trial, that the value at the port, where the injury happened, and not the valuation in the policy, was to be taken in applying the doctrine now under consideration. A new trial was ultimately granted upon another point; but the inclination of the court manifestly upon this point was, that the ruling of the chief justice was right. In the absence of all contradictory authority, the decision of his luminous and accurate mind would go very far to satisfy mine, even if I entertained, which I certainly do not, any doubt on the subject. The foreign writers also, who have treated the subject, appear to me to have proceeded upon the tacit assumption and recognition of the same doctrine in all their reasonings. See, also, Weskett, tit. "Abandonment," § 23, and Coolidge v. Gloucester Ins. Co., 15 Mass. 341.

Then, as to the other point, whether the actual cost of the repairs to the owners, or the cost, deducting one third new for old, is the rule, by which we are to ascertain the quantum of injury or loss. That is a point, upon which a great deal may be said on both sides. The propriety of the allowance of one third new for old, in cases where the ship is not abandoned, or, in other words, in cases of a partial loss, is not contested. That rule itself is somewhat arbitrary, and not founded upon any exact calculation with reference to the particular case. The ship may be almost or entirely new, and then the reason for the deduction would altogether cease. The ship may be very old, and then the reason for a much greater allowance would apply. The general principle, upon which the rule is founded, is as stated by Magens (1 Magens, Ins. 52), that the underwriters ought to pay for the actual damage or injury, but not for the wear of the things lost or injured, and therefore proper allowance ought to be made, for the difference in value between the new and the old. But if this difference were to be ascertained in every particular case by actual inspection and estimates, there would be no end to controversies, and therefore, general usage, which the law follows, as founded on public convenience, has applied a certain rule to all cases, not upon the notion of perfect justice, but as generally reaching, in substantial equity, the mass of them. It is true here, as was well observed by Lord Mansfield on another occasion, that it is of less consequence, how the rule is settled, than that it should be settled. Still the rule is arbitrary, and therefore is to be confined to the cases, where the usage is clear, or to cases, which necessarily fall within their analogies. Does it then enter as an ingredient into the rule of abandonment, where there is a loss of the half value? This is to be ascertained by considering the nature and object of that rule, and the manner, in which it has been interpreted by the authorities. We have already seen, that it had its origin in foreign maritime jurisprudence; and in the terms, in which it is laid down in the ancient treatise in Cleirac's collection (Le Guidon, c. 7, § 1), there is strong reason to think, that it was the actual cost without any deduction, which was in contemplation of the author. The object of the rule is, to ascertain, whether the ship be worth repair, and by a principle somewhat arbitrary, yet as in the former case, justified by general con-

venience, it decides, that if the injury exceeds half the value, she is not worth repair. Now certainly it cannot be pretended, that a deduction of one third new for old would operate equitably, under all, or even ordinary circumstances, upon this rule. That deduction always supposes, that the owner derives a benefit from the repairs; but unless the vessel is in fact worth, after the repairs, twice the amount of the repairs, the deduction does in effect take away the very ground-work of the rule. It throws upon the owner all the loss of the deduction, and gives the underwriter the full benefit of it. Now this, which is the natural operation of the deduction in the case, which has been put, applies with more or less force to all other cases, where the value of the ship is not increased to the full extent of all the costs of the repairs. And this, I presume, rarely occurs; perhaps not one time in ten. It is manifest then, that the deduction must operate with great inequality, and introduce into the rule an element, sometimes of injustice, and generally inconsistent with its professed design. In short, if the deduction is always to be made, the rule, instead of being expressed as one-half, should be in terms three-quarters, of the value of the ship. No such injustice could occur on the other side; because, if the ship were abandoned, it would generally be in the power of the underwriter to decide, whether to repair or not; and if repairs were made, he would receive all the benefit of any increase of value. According to my understanding too of the true sense of the rule, the owner is always affected in the application of it, by any increase of the value of the ship by the repairs, equally with the underwriters. The sense, in which I understand the rule is this—would the ship, if she were repaired, be worth double the amount of the repairs? If so, then there can be no abandonment, for the owner has not suffered an injury to the amount of half her value; if otherwise, then there may be an abandonment. I do not say, that you are to judge of the value after the repairs actually made; for then the right of abandonment might be gone by lapse of time; but you are to judge by the existing circumstances with reference to that value, whether the repairs are now worth making.

In examining the authorities, it is beyond all doubt, that no case in England has ever recognised any such deduction of the one-third, except in cases of a partial loss. In all the cases, where the injury to the half value has been in question, not the slightest allusion is made to any such deduction by court or counsel. Yet some of these cases would seem to have called for some expression in its favour, if it existed. In Cazalet v. St. Barbe, 1 Term R. 187, where the jury found the injury forty-eight per cent. only, there is not the least hint, which could lead us to suppose, that any such deduction was then made. It does not in fact appear, that any repairs had been made in that case, or were contemplated. In Da Costa v. Newnham, 2 Term R. 407, the deduction was held not to apply, except where the owner received back his ship, upon the plain ground, that he ought not to pay, where he received no benefit. In Thomson v. Royal Exch. Ins. Co., 1 Maule & S. 30, it is manifest, that Lord Ellenborough could not (as has been already intimated) have contemplated such a deduction. And Mr. Stevens, a gentleman of Lloyd's of considerable experience, in stating the deduction, applies it in terms only to cases of a partial loss. Stev. Av. 159, and see Weskett, Stranding, § 5.

The question, however, has arisen in America. In Dupuy v. United Ins. Co., 3 Johns. Cas. 182, the point was directly in judgment, and indeed formed the turning point of the cause. And it was there held by the unanimous opinion of the supreme court, that the deduction was not to be made, and that it was the actual damage of expenditure, which was contemplated by the rule, without any reference to the distinction of new for old. That decision was subsequently acted upon by the court; and though it was finally overturned by the court of errors (Smith v. Bell, 2 Caines' Cas. 153), it is impossible not to feel, with all due reverence for the latter tribunal, that upon questions of this nature, the learning and experience, and distinguished talents of the supreme court of New York, entitle their judgment to very great consideration. I have examined the reasons given by the court of errors for the reversal, and I am compelled to say, that they do not convince my judgment. Ego assentior scævolæ. The case of Coolidge v. Gloucester Ins. Co., 15 Mass. 341, appears to me to have contemplated the rule in the same light. It is there said by the court, that to all legal purposes, after the constructive total loss, the ship, repaired and rebuilt at an expense exceeding half her value, must be considered as a new ship. And I take occasion to add, that if in that case the deduction of one third had been made, and the valuation in the policy had been taken, there would not have remained an expense of one half the value of the ship to justify an abandonment. My judgment upon the whole is, that the deduction of the one third cannot be legally made in cases of this nature. If indeed it could be made, I should have no doubt, that the like deduction must be taken from the whole value of the ship after the repairs, in order to bring her down to the standard of value existing at the time of the stranding.

There are some minor points connected with this general topic, which may as well be disposed of in this connexion. The first is, whether the repairs of rigging, etc., injured by wear and tear, and of decaying wood, is to be deducted from the gross amount of the expenditure. I am to take it for true, from the whole of the argument, that no repairs have been made, which were not necessary to place the ship in her former predicament; and that the item of $372.22, now in controversy,

was indispensable in the accomplishment of this object. If so, it is not to be deducted, for it was a necessary expense, and falls within the reasoning already stated. The point was expressly ruled in Depeyster v. Columbian Ins. Co., 2 Caines, 85, under much stronger circumstances. Another point is, whether an expenditure incurred at the time with a view of getting off the ship, but which became ultimately unnecessary, from the success of another experiment, is to be considered as part of the gross expense. I allude to the charges and loss connected with the purchase of casks. It appears to me, that this forms a part of the gross expense. It might as well be argued, that if two thousand dollars had been expended in trying other experiments apparently most judicious, and yet they had not succeeded, they were not to be included. One of the very grounds of abandonment in cases of this nature is, the certainty of heavy expenses beyond half the value of the ship, and the utter uncertainty, whether they will be successful. If the underwriter will insist, that the question of expense is to be judged of by the event, and not by the highest probability at the time of abandonment (a point upon which I wish to reserve my opinion, until better advised,) he must stand to the rigour of his rule, and is not at liberty to claim, that the owner would have been wiser than himself, or that an expense, apparently judicious, was wholly unnecessary. The question never can be, in any case of this nature, whether the expense incurred accomplished a real benefit, but whether it was reasonable and proper. Suppose the ship had been got off by means of the casks, could it be contended, that the expense of stopping the holes in the bottom was to be deducted, because it turned out unproductive? Then again it is urged by the plaintiffs, that the repairs have not been sufficiently made, and that they are entitled to have the ship restored to them in as good a condition as before the stranding. And this is doubtless true in point of law. But it cannot escape observation, that if there be any deficiency in this respect, no blame can justly attach to the underwriters. They offered to have the repairs made under the direction of the owners, and upon their declining, they employed a skilful and competent agent. Under such circumstances, the court, though bound to give the parties the full benefit of the principles of law, would be disposed to look with some indulgence upon slight and unimportant deficiencies.

The principal defects relied on at the bar, are the substitution of maple in the keel, for the original oak; the increase of the number of pieces of the keel, from three to five, and the inartificial structure of the keel, by placing the scarf in the middle immediately under the scarf of the keelson; the omission to salt the ship after the repairs, she having been originally salted; the omission to take off the plank, and make a thorough examination of the ship, to ascertain all the places in which she was strained, by lying on the rocks; the making new butts, by placing short plank instead of whole, in the bottom; the leaving the ship with a continual unknown leak, after the repairs were completed. It is not to be supposed, that the court can of itself undertake to judge of the extent and importance of these supposed defects and omissions. That duty may more properly be performed by experts, as I have already intimated. And if either party shall request it, as material to the ultimate decision, there will be no difficulty in granting a suitable commission. Upon one or two suggestions thrown out at the bar, it is however my duty to comment. It is said, that the plaintiffs had a right to have the repairs made of the same materials as the original, and therefore that the underwriters could not substitute maple for oak in the keel. In short, that if the keel had been of mahogany, the plaintiffs would have had a right to a new keel of the same wood. Certainly the owner is entitled to have his ship made as nearly as practicable, as good as she was before the accident, or to receive an equivalent compensation. But if the ship is made substantially as good, and if the substitution of other materials is not from choice, but necessity; it would be going great lengths to assert, that this was not a compliance with the law. Suppose a ship, built of teak wood in the East Indies, were to meet with an accident on our coast, and require repairs, would it be contended, that the underwriters must send to the East Indies for teak wood, or pay the expense, if other materials equally solid and useful could be found here? I incline to think not. The true principle is, that the underwriter shall pay the owner such a compensation as shall make the ship substantially as good as before; or in other words, that he shall lose nothing by the peril. Matters of taste, fancy, or peculiar choice, can scarcely admit of appreciation in money, and the law can rarely reach them. It appears to me, that the plaintiffs were entitled to have had the reparation of the keel with oak, if it could be reasonably obtained. And the weight of evidence decidedly is, that the increase of the number of pieces of the keel, and the placing of the scarfs, made a material difference in the strength of the ship. Judging from that evidence alone, I should draw the conclusion, that the ship was in these respects imperfectly and inartificially repaired. But skilful artisans are far more competent judges, and to them I should cheerfully resign my own opinions. What would be the posture of the cause upon the point, as to the injury to the half value of the ship, under the views already suggested, I am not at this moment quite prepared to declare. I incline to believe, however, that taking the value of the ship at $11,000, or even $12,000, it will be found, that the repairs will exceed, by a small excess, one half of the value of the

ship. It will not however be difficult for the parties to place this matter beyond doubt. And I gladly escape from this minuteness of detail, to the last great point in the cause, which, if well founded, supersedes all the others.

And this point is, whether there was an acceptance of the abandonment. This is partly a question of fact, and partly of law. In considering this question, I understand myself, by the assent of the parties, to be at perfect liberty to deal with the subject in the same manner as if the controversies were between private persons. No question is made about the powers, rights, or modes of acting, of the corporations before the court, or as to the sufficiency of the authority, under which their presidents or other agents acted in the premises. Their acts are to bind, just as far as they might lawfully bind, if done under the fullest authority. There can be no doubt, that the acceptance of an abandonment need not be in any particular form, or by express words. It may be, and often is, inferred from circumstances; and I think it may be laid down, as a general proposition, that whenever the underwriter does any act in consequence of an abandonment, which can be justified only under a right derived from it, that act is of itself decisive evidence of an acceptance; and cases may even be put where the act of the underwriter will in law prevail over his express declarations. As if, after an abandonment, he should proceed to sell the vessel, with an express protest against the acceptance, and a declaration, that he did it for the benefit of the owner, his act would nevertheless conclusively bind him in point of law. This, to be sure, is a very strong case, but it is not the only case; and I put it to show, that it is a mistake (commonly entertained) to suppose, that declarations can overrule the legal operation of acts in reference to an abandonment.

In the present case, there is no pretence to say, that the underwriters have made any express declaration of acceptance. It is inferred by the plaintiffs from the silence of the underwriters at the time of the abandonment and their neglect to signify the contrary within a reasonable time. It appears to me however, that this inference cannot be supported. The underwriter is not bound to signify his acceptance within a reasonable time; nor can his silence, per se, be proof of his acceptance. If he says nothing, and does nothing, the proper conclusion is, that he does not mean to accept. And this conclusion, so reasonable in ordinary cases, applies with still more force to corporations, because from their mode of doing business, deliberation of the board of directors is usually required; and silence in such a case is certainly less significant, than it might otherwise be presumed to be. If the case had stopped here, it would not have presented any difficulty. But the acts of the underwriters are also relied on, as conclusive of their acceptance. Immediately after the abandonment, the underwriters declined the farther agency of the owners; they appointed their own agent with authority to sell the ship if he thought fit, and with authority to get her off if he deemed it practicable. From this moment the underwriters took the sole possession and management of the ship. She was got off at their expense, and by their agents, and was subsequently repaired, and now remains under their care and custody. Do these acts, or any of them, amount to an acceptance of the abandonment? If they would do so ordinarily, can the secret intentions of the underwriters, not to accept, if the event should be favorable, or a mistake of law as to their rights, vary the legal conclusion? That these acts done by the underwriters were done under the full belief, that the case, if not utterly desperate, was nearly so; that the facts, which were truly represented to them, were so deeply marked with calamity, that a total loss seemed almost inevitable; and that scarcely the faintest hope was entertained of changing it into a partial loss, unless by most unexpected good fortune, cannot be reasonably doubted. The very instructions to Mr. Blake, and indeed the whole conduct of the underwriters, demonstrate it. It is as clear that the underwriters did contemplate that the abandonment clothed them with some new rights, for in their letter and memorandum to Mr. Blake, they expressly distinguished between their rights over the ship, which was abandoned, and over the cargo, which was not abandoned. They might be wrong in this conclusion, and certainly they are not bound by a misconstruction of the law, if it could be otherwise for their benefit. On the other hand, it is clear, that the underwriters by the intimation in the memorandum, "that if the loss should prove to be less than fifty per cent. on the ship, the abandonment will not take effect," did suppose, that they might act upon the abandonment, and if in the event there was not a total loss, they were not bound by their acts to an acceptance. If this also was founded in a mistake of the law, the plaintiffs are entitled to the full benefit of the law, as it stands. It is however matter of observation, that this memorandum was never communicated to the owners, and therefore they could only act upon the fact, that their own agency was not required, but an agent was appointed by the underwriters; and no intimation was given that the underwriters meant to resist the abandonment.

The question then turns upon this, whether the underwriters, as such, had a right to do these acts without the assent of the owners, or derived their authority virtually from the abandonment. If the latter, then, as they cannot accept in part, and refuse in part, they are bound in the whole, and accepting the abandonment for one purpose is an acceptance of it for all purposes. They cannot treat it at one moment as a transfer

of the property, and in the next, upon some new occurrence, as utterly void. An acceptance once made, can never be recalled. It is said, that the appointment of an agent was not an acceptance of the abandonment. Certainly the mere appointment of an agent must be admitted not to conduce to such an effect. And even the additional fact, that he was clothed with unlimited and absolute power over the property, might not in all cases be conclusive, if he never acted upon such authority. But if he is clothed with absolute authority to sell the property, does it not show, that the underwriters contemplated the property as their own; and how can it be theirs, unless in virtue of the acceptance of the abandonment? And under such circumstances, is it not the strongest evidence of an antecedent virtual acceptance? An agent may be appointed merely to consult with and aid the owners, or to watch the progress of events, or to prevent frauds; and if he acts within such authority, his acts do not imply an acceptance. But this is very different from a general and unlimited agency; and still more so, when acts are done of exclusive dominion, control, and management of the ship. The case of Griswold v. New York Ins. Co., 1 Johns. 205, does not support the doctrine for which it was cited. There the policy was on freight, the assistance was given in saving ship and cargo, at the request of the owners, before the abandonment, and no exclusive possession or management was taken after the abandonment. In Wood v. Lincoln & K. Ins. Co., 6 Mass. 479, 484, the point was not made, nor is there a dictum in that case which refers to it. The remarks, as to the effect of an undertaking by the underwriter to repair, are addressed to the question of a right of an abandonment, not of an acceptance of an abandonment. It is not there said, that the underwriter has a right to repair against the will of the owner; but that his offer to repair will, under certain circumstances, defeat the abandonment.

The question then comes to this, whether the underwriter has a right, in case of stranding, without the consent of the owners, to take the exclusive possession and management of the ship, and afterwards to retain and repair the ship on account of the owners. If he has not, then the exercise of such a right can stand only upon the acceptance of the abandonment as a transfer of property; and if so, the case falls within the principle already stated. It has been supposed, that the cases of Hart v. Delaware Ins. Co. [Case No. 6,150] Condy, Marsh. Ins. 281, a, and 562, a, note, and Ritchie v. United States Ins. Co., 5 Serg. & R. 501, 509, recognise the general right of the underwriter, independent of an abandonment. No such point however, was made in either case; and the true explanation of them is that, which has been already given of the case in 6 Mass. 479. I must confess, that this is the very first time, that I ever heard of any right of an underwriter, as such, to intermeddle with the property insured. There is not a dictum in any book, which admits him to possess any ownership in the ship, or gives him any right or control over it. It has been very justly observed even in relation to repairs on account of perils insured against, his engagement is solvere, not facere, to pay the amount, and not to do the work. If the underwriter has a right to repair in one case, he has in all cases, and in his own manner, and with his own materials. Has the law ever contemplated, that he can take the possession of the ship, and decide for the owner what shall be done with her? Suppose in this very case, there had not been any abandonment, would the owners have been bound to suffer the ship to be repaired? I think the law, beyond all doubt, is otherwise; and the pretension now set up, in behalf of the underwriters, is truly alarming. The owners, if there had been no abandonment, would have had a right to claim remuneration in money for the injury sustained. They might have thought the ship not worth repairing; and if they did so, they had a right to break her up, and to claim from the underwriters an indemnity in money for the actual loss by the stranding. It would have been no answer on the part of the underwriters, that they were willing to repair the ship, or that the owners ought to repair her. It is true, that the actual cost of repairs is the best test of the actual injury, but the law does not insist on this. It gives the option to the owners, to take the reasonable estimated amount of loss, or the actual expenditure in repairs, with the usual deduction. Consider, for a moment, what would be the mischiefs and embarrassments attending this novel doctrine. At whose risk would the ship be, during the period of repairs? Could the owner sell her, so as to oust the right of the underwriter to repair, or must he sell her cum onere? If he did sell, the repairs might be just what the purchaser would choose to dispense with. Suppose an attachment on the property; in what manner are the conflicting rights to be settled? The ship in her damaged state might be well enough for all the purposes of the owner. Shall he then be compelled to give her a more complete repair? In short, does not the doctrine necessarily lead to consequences most injurious to the owner, laying open new scenes for doubt, strife, and litigation? For me it is sufficient, that no such doctrine has ever received the countenance of a court of justice; and if it should, the occurrence, looking to the present state of the law, would greatly surprise me. If, when a ship is abandoned, the underwriters do not choose to accept it, they have a right to lay by and wait the event. They are to act in this, as in all other cases, according to their

sound discretion. If the owners have abandoned without just cause, the underwriters are not prejudiced by leaving the ship as she is. If for just cause, then they are called upon at the time to act for their own interest. Cases of hardship may occur on one side or the other, and the property may, as I fear it will in the present case, perish in the contest. But this is not the fault of the law, but of the honest differences of opinion incident to all human transactions. If after abandonment, the owners were to proceed to repair the ship without consultation with the underwriters, it would be a waiver of the abandonment, because it would be doing an act inconsistent with the asserted transfer of ownership. It would deprive the underwriters of the right of electing whether to repair the ship or not, and thus compel them to spend their money in a way which they might deem useless. The same principles must govern, when the like acts are done by the underwriters after abandonment; for unless they are to be deemed subrogated owners, they would equally trench upon the rights of the original owner. What is the ground, upon which an abandonment is required to be made within a reasonable time? Lord Kenyon said, it was "to put the underwriters in a situation to do what was necessary for the preservation of the property, whether sold or unsold" (Allwood v. Henchell, Park, Ins. (6th Ed.) c. 9, pp. 239, 240; Condy, Marsh. Ins. bk. 1. c. 13, § 2, pp. 593, 594); which plainly supposes, that no such right previously existed. Lord Ellenborough, in Martin v. Crokatt, 14 East, 465, 467, uses language to the same effect. He asserts, that where expenses are necessary for repairs, and the owner chooses to make it a total loss, he "ought to give notice of abandonment, to enable the underwriters to elect whether they will or will not incur such expenses." How can this be, if the underwriters have a right to repair without an abandonment? Even the foreign jurists, standing upon the positive texts of their own ordinances, do not appear to me to contemplate such an exercise of authority over the ship, as this. 2 Valin, Comm. lib. 3, tit. 6, art. 51; 2 Emerig. 196. It appears to me, that the underwriters struggle in the present case against what I cannot but consider a stubborn principle of law. They claim to do an act, as underwriters, which they can only do as owners. They claim the right to suspend the acceptance of the abandonment by intentions against acts. They elect to act under the abandonment, disclaiming, at the same time, to accept it. They assume the possession of the ship in virtue of the transfer, with the belief, that they can still return her to the owners, if in the event that shall be most for their interest. The law has entrusted them with no such authority. They have acted, as I doubt not, from the best motives; but I cannot help thinking that they have mistaken the law, and that their acts, done, lawfully, solely in virtue of the acceptance of the abandonment, cannot now be construed as disjoined from the abandonment. I have already said, that the offer to return the ship, after the ship was off, was too late. My deliberate judgment is, that upon the point as to the acceptance, the cause is also in favor of the plaintiffs.

The subject, at least as to myself, is exhausted, and must be left for the further consideration of wiser and abler minds. I deliver my judgment, not without anxiety and diffidence, but it is, that the plaintiffs upon the merits ought to have a decree for remuneration, as for a total loss.

PEERLESS, The (ENSIGN v.). See Case No. 4,494.

PEESLER v. HABERSTRO. See Case No. 10,884.

PEGGY, The (HERRON v.). See Case No. 6,427.

Case No. 10,906.

PEGRAM v. UNITED STATES.

[1 Brock. 261.] [1]

Circuit Court, D. Virginia. May Term, 1813.

PRACTICE — SUIT ON JOINT AND SEVERAL BOND — ABSENT DEFENDANTS — PROCEEDING AGAINST THOSE SERVED — AVERMENT THAT ALL ARE IN CUSTODY — EFFECT OF INFERENCES FROM AVERMENTS IN ONE PLEA UPON AVERMENTS OF ANOTHER PLEA.

1. In an action on a joint and several bond against several defendants, some of whom are non-residents of the state in which the suit is brought, and there is a return of "no inhabitants" as to them, the plaintiff may proceed to take judgment against those on whom process has been served.

2. If, in such a case, the plaintiff declares against all the co-obligors, and those on whom process has been served, proceed to trial on the merits, the averment, that all the co-obligors are in custody, though irregular, is not fatal, and will not preclude the plaintiff from obtaining a judgment against such of the co-obligors as are really before the court.

3. As to the extent of the rule, that where there are several pleas, the legal inferences from the averments contained in one plea, have no influence in deciding on the averments of another plea, see the following opinion.

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

At law.

MARSHALL, Circuit Justice. This is a writ of error to a judgment rendered in the district court against the plaintiff in error, on a bond, taken by the collector for the district of Petersburg, under the act laying an embargo [2 Stat. 451].

The declaration is joint against all the obligors. The writ was also joint. It was executed on the plaintiff and abated as to the other obligors, on the return, that they were no inhabitants.

[1] [Reported by John W. Brockenbrough, Esq.]

It is contended, that this writ was void, since persons over whom the court has no jurisdiction, they being non-residents of the state, are united with one who is a resident, and that being void in part, it is void in the whole. The decision of the supreme court, in the case of a writ brought by plaintiffs, some of whom are citizens of the same state with the defendants, is considered as authority for the proposition urged in this case. Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267; 1 Pet. Cond. R. 523. But the court is of opinion, that the cases are essentially different. In the case decided in the supreme court, the different members of the company formed one plaintiff, and the incapacity of one of them to come into the courts of the United States, was considered as extending to all the others, and as excluding the case itself from the jurisdiction of those courts. In this case, the jurisdiction of the court is not denied. It is admitted, that a separate action could have been sustained against Pegram, and that the action could have been sustained against them all, if process could have been served on them, or if they had appeared and pleaded to the action. The process, then, is not void ab initio. It is valid in the commencement, and is voidable by facts that afterwards appear. The return operates as a plea in abatement, not because the writ issued erroneously, but because a fact appears, subsequent to its emanation, which disables the court from proceeding against all the parties. If, in such a case, it were necessary to dismiss the suit, and to bring a new action against the party who is an inhabitant, the inconvenience would be great, and no advantage would accrue to the party against whom the new process would issue. In cases where there is no fault in the original process, but the plaintiff does all he can do to bring all the parties before the court, as when he proceeds to outlawry, he is permitted to take judgment against those who are brought before the court. In this case, the plaintiff has done all he could do. The return abated the writ, and he could not proceed to outlawry; nor could he use any means to compel an appearance. It would seem reasonable, then, to place him in the same situation with a plaintiff who proceeds to outlawry, and then takes judgment against the party before the court. Had this bond been joint, and not joint and several, it may well be doubted whether the plaintiff would not have been compellable to have made all the obligors defendants. In such case, where the obligors reside in different states, there would be no court of the United States which could take jurisdiction, unless judgment could be given against one of them, or process issued against all. To suppose the jurisdiction of the federal courts excluded in such a case would be to give the act of congress a very inconvenient and unreasonable construction.

The same principle has been presented in a form somewhat different. It has been contended, that by declaring against parties as being in custody who are not before the court, the plaintiff has committed an error of which the defendant may avail himself after the verdict. That the proceeding is irregular, cannot be doubted or denied. The declaration ought to have conformed to the truth of the case. But if this could be proven, which is by no means certain, it does not follow that advantage may be taken of this irregularity otherwise than by plea. The irregularity does not affect the merits or the justice of the cause. The defendant has gone to trial on the merits, and sustains no injury from the circumstance that his co-obligors are, contrary to the fact, stated to be also in custody. If the plaintiff could have proceeded on this writ, to take judgment against the person arrested, by stating in his declaration, that the other obligors were no inhabitants of Virginia, the averment that they were in custody does not appear to the court to be a fatal averment. Both these points appear to have been settled in the case of Barton v. Pettit [7 Cranch (11 U. S.) 194]; [Riddle v. Moss] 7 Cranch [11 U. S.] 206; 2 Pet. Cond. R. 471. In that case, the supreme court clearly indicated the opinion, that the judgment against Barton alone, on a declaration stating a joint action against Barton and Fisher, might have been sustained, had the return of the officer shown that Fisher was no inhabitant. Although that principle was not necessary to the judgment rendered in that cause, and is, therefore, not of such complete obligation as if the very point had been decided in the main question, yet this court must suppose it to have been argued at bar, and considered by the court, for it is intimately connected with the question on which the cause depended.

A third error assigned in these proceedings is, that on a bond with a collateral condition, judgment has been rendered for the penalty, although it does not appear, either by the bond itself, or by the pleadings, that it was taken in conformity with the statute. In this case, the declaration is on the obligation, as on a single bill. The defendant prays oyer, and pleads five several pleas. In his first plea, he does not state that the bond was taken by the officer, who was authorised by law to take it, and the replication to this plea is general. In each of the remaining pleas, the defendant avers substantially that the vessel was within the district of Petersburg, and that the bond was given to the collector of that district, and then pleads matter in avoidance of such bond. To some of these pleas, the plaintiff demurs; and on the others, takes issue. The demurrers have all been determined against the defendant, and the issues have been found against him. The statute which directs the bond, also directs that it shall be taken by the collector of the district in which the vessel lies. And it is contended, that as it does not appear, by

the pleadings on the first issue, that the bond was taken by the collector of the district where the vessel lay, the court cannot intend it to have been taken by him, and cannot consider it as a statutory bond. It is also contended, that as the matter of one plea cannot be transferred to another, the admission of the defendant in his other pleas, that the bond was taken by the proper officer, cannot aid the plaintiff, so far as respects the judgment of the court on this issue. The rule that legal inferences from the averment of one plea, or the facts as averred in one plea, have no influence in deciding on the averments of another plea, is unquestionably correct. The examples given of payment and a release, or of non est factum, and a release, very well illustrate the rule. So in this case, one plea avers that the bond was taken by the collector of the port, in which the vessel lay, by duress. If another plea had stated that the bond was not given to the collector of the port, the first plea would not have been evidence on the trial of the second issue. But the cases are not thought precisely parallel. The judgment of the court is not rendered on the first plea only, but on the whole record. Every plea has been decided against the defendant, and, consequently this judgment of the court must be rendered against him. The question is, shall this judgment be given as on a statutory bond, or on a bond at common law? The whole record shows that the bond is taken conformably to the statute, and as the judgment of the court must be upon the whole record, it must be for the penalty of the obligation. The judgment cannot regard it as a bond both at common law and under the statute. It must then have the character which the record gives it.

The court would assimilate this case to one in which there were several pleas in bar, one of which was totally immaterial. If the issues be found for the plaintiff, he will have judgment, although had the immaterial issue been the sole issue in the cause, a repleader might have been awarded. The issue, it is true, is not immaterial, but being found for the plaintiff, it forms no bar to the action, and cannot, in the opinion of the court, avail the defendant more than if he had not pleaded it.

No error; judgment affirmed with costs.

Case No. 10,907.

In re PEGUES.

[3 N. B. R. 80 (Quarto, 19);[1] 2 Am. Law T. 136.]

District Court, W. D. Texas. 1869.

BANKRUPTCY—EXPENSES AND CHARGES RENDERED BY ASSIGNEE.

On bill of expenses and charges rendered by an assignee, *held*: 1. Specific charges by an assignee are unauthorized for (1) drafting certificate of exempted property, (2) drafting petition for sale of property, and (3) drafting acceptance of notice of appointment. A reasonable amount for the several acts done may be allowed in the compensation for general services of the assignee. Amount of five dollars allowed.

2. Charges for publishing notices of appointment, advertising, and posting hand-bills. Correct and allowed.

3. Charge of forty-two dollars for six days' services in collecting notes and accounts considered extravagant, though entitled to a reasonable amount. Suspended.

4. A charge for recording assignment is correct.

5. Three items for different days' services, at seven dollars per day; attending sale of land, traveling and examining titles. Suspended.

6. A charge of fourteen dollars for two days' services in examining papers, allowed, provided the services were actual and not constructive, and no charges shall have been for same time in other cases.

7. Charges for stationery, postage, etc., allowed.

8. Specific charges for one day's service in making out report, and another day's service in making application to court for order of sale, disallowed as unauthorized and excessive. As general services, seven dollars allowed for said acts.

9. Charge for services of auctioneer disallowed. Assignee must act as salesman, unless leave of court in necessary cases is previously obtained to employ an auctioneer.

[Approved in Re Sweet, Case No. 13,688.]

10. Commission of five per cent. allowed.

11. Charge of twenty-five dollars counsel fee suspended. Suspended items referred to register to take testimony and to allow proper amounts in his discretion; if his decision is objected to, the testimony and objections to be certified for revision by the court.

[In the matter of P. A. Pegues, a bankrupt.]

DUVAL, District Judge. Certain creditors of the bankrupt, by their attorneys, Hays & White, filed their exceptions to the following account rendered by the assignee, J. K. Williams, Esq., and the said exceptions having been overruled by the register, G. W. Whitmore, Esq., his action in the premises has been certified to me for revision:

1. Drafting certificate of exempted property	$ 5 00
2. Drafting petition for sale of property	5 00
3. Drafting acceptance of notice of appointment	5 00
4. Publishing notice of appointment	6 00
5. Advertising and posting hand-bills	1 50
6. Six days' service collecting notes and accounts	42 00
7. Recording assignment	1 00
8. Two days' service attending to sale of land	14 00
9. One day's service advertising land and papers	7 00
10. Two days' service, trip to Henderson to record assignment and examine titles	14 00
11. Two days' service examining papers.	14 00
12. Stationery, postage, etc.	1 50
13. One day making out report	7 00

[1] [Reprinted from 3 N. B. R. 80 (Quarto, 19), by permission.]

14. One day, making application for order of court for sale.....	7 00
15. Services of auctioneer.....	2 00
16. Commission on three hundred and ninety-two dollars at five per cent.	19 60
17. S. T. Newton, attorney's fee.....	25 00

The 1st, 2d, and 3d charges are not only extravagant, but they are not authorized by the law. The acts done by the assignee, however, and for which these charges were made, may be regarded as among the general services rendered by him, for which the court may make him a reasonable allowance. The exceptions to these items are therefore sustained, and in lieu thereof five dollars is allowed.

The 4th and 5th items are correct, and therefore allowed.

The 6th seems to me to be extravagant, if allowable at all. The bankrupt should have been required to deliver the notes and accounts into court, or to the assignee. But if the service was performed, as charged, a reasonable compensation should be allowed. Referred again to the register.

The 7th item is correct. Exception, therefore, overruled.

The 8th, 9th, and 10th require explanations and evidence to justify them. Referred to register again.

The matter embraced in the 11th item is also referred to the register again. If the service, as charged for, was necessary, and actually performed in this particular case, and no other cases were charged for the same time, then it would be proper to allow it.

The 12th item is allowed.

The 13th and 14th are disallowed. These charges are not authorized by law, and they are excessive. For the services mentioned in both these items seven dollars is a sufficient compensation, and that much is hereby allowed.

The 15th is disallowed. The law contemplates that the assignee shall himself sell the property of the estate. There may be cases in which it would be proper to employ an auctioneer, but the necessity for so doing should be first shown to the court, and leave obtained.

The 16th is correct, and therefore allowed.

The 17th needs explanation. The assignee does not state for what an attorney's fee is charged, and it would be difficult to tell what need he had for the services of one in the administration of this small estate. For this reason, and the views briefly mentioned by me touching a like charge in the case of In re Davenport [Case No. 3,587], the matter is again referred to the register.

The 6th, 8th, 9th, 10th, 11th, and 17th charges are again referred to Mr. Register Whitmore, who is hereby instructed to hear any pertinent and proper evidence in regard to the services charged for in the several items, and their actual performance and necessity, and after so doing, to allow or disallow the said charges in whole or in part, as he may deem just; and should his decision thereon be objected to by the creditors or assignee, the same to be certified to me for revision, together with the evidence on which it is based.

Case No. 10,908.

PEIRCE v. REINTZEL.

[2 Cranch, C. C. 101.] [1]

Circuit Court, District of Columbia. June Term, 1814.

WITNESS—INTEREST IN CONTROVERSY.

The principal obligor, having confessed judgment, and having been released by the defendant from the costs of this suit, is a competent witness for the defendant, to prove the bond usurious.

Debt on the joint and several bond of Daniel and John Reintzel. Daniel, the principal obligor, having confessed judgment, was offered as a witness for the defendant, to prove usury. The plaintiff objected, and cited the case of Virginia v. Evans [Case No. 16,969], in this court at November term, 1809, and Riddle v. Moss, 7 Cranch [11 U. S.] 206. The defendant released to Daniel Reintzel all costs of the present action in case judgment should go against him.

THE COURT (THRUSTON, Circuit Judge, doubting) permitted the principal obligor to testify for the defendant.

PEIRCE (WEBB v.). See Cases Nos. 17,320 and 17,321.

Case No. 10,909.

PEIRCE v. WEST.

[Pet. C. C. 351.] [2]

Circuit Court, D. Pennsylvania. Oct. Term, 1816.

EQUITY — EFFECT OF FAILURE TO FILE GENERAL REPLICATION — EVIDENCE TO CONTRADICT ANSWER — LEAVE TO FILE REPLICATION AFTER CAUSE SET DOWN FOR HEARING.

1. If the complainant in a bill in chancery, does not file a general replication to the answers of the defendant, the answer is to be taken as true, and nc evidence can be given by the complainant to contradict it.

[Cited in The Mary Jane, Case 9,215; Pierce v. Brown, 7 Wall. (74 U. S.) 212.]

[Cited in brief in Ballantine's Appeal, 67 Pa. St. 182.]

2. After a cause was set down for hearing on bill and answer, and a reference to the auditor, the plaintiff was allowed to file a general replication.

[Cited in Jameson v. Conway, 10 Ill. 230. Distinguished in Snyder v. Martin, 17 W. Va. 283.]

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

[2] [Reported by Richard Peters, Jr., Esq.]

The cause was set down for hearing on bill and answer, and at a former court an account was directed. When the case came on before the auditor, the defendants [West's executors] insisted that the answer was to be taken as true, and that no evidence could be given by the plaintiff to disprove it. Upon this the auditor adjourned the case, that the complainant might have an opportunity to move the court to allow an amendment, by suffering the complainant to file a general replication.

The complainant now moved to set aside the order of reference, and to allow the amendment to be made.

BY THE COURT. The irregularity which has taken place in this case, appears to have arisen from the want of an intimate acquaintance with chancery practice, by gentlemen of the profession in this state, where there is no court of chancery. We feel therefore disposed, on that account, to be more indulgent than we should otherwise think correct; and as no inconvenience can arise to the defendants by allowing the amendment, except that of depriving them of an advantage, which the mistake of the counsel on the other side has given them, the court grant the motion.

[For a hearing on the amended bill, see Case No. 10,910.]

Case No. 10,910.

PEIRCE et al. v. WEST.

[3 Wash. C. C. 354.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

EQUITY—AMENDMENT OF BILL—NEW MATTER—INTERLINEATION.

1. In equity. Where leave is given to amend the bill, it should state only so much of the original bill, as may be necessary to introduce and to make intelligible the new matter, which should alone constitute the chief matter of the amended bill.

2. The amendment should be by a separate bill, and not by interlining the original bill.

3. The amended bill should call on the original defendants to answer the new matter, or on the new parties, if any, to answer both.

Upon a rule obtained by the defendants [West's executors] to show cause why the amended bill, filed in this case, should not be referred to the master for impertinence; it appeared, that after all the original defendants, except two, had answered the bill, the plaintiffs [Peirce & McDonald] obtained leave to amend, by making new parties. [Case No. 10,909.] The new bill contains all the matter of the original bill, together with that applicable to the new parties, and calls upon all the defendants to answer this bill.

Levy & Tod, for plaintiffs.

Binney & Chauncey, for respondent.

WASHINGTON, Circuit Justice. The rule is, that the amended bill should state no more of the original bill, than may be necessary to introduce, and to make intelligible the new matter, which should alone constitute the chief subject of the bill. The reasons for this rule are obvious. Not only is the incorporating of the old bill into the amended bill unnecessary, but it increases the costs, and exposes the defendants, particularly those who have answered the original bill, to the trouble of searching out, and separating the old from the new matter; at the peril of having their answer excepted to, if any mistake should happen, and all the matter of the amended bill should not be answered. The amended bill calls upon the original defendants to answer it, and upon the new defendants to answer both that, and the original bill. Wherever leave to amend the bill is granted, it is more proper to file an amended bill, than to interline the original bill; particularly, if some of the defendants had before answered that bill. The rule, therefore, must be made absolute. But on motion of the plaintiffs' counsel, leave was granted to file a new amended bill, comprising only the new matter, instead of referring the bill.

Cases cited by the plaintiffs' counsel, Hind, Prac. By the defendants' counsel, Har. Ch. Prac.

PEIRSOLL (ELLIOTT v.). See Case No. 4,395.

Case No. 10,911.

PEISCH v. DICKSON.

[1 Mason, 9.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1815.

FACTOR'S LIEN FOR ADVANCES—WAIVER OF PERSONAL SECURITY—LATENT AND PATENT AMBIGUITIES.

1. A factor has, by the general law, the personal security of the owner, as well as a lien on the goods, for his advances; but by contract he may waive the right to a personal responsibility.

[Cited in McKenzie v. Nevius, 22 Me. 47; Martin v. Pope, 6 Ala. 532.]

2. What constitute latent and patent ambiguities, and when parol evidence is admissible to explain them.

[Cited in Bradley v. Washington, A. & G. Steampacket Co., 13 Pet. (38 U. S.) 98, 101.]

[Ganson v. Madigan, 15 Wis. (O. S.) 153, (N. S.) 168; Hill v. Rewee, 11 Metc. (Mass.) 273; Lett v. Horner, 5 Blackf. 297. Cited in brief in Noyes v. Canfield, 27 Vt. 82, 83. Cited in Savage v. Rix, 9 N. H. 270.]

[3. Cited in Currier v. Currier, 2 N. H. 77, to the point that where the obligation designates no place of performance, and when none can

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

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

be inferred from facts contained in the obligation, or from other facts, collateral and independent, which may be proved by parol, then the obligee may designate any reasonable place for the performance.]

[4. Cited in Devendorf v. W. Va. Oil Co., 17 W. Va. 153; Early v. Wilkinson, 9 Grat. 74; Ganson v. Madigan, 15 Wis. 158; and in Noyes v. Canfield, 27 Vt. 86,—to the point that if the language of the instrument is applicable to several persons, or to several species of goods, and if the words be general, and have divers meanings, parol evidence is admissible of any extrinsic circumstances tending to show what person or what things were intended.]

[Mertens v. Nottebohms, 4 Grat. 165, 171.]

5. If a consignee of goods agree that for advances made "he will hold for reimbursement on the amount and net proceeds of said goods, which are only considered answerable for said amount advanced," it is a waiver of any personal claim against the owner for reimbursement.

Assumpsit to recover of the defendant, a merchant of Gottenburgh in Sweden, a balance alleged to be due on sundry consignments made to him by the plaintiff. The defendant claimed to be allowed in account the difference, (being 6180 rix dollars,) between a sum advanced by him to the plaintiff's supercargo, upon certain goods shipped by the Dolphin, and the net proceeds of those goods. The plaintiff, on the other hand, contended that the defendant, by the contract made between him and the supercargo, had agreed to look to the goods only for his reimbursement. The instrument relied on to prove this contract bore date on the sixth day of April, 1811, and was signed by the defendant and the supercargo. It described in succession the goods belonging to each shipper, and the terms upon which they were received by Dickson. The following is the clause relating to the plaintiff's goods; viz. "On which goods Mr. R. Dickson has advanced me in iron, window glass, &c., shipped on board ship Dolphin, the sum of R. D. 58,331.36. 4, for which amount he will hold for reimbursement on the amount and net proceeds of the sales of said goods, which are only considered answerable for said amount advanced, as per our agreement; the remainder of the amount and net proceeds he will hold to the order, &c." Upon the construction of this contract a difference of opinion arose at the bar, the plaintiff's counsel contending that it was intended to waive any personal claim on the plaintiff, and to restrict the defendant's security for the repayment of the advance to the goods only; and they relied upon the introduction of the word "only" in the contract, as decisive in their favor. On the other hand, the defendant's counsel contended, that the contract contained no such restriction, and never was intended to waive the right of a personal claim for the advance; and that the words, in which the restriction was supposed to be contained, were meant merely to exempt the goods of the shippers on freight from being included as a security for the advance on the plaintiff's' goods. The plaintiff's counsel then offered parol evidence of the circumstances under which the contract was made, in corroboration of their construction of the contract. The introduction of the evidence was opposed by the defendant's counsel, upon the ground, that this was not a case of latent ambiguity, but the ambiguity, if any, was patent, and that parol evidence was inadmissible to explain it.

Prescott & Gallison, for plaintiff.
Mr. Dexter and J. T. Austin, for defendant.

STORY, Circuit Justice. It is not very easy to reconcile all the decisions upon the subject of latent and patent ambiguities; and, after several efforts, I have found myself unsuccessful in every attempt to accomplish it. Nothing is clearer than the general rule,—latent ambiguities may be removed by parol evidence, for they arise from the proof of facts aliunde; and where the doubt is created by parol evidence, it is reasonable, that it should be removed in the same manner. But patent ambiguities exist in the contract itself; and if the language be too doubtful for any settled construction, by the admission of parol evidence you create, and do not merely construe, the contract. You attempt to do that for the party, which he has not chosen to do for himself; and the law very properly denies such an authority to courts of justice. The difficulty, therefore, lies not in the rule itself, but in applying it to particular cases, where the shades of distinction are very nice. There seems indeed to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. In such a case, I should think that parol evidence might be admitted, to show the circumstances, under which the contract was made, and the subject matter to which the parties referred. For instance, the word "freight" has several meanings in common parlance; and if by a written contract a party were to assign his freight in a particular ship, it seems to me, that parol evidence might be admitted of the circumstances, under which the contract was made, to ascertain, whether it referred to goods on board of the ship, or an interest in the earnings of the ship; or in other words, to show in which sense the parties intended to use the term. In the present case, the inclination of my mind is to admit the parol evidence, reserving, however, the right to direct the jury to disregard it, if it shall hereafter appear to me inadmissible or inconclusive; or if, upon farther examination, the language of the contract should appear clear and unambiguous, notwithstanding the attempts to give it a double interpretation. See Birch v. Depeyster, 4 Camp. 385; Clarke v. Russel, 3 Dall. [3 U. S.] 415, 421, note.

STORY, Circuit Justice, after summing up the facts to the jury, expressed himself to the following effect upon the law of the case:

By the general law, a factor has the security of the person, as well as a lien upon the goods of his principal, for all advances made on them. But he may waive his right to resort to the person, and if he does so, by an express agreement, it will be binding upon him. The agreement relied on in the present case is in writing; and the construction of it is a mere question of law for the determination of the court, upon which it is bound to instruct the jury. The agreement, in my judgment, contains an express contract, upon the part of the defendant, to look solely to the goods as security for the advances, and to exonerate the person and other property of the plaintiff from all responsibility for the payment. If this be the bargain between the parties, it is perfectly immaterial, whether it be prudent or discreet, or not. It is sufficient, that it is made; and the jury are bound to return a verdict for the plaintiff for the difference between the advance and the net proceeds of the property, when sold. In respect to interest, none is to be allowed upon the balance of the accounts, unless from the general usage of trade, or the particular course of dealing between the parties, it is satisfactorily proved that interest was, in the understanding of the parties, to be paid.

Verdict for plaintiff, without allowance to defendant for the advance.

NOTE. A bill of exceptions was tendered by the defendant, but afterwards was abandoned. This cause was tried, by consent of parties, by a special jury, as was also an issue in the case of Harvey v. Richards, at this term [Case No. 6,183]. The practice of summoning special juries, appears from the records of our courts, to have been early prevalent in Massachusetts (MSS. records, court of assistants, Suffolk county, March, 1691–2. Andrew Belcher v. James Lloyd.—Appeal from the county court in an action on a charter-party. The appellant desired a special jury of merchants, which was accordingly granted. There are many other like cases), but it has been long disused, and there is now no power in any state court of this state, to proceed otherwise than by a jury returned and selected according to the statute provision, by drawing their names from a box kept for that purpose, by the selectmen of every town.

PEKIN, The (SMITH v.). See Case No. 13,090.

Case No. 10,911a.

PELHAM v. PACE.

[Hempst. 223.] [1]

Superior Court, Territory of Arkansas. Feb., 1833.

BAILMENT—COMPLIANCE WITH TERMS—MAIL AS A SAFE CONVEYANCE.

1. Where a person sent notes to an agent for collection, with directions to remit the money by mail, or some responsible person, and the money was sent by a trustworthy youth, eighteen years old, who had transacted business for himself for two years, and his pocketbook, containing this and other moneys, was stolen from him,—*held*, that the agent was not responsible, and that he had substantially complied with the duties which the bailment devolved upon him.

2. The mail is, in legal contemplation, a safe, though not a responsible, mode of conveyance; but a person, notwithstanding infancy, is considered responsible.

Appeal from Pope circuit court. [This was a suit by William Pelham against Alfred E. Pace.]

Before CROSS and CLAYTON, Judges.

OPINION OF THE COURT. This case comes up by appeal from the Pope circuit court. The appellant brought an action of assumpsit to recover money had and received by the appellant to his use. At the trial, neither party required a jury, and the matter was submitted to the court, and a judgment rendered for the defendant. From a bill of exceptions taken by the appellant, the evidence appears to have been that the attorney of the appellant forwarded to the appellee, through the mail, two notes on a man by the name of Logan, with directions to place the same in the hands of a justice for collection, and, when collected, to receive the money, and transmit it to him by mail, or some safe, responsible person; that the appellee received one hundred and thirteen dollars on the notes before the suit was commenced, and handed the same to a youth of seventeen or eighteen years of age, who promised to deliver it to appellant's attorney at Little Rock; that this youth had transacted business for himself, by the consent of his father, for one or two years, was intelligent, honest and trustworthy, as any of his age; that before he had an opportunity of paying it over his pocketbook was stolen, containing that, as well as other moneys; that said attorney had been heard to say that he would have had no hesitancy in sending the money by this same youth in his own case; and finally that appellee received compensation for his trouble. The only question it will be material to consider is whether the appellee discharged himself from liability by transmitting the money in the manner shown by the evidence. In the absence of any express agreement between the parties, or terms imposed at the time of making the bailment, the law steps in and settles the question of duty and liability. The case before us, however, depends upon the terms imposed at the time of transmitting the notes, and acceded to by the appellee in undertaking the collection. He was bound to transmit either by mail, or by a safe, responsible person. The mail, in legal contemplation, is a safe mode of conveyance, but not a responsible one. That mode was not adopted, but the money was forwarded by a youth of seventeen or eighteen years of age, who is shown by testimony to have been intelligent, prudent, and trust-

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

worthy, and to which the law adds responsibility, notwithstanding his age. On the subject of the liability of minors in such cases, see 11 Petersd. Abr. tit. "Infant," 558. The appellee, we think, in transmitting the money, complied with the terms imposed at the time of receiving the notes for collection. Judgment affirmed.

PELLETREAU (UNITED STATES v.). See Case No. 16,023.

Case No. 10,912.

In re PELTASOHN.

[4 Dill. 107; 16 N. B. R. 265; 10 Chi. Leg. News, 10; 4 Law & Eq. Rep. 441; 5 Cent. Law J. 311.] [1]

Circuit Court, E. D. Missouri. Sept. 19, 1877.

BANKRUPTCY—ACCOUNTING FOR LOSSES IN BUSINESS—DEFICIT.

Where a deficit is shown in the assets of a bankrupt's estate, he must account for it by a satisfactory explanation, or pay the amount of the deficit to the assignee.

[Cited in Re How, Case No. 6,747; Re McKenna, 9 Fed. 29.]

The bankrupts were wholesale millinery merchants in St. Louis. The assignee filed a petition in the district court, representing that the bankrupts had fraudulently withheld from him goods and property to the amount of $48,000, and asking an order on the bankrupts to show cause why they should not turn over that amount of property to him. The order issued, and the bankrupts appeared and filed a sworn answer denying the charge, and stating that they had delivered to the assignee all their property and effects. The matter was heard by the district court upon the examination of the bankrupts before the register (admitted in evidence without objection, as far as the record discloses), and upon the testimony of various witnesses produced by the assignee and by the bankrupts. The testimony, including the examination of the bankrupts, covers about six hundred written pages. The bankrupts, or their wives, or the persons to whom they alleged that money had been paid just preceding their failure, were not examined as witnesses, or their depositions taken. After a hearing, which occupied several days, the district court found as a fact that the said bankrupts "have secreted, concealed, and prevented from coming to their assignee herein, property to the value of $7,762.22, belonging to the said estate, and thereupon ordered the bankrupts to pay said sum to the assignee on or before the 8th day of September, 1875." The bankrupts, on the 8th day of December, A. D. 1875, filed their petition in this court for a review of the said order. An answer to this petition was filed by the assignee, and the matter, by stipulation and agreement, was to be heard in the circuit court upon the same proofs upon which it was determined by the district court.

By consent, the case was, at the March term, 1876, of this court, referred to S. D. Thompson, Esq., one of the masters in chancery in this court, to report upon the law and the facts. The master has filed an elaborate report, in which he states that he has given to the case a thorough examination, and seems to be of opinion that the finding of the district court against the bankrupts was for a sum too small instead of too large, but as the assignee had prosecuted no proceedings for review, he recommends an affirmance of the order below, with costs, against the bankrupts. Exceptions were taken by the bankrupts to the master's report, on the single ground that it is not sustained by the proofs, and on these exceptions the cause was submitted to the court.

N. Meyers, for bankrupts.

A. Binswanger, for assignee.

DILLON, Circuit Judge. It is an admitted fact that at cost price the bankrupts had on hand, on January 1, 1873, goods to the amount of $41,740.61. They failed in November of that year. Between January 1, 1873, and their failure, they purchased goods to the amount of $81,589.53, making stock to be accounted for $123,330.14. These sums are shown by the bankrupt's books. The books show sales, for cash and on credit, during this period, to the amount of $72,503.95, at sale prices. If sold without loss or profit, the bankrupts ought to have had on hand at their failure, goods to the amount of $50,826.19. The amount actually turned over by the bankrupts to the estate in bankruptcy was $16,500 at cost price, or, including fixtures, $18,000. The difference, viz., $34,326.19, or, if fixtures be deducted, $32,826.19, is to be accounted for.

The bankrupts attempt to account for this large deficit by showing a great decline in the value of goods of this character between January 1 and November 1, and that they had to sell at great loss. Undoubtedly, the old stock—that is, the stock on hand January 1—was not worth its cost price, and sales from that were made, on the average, greatly below cost; but it is very doubtful whether there was much, if any, loss—as likely, indeed, that there was a profit—on the goods sold from the new purchases. On the whole, I am not satisfied with the explanations offered for this large and striking deficit, and I think the district court and the master were well justified in reaching the conclusions they did.

Certain circumstances, pregnant with suspicion, strongly support this conclusion. I

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 4 Law & Eq. Rep. 441, contains only a partial report.]

mention these without dwelling upon them. The change, during the time they had a bookkeeper, of their system of bookkeeping from double to single entry; the loss or non-production of two important books—"bills receivable and payable," and the "stock or sales book,"—by no means satisfactorily accounted for; the alleged increase by one-half of family expenses during 1873, and taking money therefor, without any real increase being shown; the alleged sending of money to Europe to poor relations, and payments to a relative in this country, not otherwise shown to be true than by the unsupported statement of the bankrupts—this at a time when they were claiming to be anxious to reduce expenses, and when they were embarrassed; and particularly the statement of Peltasohn, that his wife had $5,000 or $6,000, and had had since 1871, or before that, which she kept in her house in bank-bills and had never invested—the profits, as he alleged, of business which she had conducted on her own account, and which I must say, under the circumstances, is very improbable; and the further fact that since the bankruptcy the bankrupts have gone into business as the professed agents of their wives.

In short, such a case was made against the bankrupts as to call upon them to explain these circumstances of suspicion, and they have not done so. They were not even examined as witnesses on their own behalf in the district court.

The exceptions to the master's report should be disallowed, and an order should be here entered affirming the order of the district court, with costs [including the fee of the master of two hundred and fifty dollars (not excepted)],[2] and that a mandate go to the district court to proceed with the execution of the order complained of, the same as if the petition for review thereof had not been brought.

Ordered accordingly.

NOTE. The foregoing opinion, when published in the Central Law Journal, was accompanied by the following note, written by Mr. Frank, which we here insert:

"The opposition to the bankrupt law [1 Stat. 178] as it now stands, has come from the creditor-class, and there is, perhaps, but little doubt that the reasons for the opposition are substantial; yet, if the creditors of an estate would urge those provisions of the statute which will secure them their rights, in all proper cases, except in case of composition proceedings, the act would certainly not be without efficacy. The provisions referred to are sections 5110, 5132, 5104 of the Revised Statutes of the United States.

"In Re Salkey [Case No. 12,254], Judge Drummond held, affirming Judge Blodgett's decision in the same case [Id. 12,253], under the provision of section 5104, Rev. St. U. S. (section 26 of the act of 1867 [14 Stat. 529]), that the court had authority to imprison bankrupts for failure to give a satisfactory account and make a full disclosure respecting their property. The counsel for the debtors there contended that if the answers to the inquiries concerning their property were untrue, the creditors might resort to a criminal prosecution. The court replied that criminal prosecution does not pay the claims of the creditors.

"In Re Jacobi, unreported, Judge Caldwell committed to jail, at Little Rock, Arkansas, a bankrupt for not paying over to her assignee the sum of about $12,000, a deficit of that amount not having been by her satisfactorily accounted for. The bankrupt, after being imprisoned for some time, was taken before Circuit Judge Dillon, at Davenport, Iowa, on a writ of habeas corpus, who modified the order of the district court as to the amount to be paid over, as not having been satisfactorily explained, and remanded the bankrupt.

"The Case of Peltasohn, above reported, is only one of many where creditors have been imposed upon by bankrupts, because the bankrupts supposed the act to be a shield for their fraudulent contrivances, and the court clearly lays down the rule as to how a true account ought to appear; and in the absence of such an account, to what the act subject the bankrupts."

[2] [From 16 N. B. R. 268.]

Case No. 10,913.

PELTON et al. v. WATERS et al.

[1 Ban. & A. 599; 7 O. G. 425; 21 Int. Rev. Rec. 125; Merw. Pat. Inv. 674.] [1]

Circuit Court, S. D. Ohio. Dec., 1874.

INTERFERING PATENTS — PRESUMPTION AS TO PRIORITY—PATENT GRANTED ON SECOND APPLICATION—WHAT IS INVENTION.

1. Where there are two interfering patents, the patentee of the invention described in the patent of earlier date, is entitled to the presumption of priority and novelty.

2. If between the first and second application, by an inventor, for a patent, he has manifested an actual intention to abandon the first, the patent granted upon the second application, will have relation to the time of the filing of that application only; the intention manifested by the patentee, to abandon the first, will sever the connection between the two applications.

3. W. and T., having filed applications for patents showing substantially the same device, at the respective dates March 31, 1868, and April 21, 1868, were both rejected. T. persisted in his claim, and upon appeal, secured his patent; while W. amended his application, excluding from his claim the common device, and thus, without appeal, obtained a patent of narrow scope. Subsequently learning of T.'s patent, he filed a second application, broad enough to include the device previously omitted, and in the consequent interference proceedings with T., was adjudged the prior inventor, and thereupon obtained a patent for the invention previously patented to W.: *Held*, in a suit brought by T. against W., for infringement, that W.'s second application was the commencement of a new proceeding, to which alone the patent granted in pursuance of it relates; and, therefore, that said second application being subsequent in date to T.'s patent, the presumption as regards priority of invention was with T.

4. The accidental making of an improved article in a single instance, without knowledge on the part of the producer of how it was accomplished, or how to make another like it, is not invention.

[Cited in Boyd v. Cherry, 50 Fed. 283.]

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 674, contains only a partial report.]

5. Letters patent [No. 79,279] for "improvement in lubricators," granted to Hiram Taylor, June 23, 1868, *held* valid.

Gardner Waters filed an application for letters patent for an "improvement in lubricators," March 31, 1868. On the 21st of April, 1868, Hiram Taylor made an application for a patent, for substantially the same improvement. Both applications were rejected by the examiner. Waters narrowed his claim, and thereupon received a patent of limited scope; but Taylor persisted in his claim, and, upon appeal, secured his patent, which was issued to him June 23, 1868.

When Waters learned that a patent had been issued to Taylor, with a "broad claim," he filed a second application, inserting therein a claim for the invention substantially as covered by the Taylor patent, and demanded an interference, which was granted him; and, upon the final appeal to one of the judges of the supreme court of the District of Columbia, he was adjudged the prior inventor; and letters patent were accordingly issued to him June 29, 1869. The present suit, under the Taylor patent, was instituted November, 1868; complainants' testimony was duly taken after the issue was joined.

In December, 1869, defendants filed an amended and supplemental answer, claiming that Waters was the first inventor, and setting up the interference decision. Issue was joined upon this answer, and testimony for defendants, and rebutting proofs for complainants [William W. Pelton and others], taken and filed in 1870. [The hearing was had at the October term, 1874.] [2] At the hearing, the defendants objected to a certified copy of an application for a patent made by the complainant Taylor, in September, 1867—which it was claimed, described the device in controversy—on the ground that the copy of the application referred to drawings as being a part of the original application; no drawings, however, being attached to the copy. [The objection was sustained by the court.] [2]

Reuben Tyler, for complainants.
E. W. Kittridge, for defendants.

Before EMMONS, Circuit Judge, and SWING, District Judge.

EMMONS, Circuit Judge. The patent of the complainant, Taylor, antedates that of the defendant, Waters, and he is entitled to the presumption that his invention is novel. The presumption is of importance only where the testimony is conflicting, and any considerable doubt is involved as to who is the first inventor. It is of but little consequence in this case. It has, however, been much argued. The defendants insist that Waters' application was made earlier than that of Taylor, and, therefore, his patent is to have relation to the date of its filing. As a general rule, this is undoubtedly true. We do not intend to question, or even qualify, any of the cases on the subject, which we recently considered and applied in the case of the Goodyear Dental Vulcanite Co. v. Willis [Case No. 5,603]. These judgments assert several exceptions to the application of the rule.

If, intermediate the first and second application, the patentee manifests an actual intention to abandon the first, his patent will have relation to the last one only. His actual intention severs the proceeding. The law deems the first application terminated, and as bearing no relation to the patent, which rests solely on the last one. A withdrawal of a first application, and the reception of the fee paid back from the department under the statute, is also a severance of the proceedings. The application so withdrawn is not deemed part of any proceeding, under a subsequent proceeding for a patent. These are but illustrations of exceptions to the general principle, which deems the first in a series of applications for a patent, as that upon which a patent depends. We think the case before us comes within the reason of these exceptions. Under the first application of the defendant Waters, he actually received a patent, after having amended his specifications, so as to exclude the present device. We think this action wholly terminated the first proceeding. It was ended in the accomplishment of its object. The decision of the department was acquiesced in, and its final judgment obtained. The subsequent application, in such circumstances, must be deemed the commencement of a new proceeding, and as that alone upon which the patent granted in pursuance of it depends. This last application was subsequent to that of complainants' patent; and, as they are both for precisely the same device, the presumption is in favor of priority of invention on the part of the complainant Taylor.

He testifies that in the fall of 1866, he cast an impervious joint upon the neck of a bottle. He proves his statement by a blacksmith, who came to present an account, and saw such a bottle in his shop; and his brother testifies that he, also, saw it at a subsequent period. If his rights depended upon our adopting the theory that he completed his invention at that time, by such means, we should dismiss the bill. Positive as the testimony is, the fact of success at a period so early is too inconsistent with his subsequent conduct, manifestly evincing an entire ignorance of the thing we think he subsequently invented. Such singular stories are incident to nearly all these controversies in reference to priority of invention. Parties frequently prove the making of some fixture which is destroyed; of some model which is lost; and some conversation which has never been acted upon sufficiently early to antedate his opponent. We could give many reasons why we fear the history of this bot-

[2] [From 7 O. G. 425.]

tle finds its origin in the fact that the defendants, in their testimony, place his discovery about a year earlier than we think it was invented by any one. Far more satisfactory and convincing, is the proof that the complainants, in the latter part of 1867, and subsequently, were making and vending in large quantities, the patented device. The defendants' agent, Pelton, who was selling at that time a different article for the defendants, in the fore part of 1868, bought of the complainants a number of lubricators of the kind in question, to supply the place of an inferior article, manufactured by the defendants, which they had sold for them, and which, on account of their leaking, had to be supplied by a better.

It is needless to recapitulate the proofs—they are abundant and uncontradicted—to show that from the latter part of 1867, forward, the complainants were in the full manufacture and sale of the patented device. There is no satisfactory evidence of its invention before that date. It is with this concession that we grant him a decree. To overcome this case, and prove the defendant to be a prior inventor, he himself swears that, in the latter part of 1866, he too made an impervious joint upon the neck of a glass globe, tested it with steam, and placed it upon the cross-head of an engine, where it worked successfully, as he proves by Henderson, the colored engineer, for three successive years. The witnesses Reynolds and Phillips, with more or less confirmation, sustain Henderson. We are absolved from the duty of contrasting this proof, with other unquestioned facts in the case, for the purpose of ascertaining whether it was not in 1867, instead of 1866, that this successful lubricator was made, because the defendant Waters' own statement as a witness renders it wholly unnecessary. He says, most explicitly, that though he did succeed accidentally in making one close joint upon the neck of that single globe, he tried in vain for five months thereafter to make another. He says he broke many bottles in the attempt; that he did not even partially succeed, but in a single instance, during the five months; and that one leaked so badly it was unfit for use. It was not until 1868, that he learned how to produce a close joint; and, at a time considerably after complainants were publicly manufacturing them. The accidental making of this one joint, without any knowledge on the part of the producer, of how to accomplish it, with utter inability on his part to make another like it, is not invention. His ignorance was so complete, concerning the mode of its production, that he himself swears, he not only did not attempt their manufacture, but laid aside a large stock of material, during this period, for the making of a wholly different article. These he did manufacture, and put upon the market, through Starr & Pelton, his agents. He not only had not invented a close joint, but he had so little hope of success, that he prepared extensively for the making of a different and inferior lubricator. In these circumstances, a single fortuitous success is by no means invention, within the protection of the patent law. He not only did not, and could not, give it to the public, but he did not possess it himself. It might as well be claimed that if he should be carrying three bottles in a basket, which being accidentally broken, their contents, mixing in unknown quantities upon the earth, makes some useful compound, and he should enter upon a series of experiments for the purpose of ascertaining, if possible, its relative proportions; but, does not succeed in doing so until after another has successfully completed the discovery, he could antedate him by proof of the casualty by which he saw the same thing produced. When the defendant saw the first bottle on the cross-head of the engine, without any knowledge of the mode by which he could make another, he stood in no other relation to it, as far as the patent law is concerned, than if it had been placed there by somebody else.

It is not necessary to consider the many other facts in the case, which tend to show that Waters, in fact, obtained his knowledge of the device from Taylor. We refer to a few of them only, as illustrating the rightfulness of the principle we apply to the defendants' testimony. When Pelton, their agent for the sale of a different manufacture, as late as 1868, presented the defendants with one of the complainants' lubricators, they pronounced it impracticable. They said they could not be profitably made, and that Pelton did not know how many bottles must necessarily be broken by the complainants in making their lubricator. Other analogous proofs exist. We refer to these single instances only, to show the inconsistency of treating that man as an inventor, who is so discouraged by his own failures, and the repeated breaking of his bottles, that he pronounces the attempt impracticable, and is himself at that time manufacturing a different and poorer article, nearly a year and a half after the mysterious production of the close joint which the court is asked to believe was placed upon the cross-heads in 1866.

We think the presumption of the law arising from the anterior patent of the complainants, is consonant with the inference of the fact to be drawn from the testimony. The complainant was the first inventor of the lubricator described in his patent. The accidental making of one in 1866, by the defendant, if everything occurred precisely as he swears it did, is not invention in any sense. There can hardly be said to be a conflict of testimony in reference to the fact, that the complainants, for many months before the defendants did so, manufactured and put these articles on the market.

There may be a decree for the complainants in the usual form.

PELTZ (BANK OF WASHINGTON v.). See Case No. 952.

Case No. 10,914.

PELTZ v. CLARKE.

[2 Cranch, C. C. 703.] [1]

Circuit Court, District of Columbia. May Term, 1826.[2]

EVIDENCE—COPY OF DEED FROM RECORDS — AUTHORITY TO TAKE ACKNOWLEDGMENT—ENTRIES OF DIVISION AND ALLOTMENT.

1. A copy of a deed of lands from the record book may be read in evidence without producing the original or accounting for its nonproduction.

2. The superintendent of the city of Washington was authorized by law to take the acknowledgment of deeds of lands within the city.

[Cited in Middleton v. Sinclair, Case No. 9,534.]

3. The entries of the division and allotment of the property of the original proprietors of the lands in the city of Washington may be given in evidence without producing or accounting for the nonproduction of the original certificate of division and allotment from which the entries were made.

Ejectment for an undivided moiety of lot No. 3 in square No. 461 in the city of Washington.

Upon the trial the plaintiffs [Alexander M. Peltz and others, heirs of John Peltz] produced and offered to read in evidence from the book of land records for this county a copy of a deed with a copy of the acknowledgment thereof, purporting to have been acknowledged before and certified by Thomas Monroe, superintendent, etc., and offered no evidence to account for the nonproduction of the supposed original, nor any proof of the execution of such original other than the said land-record book, purporting to set out the copy of said deed or of the said certificate of said Thomas Monroe; to the reading of which copy the defendant [Joseph S. Clarke] objected, but THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection and admitted the same in evidence.

Mr. Jones, for defendant, also contended that Mr. Monroe, the superintendent of the city, had no authority to take the acknowledgment of the deed; the act of congress under which he was appointed having transferred to him only those powers of the former commissioners which were to be executed by them as commissioners,—that is, as a board of commissioners,—not the powers which any individual commissioner could exercise; but THE COURT overruled the objection.

THE COURT also permitted the plaintiff to read in evidence the record book of the entries of the division and allotment of the square, No. 461, without producing or accounting for the nonproduction of the original certificate of division and allotment from which those entries were made.

THE COURT also gave an instruction, to which the plaintiffs excepted, and the verdict being against them, they took a writ of error to the supreme court, where the judgment of this court was affirmed. 5 Pet. [30 U. S.] 481.

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

[2] [Affirmed in 5 Pet. (30 U. S.) 481.]

Case No. 10,915.

The PENANG.

[4 Sawy. 100.] [1]

District Court, D. California. Oct. 21, 1876.

MASTER—COOK—DISRATING.

Held, that although the cook had been guilty of some misconduct, the master had no right, under the circumstances, to offer him the alternative either to be discharged in a foreign port, on payment of a little more than half his wages earned during a service of seven and a half months, or else to go into the forecastle with the men, "where he would have a chance to earn a portion of his wages, or at least his grub, and if he refused to work, to be charged for board."

In admiralty.

Daniel T. Sullivan, for libellant.

Charles Page, for claimant.

HOFFMAN, District Judge. It is extremely difficult to discern what justice demands in this case. The captain saw fit to disrate the cook and send him into the forecastle, on the refusal by the latter to accept his discharge at Callao and payment of wages at the rate of $30 per month, instead of $50, at which he had shipped. The reasons for this step, as set forth in the official log-book, were the repeated disobedience by the cook of lawful orders, his lying and treacherous conduct, his inefficiency and willful misconduct after ample time had been given him for improvement.

The lying and treacherous conduct referred to seems to have been the refusal of the libellant to accept his discharge and payment at $30 per month, after having agreed to do so, as the master alleges. But the libellant denies that he ever consented to submit to so considerable a reduction of his wages for the whole period of his service—seven and one-half months. And the probabilities are in favor of his statement. He was undoubtedly willing to leave the vessel on being paid in full, and it is much to be regretted that the master did not accept his offer. It is to be observed, moreover, that the captain sent him forward to work with the men immediately on his return from the hospital at Callao.

The official log states that the libellant was allowed to go to "a hospital on one of Mr. Swayne's estates," but that without permission he took the steamer for Callao. It does

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

not appear, however, that the master had made any arrangements for his reception at that hospital, if any such existed, and the certificate of the doctor to the effect that a residence of twenty or thirty days in a hospital was necessary to effect his cure seems inconsistent with the idea that he could have obtained there the necessary medication.

At all events, the libellant proceeded directly to the nearest American consul, and procured from him admittance into a public hospital. I cannot regard his conduct in this instance as deserving any particular censure. He left the vessel on or about March 18, 1876, and returned without delay on being discharged "cured" from the hospital. He reached the bark on the fourth April, and was at once turned forward, as before stated. Whatever may have been the previous misconduct or inefficiency of the cook, it had not been considered sufficiently important to be noted in the official log. The entries on pages 10 and 11 are dated from March 3 to April 14.

It is not pretended that these dates indicate the time of the entries. They refer to the dates of the occurrences recorded. The handwriting of both these pages is singularly uniform, and its appearance, the color of the ink, etc., suggest irresistibly the conclusion that the two pages were written at the same time. The latest entry, of April 14, is dated at Samanca, and states the "above statements were read to the libellant," etc. It is to be presumed that in compliance with law the entries were read to the libellant as soon as made. No reason existed for omitting to read an entry made at Cerro Azul on the fifth March until the fourteenth April, when the vessel was at Samanca. I think, therefore, that it may be concluded with reasonable certainty that none of these entries were made until after the cook's return on the eleventh April from his second visit to the consul at Callao, and after the captain had declared to him his final determination not to allow him to resume his duties, and had ordered him forward. The official log shows, as has been stated, that on the fourteenth April entries, extending from March 3 to April 4, were read to the libellant. The succeeding page (12) contains entries of other matters dated on April 27 and 28. The first entry on the next page (13) is dated April 11, and refers to the return of libellant from Callao, and his disrating by the captain. The other entries are on the fourteenth, twenty-sixth, twenty-seventh, and twenty-eighth. The latter states that the previous entries were read to the libellant.

It is evident that all these entries must have been made subsequently to April 14, when the previous entries on pages ten and eleven were read to the cook. I have referred to these entries thus particularly, to show that in all probability no one of them was made until after the final refusal of the libellant to accept his discharge and payment of wages at $30 per month, and after the captain had informed him that he must finish the voyage in the forecastle. They seem to have been intended as an explanation or justification of that proceeding. The entry March 3, 1876, in substance that the cook had received orders on September 17, preceding, as to lighting and extinguishing his fires; that he had disobeyed them on two different occasions, and again on the day on which the entry bears date. That on being reprimanded by the master he got "into a rage, and said that in future he would use double the amount of fuel he had been using before; that afterwards he told the captain that if he would give him $10 per month, he would leave him and trouble him no more. The captain told him he was willing to pay him more money than that, or all that he was worth, and more too. Cook replies that he would kiss the captain's hands and feet if he would." The entry of March 16, states that the cook wanted his discharge, said he would be perfectly satisfied with whatever the captain was willing to pay him. Captain gave him $110 on account, and an order on an agent for $240 more.

On the eighteenth the log states that captain and cook went ashore to see captain of the port, with whom the ship's articles were deposited, where the cook contradicted his statement, and said he was not satisfied with the amount paid to him.

The entry of April 4, made after the cook returned on board from the hospital, states that the cook asked the captain to allow him to go and see the consul at Callao. The captain told him he might do so if he was willing to accept the amount he had left for him with the consul, otherwise he would have to return on board again; "with this understanding the cook went on shore to go to Callao." It will be observed that the cook had already been ordered forward to work with the men. On the eleventh of April the cook returned, having declined to accept the wages at $30 per month which the captain had left with the consul. It was then that the captain reproached him with lying and treachery, disobedience of orders and inefficiency, and informed him that he must finish his voyage in the forecastle. The cook denies that he ever agreed to accept the reduced rate of wages offered him by the master. That he ever deliberately intended to do so I can hardly believe. But it is probable that in the excitement and anger of the moment he may have used some expressions which induced the master to think he might get rid of him on those terms.

Neither the entry of April 4 nor the master's account of the circumstances attending his second trip to Callao to see the consul show with any certainty that the cook either knew or agreed to accept the sum left for him with the consul. But in any case he had a right to retract his acceptance of the master's offer; and the question arises, had the

latter, under the circumstances, the right to insist upon it, and to disrate the cook if he persisted in his refusal?

The evidence discloses that the cook, on several occasions, was guilty of disobedience of the master's orders with regard to the fires, and when reprimanded he probably answered in a hasty and passionate manner. There also seems to have been much complaint with regard to the cooking, and his personal habits appear to have been uncleanly. Some of the crew state, however, that he did as well as possible under the circumstances, subject as he was to constant annoyance from the officers and crew. The cook assigns as a reason for the bad cooking that he had no pepper or onions with which to flavor the messes. I think it established by the proofs that the galley was kept in a very dirty condition.

On the other hand, there is no pretense that the cook was dishonest, drunken or lazy. The duties he had to perform required much diligence; he served as cook and steward for eight men and four officers. His successor was assisted by a boy, a fact which the mate, with some disingenuousness, suppresses.

I have endeavored to form as just an estimate as possible of the faults and short-comings attributed to the cook. They were such as to give some just ground for dissatisfaction on the part of the master, but I cannot consider them so flagrant as to authorize the latter to insist upon the alternative he offered him, viz.: either to be discharged on payment of a little more than half the wages due him for a service of seven and a half months, or else to go into the forecastle and work with the men, "where he would have a chance to earn a portion of his wages, or at least his grub; and if he refused to work, to be charged for board." The remainder of the voyage occupied more than five months and a half. It is now claimed that his refusal to work with the men operated a forfeiture of even the reduced wages earned while he was acting as cook, and that he is entitled to nothing for more than a year's service. I think that such a penalty would be out of all proportion to the faults and misconduct of which he may have been guilty.

The master's conduct seems to me to have been unjustifiably harsh. He had no right to arbitrarily impose a forfeiture of nearly one-half the stipulated wages earned since the commencement of the voyage; a period of seven and one-half months, during the first two or three of which there seem to have been no grounds for complaint, and when at no time had the cook's misconduct been such as to make it, in the master's judgment, worth while to make any entry whatever with regard to him in the official log. The cook had the right to be cured at the ship's expense of an illness, contracted in the service. His trips to Callao cost him, he avers, $120. His whole claim for balance of wages and expenses is $674. I think his conduct justifies some abatement of this claim, but I cannot regard the master as authorized to retain him on board during the five and one-half remaining months in a position of enforced idleness, or at least where his only chance was to "earn a portion of his wages, or at least his grub."

I shall decree to the libellant the sum of $500, with costs.

Case No. 10,916.

PENARO v. FLOURNOY.

[5 Pa. Law J. 555; 9 Law Rep. 269.]

Circuit Court, D. Georgia. April Term, 1846.

LIMITATIONS OF ACTIONS—PROMISE TO PAY—PROVINCE OF COURT AND JURY.

1. Whether the evidence of a promise to pay a debt barred by the statute of limitations is sufficient to take a case from the operation of the statute, is a question of law for the court. Whether the evidence applies to the debt in suit, or to what portion of it, is a question of fact for the jury.

2. Where A., who was in the employment of B., spoke of leaving, and said, "I want to see my money," to which B. replied, "I will put up your wages for you," it was *held* that the promise was sufficient to take the case out of the statute of limitations, for all the wages to which the promise applied, and that it was properly left to the jury to find to what portion of the wages, if any, the promise did apply.

This was an action [by Robert W. Flournoy] founded upon an open account, in the following words: "R. W. Flournoy, to Joseph Antonio Penaro, Dr. For my services on his plantation, from the 15th April, 1834, to 15th February, 1844; 9 years and 10 months, at $150 per annum, $1470." The defendant, among other pleas, relied upon the statute of limitations. The statute of Georgia requires actions on open account to be brought within four years from the time the right of action accrues. Prince's Dig. 578. The plaintiff replied a new promise, made by the defendant's intestate, within four years. In support of the issue joined, upon the plea of the statute of limitations, the plaintiff proved, by one witness, the following conversation between the plaintiff and the defendant's intestate, some two months before his death. Penaro was speaking of quitting Flournoy, who objected; Penaro said, "I want to see my money;" Flournoy said, "I will put up your wages for you." This was the only evidence to take the case out of the operation of the statute of limitations. The jury, under the charge of the court, found for the plaintiff.

The defendant moved for a new trial, upon the following grounds: First. Because there was no proof of any promise made by the intestate, Robert Willis Flournoy, to pay the demand sued for, or any part of it, within four years immediately preceding his death. Second. Because there was no proof of any acknowledgment of any specific indebtedness, on the part of said Robert Willis

Flournoy, deceased, to the plaintiff, within four years immediately preceding his death, sufficient to take the case out of the statute of limitations. Third. Because the only proof offered, on the part of the plaintiff, to take the case from the operation of the statute of limitations, pleaded in this case, was the testimony of John B. Bacon; who testified, that some three months before the death of said intestate, he was present at a conversation between the intestate and plaintiff; that plaintiff spoke of quitting Flournoy, who objected. The plaintiff said he wished to see his money; Flournoy replied, "I will put up your wages for you." Fourth. Because there being no dispute in relation to the facts proven, to take the case out of the operation of the statute of limitations, the court erred in referring that question to the jury, it then being a question of law, and not one of fact; a question for the court, and not one for the jury.

Mulford Marsh, for defendant.

There being no proof of a hiring, for any specific period of time, the plaintiff's right of action, if any, accrued every day; and the statute applies to all of the account, but the last four years. The statute runs from the time the plaintiff's right of action accrued. Wilcox v. Plummer, 4 Pet. [29 U. S.] 182. To take this case from the operation of the statute of limitations, there must be a promise, within the last four years, to pay this debt, or an acknowledgment of this debt, so direct and explicit, that the law will imply a promise; not an acknowledgment vague, uncertain, and indeterminate. The promise was in these words (in reply to the plaintiff's saying "I want to see my money"), "I will put up your wages for you." This promise was vague and indeterminate. It may mean the wages for a week, month, or year; or it may mean to increase the wages. It refers to no determinate debt or demand; no demand for any specific sum was made, nor were any particular wages named. The promise must refer to the demand sued for, not an unliquidated debt; it must be certain and determinate, not vague. From this promise no particular sum, nor any time of service, can be ascertained. This principle is sustained by the late decisions of the superior courts of Georgia upon this statute, in the following cases: Fellows v. Guimarin, Dud. (Ga.) 101; Brewster v. Hardeman, Id. 148, 149. The same principle is fully recognized by the supreme court of the United States, in the case of Bell v. Morrison, 1 Pet. [26 U. S.] 351, and affirmed by the same court in Moore v. Bank of Columbia, 6 Pet. [31 U. S.] 87. The supreme court of Massachusetts have recognized the same doctrine in the following cases: Bangs v. Hall, 2 Pick. 371, 378; Gardner v. Tuder, 8 Pick. 205. It is also recognized in England (in 1816) in the case of Rowcroft v. Lomas, 4 Maule & S. 457. And now, in England, the promise must be in writing. St. 9 Geo. IV. c. 14. The same principle is held in New York, in Purdy v. Austin, 3 Wend. 187; Stafford v. Bryan, Id. 532; Allen v. Webster, 15 Wend. 284; and Stafford v. Richardson, Id. 302. And the same in the court of chancery of New Jersey, in the case of Conover's Ex'r v. Conover, Saxt. Ch. [1 N. J. Eq.] 403.

Secondly. There being no dispute as to the facts proven, to take the case from the operation of the statute, it was a question of law for the court, and not one of fact for the jury. Clarke v. Dutcher, 9 Cow. 674.

John E. Ward, for plaintiff.

The promise, in this case, is such an one as will take the case out of the statute. The plaintiff, as was proven, had been many years in the employ of Flournoy. The plaintiff spoke of quitting. Flournoy objected; plaintiff said, "I want to see my money;" Flournoy replied, "I will put up your wages for you." This promise could only refer to the wages due, and all were due, as no payment was proved. There are two classes of cases that have been decided under the statute. One class of cases has gone upon the ground, that an acknowledgment of the justice of the debt was sufficient, to prevent the operation of the statute. The second class, and the correct one, requires a promise to pay, or an acknowledgment from which the law will imply a promise. 2 Greenl. Ev. 352, 355. No set form of words is necessary; a promise may be inferred from acts. Id. 356; 4 Pick. 110. (In support of the position, that the promise was sufficient to prevent the operation of the statute, he relied upon the following authorities: Sheftall's Ex'r v. Clay's Adm'r, R. M. Charlt. 7; Barnard v. Bartholomew, 22 Pick. 291; Ang. Lim. 258.)

As to the second point, this is the true distinction: The court decides what evidence of a promise is sufficient to remove the operation of the statute; but the fact whether the proof applies to the debt sued for, belongs to the jury. In this case the court instructed the jury, that if they found the evidence of the promise applied to the whole debt, then they must find for the plaintiff, or find for the plaintiff as much as they found the promise applied to. Whitney v. Bigelow, 4 Pick. 110; 2 Com. Law, 474.

NICOLL, District Judge. The question, whether the evidence of a promise to pay a debt, barred by the statute of limitations, is sufficient to take a case from the operation of the statute, is one of law for the court. Whether the evidence applies to the debt in suit, or to what portion of it, is a question of fact for the jury. In this case the promise was, "I will put up your wages for you;" clearly referring to the wages then due. The court holds the evidence sufficient to take the case out of the statute, for all the

wages to which the promise applied. It was the province of the jury to say to what portion, or whether to the whole of the wages, the promise applied. The promise was absolute: "I will put up your wages for you." The jury having found that the promise applied to the whole account, the court is satisfied that the verdict is correct. Motion for a new trial overruled.

Case No. 10,917.

PENDALL v. RENCH et al.

[4 McLean, 259.] [1]

Circuit Court, D. Ohio. July Term, 1847.

PROOF OF AGENCY—TRANSFER OF SPECIAL TRUST —RESPONSIBILITY OF CARRIERS.

1. An individual may prove his own agency.

2. But where a special trust or confidence is placed in an individual, he can not transfer that to another.

3. Bills of lading, which required the signature of a principal agent, can not be *held* good if signed by a person designated by the principal.

4. Common carriers are responsible for property confided to them, except it be taken or destroyed by a public enemy.

5. Any damage done to goods in the course of transportation, must be made good by the transportation company.

[This was an action at law by J. Morrison Pendall, who sues for himself and for the use of Alliance Mutual Insurance Company, against John Rench and others, who constituted a transportation company, to recover damages for loss of and damage to certain goods delivered to defendants as common carriers.]

Mr. King, for plaintiffs.

Mr. Fox, for defendants.

OPINION OF THE COURT. This action is brought against the transportation company from Cincinnati to New York, by the way of the Miami canal and the lake, etc.

Jury sworn.

N. P. Iglehart's deposition was read to the jury. He acted at Cincinnati as the agent of the company, signed the bill of lading marked A, which he was authorized to do. He knows of no order to change the consignee. The other bills were signed by Shaw, the confidential clerk of the witness, and who was authorized by witness to do so. The parties agreed as to the name of the transportation company. E. T. Tucker, in his deposition, states that five hundred pieces of cotton bagging were delivered at Cincinnati, to be forwarded to New York. The goods were received at New York in a damaged state, and this action is brought for the damages.

It was objected that Iglehart was an incompetent witness, and that from the form of the contract, it must be held to be his, and not the contract of the transportation company. THE COURT held that Iglehart was a competent witness, and that he could prove his agency. That as to the contract or bill of lading signed by him, THE COURT would regard more the substance than the form of it. But THE COURT said, as regards the bills of lading, not signed by Iglehart, they could not be received as bills of lading. That the agency of Iglehart was, as he states, to make contracts for the transportation company, to transport freight from Cincinnati to Toledo, and to the Eastern cities, was one of special trust and confidence, and could not be discharged by a substitute. But, as Iglehart swore that he made the contracts for transportation, and adopted the signature of Shaw to the bills of lading, THE COURT permitted the bills to go to the jury, not as bills of lading, but as a part of the deposition of Iglehart, showing the contract for the transportation of the goods in question.

It was contended there was no contract showing that the defendants were common carriers beyond Toledo; and this being the case, the injury received by the goods must be proved to have been done on that route, to make the defendants liable. To this, THE COURT replied, the contract proved by Iglehart showed that it was for the transportation of the goods from Cincinnati to New York, and that that was a matter for the jury.

The goods were damaged when delivered at New York. Appraisers were called and wardens, as is the custom on such occasions, to ascertain the amount of the damage. The charges for this service, and the charge of the auctioneer, who sold the goods, it is contended, constitute a part of the damages which the plaintiffs may claim. This was opposed by the defendants' counsel, who insists that the defendants can not be held liable for these.

THE COURT instructed the jury that the damages were to be ascertained by the value of the goods at New York, in a sound state. This was proved to be 12½ cents per yard. The damaged goods were sold at auction at an average of about 10½ cents per yard. That the sale at auction not being objected to for unfairness, will be received by the jury as evidence of the damage done to the goods. That the difference in value between the sound and damaged goods, together with the expenses of the appraisers and wardens, will constitute the amount the plaintiffs are entitled to recover. That this will place the plaintiffs in the situation they would have been in, had the goods been safely delivered at New York; and that this is all they are entitled to. That the plaintiffs were not entitled to recover the auctioneer's charge, as this would have been paid by plaintiffs, or charged as commission for selling the goods, had they been delivered

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

without injury. The charge of the auctioneer is the same as the charge for selling on commission.

It appears that the persons who delivered the goods at New York required the sum of eighteen dollars to be paid as a condition of the delivery. This was an unjust and illegal charge, but it was imposed by the agents of the transportation company, and was paid before the possession of the goods could be had. The defendants are responsible for this sum. It was paid of necessity, by the plaintiffs' agents, and it is an item which should be included in the damages to be recovered in this action.

The defendants, gentlemen of the jury, act in the capacity of common carriers. They hold themselves out to the world as such; and they are liable for all injuries done to the property they engage to transport; and nothing but the act of God, or the enemies of the country, can excuse a non-delivery of the goods, or an injury done to them. This results from the responsible business assumed by the defendants. Property of great amount is confided to them for the purpose of transportation, and for the protection of that property the utmost vigilance is not only required by all the agents of the defendants, but to secure the utmost safety to the goods, they are responsible for loss, except in the cases above specified.

The jury found for the plaintiffs, in accordance with the instructions of the court, $971.41 judgment.

Case No. 10,918.

PENDERGAST v. BANK OF STOCKTON.

[2 Sawy. 108; [1] 4 Am. Law T. Rep. U. S. Cts. 247; 6 Am. Law Rec. 574.]

Circuit Court, D. California. Nov. 4, 1871.

TRANSFER OF STOCK LIMITED BY BY-LAWS.

A corporation, organized under a statute which authorizes it to make by-laws for "the management of its property, the regulation of its affairs," and "the transfer of its stock," and, further provides, that the stock of the company "shall be transferable in such manner as shall be prescribed by the by-laws of the company," has power to make a by-law, providing that no transfer of stock shall be made upon the books of the corporation, until after the payment of all indebtedness to the corporation due from the person in whose name the stock stands on its books.

[This was a bill in equity by C. C. Pendergast against the Bank of Stockton to compel the transfer of certain stock.]

SAWYER, Circuit Judge. The object of the bill in this case, is, in part, to compel the defendant, a banking corporation, to transfer to complainant on its books, one hundred shares of its stock. The bill alleges, that one Howard was the owner of two certificates of stock of the Bank of Stockton, each stating that the said Howard is the owner of fifty shares of the capital stock of the said bank transferable only upon the books of said bank, personally, or by attorney, upon the surrender of the respective certificates; that said Howard delivered said two certificates of stock to said complainant, after having indorsed upon said respective certificates, an instrument in writing, whereby the said Howard sold, transferred and assigned, the said shares of stock in said respective certificates specified, to complainant, and duly authorized said complainant to make the necessary transfer of said shares of stock upon the books of said defendant; that said complainant afterward presented the said certificates of stock, together with the said assignment and authority to transfer indorsed thereon, at the same time offering to surrender the same to said defendant, and requested said defendant to transfer the said stock upon its books in pursuance of said authority; and that said defendant refused so to do.

After a general denial of the allegations of the bill, the defendant for a further answer alleges, that before and at the time of the said transfer of stock from said Howard to complainant, the said Howard was indebted to the defendant for money, before that time loaned to him, in the sum of five thousand dollars, which sum still remains due and unpaid; that before said assignment, the defendant had established and adopted among others, the following by-law, to-wit: "No transfer of stock shall be made upon the books of the bank, until after the payment of all calls and assessments, made or imposed thereon, and of all indebtedness due to the bank by the person in whose name the stock stands on the books of the bank, except with the consent, in writing, of the president;" that the president of said bank had never consented in any manner to the transfer of said stock; that said by-law had been adopted, and was in full force at the time of the issue of said stock and of all the stock issued by said bank; and that said stock was issued to, and held by, said Howard subject to the said provisions of said by-law, of all which said complainant had due notice.

The complainant excepts to the sufficiency of this special answer, the ground of the exception relied on being, that the said corporation had no power to make the said by-law, forbidding a transfer of stock until all indebtedness of the holder to the bank is paid, and this is the question to be now determined.

The defendant's counsel refer to the act of April 14, 1853: "To provide for the formation of corporations for certain purposes," as the act under which the Bank of Stockton is incorporated, St. 1853, p. 87. The fourth

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

section of this act provides, that the corporations formed under it, shall have power, among other things, "to make by-laws not inconsistent with the laws of this state, for the organization of the company, the management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company." Id. 87, 88, § 4, subd. 6.

The ninth section provides, that, "the stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company, but no transfer shall be valid, except between the parties thereto, until the same shall have been so entered on the books of the company, as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer." Id. 88, § 9.

These are the only provisions of the statute called to my attention, that affect the question; for, under the first and twenty-seventh sections of the act, the provisions of the act of May 22, 1850, have no application. Larrabee v. Baldwin, 35 Cal. 173. It is insisted by complainant that the stock of the company is personal property, held by the stockholder in which the corporation has no interest, legal or equitable, and over which it has no power other than that expressly conferred by the statute, or, such as is necessarily inferred from powers expressly granted; and that no power is found in the act authorizing the corporation to make a by-law, which shall affect the absolute right of the shareholder to have his stock transferred; that the provisions of the statute referred to only authorize the corporation to prescribe the manner in which the act of transfer shall be performed on the books, and does not reach the right of the holder to have a transfer made at his option, or, the conditions upon which it shall be made, or withheld.

Bank of Attica v. Manufacturers' Bank, 20 N. Y. 501, is relied on as the strongest case in support of this view. In that case, the corporation adopted a by-law, that "no transfer of shares of stock can be made, unless the person making the same shall previously discharge all debts and demands due, or contracted by him, or her, to the bank, unless by consent of the board." The court of appeals held that the corporation had no power to make this by-law. But upon what ground? It will be seen by a critical examination of the case, that the decision was put upon the ground that the general banking law under which the bank was incorporated provided that "the shares shall be transferable on the books of the association in such manner as may be agreed upon in the articles of association," not in such manner as should be prescribed by by-laws. The court say, "The manner of the transfer, including, according to this assumption, any qualification or restraint which it may be thought expedient to attach to the right of transfer, is to be such as may be agreed upon—not by a by-law, or by any act of the directors—but in the articles of association." "It was not necessary to insert negative words to exclude any other manner of performing the same thing; for, by the most common rules of construction, where a matter is authorized to be done in a particular way, every other different method of doing it is excluded. And the difference between a restraint upon alienating the shares in these associations, contained in the articles, which must receive the assent of all the primary shareholders, and by which all persons holding derivative interests must be bound, and a like restraint imposed by the agents of the association in the form of a by-law, which may, or may not, come to the knowledge of the shareholders, and which, if known, may be disapproved of by them, is very marked. A person may generally agree by express contract to any qualification of his rights of property, not repugnant to the rules of law; but if another person undertakes to attach such qualifications in his behalf, he must show his authority for the act. I am unable to find any authority for the directors in these associations to insert such a provision in a by-law.

The by-law was held void, because the statute provided that the manner must be regulated in the articles of association, which must be subscribed by all the original corporators as a fundamental condition of the association, and, this excluded the right of the directors, who are usually but a small portion of the parties interested, and who are mere agents, from doing it by by-law.

The statute declared that one body of men, the parties ultimately interested, themselves, should make the regulation in the articles of association, while another body who were mere agents, not expressly authorized, assumed to do it, by a by-law.

The bank, in that case, was incorporated under the act of 1838, and the exact language of the act, is: "The shares of said association shall be deemed personal property, and, shall be transferable on the books of the association in such manner as may be agreed on in the articles of association." St. N. Y. 1838, p. 249, § 19.

Now this language is, substantially, identical with the language of the statute of California under consideration, except that, in New York, the power is to be exercised by the subscribers themselves in the articles of association, while in California the power is to be exercised through the medium of a by-law passed by the corporation.

The corporation has power "to make by-laws for * * * the transfer of its stock" (St. 1853, pp. 87, 88, § 4), and "the stock of the company shall be deemed personal property, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but, no transfer shall be valid

except between the parties thereto until the same shall have been so entered on the books of the company," etc. (Id. § 9).

The language in other respects than providing by whom, and where, this regulation shall be prescribed being substantially identical, it follows, that, if under the New York act it was competent to make the restriction in the "articles of association," under the California act, the same language must confer a similar power to make the same restriction by a by-law of the corporation.

The case cited for the purposes of the decision admits the validity of the restriction if inserted in the articles of association. It is therefore no authority, for the position taken by complainant's counsel; but, on the contrary, so far as it has any significance it recognizes the other view.

In the subsequent case of Leggett v. Bank of Sing Sing, 24 N. Y. 283, where the restriction upon the transfer of stock until the payment of "all debts due by him or her, to said association," was in the articles of association—the proper place for it under the act, as was held in the previous case—the referee held that an outstanding note of the shareholder, which had not yet matured, was not a debt due at the time of the demand for a transfer, and, consequently, that the assignee was entitled to a transfer, and rendered judgment against defendant on that ground. But the court of appeals held, that it was a debt due within the meaning of the restriction in the articles of association, and reversed the judgment, thus recognizing the validity of the restriction when found in the articles of association under the language used in the statute of New York. McCready v. Rumsey, 6 Duer, 574, is to the same effect. These cases, therefore, are authorities in favor of the validity of the by-law under the statute of California, which uses the same language as the statute of New York, except that it locates the power granted in similar terms in a different body, to be exercised in a different form.

In a recent similar case,—Knight v. Old National Bank [Case No. 7,885],—decided in the United States circuit court, for the district of Rhode Island, by Mr. Justice Clifford, the same question arose under the act of congress, authorizing the establishment of national banks.

The fifth section of the act provides, that any number of persons not less than five, may, "enter into articles of association which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the association, and the conduct of its affairs," etc. 13 Stat. 100, 101, § 5. And the eighth section provides, that, "its board of directors shall, also, have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred," etc. Id. 101, 102, § 8.

In the "articles of association," it was provided "that the directors shall have power to make all by-laws, that it may be proper and convenient for them to make under said act, for the general regulation of the business of the association, and the entire management and administration of its affairs, which by-laws may prohibit, if the directors so determine, the transfer of stock owned by the stockholders, who may be liable to the association either as principal debtor or otherwise, without the consent of the board. Knight v. Old National Bank [supra].

Mr. Justice Clifford says that the supreme court of Rhode Island held the justification of the corporation in refusing to recognize and record the transfer of stock to be found "as well in the power granted to the corporation to define and regulate by by-laws the manner in which stock shall be transferred, as in the express power contained in the articles of association, that the directors, if they so determine, may prohibit by by-laws "the transfer of stock owned by any stockholder, who may be liable to the association, either as principal debtor or otherwise, without the consent of the board," and he adds, "many other decided cases proceed upon the same ground." Knight v. Old National Bank. He cites Lockwood v. The Banks, 9 R. I. 305,—a volume to which I have no access.

The decision of the supreme court of Rhode Island, then, as thus stated, is also, directly in point, for the language of the act of congress is substantially the same as that of the statute of California. It authorizes the directors "to define and regulate by by-laws * * * the manner in which stock shall be transferred." Mr. Justice Clifford, however, says "it is not necessary in this case to assume the burden of the first branch of the proposition, as the by-law conforms to the articles of association, and it is clear, that the provisions in the articles of association under which the by-law was framed, is fully warranted by an act of congress, providing for a national currency." Knight v. Old National Bank.

The learned judge nowhere intimates, that the first branch of the proposition is untenable, but, on the contrary, so far as there is any intimation at all in the opinion, it appears to me, to be the other way. He, however, prefers to rest the decision upon the other ground, leaving the first undecided.

What, then, is the language of the act of congress by which the provision in the articles of association under which the by-law is formed, is clearly, "fully warranted?"

It is the language found in the fifth section, before cited, which authorizes the articles to "contain any other provisions not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the association, and the conduct of its affairs."

But the statute of California also contains similar language, for it authorizes the corporation "to make by-laws not inconsistent with the laws of this state for * * * the management of its property, the regulation of its affairs, the transfer of its stock, and for the carrying on all kinds of business within the objects and purposes of the company." Section 4.

The act of congress locates the power in the parties associating themselves together, who are to manifest their will primarily in the articles of association, while the statute of California locates it in the corporation, to be exercised primarily and directly, by the adoption of by-laws. But, if the words "regulation of the business of the association and conduct of its affairs," cover the power in the act of congress, as Mr. Justice Clifford says, it clearly does, then, the words "the regulation of its affairs" in the statute of California must cover it, and the by-law of the defendant is valid on that ground also. In Bank of Attica v. Manufacturers' Bank, 20 N. Y. 506, the court appears to be of opinion that a power to make by-laws for the "management of the business of the association," is not broad enough to include a by-law like the one now under consideration. It is said by the court that the transfer of stock does not pertain to the business of the corporation, but to that of the individual stockholder. These words, or words of similar import, can be no more comprehensive or potent in a statute, I apprehend, than in articles of association. Mr. Justice Clifford, therefore, must have taken a different view on this point from that expressed in the opinion of the court of appeals. It is, however, a legitimate part of the regulation of the business and conduct of the affairs of a corporation to secure its dues from all parties dealing with it, whether share-holders or strangers, and a by-law substantially requiring that the stock held by a share-holder should be regarded as security for any indebtedness to the corporation, which he may incur, may in that sense be regarded as coming within the provisions for the regulation of its business. The stockholder who becomes indebted, with a knowledge of this regulation, may be deemed to assent to it, as a condition upon which his liability is allowed to accrue, and he can have no just ground of complaint. Under these authorities, the validity of this statute may be justified upon both these grounds.

As for myself, if statutory authority is required for anything contained in the articles of association signed by the parties to the association, I should find no less difficulty in resting the decision upon that branch of the proposition adopted by Mr. Justice Clifford, than on the first, which he declined to decide. On the latter ground I find no conflict in the authority so far as any opinion has been expressed or intimated. In Weston v. Bear River & A. Water & Mining Co., 5 Cal. 189, and in People v. Crockett, 9 Cal. 115, language similar to that now under consideration, in the act of 1850 (St. 1850, p. 347, § 1), and in the act for incorporating railroad companies (St. 1853, p. 104, § 14), was regarded by the supreme court of the state as authorizing the corporation to make by-laws forbidding the transfer of stock, till all the indebtedness of the owner to the corporation should be liquidated. It is true, the point was not, necessarily, involved in these cases, but it is clear, that the court took this view of the statute.

Upon the whole, after a careful consideration of the statute and the authorities, I am of opinion, that the provision of the fourth section, authorizing the corporation, "to make by-laws for the management of its property, the regulation of its affairs and the transfer of its stock," and, of the ninth section that "the stock of the company * * * shall be transferable in such manner as shall be prescribed by the by-laws of the company," etc., authorized the corporation to adopt the by-law in question, and that the by-law is valid.

It will be unnecessary, therefore, to determine, whether there is any distinction between the cases of modern corporations, and the corporation whose stock was involved in Child v. Hudson's Bay Co., 2 P. Wm. 207, as to where the title of the stock is vested, or if there is any such distinction, whether it affects the question in hand; or whether the case of McDowell v. Bank of Wilmington, 1 Har. (Del.) 27, and other cases cited, inconsiderately follow the dictum, as it is claimed to be, in that case. I rest the decision upon the statutes, and other modern decisions, arising under similar language in other statutes.

In the case of Vansands v. Middlesex Co. Bank, 26 Conn. 144, the certificate of stock stated upon its face, that it was transferable at said bank, subject, nevertheless, to his indebtedness and liability at the bank according to the charter and by-laws of the said bank. But, neither the charter nor by-laws, say anything about the liability of stockholders. The charter, however, "authorized the stockholders to establish by-laws and regulations for the well-ordering of the concerns of the bank, and make the stock transferable according to its rules." The court held that, although no by-law had been adopted upon the subject, the condition being in the certificate of stock, it must be considered, that the stock was issued and received upon this condition, and that it, therefore, constituted one of the terms of the contract upon which the stock was acquired, and that it was a valid restriction upon that ground. This form of certificate had been adopted in practice at the organization of the bank some fifteen years before, and used ever since. In the case now under consideration, the answer substantially alleges that the by-law was adopted, and in force, not only before this particular stock was issued, but before any of the stock of the company was issued, and that all of said stock was

issued subject to said by-law, of all which the complainant had notice.

Under this authority it would seem, that if all the stock of the company was issued after the passage of the by-law, and so issued and received subject to the provisions of said by-law, with the knowledge of those receiving it, the restriction would be binding as being one of the terms of the contract under which it was issued and accepted. But, as I think the by-law valid under the statute, it is unnecessary to determine the effect of its issue under such circumstances irrespective of the powers conferred by the statute.

Let the exceptions be overruled at complainant's costs.

PENDERGRAST (DAVIS v.). See Cases Nos. 3,646 and 3,647.

PENDERGRAST (SMITH v.). See Case No. 13,090a.

Case No. 10,919.

PENDERGRAST v. LAMPMAN.

[1 Deady, 54.] [1]

District Court, D. Oregon. Dec. 7, 1863.

SEAMEN—RESISTANCE TO AUTHORITY.

When one of the crew of a vessel resists a person in authority over him while in the discharge of his duty, the latter may lawfully use sufficient force to overcome such resistance.

[This was a libel by John Pendergrast against Henry Lampman to recover damages for personal injuries alleged to have been inflicted by the defendant.]

E. W. Hodgkinson and Lansing Stout, for libellant.

Amory Holbrook, for defendant.

DEADY, District Judge. The libellant substantially alleges that on or about October 12, 1863, he shipped at San Francisco on board the steamer Sierra Nevada as a coal-passer, for a voyage to Portland and back; and that about three o'clock in the morning of October 24, while the vessel was lying at the wharf at Portland, the defendant being then and there first assistant engineer on said vessel, did willfully and wrongfully beat and seriously injure the libellant. The answer of the defendant denies the allegations of the libel concerning the alleged assault, and alleges that on the morning in question the defendant went to the forecastle to call the libellant to duty; that the libellant refused to obey, and finally struck defendant in the face with his fist, whereupon defendant resisted the assault of the libellant and used sufficient force to restrain the libellant from further acts of violence, and no more.

A number of witnesses have been examined. Only one of them—Harry Bruce—saw the inception of the affair, and only one other—Thomas Williamson—saw any portion of it. These witnesses both belong to the crew of the vessel, the former being a coal passer and the latter a saloon waiter. Three others of the ship's crew were also examined—Peter Mackie, the first mate, John Roche, a coal passer, and Joseph McLain, a water tender. Besides these, the libellant has examined three witnesses concerning his appearance after the alleged beating, as evidence of the extent of the injuries received, namely: John O'Connor, late mate of the steamboat Wilson G. Hunt; Edward Gallager, the keeper of the whiskey shop where the libellant was drinking the night before, and John Sullivan, who was in the whiskey shop the same night. The libellant testified that he was on shore that night and went on board very drunk; and that he does not remember much about the matter, but thinks the defendant jerked him out of his berth and struck and kicked him.

After careful consideration, I am of the opinion that the account of the matter given by the witness Bruce is substantially the truth. His appearance on the stand, the manner of giving his testimony, and the intrinsic probability of his story, when compared with the known circumstances of the case, lead me to this conclusion. The scattered and disconnected circumstances testified to by other witnesses, after making due allowance for the effect of such partialities and sympathies as are likely to exist among comrades and cronies, do not materially conflict with his statement. Upon this estimate of the value and probability of the evidence, I find the following to be the facts of the case: That on the evening of October 22, the libellant went ashore and became intoxicated at the house of the witness Gallager, and returned to the ship in that condition; that after being in bed some time, libellant was called and roused-up by the defendant to go on duty, but feeling tired and sullen after his debauch, he behaved ugly and refused to go; that then the defendant took hold of libellant by the shirt and shook him to rouse him up, when the latter assaulted the former by striking him, to which the defendant replied by a blow that knocked libellant down. It is difficult to say how much or severely the libellant was injured. It is evident that he got a hard blow on his face, that for some hours afterwards "bunged up" his eye. But, according to his own testimony, he could see out of it the next morning. The blow and its consequences was nothing more than any sailor who assaulted an officer of the ship, when engaged in the discharge of his duties, might expect. It would be justifiable in case of a similar assault by one stranger upon another while on the street. An officer who would allow one of the crew to strike him with impunity while on duty would be held in contempt by the crew, and be of little or no use to his employer.

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

The alleged injuries on the libellant's back are not proven, and it is highly improbable that they were inflicted at all. The one upon the groin appears to have been a trifling affair, and may have occurred by the libellant's striking against the carpenter's chest or chain cable in the vicinity of the affray. But suppose the defendant had even struck or kicked the libellant on the thigh, what then? The latter after he was brought down continued to scuffle with and resist the defendant, calling him by the most opprobrious epithets and threatening to kill him. The defendant appears to be well known, and coal-passers who have served on this route under him, speak of him as a kind humane person who never "miscalls" or abuses his men. On the contrary, the libellant, so far as known, bears the reputation of being a turbulent and disagreeable man, except for a few days on the Wilson G. Hunt, while this suit was pending. O'Connor, who was mate on the Hunt, says that he was peaceable and well-behaved while with him. When the libellant got drunk and went on board in a condition which unfitted him for duty, he was unfaithful to his obligation, and to that, more than any other cause, he may attribute the trouble and bruises that followed. Not that I intend for a moment to countenance the idea that a seaman may be beaten or abused with impunity, because he is drunk, and particularly when he is insensible on that account. Far be it from this court to so administer the law as to encourage or countenance cruelty towards the humblest of the crews in our boats and ships. They have their rights, and this court will always endeavor to maintain and enforce them. But the law and courts are not for the benefit of this class of people alone. The forecastle is not all the world. The rights and responsibilities of the quarter deck or those in authority must be considered also. When seamen get drunk and act like brutes, they must not expect to be treated like sober, orderly men.

Decree, that the libel be dismissed and that the defendant recover costs.

PENDLETON (BENNETT v.). See Case No. 1,322.

Case No. 10,920.

PENDLETON v. EVANS.

[4 Wash. C. C. 336.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1823.

EQUITY—PRACTICE—RULING DEFENDANT TO ANSWER.

To entitle the plaintiff to take the bill pro confesso on account of an answer not being filed within three months after the day of appearance and bill filed, the defendant should have been ruled to answer, and the cause should be set down. The decree in this case is merely nisi, to be made absolute at the term succeeding that to which service of a copy of the decree shall be returned executed, unless cause is shown to the contrary.

[Cited in Stockton v. Throgmorton, Case No. 13,463. Quoted in Halderman v. Halderman, Id. 5,908; O'Haro v. MacCornell, 93 U. S. 152. Cited in Thomson v. Wooster, 114 U. S. 120, 5 Sup. Ct. 796; Schofield v. Horse Springs Cattle Co., 65 Fed. 436.]

[This was a proceeding by Pendleton against Oliver Evans' executors.]

WASHINGTON, Circuit Justice. This case comes before the court upon a motion to take the bill for confessed, the subpœna having been returned served upon Cadwallader Evans, one of the defendants, who has not appeared and filed his answer within three months after the day of appearance, and after the filing of the bill. It appears by an affidavit, that the other defendant resides out of this district, and has not been served with process. This is the first instance in which a motion of this kind has been made in this court, so far as I can recollect; and it is certainly the first, since the rules of practice for the government of the courts of the United States, when sitting in equity, were prescribed by the supreme court. According to the practice of the English court of chancery, a bill cannot be taken pro confesso, after service of the subpœna; and even after an appearance, until all the processes of contempt to a sequestration have been exhausted; after which the bill is taken pro confesso, and a decree passes, which is absolute in the first instance. I understand the practice of the chancery court of New York to be altogether different. There, it is not required that process of contempt should be issued after an appearance; but if the answer be not filed in time, an order is obtained from the chancellor (upon an application for that purpose) that the defendant file his answer within such a time after service of a copy of the order upon him as the chancellor may direct, or in default thereof, the bill to be taken pro confesso. If the defendant do not answer within the time limited by such order, a rule for taking the bill pro confesso may be entered, as of course, on affidavit filed of the service of a copy of the order; after which, the cause being set for hearing, an absolute decree passes. It should be observed, that, by the practice of the English court of chancery, the cause is set for hearing before the decree passes. The principle which governs the practice of both the courts spoken of is, that the defendant shall not be taken by surprise, but shall have sufficient warning before a decree is entered against him by default, the service of the order to answer in the one court being supposed to be equivalent to the process of contempt in the other, though preferable in my opinion, because less expensive, more effectual for

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

the intended purpose, and productive of less delay. These objects are perhaps still better attained by the practice now to be observed by the courts of the United States. If the answer, the subpœna being returned executed, be not filed within three months after the day of appearance and bill filed, the defendant is to be ruled to answer; and failing to do so, the bill may be taken for confessed, and the matter thereof decreed immediately; but this decree is only nisi, to be made absolute at the term succeeding that to which service of a copy of the decree shall be returned executed, unless cause to the contrary be shown. The rules do not require that the bill should be set down for hearing in order to the decree nisi being made; but as the court is, according to the English practice, to pronounce the decree, and not to permit the plaintiff to take such a decree as he is willing to abide by, there seems to be a propriety in removing the cause from the rule docket to that of the court, by setting down the cause for hearing. This will operate too as an additional notice to the defendant, without producing any additional delay. I hold it indispensable to the success of the application to take the bill for confessed, that the defendant should have been ruled to answer under the seventeenth rule of the court. This not having been done in the present case, and the cause not appearing upon the court docket as one set for hearing, the present motion is overruled.

[Subsequently plaintiff renewed his motion to take the bill for confessed. The motion was granted. Case No. 10,921.]

Case No. 10,921.

PENDLETON v. EVANS.

[4 Wash. C. C. 391.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1823.

EQUITY—PRACTICE — BILL TAKEN PRO CONFESSO.

1. If the bill were taken pro confesso at one session of this court, and service of this decree be made and returned at the same session, it may be made absolute at the following session; otherwise, it cannot be made absolute until the third session of the court.

2. A bill being, for a balance of an account, taken pro confesso, the account must be referred to the master. The decree is always nisi.

[Cited in Thompson v. Goulding, 5 Allen, 82; Hazard v. Durant, 12 R. I. 100.]

The plaintiff, having complied with what was required by the court upon the former motion [Case No. 10,920], now renewed his motion to take the bill for confessed, and presented the form of a decree, that the defendants [Oliver Evans' executors] should pay to the plaintiff the sums stated in the account annexed to the bill, as well as other sums advanced by the plaintiff on account of the estate of the said Oliver Evans, since his death.

WASHINGTON, Circuit Justice. The decree which has been prepared by the plaintiff's counsel, is incorrect in two particulars. First, it is absolute; and secondly, it decrees in a matter of an unsettled account, the sum claimed, without a reference to the master. The sixth rule prescribed by the supreme court certainly allows a very long time for the defendant to show cause why the decree pro confesso should not be made absolute. It cannot be made so in this case, before the April court of 1824. But I am clearly of opinion, that, if this bill had been taken for confessed at so early a part of this session, as to admit service of the decree, and a return before the final adjournment of the court, it might be made absolute at the next October session.

NOTE. The following decree was made: "This cause came on this tenth day of November, in the year of our Lord one thousand eight hundred and twenty-four, upon the reports of the master made the eleventh of October, in the year one thousand eight hundred and twenty-three, in pursuance of the order and decree of this court of the thirtieth of April in the year one thousand eight hundred and twenty-three, to which report no exceptions have been filed: Whereupon, it is now ordered and decreed, that the said report be in all things ratified and confirmed, and that the defendant, Cadwalader Evans, against whom the bill filed in this cause, was taken for confessed by order of the court on the thirtieth day of April, in the year one thousand eight hundred and twenty-three, and was afterwards, to wit, on the thirtieth day of October, in the year one thousand eight hundred and twenty-four, confirmed and made absolute, do, out of the goods and effects of the testator, Oliver Evans, in his hands to be administered, pay to the plaintiff the sum of two thousand six hundred and fifty-two dollars ninety-nine and a half cents, being the amount of principal and interest stated in the said report to be due to the plaintiff from the estate of the said Oliver Evans, together with interest on the said sum of two thousand six hundred and fifty-two dollars ninety-nine and a half cents, from the eleventh day of October in the year one thousand eight hundred and twenty-three, as also the costs of this suit, if so much he hath of the estate and effects of the said testator in his hands to be administered; and if not, that then he pay the costs of this suit out of his own goods and effects."

Case No. 10,922.

PENDLETON v. KINSLEY.

[3 Cliff. 416.] [1]

Circuit Court, D. Rhode Island. June Term, 1871.

CARRIERS OF PASSENGERS — LIABILITY FOR VIOLENCE OF EMPLOYEES—ACTS BEYOND AUTHORITY.

1. While collecting the fares, the clerk of a steamer owned by the defendant, inflicted personal injuries upon the plaintiff, on board the vessel during one of her regular trips. *Held*, the

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

plaintiff could recover of the defendant for the injuries received, although the defendant did not authorize the acts of his employee.

[Cited in brief in Spohn v. Missouri Pac. Ry. Co., 87 Mo. 76.]

[See note to Texas & P. Ry. Co. v. Williams, 10 C. C. A. 466, 62 Fed. 440.]

2. The principles of law applicable to the relations of master and servant, do not fully define the rights, duties, and obligations between carriers of passengers, and passengers; they are not merely citizens bearing only toward each other the relations which one citizen bears to another: the carrier had agreed to carry for hire the passenger from one place to another, and was responsible for any breach of the obligation he had assumed, that the passenger should not be ill used by himself or his employees.

[Cited in Washington & G. R. Co. v. Varnell, 98 U. S. 480; The City of Panama v. Phelps, 101 U. S. 463.]

[Cited in Littlejohn v. Fitchburg R. Co., 148 Mass. 481, 20 N. E. 103.]

3. A dispute had arisen between the clerk and the passenger as to the latter's fare, but the question whether the defendant was liable for the injuries inflicted by his clerk upon the plaintiff was decided irrespective of that dispute, and as if none such had arisen.

4. Passengers do not only contract for room and transportation, but for good treatment, and it is the duty of the owners to use due care and exertion to protect them from any degree of violence, or kind of abuse or ill-treatment from other passengers, or the owners' servants or other persons coming on board during the trip.

5. The principal in this class of cases is liable for the misconduct of the employee, when it occasions injury to the passenger, whether arising from malice or neglect.

[Cited in Gallena v. Hot Springs R. R., 13 Fed. 123.]

Case against the defendant [Rufus B. Kinsley] to recover damages for injuries resulting to the plaintiff [Dewit C. Pendleton] from an assault and battery alleged to have been inflicted upon him by one Charles L. Stanhope. Personal injuries were inflicted on the plaintiff by Charles L. Stanhope, clerk of the steamboat Perry, employed at the time and for many years before in carrying passengers and freight between Newport and Providence, in this district, and he brought action against the defendant, as the owner of the steamer, to recover compensation for the injuries so inflicted while he was a passenger on board the steamer. Service having been made upon the defendant, he appeared and pleaded the general issue, and upon that issue the parties went to trial, and the jury, under the instructions of the court, returned a verdict for the defendant, subject to the opinion of the court upon questions of law reserved by the court for further consideration. Evidence was introduced by the plaintiff sufficient to warrant the jury in finding that the defendant was owner of the steamer for the voyage, as it appeared that the record title of the steamer was in his name, that the clerk was in the employment of the defendant, and that the steamer was not under charter to any other person.

Business made it necessary for the plaintiff to go to Providence on the 29th of August, 1862, and, being at Newport at the time, he went on board of the steamer for that purpose before she started from Newport on her morning trip to the former place. He had often passed over that route in that steamer before, and, having been accustomed to purchase tickets for the trip, of the clerk of the steamer, he applied to him for one on this occasion, within a short time after he went on board, and offered him a one-dollar bill on one of the national banks of the state to pay for the ticket. The price of tickets was fifty cents, and the witness states that he had frequently offered bills for tickets before that time, and seen others do the same thing, and that the clerk always received the bills and made change without any objections. On this occasion, however, he refused to take the bill, or give him a ticket, saying that he had no change, to which the plaintiff replied, "If you have no change, give me postage-stamps," but the clerk replied to that suggestion that he had no postage-stamps, and suggested that the plaintiff would have to take two tickets, to which the plaintiff replied that he did not want two tickets, adding that he was not accustomed to purchase tickets in advance. Whereupon the plaintiff left the main deck, where the office of the clerk was, and went to the saloon deck above, where there were many gentlemen and ladies and children sitting on the settees facing the stern of the steamer. Nothing further of importance occurred till after the steamer passed Portsmouth Grove, when the express-agent came around to collect the tickets from the passengers, as he sometimes did, in the place of the clerk who had charge of that business. He went to the plaintiff and asked for his ticket, but the plaintiff told him that he had none; that he offered to pay for one when he first came on board, and that the offer which he made was refused, to which the express-agent replied, "You will have it to pay," and passed along. In a few minutes the clerk and the express-agent came up together, and the clerk demanded pay for his fare of the plaintiff, but the plaintiff replied substantially as before, that he had once offered to pay for a ticket, and that he, the clerk, had refused to accept the pay for the same. Here the conversation ended, but the clerk seized the plaintiff by the collar and pulled him violently from the settee where he was sitting, pushed him from there to the companion-way, and shoved him down those steps to the main deck, near where he was when he offered to purchase and pay for a ticket, and from there he pushed him to the companion-way leading to the lower deck, and shoved him down that passageway also to the lower cabin, and set him down violently on the seat near the berths, and left him without any explanation. Left alone he remained there for a short time, and then went to the saloon deck, where he was when he was assaulted, and on the arrival of the steamer at Providence he left unmolested.

and on the following day returned to his own residence.

Evidence was introduced by the plaintiff tending to show that he was seriously injured in his back and other parts of his body, and that the injuries were of a permanent character. Much testimony was introduced as to the extent of his injuries, but it is unnecessary to refer to it in this report, as the defendant at the close of the plaintiff's case moved the court to instruct the jury that in view of the whole evidence the plaintiff could not recover, and that their verdict should be for the defendant; and the court gave that instruction as requested. After the verdict a motion for new trial was duly filed by the plaintiff, and the parties were heard upon the question whether the defendant in any view of the evidence was liable for the assault committed on the plaintiff by the clerk of the steamer.

J. M. Blake and F. W. Miner, for plaintiff.
W. P. Sheffield, for defendant.

CLIFFORD, Circuit Justice. Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are in some respects less extensive and more qualified than in the latter, as the owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety, but in most other respects the obligations assumed are equally comprehensive and stringent. Carriers of passengers by land, it was said in one of the early cases, are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been no negligence or default; but it was held in the same case that the smallest negligence would render the carrier liable, and that the question of negligence was for the jury. Aston v. Heaven, 2 Esp. 533. Where the injury for which the action was brought resulted from the breaking of the axle of the coach, the court held, in the case of Christie v. Griggs, 2 Camp, 79, that "when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied," subject, of course, to opposing testimony; that the question of negligence was for the jury; that if it appeared that the axle-tree was sound, "as far as the human eye could discover," the defendant was not liable; that there was a difference between a contract to carry goods and a contract to carry passengers; that the carrier of goods was liable at all events; that the carrier of passengers did not warrant their safety; that his undertaking went no further than that he would provide for their safe conveyance as far as human care and foresight could go; that the owner was liable if there was the least negligence; but that the plaintiff had no remedy for the misfortune if the breaking down of the coach was purely accidental. Attempts have been made to show that the rule laid down in the case of Sharp v. Grey, 9 Bing. 457, is more stringent against the owner, but the question submitted to the jury in that case was whether the degree of vigilance practiced by the defendant was such as was required by his engagement, and two at least of the judges concurred in refusing the motion for the new trial upon the ground that the question was one of fact for the jury. The remarks of the chief justice in the case of Crofts v. Waterhouse, 3 Bing. 319, are sometimes referred to as advancing a more stringent rule, but the opinion taken as a whole furnishes no support to the suggestion, and his associate on the occasion stated in terms that a carrier of passengers is only liable for negligence. Proprietors of stage-coaches, it is held in the case of Ingalls v. Bills, 9 Metc. (Mass.) 1, are not answerable for an injury to a passenger which happens by reason of a hidden defect in an iron axle-tree, which defect, being entirely surrounded by sound iron one fourth of an inch thick, could not be discovered by the most careful external examination. Carriers of passengers, by railways or steamers, are bound to greater precautions, and to a higher degree of care, skill, and vigilance in the preparation and management of the vehicles or means of conveyance than are required of the owners of stage-coaches, because the car of the railway proprietor and the steamer of the carrier by water are intended to sustain far greater weight, and are to be propelled by much greater power and at much greater speed. Simmons v. Steamboat Co., 97 Mass. 367.

Passengers must take the risk incident to the mode of travel which they select, but those risks, in the legal sense, are only such as the utmost care, skill, and caution of the carrier in the preparation and management of the means of conveyance are unable to avert. Hegeman v. Western R. Corp., 13 N. Y. 24. Damages were claimed by the plaintiff in that case for injuries received by the breaking of the axle of a railway car in which he was riding, and the defense was that the car was a new one, recently purchased of a manufacturer of skill and good repute, and that it was carefully examined at the time of the purchase; that the track was in good condition; that the speed of the train was not excessive; and that the employees were sufficient in number and of sufficient experience and skill, and that they were guilty of no negligence: but the court instructed the jury that it made no difference whether the car was constructed by the company or purchased of an experienced manufacturer, as the defendants were liable in either event if the defect could have been discovered in the process of manufacturing the axle or car by the application of any test known to men skilled in that business, and the court of appeals affirmed the judgment. They

held that the carrier of passengers was bound to the utmost precaution, care, and skill in the preparation and management of the means of conveyance; but they conceded that the carriers of passengers were not insurers, and that latent defects might exist in machinery, undiscoverable by the most improved and vigilant examination, and from which the most serious accidents may occur.

Expressions are found in the opinion of the court in the case of Boyce v. Anderson, 2 Pet. [27 U. S.] 150, which leave it to be inferred that the court was of the opinion that the carriers of passengers were only required to exercise ordinary skill and care to secure their safety; but the correct rule is stated in the case of Stokes v. Saltonstall, 13 Pet. [38 U. S.] 199, where the same court held that proof of the accident and alleged injury afforded a prima facie presumption that there was carelessness, negligence, or want of skill on the part of the driver; that it being admitted that the carriage was upset, and that the plaintiff was injured, it was incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged, and that he acted on the occasion with reasonable skill, and with the utmost prudence and caution, and if the disaster in question was occasioned by the least negligence or want of skill or prudence on his part, then the defendant, as the owner of the coach, was liable in that action. Hall v. Connecticut River Steamboat Co., 13 Conn. 326; Briggs v. Taylor, 28 Vt. 180; Redf. R. R. 175; Galena & C. U. R. Co. v. Yarwood, 17 Ill. 509. Negligence in the smallest degree renders the carrier liable, and there is one case in which it was held that a railroad corporation was liable for injuries to a passenger caused by a defect in an iron axle of a car, although it was of such a character that it could not have been discovered by any practicable mode of examination; but the rule there laid down is expressly disapproved in a recent judgment of the exchequer chamber, and cannot be adopted in this circuit until it is approved by the supreme court. Alden v. N. Y. Cent. R. Co., 26 N. Y. 102; Readhead v. Midland Ry. Co., L. R. 2 Q. B. 412; s. c., L. R. 4 Q. B. 379; Simmons v. New Bedford, V. & N. Steamboat Co., 97 Mass. 368. Such carriers are not insurers against accidents, nor are they required to do what is impossible in the nature of things. 1 Smith, Lead. Cas. (5th Ed.) 328. Undoubtedly they are bound to the highest degree of care, prudence, and caution; but if the injury results from a hidden defect in the car, engine, or other apparatus, unknown at the time, and which could not be detected by any known means, they are not responsible, because the obligation which they assumed did not require what it was not in their power to perform. McElroy v. Nashua & L. R. Corp., 4 Cush. 400; Story, Bailm. 581. Whether the owners of a vessel engaged in carrying passengers by water are or are not insurers, as to the seaworthiness of the vessel, it is not necessary to inquire, as no complaint is made in this case that the steamer was not in a seaworthy condition. 3 Kent, Comm. (11th Ed.) 205; Lyon v. Mells, 5 East, 428; Putnam v. Wood, 3 Mass. 481; Silva v. Low, 1 Johns. Cas. 184; The William Henry, 4 La. 223. Passengers, however, contract with the proprietors or owners of the conveyance, and not with their agents as principals, and the question of the liability of the proprietor or owner is wholly unaffected by the fact that the defective car, engine, or other apparatus was purchased of another if the defect was one which might have been discovered by any known means. Whether their engine or car was manufactured at their shop or was purchased of other manufacturers, the company is equally liable to see that in the construction no care or skill was omitted for the purpose of making the car or engine as safe as the utmost care and reasonable skill could make it. Precautions of the kind are required of the carrier to provide for the safety of passengers; but the obligation which the carrier assumes in that behalf extends beyond the specified requirements in respect to the vehicle, car, or other means of conveyance, and also includes an implied stipulation for good treatment of the passenger during the passage, trip, or voyage, and especially against ill-treatment by the carrier or his employees, and against every degree of violence on their part, or wanton interference with his person. Mistakes occur in such litigations by overlooking the fact that it is the carrier, whether corporation or natural person, that assumes these obligations, and not the driver, master, or conductor of the conveyance, for the breach of which a right of action accrues to the passenger. Breaches of the obligation assumed by the carrier for proper treatment of his passengers, it is conceded, would give a right of action to the passenger if the acts constituting the breach were committed by the carrier himself; but the argument is, that the carrier is not responsible for any wilful trespass committed by the driver, conductor, or master unless it be shown either that he authorized the act or ratified it after it was committed.

Many decided cases may be found where it is held that the master is not liable for the wilful act of his servant unless previously authorized or subsequently ratified; but none of these cases can have any proper application to the controversy before the court. M'Manus v. Crickett, 1 East, 106; Croft v. Alison, 4 Barn. & Ald. 590; Wright v. Wilcox, 19 Wend. 343. Examined carefully, it will be found that all or nearly all of those decisions may be divided into two classes, neither of which will afford much aid in the solution of the question involved in the present motion: 1. Cases where it is held that trespass will not lie against the

master for the wrongful act of his servant. 2. Controversies where it appears that the acts of the servant constituting the cause of action were not done by the servant in the course of his employment. Doubts are expressed by an able text-writer whether the court in the leading case ever intended to decide more than that the master is not liable in trespass for the wilful act of the servant, and it must be admitted that the reasons assigned for the conclusion are well put, and that they are entitled to great consideration. 1 Redf. R. R. (3d Ed.) 512. Suppose that view, however, is not correct, then it is clear that the rule laid down in that case is not applicable in actions against corporations, as it is well settled that they are responsible for acts done by their agents, "either in contractu or in delicto," if done "in the course of its business and of their employment." Philadelphia, W. & B. R. Co. v. Quigley, 21 How. [62 U. S.] 210; Moore v. Fitchburg R. Co., 4 Gray, 465; Maund v. Monmouthshire Canal Co., 4 Man. & G. 452; Philadelphia & R. R. Co. v. Derby, 14 How. [55 U. S.] 483; National Exch. Co. v. Drew, 2 Macq. 103; Goff v. Great N. Ry. Co., 3 El. & El. 674.

Extended remarks respecting the second class of cases is unnecessary, as it fully appears that the clerk in collecting the tickets was engaged in the business of the defendant, and was in the course of his employment. Masters are bound by the acts of their servants whenever there is an express command of the master to make a contract or do an injury, or where a servant does an injury in the immediate pursuit of his master's business, or where an injury arises to another through the negligence or want of skill of the servant. Reeve, Dom. Rel. (3d. Ed.) 356. Questions of the kind also involve to some extent the relations, obligations, and liabilities of principal and agent, as in many cases the act of the agent is the act of the principal, and it is well settled that the representations, declarations, and admissions of the agent in the course of his agency are deemed a part of the res gestæ, and are equally obligatory upon the principal as if made by himself. Principals are not in general responsible for the criminal acts or misdeeds of their agents, but they are held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of their agents in the course of their employment, though they did not authorize the acts, nor participate in the transaction, and even if they forbade or disapproved what was done. Such, in substance, are the views of Judge Story, as expressed in his work on Agency, and the supreme court have decided that the rule of "respondeat superior" or "that the master shall be civilly responsible for the tortious acts of his servant," is of universal application, whether the act be one of omission or commission, whether negligent or deceitful; that if it be done in the course of the employment of the servant the master is liable; and that it makes no difference that the master did not authorize or know of the act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done by the servant in the course of his employment. Story, Ag. § 452; Philadelphia & R. R. Co. v. Derby, 14 How. [55 U. S.] 486; Smith, Mast. & Serv. 152; Sleath v. Wilson, 9 Car. & P. 607; The New World v. King, 16 How. [57 U. S.] 474.

Tested by these considerations, it is quite clear that the instruction given by the court to the jury was erroneous, and that the verdict should be set aside and a new trial granted. But the court is of the opinion that the principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and liabilities of the parties to this controversy. They are not strangers bearing no other relations to each other than one citizen, merely as such, bears to another; but the defendant was a carrier of passengers by water, and the plaintiff was a passenger on board the steamer of the defendant, which was engaged in carrying passengers for hire between two commercial ports. Difficulty occurred as to making change in the sale and purchase of a ticket for the trip, but the court lays that circumstance out of the case, as it is clear that the omission to purchase a ticket gave the clerk of the steamer no right whatever to inflict any personal violence on the plaintiff. Fare not having been paid by the plaintiff, the carrier, if he thought proper, might have requested him to leave the steamer, and if the request had been seasonably made and the plaintiff had refused to pay or leave, the carrier might at a proper time and place have stopped the steamer, and might have removed the plaintiff from the steamer to the shore, taking care to use no more force than was reasonably necessary for that purpose.

Nothing of the kind, however, was done or attempted, and the question as to the rights, duties, obligations, and liabilities of the parties to the suit must be determined solely in view of the facts as stated in the commencement of the opinion. Viewed in that light, as the case must be, then it appears that the clerk of the steamer demanded fare of the plaintiff, and that the plaintiff having refused to pay as requested, the clerk seized him by the collar and inflicted personal violence upon him in the manner and by the means set forth in the statement. Unjustifiable as the conduct of the clerk was, the case must be viewed as between these parties, just as it would be if no dispute had arisen as to the fare, and the questions to be decided are whether the defendant is liable for the in-

juries inflicted upon the plaintiff by the clerk, and, if so, upon what ground does that liability rest. Sufficient has already been remarked to show that the owner of the steamer is liable to the plaintiff for the injuries inflicted upon him by the agent of the owner, but it is quite important in case of a new trial to ascertain upon what ground that liability arises, whether merely as a principal answering for the acts of his agent in the course of his employment, or as a carrier of passengers answering as such, for a breach of the obligation which he assumed as such carrier, that the plaintiff as his passenger should not be ill treated by himself or his employees, and that he and they should use all due care and proper exertion to protect him as such passenger from any degree of violence or any kind of abuse or ill-treatment from other passengers, or other persons coming on board during the trip. Flint v. Norwich & N. Y. Transp. Co., 34 Conn. 554. Ship-owners, as well as the proprietors of conveyances by land, select and appoint their own agents without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passenger of which such employees may be guilty, as the moment the passenger enters the steamer or other conveyance he is more or less under the control of the master or conductor, and subject to their orders. Fit or unfit, humane or brutal, good-tempered or morose, the passenger is comparatively helpless, and may be obliged to submit for the time without any means of redress. He may have his remedy against the carrier, it is said, if he can prove that the carrier was negligent, or that the active person was the agent of the carrier and was in the course of his employment, but, if not, he must be content with his remedy against the assailant of his person. Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes towards his passenger, nor to the rights and duties which those relations create and imply.

Passengers do not contract merely for ship-room and transportation from one place to another, but they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance, and for the fulfilment of those obligations the carrier is responsible as principal, and the injured party in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation. Chamberlain v. Chandler [Case No. 2,575]; Nieto v. Clark [Id. 10,262]; Weed v. Panama R. Co., 17 N. Y. 362; Keene v. Lizardi, 5 La. 431; Block v. Bannerman, 10 La. Ann. 3. Sickness and suffering were experienced by the wife of the plaintiff in the case of Weed v. Panama R. Co., in consequence of the failure of the train to arrive at the usual time, and the evidence showed that the detention was the wilful act of the conductor. Proof of that fact having been given, the defendants contended that they were not liable; but the court refused so to instruct the jury, and the court of appeals held that the prayer for instruction was properly refused, as the proof offered that the act of the conductor was wilful, constituted no defence to the action. High authority exists, if any be needed, in support of the proposition that the owners of a vessel are responsible for the whole conduct of the master while he is on board and in command of the vessel, unless his acts amount to a criminal offence. The Nimrod, 7 Notes Cas. 570. Civilly speaking, says Dr. Lushington, in that case the owners are responsible for any deviation of the master from that line of conduct which it behooves him to perform, not simply in the navigation of the vessel and in the care of his own seamen, but in the care of those who may be thrown on board his ship, even by an accident, as was the fact in that case. Most of the recent cases in which the principle involved in such a controversy is considered, proceed upon the ground that where the misconduct of an agent causes a breach of the obligation, or contract of the principal, then the principal is liable in an action to the injured party, whether such misconduct be wilful or malicious or merely negligent; and it would seem that it must be so, as the cause of action arises from the breach of the obligation, and if so it cannot make any difference whether the breach was occasioned by the act of the principal or of his employees. Qui facit per alium facit per se. Milwaukee & M. R. Co. v. Finney, 10 Wis. 330; Goddard v. Grand Trunk R. Co., 57 Me. 202; Pittsburgh, F. W. & C. R. Co. v. Hinds, 53 Pa. St. 515.

Conductors and employees of a railroad company represent the company in the discharge of their functions, and, being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission; and the same rule must be applied in a suit against the owner of a steamer as the carrier of passengers for the misconduct of the master, as the owners of a vessel carrying passengers for hire are liable for breaches of duty of the master to the passengers equally as they are in case of merchandise committed to their care. 3 Kent, Comm. (Ed. 1866) 160; Baltimore & O. R. Co. v. Blocher, 27 Md. 286; Keene v. Lizardi, 5 La. 431; Sanford v. Eighth Ave. R. Co., 23 N. Y. 344. Owners are liable for the conduct of the master as master during the voyage, and for any ill-treatment of the passengers by the master in his capacity as such, a remedy may be had against the vessel herself. The Aberfoyle [Case No. 16]. Vessels

carrying passengers for hire, says Mr. Justice Nelson, stand on the same footing of responsibility as those carrying merchandise, the passage-money in the former case being the equivalent for the freight in the latter; that the vessel as well as the owner is responsible for a breach of a contract with the passenger. The Aberfoyle [Id. 17]; Pars. Shipp. 30; Dias v. The Revenge [Case No. 3,877]; Ralston v. State Rights [Id. 11,540]. Repeated decisions of the supreme court of Massachusetts are to the same effect, as will sufficiently appear by the following citations: Moore v. Fitchburg R. Corp., 4 Gray, 465; Hewett v. Swift, 3 Allen, 423. Wherever there is a contract between the master and another, the master, says Hoar, J., is responsible for the acts of the servant in executing the contract, although the act is fraudulent and one without his consent. Howe v. Newmarch, 12 Allen, 55; Seymour v. Greenwood, 7 Hurl. & N. 357; Aycrigg's Ex'rs v. New York & E. R. Co., 1 Vroom [3 N. J. Eq.] 462; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 370. Examined in any point of view, the court is of the opinion that the instruction given to the jury was erroneous, and the verdict is set aside and a new trial granted.

Case No. 10,923.

PENDLETON et al. v. PHELPS et al.

[Brunner, Col. Cas. 95;[1] 4 Day, 476.]

Circuit Court, D. Connecticut. April, 1810.

STATUTE OF LIMITATIONS—CLAIM AGAINST ESTATE OF DECEASED PARTNER, WHEN BARRED BY.

A claim against the estate of a deceased partner, accruing in consequence of the insolvency of the surviving partner, after the statute of limitations had run upon the claims against such estate generally, is not barred, though not exhibited within the period limited by the statute.

[Cited in Troy Iron & Nail Factory v. Winslow, Case No. 14,199.]

[This was a bill in equity by Nathaniel Pendleton, Richard L. Hallett, Philip Rhinelander, William Rhinelander, Richard Hartshorn, William Kenyon, Joseph Lindley, John Delafield, and Edward Laigh, against Timothy Phelps, John Bulkeley, Peleg P. Sanford, Elias Shipman, and Nathan Beers.]

The circumstances stated in the bill, so far as they are necessary to understand the point decided, were as follows: In February, 1801, Peleg Sanford and Timothy Phelps, merchants in company, under the firm of Phelps & Sanford, applied to the petitioners to make insurance on the freight of the schooner Betsey, from New York to St. Jago de Cuba. The policy was valued at $4,000, and the amount was underwritten, in different proportions, by the petitioners. The schooner sailed from New York, and after arriving in sight of her destined port, was captured and carried into Jamaica. The owners immediately made an abandonment, which the underwriters accepted, and paid for a total loss. The vessel and cargo were libelled in the vice-admiralty court of Jamaica, and, upon trial, a restoration of the property was decreed, the owners first giving bond to abide the event of a rehearing in the English admiralty court, to which the captors appealed, and from which the appeal was dismissed, and the sentence below confirmed. Pending the appeal, a dispute arose between the underwriters and the insured, respecting the liability of the former to contribute to the expenses of the trials, and their right to receive freight, pro rata itineris per acti, stated at sixteen seventeenths of the voyage insured. The matter was submitted to arbitrators, who awarded that the underwriters were entitled to a pro rata freight, upon payment of a proportionable part of the expense consequent upon the captor, in case the sentence of the vice-admiralty court should be confirmed. The petitioners, in pursuance of the award, paid their proportion of the expenses incurred by reason of the capture. The arbitrators made their award in February, 1803. In April, 1804, the sentence of the vice-admiralty court was confirmed. Peleg Sanford died in April, 1802, abundantly solvent, having made a will, in which the respondents, Shipman and Beers, were named executors, who accepted the trust, and caused the will to be proved and approved. Shortly after the decision in favor of the ship and cargo the petitioners commenced actions against Phelps, as surviving partner of the firm of Phelps & Sanford, to recover freight for that part of the voyage performed before the capture. It was agreed that all the causes should abide the event of a single trial, which eventually resulted in favor of the plaintiff. In 1806 Phelps became bankrupt, and obtained an act of insolvency in his favor, the claim of the petitioners remaining wholly unsatisfied. Peleg P. Sanford is now sole heir to the estate of Peleg Sanford, deceased. The petition sought relief against the heir and executors in consequence of the insolvency of Phelps, the surviving partner. To this bill there was a demurrer, under which the respondents relied upon the statute of limitations of this state against the claim stated in the bill, which provides that any persons not being inhabitants of this state shall have liberty to exhibit their claim against an estate which shall not be represented insolvent, at any time within two years after publication of notice; the same statute having previously limited a shorter time for the exhibition of claims generally. St. Conn. tit. 60, c. 1, § 23.

For the petitioners it was contended that they were not creditors of Sanford at the

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

time of his decease, or within two years after. They were not creditors, either in law or in equity, until the bankruptcy of Phelps. There was, therefore, no necessity of exhibiting this claim to Sanford's executors within the two years specified in the statute. The term "claim," as it is there used, is synonymous with the word "debt," and imports a right to demand money out of the estate of the deceased. But can it be said that a person who has no such existing right, and perhaps never will have, is a creditor, or has a claim which must be exhibited within a limited time? Commissioners cannot report on future contingent claims. The estate of a deceased person is in certain cases to be sold for the payment of debts; but it cannot be sold to pay contingent claims. The cases in the English books which show what claims may be proved under a commission of bankruptcy will illustrate our law, and confirm the position for which we contend. Tully v. Sparkes, 2 Strange, 867; Crookshank v. Thompson, Id. 1160; Hockley v. Merry, Id. 1043; Goddard v. Vanderheyden, 3 Wils. 262; s. c., 2 W. Bl. 794; Ex parte Adney, Cowp. 460. The case of Backus v. Cleaveland, Kirb. 36, decided in this state, is more directly in point. If at the expiration of the two years the petitioners had released all claims and demands whatsoever it would have been no bar to this claim. There was no antecedent debt or duty, and therefore a release would not bar it. Hoe's Case, 5 Coke, 71; Hancock v. Field, Cro. Jac. 170; Belcher v. Hudson, Id. 222; Whitton v. Bye, Id. 486; Porter v. Philips, Id. 623; Cage v. Acton, 1 Ld. Raym. 518.

The counsel for the respondents contended that the claim ought to have been exhibited to Sanford's executors within the two years. The estate of Sanford was solvent, and when this is the case the law does not require claims to be proved to the executor. He pays such as he pleases, being liable on his bond for any abuse of his trust. But in case of an insolvent estate, the commissioners, who are the officers of the court of probate, decide on all claims presented to them, and their decision is conclusive. In solvent estates the creditor is required only to exhibit his claim; in insolvent estates he must prove his claim. The object of the bond given by the heirs to refund (vide St. Conn. tit. 60, c. 1, § 17) is to furnish means of payment for claims which the executor may have improperly rejected. In cases of insolvency it is the object of our system to bring estates to a final settlement. It is no reason for not presenting a claim that the amount is uncertain. Such must necessarily be the damages for breach of covenant, and in many other cases. Jones v. Woodhull, 1 Root, 298. The cases cited from the English books are all on the principle that the claims could not be sworn to, and by their statutes of bankruptcy no claims can be sworn to unless they are certain and liquidated. Our rule in regard to the estates of deceased persons is different. Unliquidated claims, as well as liquidated, may be exhibited against the estate of a person deceased. The case of Filly v. Brace, Id. 507, was cited. (Edwards, J.—Before the case of Filly v. Brace, the superior court had decided otherwise, though manifestly contrary to British authority. Livingston, J., said, that the only question here was, whether the petitioners were creditors of the estate of Sanford. There must be, within the two years, a claim, so that the claimant may be termed a creditor. It is of no consequence whether the claim be liquidated or not.) At law there is no claim against a deceased partner; but in equity both partners owe the debt, and also their representatives. The remedy is indeed against the surviving partner only; but there is no rule of law which limits the debt to him. It is correct in a court of equity to say that Sanford, or his representatives, owed the whole of this money. Further, the money paid in this case was for a consideration which happened to fail. There was never any foundation for the payment of this money. The underwriters ought never to have paid it. The vessel ought never to have been condemned. There was, therefore, an equitable right to recover this money out of Phelps & Sanford when the vessel was condemned in the West Indies. The arbitrators decided that there was a claim against Phelps & Sanford under certain contingencies, which contingencies actually happened. The petitioners could have made a claim. They might have exhibited their claim if they had not proved the amount precisely; and this would have been sufficient to save the case out of the statute. It is the policy of our laws that all claims should be limited. The statutes of limitation are favorably regarded in our courts.

Livingston, J., asked if this claim was not barred by statute, would it ever be barred by our common law? The counsel for the respondents answered in the negative.

LIVINGSTON, Circuit Justice, delivered the opinion of the court. After stating the case, as it appeared from the bill, he observed that the only question was whether the petitioners were creditors of the estate of Sanford in such a sense as to require the exhibition of their claim within the two years limited by the statute. It is the opinion of this court that they were not. It would have answered no purpose for the petitioners to have exhibited a demand against Sanford's heirs. There is no case in England, or in this country, in law or equity, of pursuing the effects of a deceased partner while the surviving partner is solvent. Phelps was solvent during the whole two years claimed as the term of limitation. This is different from the case of a demand payable at a future period. It was here im-

possible to know that there would ever be a demand against Sanford, as it could arise only in consequence of Phelps' insolvency. This was an event not to be foreseen or calculated upon. The executors could not withhold property from heirs and devisees for such an uncertain demand. There is some force in the argument derived from the section of the statute requiring heirs to give a bond to refund in case of future creditors. This is like the case of a covenant of warranty, on which a claim may never arise. It is said that after a claim is discovered it must be presented like other claims, in two years. But there is no force in such an argument. There is no law of that sort. The demurrer is overruled, and let the bill stand for an answer.

NOTE. Estate of Deceased Partner—Liability for Partnership Debts—The estate of a deceased partner is under no liability for partnership debts, while the surviving partner is solvent. Troy Iron & Nail Factory v. Winslow [Case No. 14,199], approving case in text.

[Prior to this, in 1808, a motion was made for the appointment of a guardian to Peleg P. Sanford, who was a minor. The motion was denied on the ground that the petition was not properly drawn up. Case No. 11,739.]

PENDLETON (TEN BROECK v.). See Case No. 13,827.

Case No. 10,924.

PENDLETON v. UNITED STATES.

[2 Brock. 75.] [1]

Circuit Court, D. Virginia. Nov. Term, 1822.

EVIDENCE—LETTER FROM WAR DEPARTMENT NOT AUTHENTICATED AS PRESCRIBED BY CONGRESS—ERROR — FACT NOT STATED IN BILL OF EXCEPTIONS.

1. In a suit brought by the United States against the representative of a surety of M. and H., contractors to furnish rations to the troops of Virginia and Maryland, for the year 1802, a letter from the department of war, not authenticated in the form prescribed by the act of congress, claiming advances made to the principals, up to the 6th of January, 1803, is inadmissible in evidence, and no admission of its correctness, express or implied, by the principals, can bind the surety.

2. Where a cause is removed from an inferior to a superior tribunal, by writ of error, no fact, not stated in the bill of exceptions, will be noticed.

[Cited in U. S. v. Jarvis, Case No. 15,469.]

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

At law.

MARSHALL, Circuit Justice. This is a writ of error to the judgment of the district court, obtained by the United States against the plaintiffs in error, for the sum of $496.08, with interest from the 30th of September, 1808. Philip Pendleton, the testator of the plaintiffs, had become bound to the United States as security for Michael McKewan and Daniel Hanagan, who were contractors to furnish rations to the troops in Virginia and Maryland, for the year 1802. This suit is brought for the balance of moneys unaccounted for, which was in their hands on the last day of December of that year. The breach assigned in the declaration, is the non-payment of $1,159.89, being the balance due from the said McKewan and Hanagan on the 31st day of December, 1802.

In support of this action, the attorney for the United States, offered in evidence a certificate from the treasury department, certified by the comptroller on the 3d day of October, 1821, stating, that, on a settlement of the accounts of Michael McKewan and Daniel Hanagan, late contractors for supplying the troops stationed in Maryland and Virginia, they are chargeable—

To balance remaining in their hands for moneys advanced from the 22d of October, 1801, to the 6th of January, 1803, per report No. 15129...		$1,159 89
The same paper contains the following credits—		
On the 30th of June, 1808	$230 00	
On the 30th of September	306 00	
		536 00
Leaving due to the United States		$ 623 89

This paper was objected to by the counsel for the defendants, and was rejected by the court, because it claimed a gross sum of $1,159.89, for moneys advanced up to the 6th of January, 1803, to McKewan and Hanagan, whereas, the defendants were liable only for moneys advanced up to the last day of December, 1802. The attorney for the United States then offered in evidence an affidavit made by the defendant, Philip Pendleton, December 1st, 1818, for the purpose of obtaining a continuance, in which he states, among other things, that during the pendency of the suit, and prior to the year 1810, he, with the other security in the bond, caused sundry payments to be made to an amount about equal to the sum stated to be due, after deducting therefrom the sum of $392.54, or thereabouts, which was obviously, he thinks, an unjust charge against the securities. The vouchers for these payments were placed in the hands of Mr. Williams, with other documents, a gentleman then practising at this bar, who is since dead. After the death of Mr. Williams, a judgment was obtained, without any appearance for the defendant for upwards of $2,000, which, on his motion, was set aside, and a new trial granted. The affidavit then states, that a search was made among the papers of Mr. Williams, which resulted, as he is informed, in finding a statement made by Mr. Hay, the then attorney for the United States, admitting the incorrectness of the charge as against the sureties, a certificate of the treasurer of the United States as to the payment of $160, on or about the 31st day of October, 1803, and a letter from the affiant to Mr. Williams, dated the

[1] [Reported by John W. Brockenbrough, Esq.]

20th of April, 1809, in which he says: "I send you two receipts and a letter, evidencing the payment of $696 of the judgment." These papers, the affiant says, are, as he is informed, mislaid, and he prays a continuance for the purpose of endeavoring to replace them.

The attorney for the United States also offered to read a letter from William Simmons to Michael McKewan, in these words:

"Department of War, Accountants' Office, January 15th, 1803. Sir: I have to acknowledge the receipt of yours of the 10th instant, with the papers, * * * of which have been admitted, and your accounts as contractor for the year 1801, and of yourself and Daniel Hanagan for the year 1802, finally closed, leaving a balance due to the United States in each, to wit:

From yourself, as contractor for Virginia for the year 1802.....	$ 408 76
From yourself and D. H., and contractors for V. and M. for 1803...	767 35
	$1,176 11

—For which you are to make immediate payment to the United States. William Simmons."

The counsel for defendant objected to the admission of this account from the treasury department, and of the letter from Mr. Simmons, which objection the court overruled, "being of opinion, that the document from the treasury department was capable of being explained to the satisfaction of the jury, by reference to the letter from William Simmons to Michael McKewan, which letter was found by the attorney for the United States this day, among the papers filed in this case in this court, and because from inspection of the same, the court is satisfied, that the same was probably brought into court many years ago, and has remained among the papers in this cause, as being produced originally by the said Michael McKewan, an original party in the cause to whom the same is directed." To this opinion the counsel for the defendant excepted, and the judgment is now before this court on writ of error. The letter from Simmons to McKewan, not being authenticated in the form prescribed by the act of congress, derives no aid from that act, and the question concerning its admissibility is consequently dependent on general principles of law. The record contains no evidence that Michael McKewan was ever a party to this cause. The declaration is against the executors of Philip Pendleton, deceased, who was one of the sureties of McKewan and Hanagan. I must presume, from the statement of the judge of the district court, that a suit was originally brought against all the parties to the bond, and that on the death of Philip Pendleton, one of the obligors, this suit was brought against his executors, and that this paper was found in the original suit.

It is not stated by the judge, nor does it in any manner appear, that a trial ever took place as against McKewan, that this paper was ever read in evidence, or that it was filed with the permission of the court. In what light, then, is this letter to be considered? I am by no means satisfied that it is not the paper of McKewan, which he would be at liberty to withdraw at his own pleasure, and would not be compellable to use. If seized by the attorney for the United States, he could not use it as evidence offered by McKewan, but as a letter addressed to and received by him. But if I am wrong in this, still it only establishes the amount of the claim against McKewan and Hanagan, and does not show with sufficient precision, that the sureties were liable for the whole of the claim. The documents show, that on the books of the treasury, the sums for which the sureties are not liable are blended with those for which they are liable, and that the whole is claimed from them. The account certified by the comptroller, claims for moneys advanced to the contractors up to the 6th of January, 1803, without specifying the dates at which the several advances were made, or showing how much was advanced after the last day of December, 1802. The letter of the war accountant is dated after the 6th day of January, 1803, and states a balance to be due, varying from that contained in the account certified by the comptroller, but omits to state, that it was wholly due for advances made on or prior to the last day of December, 1802. It is said, that an inference may be fairly drawn from a comparison of these accounts, that the balance claimed in the letter of Mr. Simmons was due for advances for which the sureties are responsible. But inferences may be drawn either way, and this is not a case which ought to be left to uncertain inferences. The books of the treasury ought to show with precision and certainty the several periods at which the money was advanced, and an abstract from the books would be evidence in the cause. A court ought not to reason on a letter not explicit, and draw from it doubtful inferences, when the party requiring this course has in his possession testimony which would dispel every doubt. If the letter does not show, when accompanied by the account certified by the comptroller, that all the money it claims was advanced before the 1st of January, 1803, then no acquiescence in it by McKewan, no admission of its verity, implied or expressed, can effect the security. McKewan's admissions show only his own liability; but if that is more extensive than the liabilities of his securities, they cannot be affected by admissions which apply to the claim against him generally, without discriminating between those parts of it which affect the sureties, and those which do not.

Upon these reasons, I am of opinion that the letter of Simmons does not explain, with the requisite clearness, the account certified

by the comptroller, and ought not to have been admitted. I am not unmindful of the allegation made by the attorney for the United States, that the papers which would explain this transaction are burnt, and cannot be produced. But this fact is not stated in the bill of exceptions, and cannot be noticed. I can no more take it into consideration than I can the indorsement on the letter controverting the amount it claims, and, consequently, destroying every implication arising from its being considered the paper of McKewan. I must consider it as a paper, equivocal in itself, produced by a party in possession of testimony which is unequivocal. The judgment must be reversed.

PENDLETON (VAN HOOK v.). See Cases Nos. 16,851 and 16,852.

PENELOPE, The. See Case No. 16,946.

PENELOPE, The (LAMAR v.). See Case No. 8,007.

PENELOPE, The (LOCKE v.). See Case No. 16,946.

PENELOPE, The (McQUIRK v.). See Case No. 8,925.

PENELOPE, The (UNITED STATES v.). See Case No. 16,024.

PENELOPE, The (VINCENT v.). See Case No. 16,946.

Case No. 10,925.

PENHALLOW v. DOANE.

[See 3 Dall. (3 U. S.) 54.]

Case No. 10,926.

In re PENN et al.

[4 Ben. 99; [1] 3 N. B. R. 582 (Quarto, 145).]

District Court, S. D. New York. March, 1870.

PRACTICE—JURISDICTION—DISCHARGE.

1. Where creditors of involuntary bankrupts applied to set aside the adjudication of bankruptcy, on the ground that the court had no jurisdiction to make it, by reason of the absence of certain jurisdictional averments in the petition, the bankrupts opposing the application: *Held*, that the question of jurisdiction could not be raised at this stage, or in this way.

2. The creditors could oppose the application of the bankrupts for discharges, on the ground that the court had no jurisdiction of the case, if they saw fit.

[Cited in Re Groome, 1 Fed. 468; Allen v. Thompson, 10 Fed. 124.]

3. A discharge granted without jurisdiction is void.

[In the matter of John R. Penn, Charles V. Culver, and Lucien H. Culver, bankrupts.]

R. Sewell and A. B. McCalmont, for creditors.

F. N. Bangs and L. K. Miller, for bankrupts.

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

BLATCHFORD, District Judge. In this case, John R. Penn, Charles V. Culver and Lucien H. Culver, both individually and as members of the firm of Culver, Penn & Co., have been adjudged bankrupts. Thomas Hoge, a creditor of Charles V. Culver, individually, and William Raymond, a creditor of the said firm, and also a creditor of Charles V. Culver, individually, now apply to the court to set aside the adjudication of the bankruptcy of the said firm, and of Charles V. Culver and Lucien H. Culver, on the ground that this court had no jurisdiction to make such adjudication, by reason of the absence of certain jurisdictional averments in the petition. The petition was filed by Penn against the Culvers as his copartners, and prayed that the copartnership and its said three members might be adjudged bankrupts. An order to show cause was issued against the Culvers, and on the return day they appeared by attorney, and filed a written consent to be adjudged bankrupts in this proceeding. They do not question the adjudication. On the contrary, they and Penn, on notice from the said creditors, oppose this application.

I do not think the questions sought to be raised by these creditors, can be raised by them at this stage of the proceedings or in this way. If they wish to oppose the application of the bankrupts for their discharges, on the ground that this court has no jurisdiction of the case, they can do so when the time arrives, as was done in the case of In re Little [Case No. 8,391], where a discharge was refused on such ground. If they shall not so oppose, and a discharge shall be granted, such discharge, if granted without jurisdiction, will be void, for, by section 34 of the act [of 1867 (14 Stat. 533)], it is only a discharge duly granted which is of any avail. A discharge granted without jurisdiction to grant it, is not duly granted, and is no discharge. It is unnecessary, therefore, to pass upon the questions raised and discussed on the hearing. The motions are denied.

[For subsequent proceedings in this litigation, see Cases Nos. 10,927, 10,929, and 10,928.]

Case No. 10,927.

In re PENN et al.

[5 Ben. 89; 5 N. B. R. 30; 3 Chi. Leg. News, 225.] [1]

District Court, S. D. New York. April 6, 1871.

JURISDICTION—BANKRUPTCY OF PARTNERSHIP—PETITION BY ONE PARTNER.

P. filed a petition in bankruptcy, alleging that he was a member of the firm of C. P. & Co.; that the other members resided in Pennsylvania; that he had resided for more than six months next immediately preceding the filing of his petition, in the city of New York;

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 5 N. B. R. 30, and 3 Chi. Leg. News, 225, contain only partial reports.]

that the members of the partnership owed debts exceeding three hundred dollars, and were unable to pay their debts in full; and that the other members of the firm had been requested to unite with him in his application, and refused to do so. The petition prayed that the said copartnership, and each member thereof, might be adjudged by a decree of the court to be bankrupts. On the filing of that petition, the court made an order that the other members of the firm show cause why the prayer of the petition should not be granted. They appeared by attorney on the return day, and filed a written consent to be adjudged bankrupts; and, thereupon, an order was made adjudging them all bankrupts. On their application for a discharge, specifications of opposition were filed, raising the question of the jurisdiction of the court. The ground of the want of jurisdiction which was set forth was, that the petition did not show that the members of the partnership, as such, carried on business in the district at any time within six months next preceding the filing of the petition, or that the partnership had any assets, either at the time of the filing of the petition, or within such six months. *Held*, that the petition showed a sufficient residence of P. within the district; that it sufficiently averred a subsisting partnership, to satisfy the requirements of section 36 of the bankruptcy act [of 1867 (14 Stat. 534)]; that the proof showed that copartnership assets had come into the hands of the assignee; and that, under the provisions of section 36 of the act, and of general order No. 18, the court had jurisdiction of the proceedings.

[Cited in Re Smith, 16 Fed. 467.]

[In the matter of John R. Penn, Charles V. Culver, and Lucien H. Culver, bankrupts. The proceedings in this case are first reported as heard upon motion of certain creditors to set aside the adjudication of bankruptcy theretofore rendered. Case No. 10,926.]

Robert Sewell and A. B. McCalmont, for creditors.

Francis N. Bangs and W. S. Opdyke, for bankrupts.

BLATCHFORD, District Judge. On the application for the discharge of these bankrupts, the question of the jurisdiction of the court to entertain at all these proceedings in bankruptcy is raised. Specifications have been filed in opposition to the discharge of the bankrupts. Two of those specifications are addressed to the question of jurisdiction, and the case has been argued on that point alone preliminary.

On the 31st of December, 1868, the bankrupt Penn filed in this court a petition, addressed to the judge of this court, setting forth, "that the said John R. Penn is a copartner in the firm of Culver, Penn & Company, a copartnership composed of said petitioner, and Charles V. Culver and Lucien H. Culver, who both reside in the county of Venango, in the state of Pennsylvania; that the said John R. Penn has resided, for more than six months next immediately preceding the filing of this petition, at the city of New York, within said judicial district; that the members of said copartnership owe debts exceeding the amount of three hundred dollars, and are unable to pay all their debts in full, and that the said Charles V. Culver and Lucien H. Culver have been requested by petitioner to unite with him in this application, and refuse so to do; that the petitioner is willing to surrender all his estate and effects, joint and individual, for the benefit of their creditors and his own, and desires to obtain the benefit of the act entitled, "An act to establish a uniform system of bankruptcy throughout the United States" [14 Stat. 517], approved March 2, 1867, and desires to effect an adjudication of bankruptcy of the said partnership, and all the members thereof." The petition then refers to a schedule as annexed, containing a statement of the debts of said copartnership; to another schedule as annexed, containing an inventory of the estate of said copartnership; to another schedule as annexed, containing a statement of the individual debts of said Penn; and to another schedule as annexed, containing an inventory of the individual estate of said Penn. The petition then prays, that "the said copartnership, and each member thereof, may be adjudged by a decree of the court to be bankrupts," &c. On the filing of this petition, an order was issued by this court, requiring Charles V. Culver and Lucien H. Culver to show cause before it on the 30th of January, 1869, why the prayer of the petition should not be granted. They appeared by attorney on that day, and filed a written consent to be adjudged bankrupts, and on the same day an order was made adjudging Penn and the two Culvers bankrupts.

The specifications set forth as the ground of the want of jurisdiction, that the petition of Penn, on which the adjudication took place, does not show that the members of the copartnership, as such, carried on business in this district at any time within six months next immediately preceding the filing of the petition, or that the copartnership had any assets either at the time of filing the petition, or at any time within six months next immediately preceding such filing; that, in point of fact, such copartnership was dissolved on the 27th of March, 1866, and has not since that time carried on business any where; that no assets of the copartnership have come to the hands of the assignee in bankruptcy; that neither one of the two Culvers resided or carried on business within this district at any time within six months next immediately preceding the filing of the petition by Penn; and that neither when that petition was filed, nor within six months next immediately preceding the filing thereof, did such copartnership exist, nor did it at any time within such period possess any copartnership assets.

The petition of Penn shows a sufficient jurisdictional residence by himself in this district. It also avers that he "is a copartner in the firm of Culver, Penn & Company, a copartnership composed of said petitioner and Charles V. Culver and Lucien H. Culver." This is a sufficient averment of a subsisting copartnership, to satisfy the requirements of section 36 of the act, in regard to adjudging bankrupt two or more persons who "are part-

ners in trade." In regard to the allegation of fact, that the copartnership was dissolved in 1866, and that no assets of the copartnership have come to the hands of the assignee, and that no such assets existed when the petition was filed, or at any time within six months next immediately preceding the filing thereof, it is sufficient to say, that the proof shows satisfactorily that assets of the copartnership have come to the hands of the assignee, a portion of such assets being the proceeds of an item of assets of the copartnership named in the schedule of copartnership assets annexed to the petition of Penn, and that such assets existed when such petition was filed. This existence of copartnership assets at that time makes the copartnership a subsisting one at that time quoad creditors then existing, for the purpose of bankruptcy proceedings, as has been repeatedly held, although the copartnership may before have been dissolved as respected further active business operations.

What then remains of the objections to the jurisdiction? Neither of the Culvers resided in this district when the petition of Penn was filed, nor had either of them resided in this district for the six months next immediately preceding the time of filing such petition, or for any period during such six months, nor had the copartnership, or its members as such, carried on business in this district for such six months, or for any period during such six months. On these grounds it is contended that this court had no jurisdiction to adjudge the Culvers bankrupt, even though they appeared and consented to such adjudication.

It is contended, that the proceeding of Penn, as against the Culvers, was a proceeding in involuntary bankruptcy; and that it was necessary the petition should allege as having been committed by the Culvers, or by the firm, some one of the acts of bankruptcy specified in section 39 of the act. In these views I cannot concur. The petition of Penn was, so far as he was concerned, a voluntary petition, under section 11. It contains all the averments required by section 11, which it would have been necessary for it to contain, as respects Penn, if nothing had been said in it about a copartnership. In addition, it states that he is a copartner in a firm, which it names, and whose component members it names. It states the residence of the other members. It avers that the members owe debts and are unable to pay all of them in full; that the other two members have been requested by the petitioner to unite with him in the application, and refuse so to do; and that he desires to effect an adjudication of bankruptcy of the copartnership and all the members thereof. It then annexes schedules of the debts and assets of the copartnership, and prays that the copartnership, and each member thereof, may be adjudged bankrupts.

Where is the authority to be found for inserting these averments in the petition of Penn, or for filing a petition by Penn praying for an adjudication as respects the Culvers, unless the Culvers sign the petition containing such prayer? I conceive that full authority is found in the thirty-sixth section of the act and in general order No. 18. The thirty-sixth section provides, "that where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken," &c. This provision clearly contemplates that persons who are copartners may be adjudged bankrupt on three descriptions of petitions: (1) The petition of all the copartners; (2) the petition of any one of the copartners; (3) the petition of a creditor of the copartners.

The proceeding by the petition of all the copartners is a purely voluntary petition, under section 11. Where they all unite in it, jurisdiction as to all of them must appear by it, by residence or carrying on of business, as required by section 11. In the present case, the Culvers could not have united in the petition of Penn, because the petition could not have truly made the necessary averments required by section 11 to give this court jurisdiction through residence or the carrying on of business on the part of the Culvers.

The proceeding by the petition of a creditor of the copartners is a purely involuntary proceeding, under section 39, and requires the adjudication to proceed on the commission of some act of bankruptcy specified in that section. A proceeding by copartners, under section 11, requires no act of bankruptcy to be set forth, but only an averment that the debtors are unable to pay all their debts in full, and are willing to surrender all their estate and effects for the benefit of their creditors, and desire to obtain the benefit of the act. The filing of such petition is declared, by section 11, to be an act of bankruptcy.

The proceeding by the petition of one of two or more copartners, to have such copartners adjudged bankrupt, is a proceeding which, necessarily, is neither wholly voluntary nor wholly involuntary, but is partly voluntary and partly involuntary. So far as the petitioner is concerned, it is voluntary, under section 11. So far as the copartners not petitioning are concerned, it is not involuntary in the sense of section 39, unless the adjudication is asked for on the ground of the commission of an act of bankruptcy specified in section 39, although it may be involuntary in the sense of not being voluntary under section 11. Where it is not involuntary in the sense of section 39, the adjudication may be asked for on the ground that the members of the copartnership are

unable to pay all their debts in full, provided the petition is presented by a copartner as to whom the court to which it is presented has jurisdiction. Yet, the copartner petitioning may be unable to pay all his debts in full, and his copartners may be able to pay all their debts in full, and they may have committed acts of bankruptcy under section 39, and he may have committed no acts of bankruptcy under that section, so that, under sections 36 and 39, the partners could not be adjudged bankrupts on the petition of a creditor of the partners, and the copartners of the petitioning partner could not be adjudged bankrupt on the ground of their inability to pay all their debts in full. This would give rise to a case of a copartner petitioning to have himself adjudged bankrupt because of his inability to pay all his debts in full, and to have his copartners adjudged bankrupt because of the commission by them of some act of bankruptcy specified in section 39. These various phases are all of them provided for, in my judgment, by section 36, taken in connection with sections 11 and 39, and supplemented by general order No. 18.

Section 36 provides, that, "if such copartners," that is, copartners in trade who are sought to be adjudged bankrupt on the petition of themselves, or of any one of them, or of any creditor of theirs, "reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case." This provision implies that the court which first obtains jurisdiction over the subject-matter of the petition, and over the person of the petitioner, shall have exclusive jurisdiction over "the case," that is, over the subject-matter of the petition, and over all the copartners, if the non-petitioning copartners be brought in by appropriate process. "The case" is the bankruptcy of all the copartners. The prayer of the petition is, and must be, that all the partners may be adjudged bankrupt. Otherwise, it is not a case under section 36. In the present case, if the Culvers, residing in Pennsylvania, had filed their voluntary petitions there, praying for an adjudication against themselves and Penn, after Penn had filed his petition for the same purpose here, this court would, under section 36, have had exclusive jurisdiction of "the case." What object, then, could be attained, by compelling the Culvers to go through the vain form of filing their petitions in Pennsylvania, only to have them certified to this court, as the one having exclusive jurisdiction over "the case," after the Culvers have been brought into this court under the practice prescribed by general order No. 18?

What is general order No. 18? It provides, that, "in case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition, in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law, and by these rules, in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act." This general order applies solely to the case where one of two or more copartners petitions, under the privilege given him by section 36, to have all the copartners adjudged bankrupt. If all the copartners petition, there is nobody to make resistance. If a creditor of the copartners petitions, their right to resist is given fully by other provisions than those found in general order No. 18. That general order plainly contemplates: (1) A petition by one of two or more copartners, under section 36, to have "the firm," that is, all the copartners, declared, that is, adjudged, bankrupt; (2) the refusal of the non-petitioning copartners to join in such petition, that is, in subscribing and presenting it, as petitioners; (3) the giving to such refusing copartners of the like notice with that provided for by section 40, to be given to a debtor proceeded against by a creditor; (4) that the petitioning copartner may proceed, in his petition, on the ground either that "the copartnership" is "insolvent" (that is, that its members are unable to pay all their debts in full, which is the meaning of the word "insolvent," in that general order), or that his copartners have committed some act which is made by the statute an act of bankruptcy.

In the present case, the petition fully complied with all the provisions of the act and of the general orders. The notice was given to the Culvers, and they appeared and consented to an adjudication. This court acquired jurisdiction of "the case," that is, of the subject-matter of the petition, the bankruptcy of the copartnership, and of its members, by the petition of Penn, as to whom it had jurisdiction by virtue of his residence, and it acquired jurisdiction of the persons of the Culvers by the notice given to them. It was not necessary, in order to give this court jurisdiction of the case as to the Culvers, that they should have resided or carried on business in this district for the period mentioned in section 11, or that it should have been so averred.

The provision of general order No. 16, that, "in case two or more petitions for adjudication of bankruptcy shall be filed in different districts, by different members of the same copartnership, for an adjudication of the bankruptcy of said copartnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy, un-

til the same shall be closed," merely carries out the enactment in section 36, before referred to. Under that provision, as said before, if the Culvers, after Penn had filed his petition here, had filed their petitions in Pennsylvania, at their residences, for an adjudication of the bankruptcy of the copartnership, this court would have had exclusive jurisdiction over all the proceedings as to the bankruptcy of the copartnership. But it was not necessary, in order to give this court jurisdiction, that the Culvers should file such petitions in Pennsylvania. The provision is inhibitory as to the court in Pennsylvania, so as to give this court exclusive jurisdiction, but it is not enabling, so as to make it requisite to the jurisdiction of this court, that such petitions should be filed in Pennsylvania.

The objections to the jurisdiction of the court are overruled, and the case will stand for hearing on the other specifications.

[NOTE. The specifications in opposition to the discharge not considered in this opinion are disposed of in Case No. 10,929. An application by the defendants in an action brought by the assignee in the state court to have an order entered in this court instructing the assignee to discontinue that case was refused. Id. 10,928.]

Case No. 10,928.

In re PENN et al.

[5 Ben. 500;[1] 8 N. B. R. 93.]

District Court, S. D. New York. Feb., 1872.

SUIT BY ASSIGNEE.

An assignee in bankruptcy had commenced a suit in a state court, to recover certain property as having been the property of the bankrupts. Specifications of opposition to the discharge of the bankrupts were filed in the bankruptcy proceedings, which were held by the court not to have been proven, and discharges were granted. Thereupon, the defendants in the state court suit applied to this court, on affidavits showing that the allegations in the bill of complaint in that suit were the same as those of the specifications, to direct the assignee to discontinue the suit in the state court: *Held*, that it was more proper that the issues involved in that suit should be disposed of on hearing in that suit, than on a motion in the bankruptcy proceedings.

[In the matter of the bankruptcy of John R. Penn, Charles V. Culver, and Lucien H. Culver. The proceedings are first reported as heard upon motion of certain creditors to have the adjudication of bankruptcy set aside. Case No. 10,926. It was next heard upon specifications filed in objection to the bankrupts' discharge. Cases Nos. 10,927 and 10,929. The discharges were granted.]

This was an application by the defendants in a suit brought by the assignee in bankruptcy in a state court, that this court would direct the assignee to discontinue the suit.

F. N. Bangs, for application.

A. B. McCalmont and R. Sewell, in opposition.

BLATCHFORD, District Judge. I do not deem it a discreet exercise of the power of the court in this case, to direct the assignee in bankruptcy to refrain from prosecuting, and to discontinue, the suit he has brought in the state court of Pennsylvania. The grounds urged for doing so—that the allegations made in the bill of complaint in such suit are the same in substance as those stated in the specifications filed in this court, but not by such assignee, against the discharge of one of the bankrupts, which specifications were held by this court not to be proved, as matter of fact, and that the assignee in bankruptcy is bound by such decision of this court [Case No. 10,929], and that such suit was not commenced within the period of two years after the appointment and qualification of such assignee—raise grave questions, which, in my judgment, it is not seemly to dispose of in such a summary way. It is more proper that they should be determined in the plenary suit brought, if raised therein, and by the tribunal in which the suit is brought, with the provisions for review which obtain in a suit between party and party. As to the merits of the suit, if they shall be reached, it may very well be that the assignee in bankruptcy may produce evidence in his favor which was not before this court, or that, on such evidence as was before this court, the defences of a former adjudication and of the statutory limitation being overruled, the state court may regard the assignee as entitled to the relief he seeks. I cannot regard the case as one where the assignee ought to be restrained, as clearly exceeding his power or using it unreasonably. The application is, therefore, refused.

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

Case No. 10,929.

In re PENN et al.

[5 N. B. R. 288.][1]

District Court, S. D. New York. June 6, 1871.

BANKRUPTCY—OPPOSITION TO DISCHARGE.

Where a bankrupt's discharge is opposed on the grounds that he has sworn falsely in the oath to his schedules, has attempted to conceal his property and has transferred certain shares of stock to one of his creditors with intent to give him a preference, a discharge will be granted where the evidence shows that he had no interest in the property in question; that the alleged transfer was made without any collusion or fraud on his part, and that the stock in question was held by a third party, free from any interest of the bankrupt.

[In the matter of John R. Penn, Charles V. Culver, and Lucien H. Culver, bankrupts. The proceedings in this case are first reported as heard upon motion of certain creditors to set aside the adjudication of bankruptcy theretofore rendered. Case No. 10,926.]

F. N. Bangs and W. S. Opdyke, for bankrupts.

[1] [Reprinted by permission.]

A. B. McCalmont and R. Sewell, for creditors.

BLATCHFORD, District Judge. The specifications in regard to the jurisdiction of the court have been heretofore disposed of. [Case No. 10,927.] The third specification charges that C. V. Culver, in the oath to his schedules in bankruptcy, swore that he had no property in his own name or in the name of any other person, and in shares in any company, except ten shares of stock in the Reno Company of nominal value, whereas he owned ten thousand shares of the stock of the Reno Company, which stood on the books in the name of Robert F. Brooke, and were held by Brooke in trust and confidence for the use and benefit of C. V. Culver, as C. V. Culver well knew. The fourth specification charges that C. V. Culver, owning such shares and fraudulently intending to conceal them, caused them to stand on the books of the company in the name of Brooke, whereas they were and are the property of C. V. Culver; and that C. V. Culver, fraudulently intending to conceal them and to prevent them from coming to his assignee in bankruptcy, omitted them from the schedule of his assets. The sixth specification charges that C. V. Culver, being insolvent, transferred to a certain creditor of the bankrupts, certain shares of stock in the Reno Company, with intent to give a preference to such creditor over the other creditors of the bankrupts, and to defeat the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. The stock transferred to such creditor was some of the stock which stood in the name of Brooke. The question involved in the third, fourth and sixth specifications is whether the stock which stood in the name of Brooke was the property of Culver, or was held by Brooke in trust and confidence for the use and benefit of Culver, and examination of the testimony leads me to the conclusion that the opposing creditors have not established that such stock was the property of Culver, or was held by Brooke in trust for Culver. The only trust shown is a trust created by Brooke for the benefit of such of the creditors of the bankrupts, who were such on the twenty-seventh of September, eighteen hundred and sixty-seven, as should choose to take for their debts, shares of stock in the Reno Company at par, such shares being the absolute property of Brooke, free from any claim or interest of Culver. The title of the bankrupts to all stock in the Reno Oil & Land Company, passed away from them to Jordan. Jordan afterwards acquired title to the lands of the company. Such lands passed to Brooke. They were made by him the capital of a new company called the Reno Company, and he created the trust referred to for the benefit of the creditors of the bankrupts, with a view to relieve the bankrupts from their debts, and at the same time to secure the co-operation of such creditors as stock-holders in the company, and avail himself of the energy and skill of C. V. Culver in developing the interests of the company and making valuable the entire stock, as well that reserved to himself as that offered to the creditors. I see nothing reprehensible in this. On the contrary, it is clear from the testimony that, but for this arrangement and offer to the creditors, they would have received nothing. The property of the bankrupts had passed away from them, and there was nothing which the creditors could reach, unless it should be voluntarily offered for their acceptance by the party claiming the property under just such an arrangement as was made. The fifth specification charges that C. V. Culver, with the fraudulent intent of controlling the appointment of an assignee in bankruptcy in this proceeding, procured a certain false and fictitious debt to be proved against the estate of the bankrupts, and fraudulently, knowingly, and wilfully admitted such false and fictitious debt. This specification is not proved. Discharges are granted to all three of the bankrupts.

[NOTE. Subsequently an application by the defendants in an action brought by the assignee in the state court to have an order entered in this court instructing the assignee to discontinue that case was refused. Case No. 10,928.]

Case No. 10,930.

PENN v. BUTLER. PENN v. PENN. BUTLER v. PENN (two cases).

[4 Dall. 354.] [1]

Circuit Court, D. Pennsylvania. May Term, 1801.

BONDS TO JOINT OBLIGEES — RIGHT OF SURVIVOR TO POSSESSION—EQUITY JURISDICTION.

[1. Where an attorney in fact of two persons who were tenants in common of certain lands sold various tracts thereof and took bonds for the purchase price, running to his principals jointly, *held*, that upon the death of one of them, the survivor was entitled, as against his executors, to have possession of all the bonds, and, in the absence of any allegations of fraud or insolvency or breach of trust, there was no ground for the interposition of a court of equity for the purpose of apportioning the bonds, or to appoint a receiver to collect them.]

[Cited in Wall v. Bissell, 125 U. S. 391, 8 Sup. Ct. 979.]

These were bills in equity, involving a great variety of facts, respecting the disposition of the estates of the late proprietary family: but the principal object of all of them, was submitted for the opinion of the court, on the following agreement: "It is agreed, that these suits be submitted for the opinion of the court, upon the following statement of facts, admitted by all the parties, except the fact, that Anthony Butler, for his own accommodation, and without the consent, knowledge, or approbation, of John Penn the elder, took, inter alia, in part payment of certain sales

[1] [Reported by A. J. Dallas, Esq.]

herein after mentioned, certain bonds and mortgages, in the joint names of John Penn the elder, and John Penn the younger, after obligees and mortgagees; which fact, it is agreed, shall be decided by the court, on evidence to be produced; and that such formal decrees be eventually drawn and entered in each, as will effectuate the opinion which the court shall pronounce. Case. John Penn the elder, and John Penn the younger, after the act of assembly of Pennsylvania, passed November 27th, 1779, entitled 'An act for vesting the estates of the late proprietaries of Pennsylvania in this commonwealth,' remained seised and possessed, as tenants in common, of all their manors, reserved tracts, &c., in Pennsylvania, with power to sell in fee: three-fourth parts being the property of John Penn the younger; and one-fourth part being the property of John Penn the elder. On the 19th of November, 1787, John Penn the elder appointed John F. Mifflin his attorney, with power to sell and convey, &c., to receive payment for lands sold either in money or securities; and to substitute any agent or agents. And on the 23d of December, 1787, John F. Mifflin substituted Anthony Butler. On the 29th day of June in the year 1787, John Penn the younger appointed Robert Millegan and John F. Mifflin his attornies, with power to sell, and convey, &c., to receive payment for lands sold, either in money or securities; and to substitute any agent or agents. And on the 29th day of June in the year 1787, Robert Millegan and John F. Mifflin substituted Anthony Butler. John Penn the younger afterwards revoked the power of attorney, which he had granted to Robert Millegan and John F. Mifflin. And on the 29th of April, 1788, John Penn the younger appointed the said Anthony Butler his attorney, with powers to sell and convey, and to receive in payment money or securities. By virtue of the several powers above stated, Anthony Butler did, at sundry times, sell several tracts of land, belonging to the said John Penn the elder, and John Penn the younger, as tenants in common, in the proportions aforesaid; and in payment therefor (inter alia) took, for his own accommodation, without the consent, knowledge, or approbation, of the said John Penn the elder, certain bonds and mortgages, in the joint names of John Penn the younger, and John Penn the elder, as obligees and mortgagees. After the time of taking the said bonds and mortgages, to wit, on the 9th of February, 1795, John Penn the elder died, leaving Anne Penn and John F. Mifflin executrix and executor of his last will and testament. There are in the hands of Anthony Butler, a number of bonds and mortgages, taken as aforesaid, in each and all of which bonds and mortgages, the said John Penn the younger is interested three undivided fourth parts; and the aforesaid executors of John Penn the elder are interested the other one undivided fourth part. Questions. 1st. Whether John Penn the younger, as surviving obligee and mortgagee, is entitled to have and receive from Anthony Butler, all the said bonds and mortgages, for the purpose of collecting and distributing the money thereby secured and made payable, according to the respective interests of the parties? 2d. Or, whether the executors of John Penn the elder, are entitled to receive one-fourth part in value of the said specific bonds and mortgages, for their separate use and benefit? 3d. Or, whether the court will consider the bonds and mortgages, under the circumstances of the case, as several, as well as joint, to be followed with the consequences inferable from such principle?"

On the hearing, Mr. Butler's testimony stated, "that he was, at first, the separate agent of John Penn the younger, when Mr. T. Francis was the separate agent of John Penn the elder; that during this period the bonds, for purchase money of lands sold, were separately taken, according to the interests of the parties; that in September, 1787, he became the agent of both the Penns, but continued, for some time, to take separate bonds; that the purchasers complained of the expense of giving separate bonds and mortgages, and he then determined to take them for the joint use of his principals; that he received no instructions upon the subject, from either party; and that he was not, in fact, aware of any difference between taking the bonds jointly or severally." It, also, appeared, that Mr. J. R. Coates had been appointed the agent of John Penn the younger; and the general question was, whether Mr. Butler should be directed to deliver up the joint bonds and mortgages to him, as the agent of the surviving obligee?

Ingersoll & Mifflin contended, against the claim of the surviving obligee: 1st. That it was founded merely on the mistake, and misapprehension, of the agent, acting for two parties, having distinct interests, and giving separate powers. 2d. That, under such circumstances, a court of equity can, and ought to, apportion the securities, by a fair division of them; so that each party may possess the entire interest and remedy in his proportion. 3d. That even if an apportionment could not be made, the court will appoint a receiver, to collect and divide the joint fund, in the regular proportions. On these points, the following books were cited: 3 P. Wms. 158; 21 Vin. Abr. 509, pl. 4; Carth. 16; 1 Eq. Cas. Abr. 293; 3 Ves. 628, 631, 399; 2 Com. Dig. 255, 258; 1 Eq. Cas. Abr. 290 A.

Rawle & Dallas, in support of the claim of the surviving obligee, urged: 1st. That the point of law is clearly in favour of the claim; and to set aside a plain rule of law, there must be strong, controlling, principles of equity, in favour of the opposite party. 2d. That the act of taking joint securities was not a mistake, or error; but a deliberate act for the accommodation of purchasers. 3d. That there was no suggestion of a fraud, a breach of trust, wilful laches, or probable in-

solvency, in reference to the surviving obligee. 4th. That there is, therefore, no foundation for the interposition of the court to appoint a receiver; nor to justify a court of equity in compelling the parties to accede to an arbitrary apportionment of the securities. On these points were cited, Yel. 177; Vent. 34; 3 Dyer, 350; Shep. Touch. 363, 356; 2 Brownl. & G. 207; 1 Eq. Cas. Abr. 290; 2 Pow. 263; Amb. 311; Cooper v. Coates, 1 Dall. 248; Wallace v. Fitzsimmons, 2 Com. Dig. 110, 209, 213, 255; 2 Vern. 556.

THE COURT were decidedly of opinion, that, at law, the surviving obligee was entitled to the possession of the joint securities, that he might recover the amount; and that there was no ground laid, on the present occasion, for the interposition of a court of equity.

NOTE. On this clear intimation of the opinion of the court, Mr. Coates liberally declared, that if the executors of John Penn, the elder, would concur in giving him immediate possession of the securities, he would not charge a commission, for collecting and paying their proportion of the amount; and the proposition was, accordingly, agreed to.

Case No. 10,931.

PENN v. BUTLER.

[Wall. Sr. 4.] [1]

Circuit Court, D. Pennsylvania. May 11, 1801.

EQUITY PRACTICE — WITHDRAWING EXCEPTION TO ANSWER.

Complainant allowed to withdraw his exception to the defendant's answer; and to take at his peril a subpœna to rejoin, returnable forthwith.

On chancery side. Exceptions had been taken to the defendant's answer. But

Mr. Rawle, for complainant, now stated, that for certain reasons it would be satisfactory to both parties, to go to a hearing upon the bill and original answer, and moved for leave to withdraw his exceptions; which being allowed, he filed a replication instanter. He then moved for a subpœna to rejoin, returnable forthwith, which he said was the proper form of that process, merely to put the cause at issue.

Mr. Ingersoll, for defendant, seemed to question whether it was of course and always returnable forthwith, but objected to the proceeding, if it was intended, at all events, to oblige the defendant to a hearing this term.

BY THE COURT. Take the subpœna at your peril. It is a writ of course; and then all objections will be open to the defendant.

[The cause was subsequently heard, when the object of the bills was submitted for the opinion of the court on an agreed statement of facts. The court held that the interposition of a court of equity was unnecessary. Case No. 10,930.]

[1] [Reported by John B. Wallace, Esq.]

PENN (CONN v.). See Cases Nos. 3,104 and 3,105.

Case No. 10,932.

PENN v. GROFF et al.

[1 Wash. C. C. 390.] [1]

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

LAND PATENTS IN PENNSYLVANIA—PROPRIETARY'S TENTHS.

The proprietaries of Pennsylvania, by authorizing their agent, in 1733, to adjust the claims of settlers, on the west side of the Susquehannah, within the boundaries of a body of lands, which was afterwards resurveyed as the manor of Springettsbury, and to allow to those persons common terms for the same; did not, thereby, deprive themselves of the legal right to appropriate all the residue of these lands, as part of the proprietary tenths, and to claim the said residue as part of their said manor.

This case [by the lessee of John Penn and Richard Penn against Groff] was, in every respect, like that of Penn v. Kline [Case No. 10,935], and the argument at the bar, was nearly the same; except that this point was started by the counsel for the defendant (Mr. James Ross of Pittsburgh, and Mr. Hopkins, who were employed by the state of Pennsylvania), and very much pressed; that is, that after settlements were made on the western side of the Susquehannah, on the common terms, the proprietary had no right to lay off his tenths there, so as to enclose a single settler, although the residue should be clear of settlers, and even though no more should be demanded from such settler, than what was paid by others, purchasing upon the common terms. The reason assigned was, that every person, settling there upon common terms, was not only entitled to the privilege of paying no more than the common price, but to retain the advantages he had also expected from a close population, and the certain consequence of increase of value to his land, which might be prevented, by being enclosed within the boundaries of a manor. That the commission from Thomas Penn to Blunston, in 1733, in which he speaks of certain persons, who had settled west of the Susquehannah, under promises from the governor, and of applications of others to settle, and appointing him to adjust any differences among the settlers, and to grant them licenses for their lands, for which warrants should issue on the common terms; amounted to a contract, on the part of the proprietary, to grant out all the lands, west of the Susquehannah, on the common terms;

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

and, consequently, that he had no right afterwards to enclose those settlers within a manor, and compel them to take out warrants to agree; which left the settlers, as to the price of their lands, entirely at the mercy of the proprietary.

THE COURT read to the jury the charge, in the case of Penn v. Kline, and then noticed this new argument, as follows: It seems to be contended, on general principles, that, after settlements were made west of the Susquehannah, the proprietary could not lay off his tenths on that side of the river. Whether the settlers would be benefited, or injured, by being thrown within the limits of a manor, might be a questionable thing; at any rate, the court are of opinion, it is too entirely hypothetical to form any solid reason, why the principle contended for, should have existed. The doctrine is novel, and, we think, very extravagant; because, it goes to cut the proprietary out of his acknowledged right to one-tenth of the lands on the west of the Susquehannah, as well by the prior settlement of one solitary individual in that country, as if thousands had settled there. But, what law is it, that sanctions this doctrine? His right to the whole of the soil, by his charter, is no otherwise diminished by his concessions, than as to nine-tenths; as to which, it is clear of all restraints, but such as he might please afterwards to impose. But, it is said, that his commission to Blunston amounted to a contract, not only with those who had, but with those who might thereafter settle on those lands, that they should hold them on the common terms; therefore he could not appropriate those lands as part of his tenths: whether this is the proper construction of that commission, we avoid deciding now, lest we should prejudice the case of these defendants, should it be brought before us on the other side of the court. But, if the construction be as contended for, still, the consequence does not follow. For, let it be conceded, that the proprietary bound himself by that commission to let the lands on the west side of the river, to be taken up on the common terms, this would not prevent him from appropriating a tenth as private property. Those, to whom he issued warrants, might say, that he could not exact more than the common terms; but, yet, he might exact those terms. The legal right to the soil would be one thing; the terms on which others could acquire it, was quite another. The argument which we have heard, might have done very well in the legislature, which passed the divesting and confirming law, and the reasons, if sound, might properly have been urged to induce that body, either not to confirm the title of the proprietaries to their tenths, or to qualify the law, so as to compel the proprietaries to demand the purchase money, only at the rate on which the general lands had been sold. They might do in the state court, where, I understand, the defendant, though a verdict were found against him, might redeem the land, by paying the purchase money to such amount, as the jury might find. They might do this on the equity side of this court, if the defendant were applying to be secured in his possession, on paying the purchase money. But, the question for you to decide, is not what sum the defendant shall pay for the land; but, who has the legal title to it? Now, if this land was part of a reputed manor, which was duly surveyed and returned, before the 4th of July, 1776, then the legal title is in the plaintiff; and, it is admitted, that the defendant has only a survey, without a patent, and without having paid the consideration. If you find for the plaintiff, then the defendant may compel the plaintiff, on the equity side of this court, to receive what is justly due, that is, £15. 10s. a hundred, if he is entitled to hold on the common terms; or such other sum as may be thought the value of the land, if he be not so entitled. But you have nothing to do with this now.

Upon the whole, then, if you are of opinion, upon the evidence, that the land in dispute, is part of a tract called and known by the name of a proprietary's tenth, or manor, and was actually surveyed in the year 1768; then, it is the opinion of the court, that the manor of Springettsbury, was duly surveyed; and, it is admitted, it was returned into the land office before the 4th of July, 1776: and, therefore, the plaintiff is entitled to recover.

Verdict for plaintiff.

Case No. 10,933.

PENN v. INGHAM.

[3 Wash. C. C. 90.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

EJECTMENT—LIMITATIONS.

1. The order of the proprietaries to survey the land in controversy, was dated in August, 1773; and the survey was made, and returned into the land office, in October, 1774. The defendant claimed title by possession in 1789, and subsequent settlement and improvement. This ejectment was brought in 1805. The objection to the plaintiff's title was, that all the lines of the tract had not been run, and that the plaintiff was barred by the statute of limitations. The defendant, who appears with no title, except possession, and improvement made after the survey, who is a mere intruder on land long before appropriated, is not a person whom the laws of the state favour.

2. In 1774, and long afterwards, there was no positive law requiring the surveyor to make an actual survey, by running and marking all the lines; if, from old lines and natural boundaries,

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

the necessity to run all the lines did not exist, no objection could legally be made to the survey.

[Cited in brief in Billon v. Larimore, 37 Mo. 384.]

3. The act of limitations did not begin to run, until the plaintiff's lessor was ousted, or adversely kept out.

4. The meaning of the act of the legislature of Pennsylvania, of 26th March, 1785, section third, is this:—If, at the time the law passed, a person was disseised, he was bound to bring his ejectment within fifteen years. But if he was afterwards disseised, the act of limitations, which would begin to run, would not be a bar in less than twenty-one years.

The plaintiff [Penn's lessee] proved an order of the proprietors to the surveyor, to lay off 10,000 acres for the proprietors, on both sides of Wyaloosing creek, and east of the Susquehanna, dated August, 1773; for which, a warrant to the surveyor general issued, in September, 1773; and a survey was made, on the 4th, 5th, and 6th of October, 1773, and returned into the land office, on the 31st of October, 1774. The evidence of the return, was an abstract from a book, remaining in the surveyor general's office, containing a list of deputy surveyors' returns, certified to be a true copy, by the surveyor general. The entry is thus: "31st of October, 1774, Charles Stewart to John Lukens. The Hon. Proprietaries, 3,520 acres, 11. 17s. 6d." Proof was given, that this is the usual evidence of a return of survey to the surveyor general, by a charge against the deputy who made the survey; and the act of assembly of 9th April, 1781 (section 3), making the book from which this extract was taken, a book of record. The evidence was objected to, but admitted by the court, to be left to the jury, as evidence of a return. Evidence was given to prove that this manor, called Dundee, has, since the year 1774, been always called and reported "a manor." Strong evidence was given to show, that this manor was regularly surveyed on the ground; positive, as to the line on Susquehanna, and all the lines on the north of Wyaloosing, it being called for, and adjoined by John Shee on the east, and its calling for one Smith, on the line from Susquehanna, crossing the creek and running south. The defence was, that the survey had not been regularly made on the ground, and the lines actually run on the south of the creek; and to prove this, one of the chain carriers, who, at one time went with the deputy surveyor to make this survey, stated, that the surveyor did not then cross to the south of the creek. Two other witnesses stated, that they had, within a few years past, made ex parte surveys of the manor, and could not find marked lines on the south side; but, it appeared that one of them missed one of the corner trees, and the other, who found an old line on the south, did not follow it, because it was not in the precise direction of another line, at the extremity of the number of poles called for, but two poles short of it. The plat made by one of these surveyors, was read without opposition. The other, ran pretty nearly the courses and distances, on the south, which extended about six miles, in all, and hit the beginning tree on the river. The defendant set up no title but possession, in 1789, and a subsequent settlement and improvement. The lessors of the plaintiff, were in this state in 1785 and 1787. This ejectment was brought in 1805; and it was contended, that the plaintiff was barred by the act of limitations, the suit not having been brought within fifteen years after the 26th of March, 1785, when the law passed, under the third section, or within twenty-one years from the year 1774, when the plaintiff's title accrued, they being then in Pennsylvania.

WASHINGTON, Circuit Justice. There is nothing in the objection of the act of limitations. It never began to run, until the plaintiff was ousted, or adversely kept out, which was not prior to 1789; and from that time, the plaintiff was not barred, before twenty-one years had run out. The meaning of the law is this:—If, at the time it passed, a person was disseised, he was bound to bring his action within fifteen years. But, if he was afterwards disseised, the act of limitations, which would then begin to run, would not be a bar, in less that twenty-one years. In this case, therefore, the suit was brought long within the twenty-one years from the time of the ouster, if, in fact, there was one.

WASHINGTON, Circuit Justice (charging jury). The only contested point is, whether the survey of this manor, was duly made within the true meaning of the act of 27th November, 1779. The other requisites of the eighth section are not contested. The plaintiff appears with a regular paper survey, made, and returned, by a proper officer, and he is told by the defendant, who does not pretend to any title, other than that of possession, settlement, and improvement, made sixteen years after the survey of the manor was made, that this survey was not regularly made. If he set up a right in himself, by survey or settlement, when the plaintiff's survey was made, there might be some reason, in a defendant thus circumstanced, making such a defence. But it seems strange, that a mere intruder (for such is the defendant, since his settlement being made upon land, then, and long before appropriated, he is not one of those persons whom the laws of this state favour), should be permitted to protect his possession, by questioning the regularity of the plaintiff's survey. At the time that survey was made, and long afterwards, there was no positive law of this state, which required that the surveyor should make an actual survey, by going on the ground, and running and marking all the lines. There was a propriety, and even a necessity, that

this should be done, in cases where the lines could not otherwise be laid down; and this, the public, and particularly the individual whose warrant was to be located, had a right to expect from this public officer. But, if from former lines, or natural boundaries, known to the surveyor, he was enabled, by running some of the lines, to lay down the other lines of the survey, with accuracy, where was the necessity of going over all the lines on the ground? If the warrant was special, no actual survey was necessary. Even the act of 1785 does not declare a survey void, if not actually made on the ground, although it directs the officer to run and mark the lines on the ground. But, suppose an actual survey necessary to the validity of the title, it is admitted, that the presumption, that this was done, is so strong in favour of the survey returned, as to require clear evidence from the person who would impeach it, in order to repel such presumption; and, we will add, that it should be very clear and direct, where that presumption is fortified by the antiquity of the survey.

The testimony of the chain carrier, in this case, is entirely negative, and proves only that, at the particular time he speaks of, the lines on the south of the manor were not run by the surveyor for whom he carried the chain. But it does not follow, that those lines were not run at the same time by another surveyor, or that they were not afterwards run, or had been previously run; such evidence as this, is too weak, to be set in opposition to the presumption in favour of the survey. As to the evidence of the two surveyors, who could not find the lines on the south of the creek, it ought to have very little, if any, weight in the cause; because the surveys they made were ex parte; and if the plat they produced had been objected to, the court would for this reason have rejected it. If notice had been given to the plaintiff, and accepted, and they or their agent had attended; or if the survey had been made under an order of this court, although the plaintiff had not attended, being duly notified of the time and place; that survey, and the testimony of these men, might have been important. But, even by their own showing, they failed to trace the lines on the south; one of them, by not finding an important corner, and the other, very probably, by not following the old line of marked trees. But what seems conclusive is this, that it would seem impossible for a surveyor, by running the lines on the north of this creek, without having also got the precise course of the creek, to plat by course and distance, the lines on the south, not parallel with those on the north; and to do all this with such accuracy, as for it to turn out, on actual experiment, precisely right, as it appears this did, by the evidence of one of these very surveyors.

Verdict for plaintiff.

Case No. 10,934.

PENN v. KLINE.

[4 Wash. C. C. 64.] [1]

Circuit Court, D. Pennsylvania. April Term, 1821.

HABERE FACIAS POSSESSIONEM—RETURN.

The defendant cannot call upon the marshal to return a writ of habere facias possessionem, although the plaintiff may do so.

Rule obtained by defendant on the marshal to return the writ of habere facias possessionem.

Mr. Peters, for the rule.
Mr. Binney, against it.

THE COURT decided that the defendant could not call upon the marshal to return the writ, although the plaintiff might do so. Runn. 434, and the cases there cited. Rule discharged.

Case No. 10,935.

PENN v. KLYNE.

[1 Wash. C. C. 207; [1] 4 Dall. 402; Pet. C. C. 497.]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

PENNSYLVANIA PROPRIETARIES — OWNERSHIP OF SOIL AND SOVEREIGNTY — RULES AND CONCESSIONS—TENTHS—WARRANT AND SURVEY — CONSIDERATION—EJECTMENT.

1. The proprietaries of Pennsylvania, were the sole owners of the soil of the province, as well as of the sovereignty, in absolute fee simple; and were no otherwise trustees for the people, in respect to the soil, but as they rendered themselves so, by "the rules and concessions," which they made.

2. By these rules and concessions, they reserved to themselves, the right to appropriate one-tenth of the lands in the then province of Pennsylvania, to their own private use; and this appropriation was made by a particular warrant of appropriation, which was followed by a survey.

3. The land thus appropriated, could not be, afterwards, taken up by others, without a special agreement with the proprietaries; which might be on the "common terms," on which lands were then sold; or on other terms, by agreement. The title of any one, acquired previous to such an appropriation, could not be affected by any act of the proprietaries.

4. The divesting law of 1779, confirmed to the proprietaries, all their private lands, of which they were possessed, or entitled to, in 1779; and such as were known by the name of their tenths, or manors; and which had been surveyed, and returned into the land office, prior to July 4, 1776.

5. The manor of Springettsbury, was known as a manor, prior to 1776; and it was duly surveyed, and returned into the land office, before 4th July, 1776.

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

6. If a warrant be issued, to re-survey land, which was not legally surveyed; it will stand as an original warrant of survey.

[Cited in Goodlet v. Smithson, 5 Port. (Ala.) 245.]

7. A warrant and survey, and consideration paid, gives a title to land in Pennsylvania, sufficient to maintain an ejectment.

[Cited in Winter v. Jones, 10 Ga. 190.]

8. But, if the consideration be not paid, the warrant holder has only an equitable title, to compel a conveyance, on payment of the purchase money; and he cannot recover in ejectment, in this court, against the proprietaries, or those who hold under them; nor can he defend himself, in an action of ejectment brought against him by them.

[Cited in Winter v. Jones, 10 Ga. 190.]

This was an ejectment brought by the former proprietaries of Pennsylvania, to recover the tract of land in question, being part of the manor of Springettsbury. Springettsbury Manor was surveyed in the year 1722, under a warrant from the governor of Pennsylvania, for the use of the proprietary. The survey, however, was not returned into the land office, but into that of the council. Being supposed to be lost, another warrant issued in 1762, stating the loss, and directing a re-survey of the manor of Springettsbury; but directs the location of it specially. The survey was made, and duly returned into the land office, in the year 1768. This last survey comprehends a great part of the land surveyed in 1722, and a large body of land not included within that survey. But the land in question lies within both surveys. The defendant showed a complete title to a part of the land in question, and a warrant and survey for the balance, prior to the year 1762; but did not prove payment of the consideration money to the proprietaries. The defendant insisted that the survey of 1722 was void, as the governor had no authority to issue the warrant in 1722. That the survey of 1762 was void, being made as an original survey, though the warrant only authorized a re-survey; consequently, that the land in question was not part of a manor surveyed according to the terms of the divesting law; and was, therefore, confiscated by that law: not being within the exceptions of it. But, that if the plaintiff had a title, still, the defendant's was a better, being founded on a warrant and survey, which is a good legal title, in this state, against all the world; and, as to the consideration money, the jury, after such a lapse of time, might and ought to presume it paid.

[2] [The title of the lessor of the plaintiff to the premises in dispute, was regularly deduced from the charter of Charles II. to William Penn,[3] provided there was a manor called and known by the name of Springettsbury, duly surveyed and returned, according to the terms and meaning of the act of November, 1779.

[The material facts, upon the controverted point, were these: At the time that Sir William Keith was governor of the province, the controversy between the proprietor and Lord Baltimore had arisen; and many persons from Maryland intruded upon the adjacent lands in Pennsylvania. Under the pressure of these intrusions, Sir William, on the 18th of June, 1722, issued a warrant to John French, Francis Worley and James Mitchell, in which he recited, "that the three nations of Indians on the north side of Susquehanna are much disturbed, and the peace of the colony in danger, by attempts to survey land on the south-west bank of the river, over against the Indian towns and settlements, without any right, or pretence of authority, so to do, from the proprietor, unto whom the lands unquestionably belong; that it is agreeable to treaty and usage to reserve a sufficient quantity of land, on the south-west side of the Susquehanna, within the proprietor's land, for accommodating the said Indians: and that the Indians had requested, at a treaty, held on the 15th and 16th instant, that a large tract of land, right against their towns on Susquehanna might be surveyed for the proprietor's use only; because, from his bounty and goodness, they would always be sure to obtain whatsoever was necessary and convenient for them, from time to time." Sir William's warrant then proceeded, that "by virtue of the powers wherewith he is entrusted for the preservation of his majesty's peace in this province, and with a due respect and regard to the proprietor's absolute title, and unquestionable rights, he directs and authorises, the persons named in the warrant, to cross and survey, mark and locate, 70,000 acres in the name and for the use of Springet Penn, Esq., which shall bear the name, and be called the manor, of Springettsbury: beginning upon the south-west bank, over against Conestogoe creek; thence W. S. W. 10 miles; thence N. W. by N. 12 miles; thence E. N. E. to the uppermost corner of a tract called Newberry; thence S. E. by S. along the head line of Newberry, to the southern corner tree of Newberry; thence down the side line of Newberry E. N. E. to the Susquehanna; and thence down the river side to the place of beginning: And to return the warrant to the governor and council of Pennsylvania." The survey being executed on the 19th and 20th of June, was returned to the council, on the 21st of June, 1722, according to the following boundaries: "From a red oak, by a run's side, called Penn's run, marked S. P., W. S. W. 10 miles to a chesnut by a run's side called French's run, marked S. P.; thence N. W. by N. to a black oak marked S. P. 12 miles; thence E. N. E. to Sir Wm. Keith's western corner tree in the woods 8 miles; thence along the S. E. and N. E. lines of Sir Wm. Keith's tract called New-

[2] [From 4 Dall. 402.]

[3] The original charter was given in evidence upon the trial.

berry to the Susquehanna; and thence along the river side to the place of beginning; containing 73,520 acres."

[Sir William Keith having communicated these proceedings to the council, on the 2d of July, 1722, it was thereupon declared, that "so far as they concerned, or touched, with the proprietary affairs, they were not judged to lie before the board;" which acted as a council of state, and not as commissioners of property. Col. French (one of the surveyors who executed the warrant) then undertook to vindicate the conduct of Sir Wm. Keith to the council, stating that "the warrant specified his true reasons; and that it was, under all circumstances, the only effectual measure, for quieting the minds of the Indians, and preserving the public peace." The warrant and survey, however, could not be returned into the land-office at that time; for, it was said, that the land-office continued shut from the death of W. Penn in 1718, until the arrival of T. Penn in 1732: nor does it appear, that they were ever filed in the land-office, at any subsequent period. In order to resist the Maryland intrusions, encouragement was offered by Sir W. Keith, and accepted, by a number of Germans, for forming settlements on the tract, which had been thus surveyed; and in October, 1736, Thomas Penn having purchased the Indian claim to the land, empowered Samuel Blunston to grant licences for 12,000 acres (which was sufficient to satisfy the rights of those who had settled, perhaps, fifty in number) within the tract of land "commonly called the manor of Springettsbury," under the invitations of the governor. But in addition to such settlers, not only the population of the tract in dispute, but of the neighbouring country, rapidly increased. The controversy with Maryland was finally settled in the year 1762, at which time James Hamilton was governor of the province; and, on the 21st of May of that year, he issued a warrant of re-survey, in which it was set forth, "that in pursuance of the primitive regulations, for laying out lands in the province, W. Penn had issued a warrant, dated the 1st of September, 1700, to Edward Pennington, the surveyor general, to survey for the proprietor, 500 acres of every township of 5,000 acres; and, generally, the proprietary one tenth of all lands laid out, and to be laid out; that like warrants had been issued by the successive proprietaries to every succeeding surveyor general; that the tracts surveyed, however, are far short of the due proportions of the proprietary; that, therefore, by order of the then commissioners of property, and in virtue of the general warrant aforesaid to the then surveyor general, there was surveyed for the use of the proprietor on the 19th and 20th of June, 1722, a certain tract of land, situate on the west side of the river Susquehanna, then in the county of Chester, afterwards of Lancaster, and now of York, containing about 70,000 acres, called and now well known by the name of the manor of Springettsbury; that sundry Germans and others afterwards seated themselves by leave of the proprietor on divers parts of the said manor, but confirmation of their titles was delayed on account of the Indian claim; that on the 11th of October, 1736, the Indians released their claim, when (on the 30th of October, 1736) a licence was given to each settler (the whole grant computed at 12,000 acres) promising patents, after surveys should be made; that the survey of the said tract of land is either lost, or mislaid; but that from the well known settlements and improvements made by the said licenced settlers therein, and the many surveys made round the said manor, and other proofs and circumstances, it appears that the said tract is bounded E. by the Susquehanna, W. by a north and south line west of the late dwelling plantation of Christian Elstor, called Oyster, a licenced settler, N. by a line nearly east and west distant about three miles north of the present great roads, leading from Wright's ferry through York-Town by the said Christian Oyster's plantation to Monockassy; S. by a line near east and west distant about three miles south of the great road aforesaid; that divers of the said tracts and settlements within the said manor, have been surveyed and confirmed by patents, and many that have been surveyed remain to be confirmed by patents, for which the settlers have applied; that the proprietor is desirous, that a complete draft, or map, and return of survey of the said manor shall be replaced and remain for their and his use, in the surveyor general's office, and also in the secretary's office; that by special order and direction a survey for the proprietor's use was made by Thomas Cookson, deputy surveyor (in 1741) of a tract on both sides of the Codorus, within the said manor, for the scite of a town, whereon York-Town has since been laid out and built, but no return of that survey being made, the premises were re-surveyed by George Stevenson, deputy surveyor (in December, 1752) and found to contain 436½ acres." After this recital the warrant directed the surveyor general "to re-survey the said tract, for the proprietor's use, as part of his one-tenth, in order that the bounds and lines thereof may be certainly known and ascertained." On the 13th of May, 1768, the governor's secretary, by letter, urged the surveyor general to make a survey and return of the outline of the manor at least; the survey was accordingly executed on the 12th and 30th of June; and the plat was returned into the land-office, and, also, into the secretary's office on the 12th of July, 1768, containing 64,520 acres; a part of the original tract of 70,000 acres having been cut off, under the agreement between Penn and Baltimore, to satisfy the claims of Maryland settlers.

[On the trial of the cause, evidence was given on each side, to maintain the opposite

positions, respecting the existence or non-existence of the manor of Springettsbury, from public instruments; from the sense expressed by the proprietaries, before the Revolution, in their warrants and patents; from the sense expressed by the warrants and patents issued since the Revolution; from the practice of the land-office; and from the current of public opinion.

[The general ground taken by the plaintiff's counsel (E. Tilghman and Lewis & Rawle) was, 1st. That the land mentioned in the declaration is a part of a tract called, or known by the name of a proprietary manor. 2d. That it was a proprietary manor duly surveyed, within the true intent and meaning of the act of the general assembly. And, 3d. That the survey was duly made and returned before the 4th of July, 1776.

[The defendant's counsel (McKean, Atty. Gen., and Hopkins & Dallas) contended, 1st. That Sir Wm. Keith's warrant being issued in 1722, without authority, all proceedings on it were absolutely void; and that neither the warrant, nor survey, had ever been returned into the land-office. 2d. That Governor Hamilton's warrant was issued in 1762, to re-survey a manor, which had never been legally surveyed, and was, in that respect, to be regarded as a superstructure without a foundation. 3d. That the recitals of Governor Hamilton's warrant are not founded in fact; and that considering the survey, in pursuance of it, as an original survey, it was void, as against compact, law, and justice, that the proprietor should assume for a manor, land, that had been previously located and settled by individuals.] [4]

WASHINGTON, Circuit Justice (charging jury). In this cause there are two questions. First; has the lessor of the plaintiff shown a title to the lands in question? If he has, secondly, has the defendant shown a better right?

1. The lessors of the plaintiff, or those under whom they claim, were once the sole owners and proprietaries, not only of the government, but of the soil of Pennsylvania; not in a political, but in their private capacities; not as trustees for the people, as to the whole, or any part of the soil, but in absolute fee simple for their individual uses. This right was no otherwise weakened by concessions or agreements, made by the first William Penn, or his descendants; than to render them trustees for such individuals, as should acquire equitable rights to particular portions of land, under general or special promises, rules, and regulations, which the proprietaries may, from time to time, have entered into, and established. The right of the proprietaries to appropriate to their own use, particular portions of the waste lands within the province; was not derived from, or founded upon any such rules or concessions; but flowed from their original chartered rights, which vested in them a perfect title to the whole of the soil. But, since it was their interest to encourage the population and settlement of the province, they erected an office, and laid down certain rules for its government, and the government of those who might desire to acquire rights to the unappropriated lands within the province; reserving to themselves a right to appropriate one-tenth of the whole to themselves, for their private individual use.

From hence the following principles resulted. That all persons complying with the terms thus held out, acquired a right to the portion of land thus appropriated, not only against other individuals, who might thereafter attempt to appropriate the same tract, but even against the proprietaries themselves; unless they had previously, and by some act of notoriety, evidenced their intention to withdraw such land from the general mass, and to appropriate it to their private use. As a necessary consequence of this principle, whenever such was their intention, it was made known by a warrant of appropriation, and a survey to mark out, and locate the ground thus withdrawn. These steps gave notice to all the world, that no right to the land thus laid off for the proprietaries, could be acquired by other individuals, without a special agreement with the proprietaries or their agents; and this might or might not be upon the common terms, as the proprietaries might choose. But, if before such special appropriation by the proprietaries, an individual had, in compliance with the office rules, obtained a warrant, and made an appropriation of a tract of land, lying within the boundaries of the tract thus laid off for the proprietaries; such prior appropriation of the particular tract, could no otherwise affect the right of the proprietaries, than in relation to such particular tract. Their right to the residue would remain as perfect, as if such interference had not taken place. On this ground, the right of the first proprietary stood at the time of his death, and so continued to exist in his legal representatives, until the year 1779; when a law of the state was made, divesting the proprietaries of all their estate, right, and title, in or to the soil of Pennsylvania, and vesting the same in the commonwealth. But this law excepted certain portions of land, the right to which is confirmed and established in the proprietaries for ever. The lands thus confirmed, are all their private lands, whereof they were possessed, or to which they were entitled in 1779, and such as were known by the name of their tenths and manors, which had been surveyed and returned into the land office before the 4th of July, 1776.

The lessors of the plaintiff, who most undoubtedly are entitled to all the rights of the proprietaries, are now compelled to date their title from this law; and therefore it is necessary for them to show, that the land in ques-

[4] [From 4 Dall. 402.]

tion, is part of a tract called and known by the name of a proprietary tenth or manor, which was duly surveyed, and returned into the land office, on or before the 4th of July, 1776. They are to prove: 1. That the tract of which the land in question is a part, was, in 1779, called and known by the name of a proprietary tenth, or manor.

The words of the law are peculiar. As to their private rights, they must be such, whereof they were, in 1779, possessed, or to which they were entitled. But as to the tenths, or manors, it is sufficient if they were known by that name, and had been surveyed and returned before the 4th of July, 1776. These expressions respecting the manors, were rendered necessary, to avoid giving to the word manor a technical meaning. For there were no manors in Pennsylvania, in a legal acceptation of that word; but there were many tracts of land, appropriated to the separate use of the proprietaries, to which this name had been given.

The first inquiry, therefore, under this head, is, was the land in question, part of a tract called and known as a manor, on the 4th of July, 1776, or in 1779. To prove this fact, the licenses granted by Thomas Penn, to about fifty settlers in different parts of the first, as well as the second, survey, in all of which this is called the manor of Springettsbury; are strongly relied upon to show, that even at that early period, it had acquired this name. The tenor of the warrants, afterwards granted for lands within this manor, varying from the terms of the common warrants; and this variance proved by many witnesses, as marking this for manor land, is also relied upon. In addition to these, the following circumstances are strongly insisted upon by the plaintiff's counsel.

The testimony of witnesses, to show that the west line of this manor, was always reputed to go considerably beyond York to Oyster's. The practice of the surveyors, and other public officers, whenever warrants were issued to survey lands in this manor. But even if this tract of land had never acquired the name of a manor, prior to 1768, the survey made of it in that year, as of a manor, is conclusive. From that period, it acquired by matter of record the name of a manor; and so it appears, by the evidence in the cause, it was called and known, if that evidence be believed.

Secondly. Was it duly surveyed, and returned into the land office, before 4th July, 1776? That it was surveyed in 1768, is admitted; but it is contended, that it was not duly surveyed. The argument of the defendant's counsel, on this point, is, that the survey was not duly made; because the land was surveyed in 1722. That this survey was void, because made without authority; the governor having no authority to issue the warrant. That it was not executed by the surveyor general, and was returned into the council of state's office, instead of the land office. Presuming these points to be established, it is then deduced from them, that the illegality of the survey of 1722, vitiates that of 1768; the former being considered as the foundation, and the latter as the superstructure. It is argued, that the survey of 1768, is executed under a warrant of re-survey in 1762; and consequently, that the repetition of an act, which has no validity, cannot make it valid. It is further contended, that the recital in the last warrant, of the loss of the first survey, is a mere pretence, since it was afterwards found; a fraud to enable the proprietaries to change the location, for the purpose of getting good, instead of bad lands.

Now, I confess, that I do not understand this kind of logic. [It is far too refined for the sober judgment of me, who have to decide.] [5] If the invalidity of the first survey, can have any effect upon the second, I should suppose it would establish it beyond all doubt; because if the first survey were good, and if the warrant of 1762, were merely an order to retrace the lines of that survey, the counsel might, with some plausibility at least, have argued, that the surveyor was bound to pursue the lines of that survey; and this might give colour to the observations, founded on the mistake of the public officers, as to the proper lines of the survey. But, if the first survey be unauthorized, and utterly void, then the second could not, in the nature of things, be a re-survey; whatever might be the language of the warrant on which it was founded. There is no magic in the word re-survey. If in fact there never was a former survey, there could not be a re-survey; and consequently, the survey of 1768 was an original survey, founded on a special warrant, marking out the lines and boundaries, by which the surveyor was bound to go; and such is the fact in this case. As to the imputation of fraud, I see nothing to support it. The proprietaries had no motive to practise it, since the lands included in the second survey, which were not within the first, being at that time unappropriated, (some few parcels excepted,) they had a perfect right to appropriate them without the aid of a fraud. Although the survey of 1722 is referred to, in the warrant of 1762, yet, the lines of the manor to be surveyed, under the second warrant, are specially described; and consequently, it is not a re-survey in fact, as to any lines not marked in the first survey. To the lines thus described, the surveyor was confined; and had he departed from them, the surveys, unless ratified by acceptance, would have been void, as against the proprietary who might have directed it to be made, conformable with the warrant. It is not denied, that the survey of 1768, is in conformity with the warrant. It was accepted as a valid survey, and I cannot see upon what ground the defendant, or any other person, can now say

[5] [From 4 Dall. 402.]

that it was void. Had not the proprietary a right to appropriate, to his private use, the land included within the survey of 1768, in part of the tenths which had always been reserved? And if the warrant and survey made this appropriation, what does it signify whether there was a prior survey or not, or whether it was good or bad? I admit, that if, previously to the warrant of 1762, third persons had acquired a right to parcels of this land, or had done so afterwards, and before the survey of 1768, but without notice of the warrant; the proprietary would have been bound to make them titles, upon their complying with the common terms; but this could not impeach the title of the proprietaries, to the residue of the land, comprehended within the lines of the survey.

Upon the whole, then, the court is of opinion, that this manor was duly surveyed; and it is admitted, that the survey was returned into the land office, before 4th July, 1776.

The next question is, has the defendant a better legal title, than that of the lessors of the plaintiff? He claims by a warrant dated in 1747, the title to which is regularly deduced to him, for ninety-five acres, part of the land in dispute. He has no patent; but yet, by the common law of this state, a warrant and survey, if the consideration be paid, gives a legal title against the proprietaries; as much so as if a patent had been granted. If the consideration be not paid; then the legal title is not out of the proprietaries; but still, the warrant holder has an equitable title, which he may render a legal one, by paying what is due to the proprietaries. No proof is given of payment by the defendant, or any one under whom he claims, but the jury are called upon to presume it from length of time.

In a case of this sort, there is no room for presumption. The very circumstance of the defendant appearing in court, without a patent, or without showing or pretending that a patent ever was granted, destroys the presumption, which length of time might otherwise have created. For, if he had paid the consideration money, he would, that moment, have been entitled to a patent. The one was a necessary consequence of the other. A man might, for a long time, forbear to call for this consummation of his title, from his inability to pay the consideration money; but that he should pay it, and not go on to perfect his title, is altogether improbable, and certainly not to be presumed. But, if the jury could presume any thing from length of time, yet that presumption may be repelled, and in this case there is strong evidence to repel it. The original grantee, in his deed to Shultz, in 1771, states, that it had not been paid; and such is the statement in the deed from Shultz's executor, in 1794, to Stamp, under whom the defendant claims. The defendant therefore has not a legal title, so as to enable him to succeed in this suit. But he has an equitable title, and may compel the lessors of the plaintiff to make him a conveyance, upon his paying, or tendering, what is due to the plaintiff's lessors, with interest, costs, &c. And if the plaintiff's lessors should, on such payment or tender, refuse to make a conveyance, this court, sitting in equity, would compel them, at the expense of costs in that suit.

I understand, that in the courts of this state, the jury, in a cause of this kind, may make a special or conditional finding, in consequence of there being no courts of equity in Pennsylvania. But the reason not applying to this court, the verdict must be general.

Verdict for plaintiff.

[For a similar action see Penn v. Groff, Case No. 10,932.]

Case No. 10,936.

PENN v. KLYNE et al.

[Pet. C. C. 446.] [1]

Circuit Court, D. Pennsylvania. April Term, 1817.

SCIRE FACIAS—PLEA—EJECTMENT—DECEASE OF LESSOR OF PLAINTIFF.

1. To a scire facias to revive a judgment in ejectment for the term and damages, the defendant cannot plead a conveyance of the premises by the lessor of the plaintiff, subsequent to the judgment.

2. Quere, whether a defendant in ejectment can take advantage of the fiction on which the action is founded, in order to defeat the judgment as to the land, to the benefit of which judgment a third person is entitled.

3. After a conveyance to a third person of the land which has been recovered in an ejectment, a scire facias and a habere facias must issue in the name of the plaintiff in the original judgment.

4. Where the lessor of the plaintiff dies after judgment in ejectment, the execution may issue in the name of the lessee without the necessity of a scire facias.

5. In every case where a scire facias issues to revive a judgment, it is a continuation of the original suit, and may issue in the name of the original plaintiff or of those claiming as his legal representative; although such representative should be a citizen of the same state with the defendant.

[Cited in Rice v. Moore (Kan. Sup.) 30 Pac. 10.]

This was a scire facias to revive a judgment in ejectment for the term, and for damages, after the expiration of twelve months. The plea was, that before and at the time of issuing the scire facias, John and Richard Penn, the lessors of the plaintiff, had transferred and conveyed all their right and title in and to the premises in the declaration mentioned, to J. R. Coates, a citizen of Pennsylvania, and that the said John and Richard Penn have no cause for suing out the scire facias; with an averment of the citizenship of Coates and the defendants: and the plea concludes by praying judgment, if the plaintiff shall further have and main-

[1] [Reported by Richard Peters, Jr., Esq.]

tain his said writ of scire facias, and have his execution against the defendants. To this plea there was a general demurrer.

Binney & Rawle, for plaintiff, contended: First, that the plea is bad as to the damages, though it should be sufficient as to the term, because if the transfer of the land bars the right of the Penns to recover that, or to oust the jurisdiction of the court as to that part of the recovery, it could not affect their right to the damages; and therefore the plea being no bar to the whole is not good as to part. Runn. 431. Second. The plea is no bar, nor does the matter contained in it oust the jurisdiction as to the land. The nominal plaintiff will be considered as the real plaintiff in the scire facias, the term not having expired. To prove this it was contended, that if the lessor die subsequent to the judgment, that will not defeat the execution. 4 Burrows, 1970. If he die before verdict, that will not abate the suit. Hob. 5. An action for mesne profits may be sustained in the name of the nominal plaintiff. [Duffield v. Stille] 2 Dall. [2 U. S.] 156. But the transfer stated in the plea is of the subject of the judgment, and not of the judgment itself; so that the plaintiff on record in the original suit must sue out the scire facias. The alienee, not being plaintiff on the record or the legal assignee of the judgment, cannot sue it out. The former is a mere trustee for the latter. If the plaintiff, being a citizen of another state, be a trustee for a citizen of the state where the suit is brought and where the defendant resides, the court has jurisdiction, unless it appear that the transfer had been fraudulently made to give jurisdiction; in which case, the circuit courts have, in some instances, struck the cause from the docket. Maxfield v. Levy [Case No. 8,321]; [Chappedelain v. Dechenaux] 4 Cranch [8 U. S.] 308. This scire facias is not a new suit, but a mere continuance of the original action, and of course, if the court had jurisdiction in the latter it has in the former. 6 Term R. 365; Id. 282; 1 Term R. 388; 6 Bac. Abr. 102.

Dallas & Ingersoll, for defendants, contended: First, that the scire facias is an original suit, so far at least as to admit of this plea. The general rule is, that plea of any matter may be put in to a scire facias except such as might have been pleaded to the original action. The scire facias is an action. Co. Litt. 290; Skin. 682; 10 Vin. Abr. 550; Comb. 455; 1 Term R. 268; 2 Wils. 251; 2 W. Bl. 1227; 6 Johns. 108. Second, a plea to the jurisdiction is allowed at any stage of the cause. 1 Bin. 142; [Skillern v. May] 6 Cranch [10 U. S.] 267; 1 Mass. 359; 1 Ves. Sr. 471; [Strawbridge v. Curtiss] 3 Cranch [7 U. S.] 267. As to the first point made on the other side, it was answered, that if the plea shows that the plaintiff cannot maintain his suit for the whole, it is sufficient to defeat him though his right to a part is unquestionable. As to the plaintiff in the original judgment being a trustee for his vendee, this cannot be where the legal estate in the land is conveyed, and such a conveyance may be made by the common law of this state, though the grantor be out of possession.

WASHINGTON, Circuit Justice. The nominal parties to the original suit were the lessee of John and Richard Penn, and the tenant in possession. The judgment was, that the lessee should recover his term, then unexpired, and his damages, amounting to five hundred dollars. Considering those as parties who appear to be so by the record, there could be no doubt that the conveyance by the lessors of the plaintiff could pass only the reversion, and consequently could not affect the interest of the lessee. It is true, that the lessee, and the casual ejector, are merely the actores fabulæ, and that by a fiction, the lessor is considered as being in fact the only plaintiff in the suit. But it may well be doubted, whether the fiction ought to be set up for the mere purpose of protecting the defendant who asserts no meritorious ground of defence, but merely seeks to defeat the judgment as to the land, to the benefit of which a third person is, to say the least, equitably entitled. I say to defeat the judgment, because the scire facias, as well as the habere facias possessionem, must issue in the name of the plaintiff in the original judgment. We know that the nominal plaintiff is sometimes considered to be the real plaintiff, as in the case where the lessor of the plaintiff dies after judgment, the execution may issue in the name of the lessee, without the necessity of a scire facias. To use the words of Lord Mansfield, in the case of Doe, on the demise of Beyer, v. Roe, 4 Burrows, 1970: "This is an ejectment brought by John Doe, and the defendant does not show that John Doe, the plaintiff in this action, is dead." As to the objection on the ground of jurisdiction, there is nothing in it. It is true that in some cases a scire facias is an original action, but, in every case where it issues to revive a judgment, it is a continuation of the original suit, and may issue in the name of the original plaintiff or those claiming as his legal representatives, although such representatives should be citizens of the same state with the defendant. But upon another ground, the court is clearly of opinion, that judgment ought to be given in favour of the plaintiff, upon the present plea. Though the plea, which professes to be an answer to the whole writ, should be considered as giving a sufficient answer to the writ, as to the term in the land, it is certainly no answer to the damages recovered by the judgment; and consequently it assigns no sufficient reason why execution should not issue according to the judgment which stands unimpeached. Judgment for plaintiff.

Case No. 10,937.

PENN v. KLYNE.

[The case reported under above title in Pet. C. C. 497, is the same as Case No. 10,935.]

PENN v. PENN. See Case No. 10,930.

PENN (UNITED STATES v.). See Case No. 16,025.

PENNIMAN (DE BRIMONT v.). See Case No. 3,715.

PENNIMAN (WESTON v.). See Case No. 17,455.

PENNINGTON (COXE v.). See Case No. 3,311.

Case No. 10,938.

PENNINGTON v. LOWENSTEIN et al.

[1 N. B. R. 570 (Quarto, 157).] [1]

District Court, N. D. Mississippi. 1868.

BANKRUPTCY—ATTACHMENT BY STATE COURT—DEMURRER—LEAVE TO ANSWER.

1. An attachment of a bankrupt's goods, under process in a state court, within four months before bankruptcy, is defeated by the provisions of section 14 of the bankrupt act [of 1867 (14 Stat. 522)].

[Cited in Jones v. Leach, Case No. 7,475.]

2. Demurrer overruled, and the defendant allowed fifteen days in which to answer.

[This was a suit by G. W. Pennington, assignee in bankruptcy of C. D. Bryan, against J. H. Lowenstein and others. The case is now before the court on the defendants' demurrer.]

HILL, District Judge. The questions presented to the court arise upon the defendants' demurrer to complainant's bill. The bill, in substance, states that on the 24th day of October, 1867, said Lowenstein & Brothers sued out of the circuit court of Monroe county an attachment against said Bryan, which was, by the sheriff of said county, on the next day, levied upon a stock of goods, as the property of said Bryan, and which goods were afterwards sold by the sheriff, who now holds the proceeds; that said attachment suit remains undetermined; that, on the 8th day of November, 1867, said Bryan filed in this court his petition praying to be declared a bankrupt, and was, on the 6th day of December thereafter, so declared; that, on the 3d day of February, 1868, complainant was duly appointed assignee of said estate, and received an assignment thereof. The prayer of the bill is, that the sheriff be enjoined from paying said proceeds to the plaintiffs in said attachment, and that he be required to pay the same over to complainant, to be applied as this court may direct. The defendants, by their demurrer, admit the facts as stated to be true; but insist that, by the levy of the attachment the title to the goods became vested in the sheriff, for the payment of such judgment as might thereafter be obtained in said suit; that the state court, having obtained jurisdiction thereof, cannot be ousted or interfered with by this court. And whether this is so or not, is the only question now to be determined.

The 14th section of the bankrupt act of 1867, provides "that the assignment therein provided shall relate back to the commencement of proceedings in bankruptcy, and by operation of law shall vest in the assignee all the title and interest which the bankrupt then had to his estate, real and personal, although the same may then have been attached by mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next before the commencement of such proceedings." If this provision of the act embraces the attachment and proceedings in this cause, it is clear that the demurrer should be overruled, and the prayer of the complainant granted. It is insisted by complainant's counsel that it is so embraced, and by defendant's counsel that it is not. The determination of this question depends upon the construction which should be given to the term mesne process, and this depends upon the intention of congress in the passage of the law. The object of the law was, that, when an act of bankruptcy was committed, no matter by what means, all the creditors of the bankrupt should share equally, according to their respective rights, in the bankrupt's estate. To give the term its restricted meaning, would most clearly defeat that object. Such being the case, the next emergency is, has the term a more general application, so that it can be applied to secure the object of the law? Upon this point there is no difficulty. Mr. Blackstone, in his Commentaries, at page 280, says "that mesne process is sometimes put in contradistinction to final process, or process of execution, and then signifies all such process as intervenes between the commencement and end of the suit." The term is used in the same sense repeatedly in our own Code, and it is in that sense that the term is most usually used in the courts. Were there any doubts about this being the proper construction to be given the term, as applied to this case, it would be greatly aided by reference to the present English bankrupt law, and from which our present act was mainly taken. By that law it is provided "that to preserve the lien of the attachment the levy and sale must be made before the act of bankruptcy, and that the knowledge by the party for whose benefit it was made, of a former act of bankruptcy, renders the proceeding invalid." With but one exception every cause for attachment, under the laws of this state, is by this act declared to be an act of bankruptcy, and some one of which must have been the cause alleged for the issuance of this attachment. The act of 1841 [5 Stat. 440], contained no

[1] [Reprinted by permission.]

provision similar to that in the 14th section of the bankrupt act of 1867; so that the authorities cited by counsel have no application to this case. The power of this court to restrain litigants in the state courts when it is necessary to give effect to the bankrupt law, and its jurisdiction of the bankrupt, his estate, and all persons interested therein, is too well settled upon principle and authority to be successfully controverted.

After a careful examination of the question, I am constrained to say, in the language of Mr. James, in his valuable treatise on bankruptcy, at page 45, that "the effect of the 14th section of the act of 1867, is absolutely to defeat all attachments issued against the property of the bankrupt, made within four months before the bankruptcy." Such being the case, the demurrer will be overruled, and the defendants allowed fifteen days in which to answer.

Case No. 10,939.

PENNINGTON v. SALE et al.

[1 N. B. R. 572 (Quarto, 157); 2 Am. Law Rev. 776.] [1]

District Court, N. D. Mississippi. 1868.

BANKRUPTCY — SHERIFF'S LEVY AFTER FILING OF PETITION.

A levy was made by the sheriff on certain goods of bankrupt after the date of filing his petition in bankruptcy: *Held*, that the title being vested in him, the assignee must make sale and deposit proceeds of such goods subject to whatever claims may be determined by the court to be upon them.

[Cited in Re Dey, Case No. 3,870; Re Carow, Id. 2,426; Re Mallory, Id. 8,991; Re Brinkman, Id. 1,884; Re Hufnagel, Id. 6,837; Thames v. Miller, Id. 13,860.]

[Cited in Stuart v. Hines, 33 Iowa, 60.]

The questions now presented arise upon defendant's demurrer to complainant's bill. The bill in substance states that on the 27th day of May, 1867, said Sale & Phelan obtained, in the circuit court of Monroe county, judgment against said [James F.] Stewart for the sum of $730.77, upon which execution was issued and returned, nulla bona; that on the 11th October thereafter, an alias executed thereon was issued, and on the 11th of January, 1868, levied on a lot of seed cotton, and on the 14th on two mules, and on the 24th on four bales of other cotton, as the property of Stewart, and that the cotton first levied on and the mules were sold by the sheriff, on the 25th January, 1868, and the proceeds first applied to the payment of an elder judgment, and the remainder, $227.97, applied to said execution. That the last of the cotton levied upon is still in the hands of the sheriff, who has advertised the same for sale. That on the 14th of October, 1867, said Stewart filed in this court his petition praying to be declared a bankrupt, and was, on the 6th day of December, so declared. Complainant [G. W. Pennington] files with his bill, as an exhibit, a copy of the assignment of the register of the estate of said bankrupt, dated the 3d day of February, 1868. The bill prays that the sheriff be enjoined from the sale of the last mentioned cotton, and that it be turned over to complainant to be sold, and the proceeds applied as this court may direct. The defendants, by their demurrer admit these statements as true, but insist that said judgment was a lien on the cotton; that the title never vested in the complainant; but the state court, by the judgment, obtained complete jurisdiction over the cotton and the subject matter, which cannot be ousted or interfered with by this court.

Two questions are presented: First. Is the judgment stated a lien upon the cotton mentioned? Second. If such a lien, by what process and in what form is it to be enforced? The answer to the first question depends upon whether or not the judgment was enrolled according to the provisions of Act 260, c. 61, Revised Code of this state. Act 261 of the same chapter provides "that all judgments and decrees so enrolled shall be and remain a lien upon the estate real and personal, of the defendant, situated in the county where the enrollment is made, and not otherwise." The bill does not state whether the judgment is, or is not, enrolled.

The answer to the second question will be found in section 1 of the bankrupt act of 1867 [14 Stat. 517], which, among other powers conferred upon the district courts, makes the following provision: "And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor, or creditors, who shall claim any debt or demand under bankruptcy; to the collection of all assets of the bankrupt, to the ascertainment and liquidation of the liens, and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors." In all cases of liens where the parties holding by themselves, or trustees, are in a condition to enforce the lien without the aid of the courts, or their officers, this court will interfere only upon a showing that the interest of the general creditors requires it. The filing of the petition by the bankrupt was the act of bankruptcy; the assignment related back to the date of filing; from that time the estate of the bankrupt was transferred to the jurisdiction of this court, subject to whatever incumbrances might then have attached to it. Had the levy then been made, both the possession and title for the purpose of satisfying the judgment would have been vested in the sheriff, who, as trustee, could have gone on and made the sale as in case of the death

[1] [Reprinted from 1 N. B. R. 572 (Quarto, 157) by permission. 2 Am. Law Rev. 776, contains only a partial report.]

of a defendant. It may well be questioned whether the bankruptcy of the defendant does not work his civil death and produce the same results as to his estate; if so, the right to levy after the act of bankruptcy, would cease; but the levy not having been made at the date of the bankruptcy, the title by operation of law is vested in the assignee, who must make the sale, and deposit the proceeds, subject to whatever claims may be upon it, as hereafter determined by this court. The object and purpose of the bankrupt act of 1867 being to confer upon the district courts, as courts in bankruptcy, full and complete jurisdiction of the bankrupt and his estate, with all parties interested therein; such was repeatedly declared by the courts, federal and state, to have been the case with regard to the bankrupt act of 1841 [5 Stat. 440]. The powers granted under the present act are in many particulars more extensive than under the former one. Whilst this court does not claim the power to restrain the state courts, it does claim the power to restrain parties litigant in the other courts, when it becomes necessary to give force and effect to the jurisdiction and powers conferred upon it under this law, and this position is sustained by numerous decisions of both the national and state courts, under the former law.

For the reasons stated, the demurrer will be overruled, and the defendants allowed fifteen days in which to answer.

Case No. 10,939a.

PENNINGTON v. THORNTON.

PENNINGTON v. STICKNEY.

[1 Cranch, C. C. 101.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

SCIRE FACIAS—COSTS.

Where two become bail jointly and severally, and two writs of scire facias are issued, and one of the bail surrenders the principal, he must pay the costs upon both writs of scire facias.

Scire facias. The bail offered to surrender the principal.

Thornton and Stickney jointly and severally recognized as bail for Blodget. The writ against Thornton was returned "scire feci." That against Stickney, "nihil."

THE COURT refused to receive the surrender without payment of the costs on both writs of scire facias, it being stated by Mr. Mason and Mr. Gantt that such was the practice in Maryland.

THE COURT, however, doubted the propriety of the practice, where several writs of scire facias were issued.

KILTY, Chief Judge, absent.

PENNINGTON (UNITED STATES v.). See Case No. 16,026.

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

Case No. 10,940.

PENNOCK v. BEALE.

[13 O. G. 125.]

Circuit Court, E. D. Pennsylvania. Jan. 17, 1878.

PATENTS—VALIDITY.

Letters patent No. 153,110, granted to Joseph L. Pennock, July 14, 1874, for "improvement in puddling-furnaces," declared valid.

[This was a bill in equity by Joseph L. Pennock against Horace A. Beale, for an injunction to restrain the infringement of a patent, and for an account.]

Charles Howson, for complainant.

N. Sharpless, for defendant.

McKENNAN, Circuit Judge. And now, to wit, this 17th day of January, 1878, this cause having been brought to final hearing upon the pleadings and proofs, and counsel for the parties respectively having been heard thereupon, and the same having been duly considered by this court, it is found, and hereby ordered, adjudged, and decreed, that the letters patent numbered 153,110, granted to Joseph L. Pennock, July 14, 1874, for improvement in puddling-furnaces, and set forth in the bill of complaint filed, are good and valid, and that the title thereto is duly vested in the complainant. And it is further ordered, adjudged, and decreed that the defendant has disturbed, violated, and infringed the exclusive right of the complainant under the said letters patent as in said bill set forth. And it is further ordered, adjudged, and decreed that the complainant do recover of the defendant the profits, gains, savings, and advantages made by the said defendant in consequence of the said infringement and violation of the exclusive rights of the complainant under the said letters patent, together with the damages the complainant has sustained thereby, and the costs, charges, and disbursements in this suit to be taxed. And it is further ordered, adjudged, and decreed that it be referred to John Cadwalader, Jr., Esq., as master, to ascertain and take, and state and report to the court, an account of the gains, profits, savings, and advantages which the said defendant has received, or which have arisen or accrued to him from infringing the said exclusive rights of the said complainant under the said letters patent, as well as of the damages the complainant has sustained thereby. And it is further ordered, adjudged, and decreed that the complainant in such accounting have the right to cause an examination of said defendant, ore tenus or otherwise, and also the production of the books, vouchers, and documents of defendant, and that the said defendant attend for such purpose before said John Cadwalader, Jr., Esq., master, from time to time, as said master shall direct. And it is also further ordered, adjudged, and decreed that a per-

petual injunction be issued in this suit against the said defendant, according to the prayer of the bill.

PENNOCK (COE v.). See Case No. 2,942.

Case No. 10,941.

PENNOCK et al. v. DIALOGUE.

[4 Wash. C. C. 538; 1 Robb, Pat. Cas. 466; Merw. Pat. Inv. 412.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1825.[2]

PATENTS — PROOF OF INVENTION—COMBINATION—SIMILARITY IN PRINCIPLE—ABANDONMENT—EVIDENCE.

1. In an action for a violation of a patent right, proof that the plaintiffs at a particular time made a specimen of the thing patented, which had not been before seen or heard of by the witness, is prima facie evidence that it was invented by the patentee.

2. It is unimportant whether the experiment or use of the thing invented and patented was first made by the inventor, or by any other person.

3. If old materials and old principles be used in a state of combination to produce a new result, the inventor may obtain a valid patent for such result.

[Cited in Whitney v. Emmett, Case No. 17,585.]

[Cited in brief in Rheem v. Holliday, 16 Pa. St. 350.]

4. It is for the jury to say whether the thing patented, and any other thing resembling it be the same in principle. If they be, still if that other asserted by the defendant to have preceded the plaintiff's alleged discovery be the same in principle, it will not avoid the plaintiff's patent, unless it is proved that it was in use.

5. Suggestions made by the mechanic to construct the machine, as to its form or proportions, are not sufficient to invalidate the patent; although they may be incorporated in the specification.

[Cited in Watson v. Bladen, Case No. 17,277; Whitney v. Emmett, Id. 17,585.]

6. If an inventor before he obtains a patent, makes his discovery public, and permits the free use of it by others without objection, or assertion of claim to the invention, of which the public might take notice, he abandons his right to the discovery; and a patent can give him no title to the monopoly; and it makes no difference, that the article so made and publicly used, was made by a particular person, by the permission of the inventor.

[Cited in Whitney v. Emmett, Case No. 17,585.]

7. Minutes of a hose company of which the plaintiffs were members, and at whose instigation and expense the hose, the subject of the patent, was asserted to have been invented, may be read on the part of the defendant, to prove the plaintiffs were not the inventors.

8. But other entries made at other times in the same books, cannot be read to prove that the company acknowledge the plaintiffs to be the inventors, (the defendant not having been a member of the company); or to show that the company were not the inventors; the defendant's counsel disavowing any intention to impute the invention to the company.

9. A report made to the hose company, in which the rivet hose, the invention patented, is described, cannot be read in evidence to bring the case within the sixth section of the patent law, as that is not a public work.

10. The minutes of other hose companies, of which plaintiffs were not members, cannot be read in evidence by the defendant, for any purpose.

This was an action on the case for the infringement of a patent right. The declaration states that the plaintiffs [Abraham L. Pennock and James Sellers] were the true and original inventors and discoverers of a certain new and useful improvement, in the art of making leather tubes or hose for conveying air, water, and other fluids; which improvement had not been known or used before the said invention by the plaintiffs. It then proceeds to state the steps taken to obtain a patent, as prescribed in the first section of the patent law [1 Stat. 318], and the granting of the patent on the 6th of July, 1818. Upon the plea of not guilty, the defendant [Adam Dialogue] gave a written notice to the plaintiffs, that he should, at the trial, offer evidence tending to prove that the plaintiffs were not the original inventors of the thing patented, but that the same was known and in use before the supposed discovery of the plaintiffs.

The specification sets forth that "the ordinary method of constructing leather tubes or hose, is by securing the two edges together by sewing or stitching. The improvement consists in lapping the edges of the leather so as to form a double thickness in that part, and then connecting them with metallic rivets and burs. The leather near both edges being perforated, rivets, having heads on one end, are inserted in the holes so formed along one edge first; the other edge of the leather is then lapped over and driven on the projected rivets. The rivets then being made through both edges, or thicknesses of the leather, burs of metal about the size and shape of the heads of the rivets, are then forcibly driven on their projecting ends, and secured there by hammering or compressing the ends so as to form heads. The rivets are inserted near each other in one or more rows as occasion may require, and the burs are so forcibly driven, as to bring the parts of the leather into complete and close contact, forming a durable, flexible, and water tight seam; the pressure of the fluid upon the inner lap or edge of the leather, increasing the tightness of the seam. In order to connect several pieces of leather, so as to form a tube or hose of any extent, the ends are cut in an oblique form, and are secured together by rivets and burs in the manner above described."

The defendant's counsel admitted that the defendant had made and used the rivet hose, as described in the specification, since the

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq. Merw. Pat. Inv. 412, contains only a partial report.]

[2] [Affirmed in 2 Pet. (27 U. S.) 1.]

date of the plaintiffs' patent, and that the invention was useful. They then gave evidence, tending to prove that the first specimen of hose was procured by the zeal and public spirit, and at the expense of the Philadelphia Hose Company in the year 1811; and that the plaintiffs were not only members of that company, but were on the experimental committees who were charged with the duty of inquiring into and procuring some improved mode of making them. That in that year, a certain quantity of hose was made by order of the committee for that company, by a certain Samuel Jenkins; who stated upon his examination, that he was taught by the plaintiffs in 1811, to make hose, and that by their permission, he made about thirteen thousand feet of hose for different hose companies, from the year 1811 to the time when the patent was granted. They also gave evidence that more than thirty years ago, one Andrews used harness, the parts of which were fastened by metallic rivets and burs. That in the year 1811, an Indian scabbard, used for containing a large knife, was brought to Philadelphia, and was shown to the president of the Philadelphia Hose Company. It was made of sole leather, the edges of which were united and fastened by lead rivets. That before the year 1811, Mr. Bedford made a specimen of hose, in all respects resembling that claimed by the plaintiffs, except that the edges, which were lapped, were fastened by nails with the heads on the inner side, and clinched on the other. This specimen was placed in a domestic warehouse for public examination. Evidence was also given, by John Anderson, that in the year 1799, he, being one of the ship's company of the ship Samuel Smith, made six or seven pieces of hose with scupper leather, and fastened with rivets and burs, which he applied to the scuppers of that ship to convey off the water from the deck; and that in the year 1802, he made another piece of hose in like manner, which he applied to a small fire engine for washing windows, as a substitute for a goose neck, and which was used frequently for the purpose for which it was designed, by the person for whom it was made, and by others.

Upon this evidence the defendant's counsel contended: (1) That the plaintiffs were not the true and original inventors of the improvement in question, but that the same was known and in use before their alleged discovery in 1811; the harness, the scabbard, and the hose constructed by Bedford, and by Anderson, being in principle the same as the patented improvement. That independent of this evidence, the specimen made by one of the plaintiffs was not the effect of the suggestions of either of the plaintiffs, but was brought into existence by the exertions, and at the expense, of the Philadelphia Hose Company; nor was the merit of the invention at any time asserted by the plaintiffs, or either of them. (2) That the patent covers two rows of rivets, whereas it is proved that another person suggested to the plaintiffs the two rows. (3) That the use of the improvement by the plaintiffs and others, prior to the application for the patent, avoids it under the first section of the patent law; which authorizes the granting of a patent to the true and original inventor of a machine, manufacture, &c. not known or used prior to his application; and that these expressions are not controlled by those to be found in the sixth section. 3 Inst. 183; 5 Bac. Abr. 591, 592; Gods. Pat. 60, 61, 64; Wood v. Zimmer, 1 Holt, N. P. 58. Thomas v. Knight [unreported], decided by Judge Van Nesse, Law Journal, published in Connecticut. (4) That the use by the public of this invention, from 1811 to the time when this patent was applied for, without opposition by the plaintiffs, amounted to an abandonment of their right, and a gift of their discovery to the public. Whittemore v. Cutter [Case No. 17,601]; Evans v. Eaton, 1 Pet. [26 U. S.] 348. Also, Pettibone v. Derringer [Case No. 11,043], in this court. These points were all controverted with great ability by the plaintiffs' counsel; who, upon the last point, insisted, that an abandonment was not to be presumed in this case, inasmuch as it appeared that every foot of hose which had been made prior to the date of the patent, was made by Jenkins, under the permission of the plaintiffs, who thereby retained their control over their discovery.

Chauncey & Binney, for plaintiffs.

J. R. Ingersoll and John Sergeant, for defendant.

WASHINGTON, Circuit Justice. The patent being prima facie evidence, and no more, of the right of the patentee to the subject patented; the one in question is objected to upon the following grounds:

1. That the plaintiffs are not the true and original discoverers of the improvement mentioned in the patent, but that the same was in use prior to their supposed discovery. Evidence having been given that the improvement was in use prior to the date of the patent, the plaintiffs insist that they made the discovery some time in the year 1811, and to establish that fact, they have given the following evidence: Three witnesses, Mr. Haines, Mr. Vaux, and Mr. Wainwright, have stated that the first specimen of rivet hose they ever saw or heard of, was shown to them by one of the plaintiffs, in the year 1811; and Mr. Robins, another witness, who gives the same testimony, has further deposed, that he saw one of the plaintiffs engaged in making the first specimen he had ever seen or heard of; which was completed, and an experiment made of it, in the year 1811.

To the weight and effect of this evidence certain objections have been made by the defendant's counsel, which it is proper we should notice.

It is insisted, first, that the evidence proves no more than that one of the plaintiffs made a specimen of hose in the year 1811, but not that he was the author of the invention, and entitled to the merit of the discovery. The objection does not appear to the court to be well founded, because the fact of making or exhibiting an article never before seen or heard of by the witnesses who prove the fact; is at least prima facie evidence of invention, until other evidence is given to prove that the same article was invented, known, or in use, at an antecedent period of time, and that the patentee had only imbodied the conceptions and the discovery of some other person. No evidence of this kind has been given, unless it may be considered as being so by the witnesses whose testimony will be hereafter noticed.

2. It is next objected that the plaintiffs made no experiment of the piece of hose made by them in 1811, but that it was first made by the Philadelphia Hose Company, with a specimen laid before them by the experimental committee. In answer to this objection, it may, in the first place, be remarked, that Mr. Robins has stated that he saw Mr. Pennock try the first specimen made by him; and it may be added, that it is in the highest degree improbable that an inventor should not anxiously seek an opportunity to test by experiment the success and practical utility of the article he has invented, before it is exhibited to the public. But be this as it may, it is clearly immaterial whether the experiment be made by himself, or by others; the only question being, is he the original inventor of an art not before known or used. The hose company do not pretend that they were the inventors; and consequently, the experiment, if first made by them, cannot detract from the merit of plaintiffs, if, in point of fact, they or either of them, was the original inventor.

3. It is insisted that the Philadelphia Hose Company, by their zeal, public spirit, and their money, caused the discovery to be made. This may be admitted; and further, that but for the laudable exertions of that body, the discovery might probably not have been made, either by the plaintiffs, or by any other person, to the present moment. But what has this to do with the question of original discovery? The conduct of the company may entitle them to every kind of merit except that of inventors, but cannot deprive the plaintiffs of that merit, if they were in fact the inventors. Lastly, it is insisted, that the absence of any proof that the plaintiffs or either of them, at any time, to the company, or to their associate members of the experimental committee, or to any other person, claimed to be the inventors of this improvement, is sufficient to outweigh all the evidence of original invention which they have given. It must be admitted that, as an argument upon the weight of evidence, this is fairly urged. It has before been observed, that the making, or exhibiting the first specimen of hose ever seen or heard of by the witnesses of that fact, is prima facie evidence of the plaintiffs' invention. It is fair then to oppose to that evidence, the total silence of the plaintiffs, or of Mr. Pennock, as to their or his claim of original invention, and to urge the probability, from that circumstance, that they did no more than give form and substance to the invention of some other person. But whether the circumstance is sufficient to outweigh the evidence to which it is opposed, is for the jury to decide.

The defendant has given evidence for the purpose of showing that the improvement in question was invented and in use long before the year 1811; and to enable you to understand and apply this evidence it will be necessary for you constantly to keep in mind what the improvement is which is patented, the mode of constructing it, and the use and design of it. It is for an improvement in making leather hose or tubes for conveying water and other fluids; and they are constructed by lapping their edges over, and fastening them by metallic rivets and burs, so as to be rendered water proof, and capable of resisting a heavy pressure of that fluid. Now, it is for the jury to say whether the harness, the parts of which were fastened by metallic rivets, or the Indian scabbard, which was intended as a covering for a knife, not lapped, but their edges united by lead rivets, is in form, structure, or principle, the same thing as the hose for which this patent was granted? It is true, that, in the construction of those articles, leather, and metallic rivets were employed; but it is clear law, that if old materials, and old principles in mechanics, or otherwise, are used in a state of combination, so as to produce a new result, the inventor of the article so produced is entitled to apply for, and may obtain a valid patent. The hose invented by Mr. Bedford more nearly resembles that which the plaintiffs have patented. It was made of leather, the edges of which were lapped and fastened by nails, having their heads on the inside, and their points clinched on the outside; and its use was, to convey water. Now you have to decide upon the evidence, first, whether a hose made with clinched nails, and one made with rivets and burs, are, in principle, the same;—to prove, and to controvert which fact, specimens of each have been exhibited, and some witnesses examined; and secondly, whether there is any proof that the hose invented by Mr. Bedford was ever in use? If they are the same in principle, but Bedford's was never in use before the plaintiff's invention, then it cannot impeach the validity of their patent. If it was the same in principle, and had been so used, the plaintiffs cannot recover in this action.

The last invention relied upon by the defendant's counsel is that of John Anderson.

He swears that in 1799, he made six or seven pieces of hose on board the Samuel Smith, for conveying water from her deck, and fastened them to her scuppers—that he made them with scupper leather, and fastened them with iron rivets and burs. That, in the year 1802, he made a small fire engine for Mr. M'Callister, with whom he lived, for the purpose of washing his windows; and as a substitute for a goose neck, he made a piece of hose about eighteen inches long, and fastened the edges with metallic rivets and burs; that it was in common use whilst he lived with that gentleman by his family and by his neighbour. The seams he states were water tight, but he does not state in his deposition, whether the edges were lapped over, or merely united. One of the witnesses, who was examined, stated, that the pressure of the water on the inner lap gave to it the character and utility of a valve; and it is for you therefore to say, whether the hose described by Anderson, and that patented, are the same in principle. To contradict this witness in part, six of the crew of the Samuel Smith, in 1799, have been examined, who state, that they never saw the hose spoken of by this witness—that if it had been made and fixed to the scuppers, it could not have escaped their observation; and finally, that hose would not have answered the purpose of scuppers. The character of this witness for veracity, has also been attacked and defended. As to all this, the jury must decide for themselves.

2. The next objection made to this patent is, that it is broader than the discovery, it being proved that the double row of rivets was adopted upon the suggestion of another person. If this be a valid objection, very few patents could be supported; as, in most cases, it might probably be shown, that, whilst the thing patented was constructing, or before it was brought to perfection, many improvements in the form or proportions were adopted in consequence of the suggestions of the mechanic employed to make the specimen, or of others. But these are not inventions or improvements for which a patent could be obtained, nor can they invalidate the patent for the thing to which they were applied.

3. The next objection is, that the hose, having been known and used prior to the application of the plaintiffs for a patent, the patent is void by the terms of the first section of the patent law. Upon this point, which certainly involves much difficulty, we think it unnecessary to give a decision: because we are clearly of opinion, that, if an inventor makes his discovery public, looks on, and permits others freely to use it, without objection, or assertion of claim to the invention, of which the public might take notice, he abandons the inchoate right to the exclusive use of the invention to which a patent would have entitled him, had it been applied for before such use; and we think it makes no difference in the principle, that the article so publicly used, and afterwards patented, was made by a particular individual, who did so by the private permission of the inventor. As long as an inventor keeps to himself the subject of his discovery, the public cannot be injured; and even if it be made public, but accompanied by an assertion of the inventor's claim to the discovery, those who should make, or use the subject of the invention, would at least be put upon their guard. But if the public, with the knowledge, and the tacit consent of the inventor, is permitted to use the invention, without opposition, it is a fraud upon that public afterwards to take out a patent. It is possible that the inventor may not have intended to give the benefit of his discovery to the public; and may have supposed that, by giving permission to a particular individual to construct for others the thing patented, he could not be presumed to have done so. But it is not a question of intention which is involved in the principle which we have laid down, but of legal inference, resulting from the conduct of the inventor, and affecting the interests of the public. It is for the jury to say whether the evidence brought this case within the principle which has been stated. If it does, the court is of opinion that the plaintiffs are not entitled to a verdict.

Verdict for defendant.

Affirmed by the supreme court upon a writ of error at the January term, 1829. 2 Pet. [27 U. S.] 1.

NOTE. The following points of evidence were ruled in this case: (1) That the minutes of the Philadelphia Hose Company, of which the plaintiffs were members, as they also were of the committee appointed to make inquiries respecting the best method of constructing hose, might be read by the defendant's counsel to prove that the plaintiffs were not the original inventors of the rivet hose, but that they were in use before their alleged invention in 1811; but not to prove that the plaintiffs had surreptitiously obtained a patent for the invention of another person, that forming no part of the notice to the plaintiffs. (2) That the minutes being read for those purposes, the plaintiffs cannot read other entries made in the minute book, to show that the company, at a subsequent period, acknowledged the plaintiffs to be the original inventors of these hose; the defendant not being a member of that company. The written declarations of the company were good against the plaintiffs, but not for them, unless they should be necessary to explain such parts of the transactions and declarations as shall have been read. If part of a statement be read by one side, the other side may insist upon having the whole read. But a subsequent declaration or statement made by the company, does not come within this exception. Neither can the plaintiffs read other parts of the minutes in order to show that that company were not the inventors, or that the invention was not made at their expense; the defendant's counsel having disavowed any intention to claim for the company the merit of the invention; and the latter subject being totally irrelevant to the cause, and we shall so instruct the jury. (3) A report of this company, in which the rivet hose is described, cannot be read to bring it within the sixth sec-

tion of the patent law; because first, the book containing the minutes, is a private and not a public work; and if it were, then secondly, no notice of such a defence has been given to the plaintiffs. (4) The minutes of other hose companies, of which the plaintiffs were not members, cannot be read by the defendant against them for any purpose.

Case No. 10,942.

PENNOCK v. GILLELAND.

[See 1 Pittsb. Rep. 37.]

PENNOCK (LONGSTRETH v.). See Case No. 8,488.

PENNOYER (NEFF v.). See Cases Nos. 10,083-10,085.

Case No. 10,943.

PENNOYER et al. v. SHELDEN et al.

[4 Blatchf. 316.] [1]

Circuit Court, S. D. New York. May 6, 1859.

WILL—CONSTRUCTION OF DEVISE—USES AND TRUSTS—INTENTION OF TESTATOR.

1. Where a testator, in New York, devised his real estate to his executor and trustee, in trust, to sell and convey it, and, having converted it into money, to distribute and divide the proceeds among certain benevolent institutions enumerated, but the will did not empower the executor to receive the rents and profits of the real estate: *Held*, that, under the 56th section of the article, "Of Uses and Trusts," in the Revised Statutes of New York (1 Rev. St. 729) the executor took no estate in the land, but it descended to the heirs at law of the testator, subject to the execution of the power in trust.

2. The intent of a testator must be gathered not merely from the words used in the will, but from the words in connection with the law of the land.

3. When a trust is created, the legal effect of which is declared by the law, the court is bound to presume that the intent of the testator was in conformity with it.

4. Under the will in this case, the fee in the land would, at common law, have passed to the executor; but the statute has changed the law. The case of Germond v. Jones, 2 Hill, 569, cited and applied.

The bill in this case was filed [by William H. Pennoyer and Cornelia Pennoyer, his wife] to recover from the defendant [Henry] Shelden one-half of the rents and profits of the real estate of the late Abraham G. Thompson, from the time of his decease until the sale of the estate under certain trusts in his will. The plaintiff Cornelia, and the defendant [Edward G.] Thompson, were his sole heirs at law, and the defendant Shelden was the executor of the will. After devising certain legacies, and, among others, one of $100 to the plaintiff Cornelia, his granddaughter, the testator disposed of the rest of his estate, as follows: "All the rest and residue and remainder of my estate, real and personal, I give, devise and bequeath to my executors and trustees hereafter named, and to such of them as shall take upon themselves the execution of the trusts of this my will, and the survivors and survivor of them, in trust, to sell and convey my real estate, and to sell and dispose of my personal estate," (with a special exception as to the time of disposing of certain of the real estate,) "and, having converted said real and personal estate into money, then to distribute and divide such residue and remainder of my estate as follows." The testator then directs the proceeds to be divided into thirty-two equal parts, and gives them to certain benevolent institutions enumerated. The bill prayed for an account by Shelden of such rents and profits, and a decree in favor of the plaintiffs for the one-half of them. The defendant Shelden demurred to the bill.

Samuel Blatchford, for plaintiffs.

Edward P. Cowles, for defendant Shelden.

NELSON, Circuit Justice. The question presented in this case is, whether or not the heirs of the testator are entitled to the rents and profits of the real estate down to the time when the same was sold, for the purpose of paying the legacies, and making distribution of the remainder to the several institutions, under the will. The affirmative of this question is maintained by the bill. The defence, which is presented by way of demurrer, insists, that the real estate passed to Shelden, the executor and trustee, and vested the fee in him, subject to the trusts of the will; or, if the trust is to be construed as a power, that the execution of the power carried the whole estate from the heirs.

The trusts provided for in the will are valid under the 55th section in the article "Of Uses and Trusts." 1 Rev. St. N. Y. 728. That section declares as follows: "Express trusts may be created for any or either of the following purposes: 1. To sell lands for the benefit of creditors; 2. To sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon." The trusts in this will are to pay debts and legacies. The 56th section of the same article provides: "A devise of lands to executors or other trustees, to be sold, or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power." Under this section, the executor, Shelden, took no estate in the land, as he is not empowered by the testator to receive the rents and profits, and it consequently descended to the heirs at law, of whom Cornelia, the plaintiff, was one. The trust to sell, and apply the moneys under the will, is simply a power in trust, and the land follows the law of descents, and remains in the heirs, subject to their ownership and control, until the execution of the power.

It was strongly argued, that the testator devised his whole estate, real and personal,

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

to the executor, for the benefit of the legatees and distributees, and that such devise necessarily included the rents and profits of all real estate from the time of his decease; also, that the legacy to Cornelia of $100, with the reasons in the will for fixing this limit, indicates an intent to exclude her from any other portion of the estate, and that the court is bound to construe the will so as to effectuate this intent. It was further argued, that in view of the direction to sell and convert the whole estate into money for the purposes of the trusts, the land must be deemed, in equity, to have been so converted at the death of the testator, which principle would carry the rents and profits to the executor, down to the time of the sale. But, the answer to all these suggestions is, that the intent of the testator must be gathered not merely from the words used in the will, but from the words in connection with the law of the land, and that, when a trust is created, the legal effect of which is declared by that law, the court is bound to presume that the intent of the testator was in conformity with it. Under this will, the fee would, at common law, have passed to the executor. But the statute has changed the law, and has declared that it shall not pass, but shall descend to the heir, and that the trust shall be executed as a power.

The question in this case was, I think, disposed of in the case of Germond v. Jones, 2 Hill, 569. The trust there was to sell to pay debts and legacies, but the trustee was not empowered to receive the rents and profits. The court held that the land descended to the heirs, and remained there till the title was divested by an execution of the power.

The release by the plaintiff Cornelia, executed on the 6th of June, 1856, and which is set forth in the bill, and relied on as a defence to this suit, is very special and particular, and, without a minute examination of the whole instrument, some general phrases might be regarded as embracing the subject-matter in question. But I am quite satisfied, after a thorough examination of it, that every part of it relates, and was intended to relate, exclusively to the subject of the validity of the will, which was in dispute between the parties.

I am of opinion, therefore, that the demurrer is not well taken, and must be overruled.

Case No. 10,944.

PENNS v. INGRAHAM.

[2 Wash. C. C. 487.] [1]

Circuit Court, D. Pennsylvania. Jan., 1811.

EVIDENCE—DEPOSITION—WITNESS.

Depositions taken de bene esse, cannot be read in evidence, unless the party who offers them, shows that the witnesses were subpœnaed, and cannot attend.

[Cited in Whitford v. Clark Co., 119 U. S. 525, 7 Sup. Ct. 308.]

In this case, the defendant offered in evidence, depositions taken before a judge of the common pleas, which were objected to, because taken de bene esse; and it does not appear that the witnesses were subpœnaed, and could not attend. The plaintiff not having traced a title to the lessors of the plaintiff, the court directed a nonsuit; but the parties agreed to withdraw a juror, and to continue.

Tilghman & Wallace, for plaintiff.

Mr. Lewis, for defendant.

BY THE COURT. The objection is well taken, and the deposition cannot be read.

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

PENNS v. KLYNE. See Case No. 10,935.

Case No. 10,945.

The PENNSYLVANIA.

[31 Leg. Int. 237; [1] 13 Am. Law Reg. (N. S.) 561; 10 Phila. 283; 21 Pittsb. Leg. J. 197; 1 Am. Law T. Rep. (N. S.) 402; 6 Leg. Gaz. 236.]

District Court, E. D. Pennsylvania. July 21, 1874.

SALVAGE—SERVICE BY PASSENGER.

1. The rule of maritime law that a passenger that has no opportunity to leave a vessel in distress cannot render a salvage service may admit of a qualified exception where he has promoted her safety by an extraordinary and peculiar service which he was not compellable to render. But, in admitting such an exception in favor of a passenger, the greatest caution is necessary, and especially so where he is of the nautical profession.

[Approving Towle v. The Great Eastern, Case No. 14,110.]

2. Where a passenger of the nautical profession who has rendered such service afterwards assumed and exercised illegitimate authority over the vessel, though the circumstances were not such that he incurred an absolute forfeiture of the salvage compensation, its amount was nevertheless materially reduced by reason of such usurpation of authority.

[This was a libel and amended libel by Cornelius L. Brady against the steamer Pennsylvania (the American Steamship Company, claimants) for salvage.]

C. M. Neal and Rufus E. Shapley, for libellant.

Morton P. Henry and Theodore Cuyler, for claimants.

CADWALADER, District Judge. A vessel manned and otherwise fitted for a voyage is often spoken of as having an organized representative or artificial personality. A public armed vessel represents the sovereignty of the nation to which she belongs. A

[1] [Reprinted from 31 Leg. Int. 237, by permission.]

merchant vessel represents a little private community. It is a definite organized portion of the social system of her nation. Judges, on both sides of the Atlantic, have assimilated such a vessel, when on the high sea, to a floating portion of this nation's territory, of which, though temporarily detached, it continues to be a part. Her internal relations are determined by its laws, and her external relations by the laws of the sea, which constitute a part of the system of universal jurisprudence. Under certain qualifications, her exterritoriality is through international comity, recognised, even when she is in foreign territory.

These observations, in part, explain the remark of Montesquieu, that mariners are citizens or inhabitants of the vessel. They cannot rightfully leave her, unless their association with her is legally at an end, through the conventional termination of their voyage, or otherwise. Till then they can be compulsorily detained in her. The relation of a passenger to a vessel is different. If a sailor has been rightly described as an inhabitant of the vessel, and as in subjection to her government, a passenger may be compared to a mere sojourner in her who is only in temporary subjection. A passenger, while on board, may, indeed, be considered as one of her company, but not in the same light as one of her crew. The passenger may leave her at his pleasure, if an opportunity occurs before the end of this conventional passage; and may do so even in time of danger, however great. For this reason, if the vessel is in distress, and a passenger who has an opportunity of leaving her chooses to remain on board, he may stand afterwards, upon a question of salvage service, nearly or quite in the same relation as if he were not associated with her at all. He may therefore entitle himself to compensation of the nature of salvage by rendering even service of ordinary bodily labor, as in pumping or otherwise. But where he has had no such opportunity of dissociating himself from the vessel, he is, in time of danger, compellable to render, to the utmost of his ability, like service with any other person of her company; and, as to such service, cannot have any claim of salvage. It by no means follows that a passenger peculiarly capable of rendering extraordinary service, far beyond that of one of a good crew, is, in all cases whatever, compellable to render it, or that, if he does render it with useful effects, he cannot, in any case, become entitled to compensation of the nature of salvage. We may suppose the case of a ship, or her cargo, partially on fire, the ship having on board a passenger who is a chemist, with a sort of travelling laboratory. He may have, in this laboratory, the probable means of checking the fire, but perhaps not without some risk, to himself and others, of increasing the danger. If, by professional skill and judgment, under the authority of the navigator of the vessel, the chemist makes the experiment, and there is a successful result, is he to receive no compensation? If he should be compensated, is not the compensation for a service of the nature of salvage?

The decision in the case of the steamer Great Eastern answers the question. When that vessel was three hundred miles from land her paddle-wheels were disabled, so that she could be moved by the screw alone. While she was in this condition, the rudder shaft was broken, and was disconnected from the steering gear, so that she became quite unmanageable. Her officers in vain endeavored to substitute and secure some appliance by which to work the shaft. A passenger, who was a mechanician, then devised, and, with the consent of the master and the assistance of the crew, executed a plan for the purpose, which was successful. This was done by a skilful use and adaptation of fixtures, tackle and apparel of the vessel herself. For the service $15,000 was decreed to the passenger as salvage. [Case No. 14,110.] The reason of the decision was that this highly beneficial service had been peculiar and extraordinary, and such as he was not compellable to perform. This decision is, I think, right in principle. But it establishes what must be considered as an exception from a rule. The rule is that a passenger cannot be a salvor. The exception, lest it should engender litigation, and promote insubordination, must not be admitted without the greatest caution. Especially must such caution be observed where the passenger is of the nautical profession.

In the present case, a large steamer, worth perhaps half a million of dollars, with passengers and a cargo, having four officers, besides the master, encountered, in mid-ocean, a tempest of great violence. During the storm, when changing watches at midnight, she shipped a heavy sea which stove in the forward hatches, and swept away the house forward, carrying overboard the master and first and second officers, with two of the crew. So long as any officer of a vessel is on board, and not disabled, there can be no suspension of the executive authority of her internal government. Therefore, at this crisis the command legally devolved at once upon the third officer. He, however, did not assume it, but was for some time fully and usefully engaged in securing the forward hatches, or in superintending the securing of them. The fourth officer had been previously disabled, and was not on duty. The wheel was fully and properly manned, but this was at no time otherwise. But there was no officer of the deck surviving, and there was urgent necessity for such an officer to give directions to the men at the wheel. It was a crisis of great peril. There was, at all events, great seeming danger; and it would now be mere idling to inquire speculatively how far actual danger may really have ex-

isted. The after-born supposed wisdom from such a retrospect might be arrogant folly. There certainly was also great alarm, with ample supposed cause; and a general panic, if not prevented, might have soon ensued; and this might, in its consequences, have been dangerous, if not disastrous.

At this crisis the libellant intervened meritoriously. He was on board simply as a passenger, who, as such, had paid his fare. He was a competent professional master navigator, with former experience in the command of sailing-vessels and of steamers. He went to the wheel-house and promptly assumed command or direction there, doing whatever was necessary and proper for the exigency. He thus averted, until the termination of the storm, whatever danger may have been caused by the unfortunate loss of the master. I think that this was a salvage service. The difficulties in the way of so deciding are great. But those in opposition to such a contrary decision would be greater. It is true that when the third officer succeeded of right to the command of the vessel, he might have ordered the libellant to take the watch during the emergency. The libellant would certainly have been compellable to go to the wheel-house. If he had been directed, when there, to act as officer of the deck, it would, I think, have been his duty to obey, and to execute his office to the best of his ability. Had he done so, under such orders, I do not, as at present advised, think that it would have been a salvage service. But without orders, he was not compellable to decide who should have the watch, or to take upon himself the direction, with its cares and responsibilities. At the crisis of danger there was no means of organizing the internal government of the vessel, unless through immediate energetic action of the third officer. That officer did not thus act. The libellant was, therefore, justifiable, under the law of maritime necessity, in acting upon his own responsibility, as officer of the deck. There was, at this time, therefore, no usurpation of unlawful authority by him. This being so, his conduct thus far was meritorious and highly beneficial; and the service was, under the circumstances, extraordinary. It was a peculiar service for one who was not of the crew to take the command of the watch without being assigned to it.

On the next morning, the storm having ceased or abated, and no special danger continuing to exist, the chief engineer and purser, and some others on board, without consulting the third officer, whose authority alone they should have recognised, wrongfully assumed upon themselves to offer the command of the vessel to the libellant, and urgently invited him to assume it as master. He very improperly did so. He did not consult the third officer, but nominated him as first officer. It is contended that the third officer acquiesced in what would thus otherwise have been usurpation. An English judge has recently said that quiescence is not acquiescence. Mere enforced submission certainly is not. The third officer here submitted, but did not acquiesce. The libellant continued to act in this usurped relation of master of the vessel for several days, until she reached the port of destination. On her arrival, the owners, who are here defendants, gave thanks, in writing, to the libellant, as for extraordinary services, and offered him what would have been a liberal gratuity for meritorious conduct if he had been an officer of the vessel. But the amount offered was greatly below the least possible estimate of compensation for a salvage service. He now alleges that he became of right master of the vessel, and thus rendered a continuing salvage service. This unfounded pretension is, of course, rejected.

The question then arises, whether through his usurpation of the command of the vessel after the storm, he has incurred a forfeiture of the salvage compensation to which he was otherwise entitled for his prior service. I do not think that, under the peculiar circumstances of the case, an absolute forfeiture of the whole amount was incurred retroactively by his assumption and exercise of the illegitimate authority. But the effect of this usurpation must necessarily be to reduce very materially the amount which would otherwise be awardable to him. What the reduced amount ought to be is not easily determinable. I have hesitated between three thousand and four thousand dollars, and have determined on the greater sum partly because I think that the defendants' letter of thanks almost invited the litigation which has followed, and though not so intended, must have induced a high estimate by the libellant of the value of the service. Costs are adjudged to the libellant; but under the head of depositions, taxable costs will not be allowed to an amount exceeding two hundred dollars. The testimony is of great bulk, but of no proportionate weight; and its excess in bulk ought not to be allowed to swell the costs.

Decree for libellant for four thousand dollars, provided that, under the head of depositions, costs exceeding two hundred dollars will not be taxed or allowed.

Case No. 10,946.

The PENNSYLVANIA.

[3 Ben. 215.] [1]

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

COLLISION IN NEW YORK HARBOR—VESSEL IN TOW AND STEAMSHIP—FAILURE TO KEEP COURSE.

1. Boats in tow, and exclusively under the control of a steam-tug, are, as respects other vessels, to be considered vessels under steam.

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

2. Where a steamboat, having fourteen boats in tow, was coming up the Hudson river on a flood tide, and saw a steamship ahead, and about 2,000 feet off, coming down the river, presenting the bluff of her starboard bow, and blew two whistles as a signal to her to pass to her own left, and received no answer, and soon, seeing that the steamship had ported her helm, the steamboat, without altering her own helm, stopped, and reversed her engine, the effect of which, in the flood tide, was to cause the rear boats to spread out, so that they were thrown across the course of the steamship, which would otherwise have cleared them, but which struck the rear boat on the port side of the tow: *Held*, that if the steamship was seen directly ahead of the steamboat, and presenting the bluff of her starboard bow, as claimed by the steamboat, the vessels would have passed clear, if both had kept on, and that article 14 of the rules for avoiding collisions was, therefore, on that theory, not applicable to the case.

3. If it were, it was also the duty of the steamboat, under article 18, to keep her course, and, having allowed her tow to spread out across the track of the steamship, she did not, in the sense of the statute, keep her course, and was negligent in so doing.

4. The spreading out of the tow by the tide, was a necessary effect of her stopping, and was a special circumstance requiring a departure from article 16, if that article would otherwise have been applicable.

5. Under article 20, the steamboat was liable for neglecting the precaution of keeping on without stopping.

6. The steamship, having made the tow a little on her port bow, and having ported her helm, and having slackened her speed, and stopped and backed as soon as she saw, by the stopping of the steamboat, and the spreading out of her tow, that there was risk of collision, was not in fault.

In admiralty.

James Ridgway, Max Goepp, Julius Bissell, and Francis C. Bowman, for libellants.

John Chetwood and Charles Donohue, for claimants.

BLATCHFORD, District Judge. These are five libels filed to recover the damages caused by a collision, which took place in the harbor of New York, in the Hudson river, off the foot of Courtlandt street, in the city of New York, on the morning of the 24th of October, 1867, just before sunrise, between the steamship Pennsylvania, which had left her dock, in said city, and was bound on a voyage to sea, and three boats, called "chunkers," loaded with coal, and in tow of the steamer Princeton. The Princeton was on her way up the Hudson river, having come from Amboy, New Jersey, with fourteen boats in tow, two being on each side of her, one directly behind each of those four, and six more in a third tier behind the second four, such six being arranged so that three of them were on the left, in the second tier behind the two on the port side of the Princeton, and three of them were on the right, in the second tier behind the two on the starboard side of the Princeton, with an interval between the port three and the starboard three. These suits relate to the port three, and their cargoes, which were damaged by the collision. The Pennsylvania struck the extreme port boat of such port three.

The case on the part of the libellants is, that the Princeton saw the Pennsylvania ahead, about 2,000 feet off, presenting to the Princeton the bluff of her starboard bow; that the Princeton, when the Pennsylvania was at that distance off, blew two blasts of her steam whistle, as a signal to the Pennsylvania to pass to her own left, or between the Princeton and the New York shore; that the Princeton, receiving no answer to her whistle, and observing, when the Pennsylvania was about fifteen hundred feet distant, that the Pennsylvania had ported her helm, and was coming straight towards the Princeton, so as to involve risk of collision, stopped and reversed her engine, and did not alter her helm; that the checking of her headway caused the port three boats, in her hindmost tier, to spread out more to port, by means of the tide, which was flood, while she and her tow were being swept up the river by such tide; and that the Pennsylvania passed in safety to the westward of the two boats on the port side of the Princeton, and of the boats in the first tier behind, but struck the port side of the extreme port boat of the hindmost tier. The libellants claim, in the first place, that this case is to be governed by the regulations prescribed by article 14 of the steering and sailing rules contained in the act of April 29th, 1864 (13 Stat. 50); and that, as the two steamers were, when the Princeton first saw the Pennsylvania, crossing, so as to involve risk of collision, and as the Pennsylvania then had the Princeton on her own starboard side, it was the duty of the Pennsylvania to keep out of the way of the Princeton and her tow. The answer to this is, that the two vessels were not crossing so as to involve risk of collision, because it is expressly contended by the Princeton, and the fact is so, that if the Pennsylvania was in the position alleged by the Princeton, directly ahead of the Princeton, and 2,000 feet off, and presented the bluff of her starboard bow to the Princeton, the two vessels, if both of them had kept on their respective courses, would have passed clear of each other. Besides, if it was the duty of the Pennsylvania, by article 14, to keep out of the way of the Princeton and her tow, it was also the duty of the Princeton, by article 18, to keep her course. I am satisfied that this collision happened entirely from the fault of the Princeton in stopping where she did, and suffering her boats to spread out by the force of the tide. That was gross negligence. But for that, the Pennsylvania would have passed the hindmost tier in safety, as she did the rest of the boats. The boats in tow are to be considered as boats under steam, because towed by, and exclusively under the control of, the tug. The Princeton, in suffering the tows to spread out, and change their course, and lie, as Riley, one of the

hands on the Princeton, and one of the witnesses for the libellants, expresses it, right across the track, did not, in the sense of the statute, keep her course. She should, at least, have refrained from this manœuvre, with a flood tide, which she must have known would produce the very effect it did. She had no power, by whistling, to compel the Pennsylvania to pass to the eastward. Even if she was not obliged, in compliance with article 13, to put her helm to port, when she saw that the Pennsylvania had ported, and was meeting her end on, so as to involve risk of collision, yet she had no right, in reliance on article 16, under the circumstances, to stop and reverse. By article 19, in construing the rules, due regard must be had to special circumstances which exist, in any particular case, rendering a departure from any rules necessary, in order to avoid immediate danger; and, by article 20, nothing in the rules is to exonerate a vessel from the consequences of the neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case. In this case, an adherence to rule 16, by stopping and reversing, on the part of the Princeton, was sure to bring with it, in the flood tide, immediate danger, by spreading out the tow across the track of the Pennsylvania, and a departure from that rule was necessary to avoid such danger; and the collision was the plain consequence of the neglect by the Princeton of the precaution, which the special circumstances of the case, and the ordinary practice of every intelligent seaman required, of not stopping and reversing, when going with the tide, and thus suffering the boats in tow to spread out, and get into the way of the Pennsylvania.

I see no fault on the part of the Pennsylvania. She slackened her speed, and stopped, and reversed, as soon as she perceived, by the stoppage of the Princeton, and the spreading out of her tow, that there was any risk of collision with any part of the tow. She could not have apprehended any such negligent action on the part of the Princeton. The fact that she passed every thing in safety, except these three port tows, which were in the act of being spread out by the tide through a stoppage by the Princeton, which could not have been anticipated, shows that the collision was wholly due to such action of the Princeton. I think, on the evidence, that the Pennsylvania made the Princeton a little on the port bow of the Pennsylvania, and that, from that moment, in accordance with article 13, the Pennsylvania put and kept her helm to port until the collision, and that she would have cleared the Princeton and the whole of her tow, if the Princeton had not negligently thrown her tow, in the manner already stated, across the track of the Pennsylvania. When too late, the Princeton became aware of the danger in which she had involved her tow, and started ahead, with a view of dragging the boats out of the way of the Pennsylvania, but there was not time to effect the object.

The libels must be dismissed, with costs.

Case No. 10,947.

The PENNSYLVANIA.

[4 Ben. 257.] [1]

District Court, E. D. New York. June, 1870.[2]

COLLISION AT SEA — STEAMER AND SAILING VESSEL—SPEED IN A FOG—VESSEL LYING TO.

1. A bark was lying to near the George's Banks under shortened sail, with her helm lashed three quarters to port, drifting about a mile an hour. It was very foggy, and a bell on board her was being struck, but no fog horn was blown. A steamer was approaching her nearly at right angles, running at a speed of seven knots an hour. As soon as the bell of the bark was heard, the helm of the steamer was put to port, then changed to starboard, and then again put to port, her engine having been stopped and reversed. She struck the bark amidships and sunk her: *Held*, that the bark was under way, and was bound to have been using a fog horn, instead of a bell.

2. The use of the bell could not have misled or embarrassed the steamer, for the bell was the proper signal to announce the presence of a vessel, not in motion and incapable of getting out of the way, which was, substantially, the condition of the bark.

3. On the evidence, the bell could be heard further than the fog horn.

4. On the evidence, the bark had a proper lookout, and was not guilty of any fault which contributed to the collision.

[Cited in The Atlas, Case No. 634.]

5. It was the duty of the steamer to have reduced her speed to the lowest point, consistent with steerage way.

6. On the evidence, it was not necessary for the steamer to have been running at the rate of seven knots an hour.

[Cited in The City of Panama, Case No. 2,764.]

7. Her helm was negligently managed.

8. She was liable for all the damages.

In admiralty.

Benedict & Benedict, for libellants.

C. Donohue and J. Chetwood, for claimants.

BENEDICT, District Judge. This action is brought by the owners of the bark Mary A. Troop, to recover of the steamship Pennsylvania, the value of their bark, which was sunk in a disastrous collision, which occurred between those two vessels, on the George's Banks. The owners of the bark, after setting forth in the libel the facts attending the accident, aver that the collision was not caused by any fault on the part of the bark, but was caused by the fault of the steamer,

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

[2] [Affirmed in Case No. 10,950; decree of circuit court reversed by supreme court in 19 Wall. (86 U. S.) 125.]

in running at too great speed in a fog, and in not keeping a proper lookout, and in not changing her course, in time to have avoided the bark by going under her stern as she could, and should have done.

The answer of the steamer avers that she was proceeding at a reduced speed, only sufficient to keep her proper course, with a good lookout; that it was so foggy, that a vessel could not be seen more than a length off; that while so proceeding a bell was heard, and immediately the bark hove in sight, too near the steamer for the steamer to avoid her; that the engine of the steamer was at once stopped and backed, and the helm ported, but that the bark was going at a speed of about five knots an hour, with her helm lashed; and being unable to port, came into the steamer, which was then nearly dead in the water.

It will be observed in regard to these pleadings, that there is no averment on either side, that the accident was inevitable. On the contrary, specific faults are set forth, as the sole cause of it. The duty of the court therefore is to determine, which of these faults appear to be proved by the weight of the evidence. It will be convenient to consider first, the faults charged against the bark. It is charged that she was going at the rate of five miles an hour, with her helm lashed. The proofs show the bark, at the time of the collision, to have been hove to, with her helm lashed three quarters to port, and under two reefed topsails, foresail, foretopsail and mizzen staysails, with little or no headway through the water, drifting to leeward nearly broadside to the steamer as she approached. She had the right to lie to, and, being without headway, with her helm lashed, it is manifest that she could make no movement to avoid the steamer, she was not at anchor, but under way, and by the international navigation rules she was bound to use a fog horn, to announce her presence to other vessels. Instead of a fog horn she was using a bell, and this is also charged upon her, as a fault which must render her responsible for the collision. But it is obvious, that the use of a bell instead of a horn, on the part of this bark, could have no effect to mislead or embarrass the steamer; for the bell was the proper signal to announce the presence of a vessel not in motion, and incapable of getting out of the way; and such substantially was the position of the bark. Her slight drift would have no substantial effect to change her position, within the time that would elapse, after it became possible for the steamer to be made aware of her presence, by either horn or bell; nor could she within that time acquire any headway. Her bell required that she should be considered by the steamer, to be, what she was in effect, and so affords the steamer no excuse for an improper manœuvre, if she adopted one. But the bark cannot be absolved from responsibility by reason of her bell, unless it also appear that the sound of the bell would be heard as soon as the sound of the horn. This the proofs show, for it is proved that the bark had on board a fog horn, and an unusually large bell, and that it was judged by those on the bark, that the sound of such a bell could be heard further than the sound of a horn, whereupon, instead of using the horn, the bell was rigged upon the forestay and rung by a lanyard from its clapper. The opinion then formed by those on the bark, as to the efficiency of the bell, is reiterated upon the stand by the witnesses from the bark, and is confirmed by other witnesses, who testify to the fact, that the bell would be heard farthest, and also by the fact of the adoption of the bell, in place of the horn. Under such circumstances, it is incredible that the officers of this vessel, loaded with pig iron, lying in a dense fog where steamers were known to be passing, with their lives depending upon the efficiency of their fog signal, and with full means of knowledge, should have selected the least effective of two signals in their possession. The averment of the answer, that the bell was permitted to remain unrung, relying upon the motion of the vessel, to cause it to tinkle when she rolled, is not only improbable, but is disproved by the steamer's lookout. The description of the sound of the bell, as he heard it, proves the bell to have been struck by hand, as the witnesses from the bark say it was rung.

This testimony of the steamer's lookout, in regard to the bell he heard, also disposes of the ingenious argument, which has been made in support of the averment of the answer, that the bark had no lookout, and shows beyond controversy, that there was a man stationed on the bark's forecastle, where the bell was, who was doing all that could be done; namely, ringing the bell. The witnesses from the bark are thus confirmed in their statements as to the lookout, by the witnesses from the steamer.

I have thus disposed of the faults charged upon the bark, and it remains to consider the faults charged upon the steamer.

The testimony which has been produced on her behalf, taken in connection with her answer on file, presents some features worthy of notice.

In regard to her wheel, the averment of the answer is, that it was ported when the bark was seen. The testimony of the second officer, who was officer of the watch and on the bridge, is, that the wheel was put hard a-port, as soon as the bark was seen, but he does not say who gave the order, and he leaves it to be inferred that no other order was given. But the quartermaster, who was at the wheel, testifies, that he first received from the officer at the con an order to port, which he obeyed; that he next received from the same officer an order to hard a-starboard, which he obeyed, and next the

captain ordered him to port, which he did. This witness further says that another man, whose name he gives, was with him at the wheel, and that when the order "hard a-starboard" came, he called three of the watch, who were then heaving the log, to help him heave the wheel, and they did so. Neither of these other seamen are produced, and neither the master nor the officer at the con, nor the second officer—all of whom gave their testimony some months after the deposition of the quartermaster had been taken—make any denial of the quartermaster's statement. So specific a statement, by the man in charge of the wheel, demanded some explanation, or a more specific denial than has here been given. So too, the condition of the testimony introduced by the steamer, in respect to her speed, has attracted my attention. No rate of speed is given in the answer, but it is stated that the steamer was running at a reduced rate, only sufficient to keep her proper course. The officer of the watch, whose duty it was to know the speed at which the steamer was running in such a fog, makes no statement as to the rate of speed, nor does it appear that he had given any order to the engineer, prior to seeing the bark. The telegraph, he says, was at "stand by," and he simply says "We were going at reduced speed, I believe." The engineer on duty at the engine, does not speak of the rate of speed, nor does he say how he was running the engine. The chief engineer, who was not on duty, expresses no opinion as to the speed or the action of the engine, but says that the pressure of steam was seventeen pounds, the ordinary pressure being nineteen to twenty pounds. Neither the officer at the con, nor the boatswain's mate, both of whom were on deck and on duty, allude to the speed. The only witness who does give the rate is the master, who says that the steamer was running at the rate of seven knots an hour, and, in answer to an enquiry whether, with the wind and sea as it was, he could have run the steamer safely at less speed, his answer is, "I don't consider we could have steered the vessel going slower, i. e., could not have steered her straight." Now while, in the absence of any testimony to the contrary—or any circumstances which can be considered as clearly inconsistent with the master's statement, that his speed was seven knots, I consider that rate to be proved, I feel bound to say, that I do not deem his statement in regard to his inability to run safely at less speed, as satisfactory proof of such inability, when taken in connection with the evidence as to the wind and sea, and the testimony produced showing that this steamer has been known to run and hold her course at a much less rate. Upon such evidence, I am unable to bring my mind to the conclusion, that it was necessary or proper for this steamer to be running at a speed of seven knots in such a fog.

I am thus brought to a decisive point, in the consideration of this case, for it was the clear duty of this steamer, under the circumstances to reduce her speed to the lowest point, consistent with steerage way. There is, I am aware, a notion entertained by some commanders, that they are justified in running at full speed in fog at sea, upon the ground that the time of exposure to peril is thereby lessened, and, if a collision does occur, the chance of injury to the steamer is diminished. But such a practice, if safer for the steamers, is full of danger to all smaller vessels, and cannot be upheld. The maritime law imposes upon a steamer, running in a thick fog at sea, the duty of at least slackening her speed to the lowest possible point, consistent with steerage way. Beyond this the facts of the present case do not require the rule to be extended; and, if the remark can be permitted in view of some adjudged cases, I may add that it is quite possible that fog dense enough to render it impossible to see a vessel at any available distance, is so constant a feature in portions of the Atlantic voyage, as to make it impossible in some localities, to act under any more stringent rule, in regard to speed, than the one I have stated. That rule this steamer failed to comply with, and because of that neglect she must be held responsible for the collision in question, which an observance of the rule would have prevented. In this view of the case, it becomes unnecessary to consider at length the other faults, which are charged upon the steamer; and I content myself with adding the observation that the negligent management of the helm on the part of the steamer, which the evidence discloses, tends to confirm the opinion that she was negligently run. For it is quite clear, that if the steamer's helm had at once been hove hard-a-port, when the bark was seen and kept so, there would have been no collision, and it is certainly probable, that the same would have been the case, if the helm had been hove hard a-port, when the bell of the bark was first heard; instead of which the helm, when it was changed, was first put a-port, then changed to hard a-starboard, and then again to port. In accordance with these views a decree must be rendered condemning the steamer, as in fault and liable to pay the damages, sustained by the loss of the bark.

[NOTE. Pursuant to the order of the court, a reference was had to a master to ascertain the value of the vessel at the time of her loss. The exceptions to the master's report filed by claimant were overruled, and the report confirmed. Case No. 10,948. Subsequently an appeal was taken to the circuit court, where the decree of the district court rendered in this case was affirmed. Id. 10,950. On appeal to the supreme court, the decree of the circuit court was reversed, it being held that both vessels were in fault. 19 Wall. (86 U. S.) 125. Thereupon the claimants, not having alleged that they had sustained any damages by reason of the collision, moved in the circuit court for leave to amend their answer in that respect. The motion was granted. Case No. 10,951.]

Case No. 10,948.

The PENNSYLVANIA.

[5 Ben. 253.] [1]

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

DAMAGES BY COLLISION AT SEA—TOTAL LOSS OF VESSEL.

1. A bark was sunk by a collision with a steamship off the George's Bank, and the steamship was held liable for the damages. The bark was owned in St. John, N. B., and was bound from Glasgow to New York. Evidence was given as to her value, by witnesses from St. John and from New York. The commissioner reported, as damages, the value of the vessel "at the time and place of loss." The claimants excepted to the report on the ground, among others, that the report did not state at what port or place the value of the vessel was fixed, and that the report really gave the value by turning her gold value into currency. *Held* that, where a vessel is lost at sea, proof of her value at the time and place of her loss may in ordinary cases be made by evidence of her value at her last port of departure, or at the place of her destination.

2. The commissioner having taken the lowest value given by any witness as her value in New York, and the witnesses having given their values in currency, the exceptions must be overruled. See [Case No. 10,947].

[This was a libel by the owners of the bark Mary A. Troop against the Pennsylvania, to recover the value of the bark, which was sunk in a collision between the two vessels. A decree was rendered condemning the Pennsylvania, with a reference to a master to ascertain the value of the bark. Case No. 10,947. The cause is now heard on exceptions to the master's report.]

Benedict & Benedict, for libellants.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. The libellants are entitled to recover the value of the vessel at the time and place of her loss.

When a vessel is lost at sea, proof of that value may in ordinary cases be made by evidence of her value at her last port of departure, or at the place of her destination. In this case there is no evidence of her value at the last port of her departure. Some witnesses give her value at the residence of her owners, but I consider the evidence of her value at New York, which was the place of destination of the vessel, and a port where the market price is fixed for most other American ports, and the nearest important port to the place of collision, to be the best evidence to show the loss sustained by the libellants, and I have not, therefore, considered the evidence as to her value at St. John as material.

The commissioner has taken the lowest price given by any witness as to her value in New York. I understand the witnesses to have given their answers in currency of the United States, and that the commissioner has made his report in currency upon such evidence, and I see no reason to change it.

I do not consider the sum reported to have been arrived at by a calculation of the premium on gold, and I make no such calculation, but intend to give the libellants what is shown to have been the market value of such a vessel in the port of New York at the time of the loss, in the currency of the United States.

As to the freight, no objection was taken before the commissioner to the evidence of its amount, as given by Mr. Elwell, and his statement must be deemed to have been acquiesced in by the claimant.

It is too late now to question the accuracy of his method of computation, or to ask to reopen the case upon that point.

The exceptions are therefore overruled, and the report confirmed.

[NOTE. An appeal was subsequently taken to the circuit court, where the decree of the district court rendered in Case No. 10,947 was affirmed. Case No. 10,950. On appeal to the supreme court, the decree of the circuit court was reversed, it being held that both vessels were in fault. 19 Wall. (86 U. S.) 125. Thereupon the claimants, not having alleged that they suffered any damages by reason of the collision, moved in the circuit court for leave to amend their answer in that respect. The motion was granted. Case No. 10,951.]

Case No. 10,949.

The PENNSYLVANIA.

The A. R. GRAY.

[9 Ben. 536.] [1]

District Court, E. D. New York. June, 1878.

COLLISION IN NORTH RIVER—TUG AND TOW—LOOKOUT.

Where a propeller came up the North river having in tow alongside a large float, extending some forty feet in front of the pilot-house of the propeller, on which were railroad cars thirteen feet high, whereby those on the propeller were prevented from seeing anything to starboard, unless at a considerable distance, and had no lookout on the front part of the float, and a collision occurred with a vessel in tow of a tug coming out from the piers: *Held*, that the propeller had no proper lookout; such a float alongside must be deemed part of the propeller, and it was the duty of the propeller to have a lookout upon it.

In admiralty.

W. W. Goodrich, for libellant.

Beebe, Wilcox & Hobbs, for the Pennsylvania.

R. P. Lee and R. D. Benedict, for the A. R. Gray.

BENEDICT, District Judge. I am of the opinion that the collision which has given rise to this action was caused solely by the fault of the propeller Pennsylvania in not maintaining a proper lookout. The business

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

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

of this propeller is to transport across the harbor, upon a large float, the cars of the Pennsylvania Railroad. At the time of the accident she had this float alongside on the starboard side, and it extended some forty feet beyond the pilot-house of the propeller. Upon the float were railroad cars some thirteen feet high. By this arrangement those on the propeller were wholly prevented from seeing anything to starboard, unless at a considerable distance.

There was no lookout on the forward part of the float, which, for the purposes of this action must be deemed a part of the propeller, and on which it was the propeller's duty to have a stationed lookout because of the fact that the projecting float cut off the view to starboard from the propeller. The consequence of this omission was that the pilot of the propeller proceeded on in ignorance of what was occurring off his starboard bow, and upon the assumption that the tow which he had before seen was fully made up, and was passing down outside of him. A lookout on the float would have informed him that the tug was backing, and would have warned him of danger as soon as the Levantia began to swing.

It is contended on behalf of the propeller that it must be conceded that the two tugs could not have been more than 400 feet apart when the Levantia took the sudden swing, but that distance gave time to stop the propeller, for her pilot swears that he could stop her absolutely in 270 feet.

It seems to be shown, therefore, that the propeller could have avoided colliding with the Levantia if the movements of the Levantia and of the Gray had been known by the pilot of the propeller, and that the sole reason of the pilot's ignorance was that being prevented from seeing off the starboard, he had no lookout upon the float to inform him as to the movements of the vessels he was approaching. He saw no movement on the part of the Levantia until she came in sight under the very bows of the float, and when it was too late to stop the headway of his boat before she struck the Levantia, doing the injury complained of.

For these reasons I hold the propeller to be guilty of fault, and responsible for the collision in question, nor can I see that the Gray is bound to share in that responsibility. The Gray was engaged in making up her tow in plain sight of all approaching vessels. In the course of that operation one boat of the tow—the Levantia—under the action of wind and tide swung off from the other boats, and thereby was thrown on the course of the Pennsylvania, but the circumstance cannot be imputed to the Gray as a fault. It is rather to be considered as a circumstance naturally attending the making up of a tow in wind and tide, and against which vessels in close proximity should be on guard.

No blame being attributable to the Levantia, she is therefore entitled to recover her damages of the Pennsylvania, and her libel as against the A. R. Gray must be dismissed with costs.

Case No. 10,950.

The PENNSYLVANIA.

[9 Blatchf. 451.] [1]

Circuit Court, E. D. New York. Feb. 23, 1872.[2]

COLLISION — RATE OF SPEED IN FOG — STEAMER AND SAILING VESSEL—FOG HORN—JURISDICTION OF EASTERN DISTRICT OF NEW YORK—VALUE OF VESSEL.

1. A steamship and a barque collided, in the Atlantic Ocean, within a day's sail of New York, in the track of her inward and outward commerce, where the presence of other vessels was to be expected, in a fog so dense that a vessel could not be seen at a distance greater than the length of the barque. The steamer was going, at the time, at a speed of not less than seven miles an hour: *Held*, that the steamer was in fault in going at such a rate of speed, and that such fault was a cause of the collision.

[Cited in The Atlas, Case No. 634; Ellis v. The Katy Wise, Id. 4,404.]

2. Her navigators were in fault, in giving conflicting and vacillating orders, after discovering the barque.

3. The barque, although under way, was ringing a bell, and was not blowing a fog horn. That was a fault on her part, but, on the evidence, it was not a fault which contributed to the collision.

4. The jurisdiction of the district court for the Eastern district of New York, in this case, sustained, although the vessel proceeded against was found and attached in the waters of the county of New York.

5. The report of the commissioner as to the value of the libellant's vessel, founded on conflicting or varying estimates, sustained.

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

[This was a libel by the owners of the bark Mary A. Troop against the Pennsylvania, to recover the value of the bark, which was sunk in a collision between the two vessels. A decree was rendered condemning the Pennsylvania, with a reference to a master to ascertain the value of the bark (Case No. 10,947); and it was from this decree that the present appeal is taken. Exceptions which were filed to the master's report were overruled in Case No. 10,948.]

Benedict & Benedict, for libellants.

Charles Donohue and John Chetwood, for claimants.

WOODRUFF, Circuit Judge. The proofs in this cause fully establish fault in the management of the steamship, both in respect to the speed at which she was running, in a fog so dense that a vessel could not be seen at a distance greater than the length of the

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

[2] [Affirming Case No. 10,947. Decree of circuit court reversed by supreme court in 19 Wall. (86 U. S.) 125.]

barque; and, I think, also, there was fault in the confused and conflicting or vacillating orders given after the barque was discovered. I greatly doubt whether any change in her course, after the barque was seen, would have been completely effectual to prevent a collision; but, had she done her utmost, in an endeavor to turn in a single direction, accompanying that effort by a reversal of her engine, the injury by the collision might have been greatly mitigated. To this is to be added the fact, fairly inferrible from the testimony of the claimants' own witnesses, that the first report of the lookout, announcing a bell on the starboard bow, was not heard by the officer to whom it was addressed; and the suggestion becomes more significant, that if, at that moment, a consistent effort had been made, the collision might not have happened, or its injurious consequences would have been greatly lessened. The second officer, who was on the bridge, states, that the first report he heard was, "Ship ahead, a little on the starboard bow;" and no other officer testifies to hearing any earlier report. He testifies, also, that the barque was then "barely her own length off." It is perfectly shown, by the two men on the lookout, that the bell on the barque was heard before she could be seen. It follows, that the bell was not properly reported, or the officer was inattentive. The first thing heard by the officer at the bow, was the bell itself, and he saw the barque at the same time, then barely a ship's length distant. So, also, the master heard nothing until he heard the bell and saw the barque. The man at the wheel testifies explicitly to the conflicting or vacillating orders, and there is no explicit denial that they were given, by the officers.

The principal and primary fault, however, was in running at too great speed, in such a fog. I concur with the district judge, on that subject, in two aspects of the question—first, that seven miles an hour was, under such circumstances, a hazardous speed, when the steamship was within a day's sail of New York, in the track of her outward and inward commerce, where the presence of other vessels was to be expected; and, second, the proof is not very satisfactory, that her speed was not greater.

On the other hand, it is clear, that the barque was in fault. She was in direct violation of the rule of navigation which required her to blow a fog-horn. It is not improbable that her officers construed the rule to require them to ring a bell. Such is the testimony in her behalf. They regarded themselves as lying to; and, in this, they are supported by other witnesses, who are experienced mariners. They appeared to have regarded the term "under way," in the rule, as the opposite of "lying to." But, in this they were mistaken, if the term "lying to" was at all apt to describe their condition. The rule is, that, in a fog, sailing ships under way shall use a fog-horn; when not under way, they shall use a bell. Here, the barque, although having some of her sails reefed, and her helm lashed, was on her starboard tack, and making not less than a mile an hour. True, she was not under full headway, but she was, nevertheless, under way, and should have used her fog-horn. Evidence was given, tending to show that the bell which she used could be heard at a greater distance than a fog-horn could be heard. But parties are not at liberty to disregard a distinct and explicit rule of navigation, upon their judgment that its disobedience will better subserve the purpose for which the rule is designed. The fact so testified may be useful in determining whether the neglect to use a fog-horn contributed to the collision; but, if the negative of that be proved, by decided, and even conclusive, evidence, it will, nevertheless, be true, that the disobedience of the rule is not justified, when obedience was practicable.

I do not find, upon the evidence, any other fault in the conduct of the barque. She had a perfect right to lash her helm, and, in view of the head winds, which impeded her direct progress, suffer herself to be carried, on her starboard tack, in the direction off her desired course, at as slow a rate as possible. Nor do I find that any want of vigilance or lookout, on her part, if any there was, could have had any influence in causing the collision.

The case stands thus: The Pennsylvania was in fault; and that fault, beyond all question, was a cause of the collision. It brought the steamship into a position, relatively to the barque, in which collision, if not inevitable, was made so by the failure to discover the barque, and act on the discovery in season, and by the conflicting or vacillating orders and movements which she made. The barque was in fault, by neglecting or misinterpreting the rule which required her to blow the fog horn, and by ringing the bell, which indicated that she was not under way. The question in the case is, by these facts, reduced to the enquiry, whether the barque should contribute to the loss resulting from the collision; and this is to be answered by enquiring whether the fault of the barque contributed to the collision itself, for, if it did not, then, however severely the neglect of the rule may be condemned, such condemnation in no wise enures to the benefit of the other vessel.

It is claimed, that the neglect of the rule did contribute to the collision in two ways—first, that a fog horn could have been heard further, and, if blown, would have earlier apprised the Pennsylvania of her neighborhood, and afforded her more time and opportunity to check her own speed and avoid the barque; and, second, that the ringing of the bell was adapted to deceive those in the management of the Pennsylvania, into the belief that she was not in motion, and that the manage-

ment of the Pennsylvania was thereby affected. If there is just reason, upon the proofs herein, to conclude, that, had the fog horn been used, the Pennsylvania would have had such earlier notice, that, under the speed at which she was moving, her efforts to avoid the collision would have been more effectual, or, if her officers were in fact deceived, and thereby led to do what otherwise they would not have done, or were led to omit to do anything which otherwise they would have done, then the fault of the barque contributed to the collision, and her owners should share in the resulting loss.

This question is often one of much delicacy. Parties found in actual fault should make it plain that their fault was not a contributory cause of the disaster. Community in fault, in general, involves community in the aggregate or combined result; and I am bound to admit, that, in this case, there is room for no little hesitation, in declaring that the fault of the barque in no wise operated as a cause of the collision of the two vessels. But it was deemed, in the court below, that all suggestion that the use of the bell had any influence was speculative and imaginary; that an examination of the proofs by a practical mind, and a view of all the facts in the light of reason and good sense, would show, that the theory, suggested by counsel, of what was possible, was a suggestion of what might, in a supposable case, be possible, but which, in this case, is not true; that no witness from the Pennsylvania has suggested that any one was deceived, or that any one on board of her acted upon any idea that the barque was in any other situation than she proved to be; that, in fact, for reasons above suggested, the steamship did absolutely nothing until they saw the barque, and then the measures taken to avoid her were taken not in view of the bell, or of the want of the sound of the fog horn, but in view of the report, "Ship ahead, off starboard bow;" that there is, therefore, literally, no ground for any suggestion whatever, that those who actually directed the movements of the Pennsylvania were deceived, or that those movements were, in any manner, affected by the use of the bell, as an indication that the barque was not under way; and that, as to the claim that the fog horn would have sooner apprised the Pennsylvania of the neighborhood of the barque, several answers are pertinent—that the bell was heard, and ineffectually reported, and, in fact, nothing was done until the barque was seen; that, in truth, the preponderance of the testimony is, that the bell on the barque could be heard further than a fog horn could be heard; and, finally, that, if there could be claimed any slight difference in this respect—for, upon the testimony most favorable to the Pennsylvania, it must be slight—that difference, upon all the proofs, would manifestly have not affected the movements of the Pennsylvania or averter the collision. It is not without great hesitation that my mind has concurred with the district judge on this branch of the case.

As to the question of the jurisdiction of the court, I think there is no room for doubt. The cause was maritime. Of the subject matter the district court for the Eastern district has jurisdiction; and, by the express provision of the statute creating the district and the court, it has power to send its process into any of the waters of the county of New York, and thereby gain jurisdiction of the cause, by attaching the vessel proceeded against. Act Feb. 25, 1865; 13 Stat. 438, § 2.

As to the exceptions to the commissioner's report on the value of the vessel, it must suffice to say, that it was founded upon conflicting or varying estimates; and it cannot, I think, be said, that the commissioner based his report on the proof of value in New York, more than it can be said he based it on the proof of value at St. Johns, where the vessel was owned. He properly found the value of the vessel at the time and place of collision. As a guide to that value, he had before him the estimates of various witnesses at her home port, varying in amount, from greatly less to greatly more than he reported, and the estimate of witnesses of her value at her port of destination, varying from the amount which he reported to a much greater extent. If I were to conclude, that, on a perusal of the written testimony, I might differ in some small sum from his conclusion, I must still say, that the proof sustains his finding in such degree that it ought not to be disturbed.

This view leads to a decree for the amount reported and decreed to the libellants below [Case No. 10,947], with costs of the appeal.

[NOTE. On appeal to the supreme court the decree of this court was reversed, it being held that both vessels were in fault. 19 Wall. (86 U. S.) 125. Thereupon the claimants, not having alleged that they had suffered any damages by reason of the collision, moved in the circuit court for leave to amend their answer in that respect. The motion was granted. Case No. 10,951.]

Case No. 10,951.

The PENNSYLVANIA.

[12 Blatchf. 67.] [1]

Circuit Court, E. D. New York. May 16, 1874.

COLLISION—PLEADING IN ADMIRALTY—MOTION TO AMEND ANSWER.

In a case of collision, this court decreed for the libellant. The supreme court, on appeal, held that both vessels were guilty of fault which contributed to the collision. The claimant, not having alleged, in his answer, that he had sustained any damages by the collision, moved, on the presentation of the mandate from the supreme court, that he be allowed to amend his answer in that respect: *Held*, that the motion ought to be granted, and such damages ascertained by a reference, and then brought into an apportionment with the amount of damages al-

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

ready found to have been sustained by the libellant.

[Cited in Ebert v. The Reuben Doud, 3 Fed. 528.]

In this case, this court, affirming the decision of the district court [Case No. 10,947], decreed in favor of the libellants [Id. 10,950]. The supreme court, on appeal (19 Wall. [86 U. S.] 125), held that both vessels were guilty of fault which contributed to the collision in question. The claimants, not having alleged, in their answer, that they had sustained any damages by reason of the collision, now, on the presentation of the mandate of the supreme court, moved for leave to amend their answer in that particular.

Charles Donohue and John Chetwood, for the motion.

Robert D. Benedict, opposed.

WOODRUFF, Circuit Judge. Upon the decision made in this cause, by the supreme court, it is altogether just that the damages sustained by the Pennsylvania should be brought into the apportionment which, by the rules of admiralty, follows when both vessels are guilty of fault which contributes to the disaster. I regard the opinion of the supreme court in the case of The Sapphire, 18 Wall. [85 U. S.] 51, as a plain recognition of the competency of this court to allow the owners of the Pennsylvania to bring their damages to the attention of the court, in this stage of the proceedings, with a view to including them in such apportionment. It is just that it should be so. The mandate directs proceedings here in conformity to the opinion. The opinion finds facts upon which the damages should be divided. But, the privilege now given should not disturb the proceedings in any other respect, nor work any disadvantage to the libellants beyond the ascertainment and allowance of those damages in the apportionment. On those terms and conditions, let the answer be amended, by an averment that the Pennsylvania was injured by the collision mentioned in the libel, and let an order of reference be entered to ascertain the amount of such damages. On the coming in and confirmation of the report, such damages will be brought into the apportionment, with the damages already found to have been sustained by the libellants.

Case No. 10,952.

PENNSYLVANIA v. ARTMAN et al.

[20 Leg. Int. 364;[1] 5 Phila. 304; 3 Grant, Cas. 436; 11 Pittsb. Leg. J. 123.]

Circuit Court, E. D. Pennsylvania. 1863.

REMOVAL OF CAUSES—CRIMINAL PROSECUTION—WHEN COMMENCED.

[Cited in Georgia v. Bolton, 11 Fed. 218, to the point that a criminal prosecution is commenced, within the meaning of section 643 of the Revised Statutes, as soon as a warrant has been issued, and is then removable into the United States circuit court.]

This was a criminal prosecution in the court of quarter sessions of Bucks county, against [Enos Artman and Henry W. Bach] officers of the United States appointed under the "Conscription Act," for an alleged assault and battery. The case was certified by the state court, under the act of March 3, 1863 [12 Stat. 756], to the circuit court of the United States, before indictment found. The prosecution took a rule in the circuit court to show cause why the record should not be remitted to the state court. The counsel for the commonwealth of Pennsylvania and the prosecutors urged that the act of March 3, 1863, was unconstitutional. The circuit judge said, that he had already in a previous case, recently decided, Hodgson v. Millward [Case No. 6,568], held the act of congress to be constitutional; but as the case had been certified before there was an indictment, he thought the record should be remitted to await the action of the grand jury of Bucks county in the case.

GRIER, Circuit Justice. We feel compelled to grant this motion, but not for any reason alleged by counsel here, or brought to the notice of the learned judge of the state court, who certified the record to this court. The fifth section of the act of congress of 3d March, 1863, c. 81, enacts "that if any suit or prosecution has been or shall be commenced in any state court against any officer, civil or military," &c., &c., he may "file a petition for the removal of the cause for trial at the next circuit court of the United States to be holden in the district where the suit is pending," &c. The petition of the defendants brings their case fully within the provisions of this section. But the removal is premature. The prosecution has not been commenced in the state court. A warrant has been issued by a justice of the peace, and the defendants have been arrested preparatory to the commencement of a prosecution in the state court, but the attorney for the commonwealth has not sent a bill to the grand jury. We do not know, therefore, whether the commonwealth of Pennsylvania intends to prosecute the defendants for the alleged offence, or whether the grand jury will find a bill, without which the prosecution cannot be said to be "commenced in the state court." The act contemplates the removal of a prosecution "pending," that a "trial" may be had in the circuit court. If the attorney of the United States were required to send a bill of indictment before a grand jury of the United States court for a breach of the peace of the state, it would present a truly anomalous proceeding. Yet without it there would be no case to try in the circuit court. If a bill of indictment had been found in the state court it would have

[1] [Reprinted from 20 Leg. Int. 364, by permission.]

presented such a case—but until this is done, there is no case pending in the court of Bucks county, which can be removed to this circuit for trial.

PENNSYLVANIA, The (SCHMIDT v.). See Cases Nos. 12,464 and 12,465.

PENNSYLVANIA CANAL BOAT NOS. 68 AND 69, The (UNITED STATES v.). See Case No. 16,027.

Case No. 10,952a.

PENNSYLVANIA COAL CO. v. The QUEEN VICTORIA.

[22 Betts' D. C. MS. 113.]

District Court, S. D. New York. Oct. Term, 1855.

COLLISION—VESSELS MEETING IN EAST RIVER — RULE FOR PASSING.

In admiralty.

BY THE COURT. A collision occurred between the barge Sarah N. Palmer, in tow by the steamer Telegraph, and the ship Queen Victoria, in tow of the steamer Union, in the East river, between the Battery and Blackwell's Island. The tide was flood. The Telegraph was on the tide, going up the river. The Union was coming down the river, against the tide. Both vessels, when within two or three hundred yards apart, were nearly in the middle of the channel, and heading towards each other. The east side or shore of the river was most favorable to the ascending ship, and the western side to the descending one, in that state of the tide,—it being flood. The collision was east of mid-channel, both vessels at the time of the collision having their direction or course tending towards the east shore. There was no impediment in the stream to prevent either vessel going east or west of the channel at the place of collision, and there was width of the river and depth of water each side of mid-channel sufficient for either ship to go clear of the other outside of mid-channel. The law of the state required each vessel to be navigated at that place as near as possible in the center of the river. Sess. Laws 1848, p. 450, c. 321; Blatchf. St. Laws, 951. Also by statute of this state, —steamboats meeting each other on any waters within the jurisdiction of the state,—each boat, in meeting, is required to go to her starboard, so as to pass each other with safety. 1 Rev. St. 682, § 1. Such is the maritime law in England (The Gazelle, 1 W. Rob. Adm. 471; The Friends, Id. 478; Id. 488, 489), and has been recognized as the true rule in the United States courts (The Neptune, 10 How. [51 U. S.] 558; Van Pelt v. The Niagara, 18 Betts' Dec. 40–42; Ray v. Harris, Cir. Ct. Scr. Bk. 518; Ang. Carr. § 658; 3 Kent, Comm., 8th Ed., 294, 296.) The barge Sarah N. Palmer was in tow on the larboard side of the Telegraph, and the ship Queen Victoria on the starboard side of the Telegraph. The collision was by the striking of the larboard bow of the barge and starboard side of the ship. The barge was sunken and lost. There is the accustomed conflict in the opinion of witnesses present, and some discord in their statements of facts, but the fair preponderance of evidence is that the barge bore away to starboard from the channel upon a port helm, and that the ship bore eastwardly across it on a starboard helm, tending also across the bows of the barge, and that the collision occurred whilst the vessels were moving in that manner.

Upon these considerations, the faulty conduct was on the part of the ship, and the libellant is entitled to recover the damages he has sustained by means of the collision. Decree accordingly, with reference to a commissioner.

PENNSYLVANIA CO. (PIERCE v.). See Case No. 11,146.

PENNSYLVANIA INS. CO. (CRUDER v.). See Case No. 3,452.

PENNSYLVANIA INS. CO. (GRAHAM v.). See Case No. 5,674.

PENNSYLVANIA MUT. LIFE INS. CO. (BIRD v.). See Case No. 1,430.

Case No. 10,953.

PENNSYLVANIA R. CO. v. NEW YORK & L. B. R. CO.

[18 Int. Rev. Rec. 142.]

Circuit Court, D. New Jersey. May, 1873.

CONSTITUTIONAL LAW—BRIDGES—NAVIGABLE STREAM WITHIN A STATE.

[1. The act of a state legislature providing for the bridging of a navigable stream within the state is not in conflict with the constitutional power of congress to regulate foreign and interstate commerce, unless in a case where congress has exercised that power by special enactment, and the state act is in conflict therewith.]

[2. The state of New Jersey by its contract with the Delaware & Raritan Canal Company did not thereby disable itself from afterwards passing an act providing for the bridging of the Raritan river.]

In the case of the Pennsylvania Railroad Company against the New York & Long Branch Railroad Company—argued the 28th, 29th, and 30th of May last, at Pittsburg, before McKENNAN, Circuit Judge, and NIXON, District Judge. This is an injunction bill filed by the complainants to restrain the defendants from constructing a bridge over the Raritan river. The judge proceeded first to speak of the history of the river, and giving its courses, pronouncing it a link in the chain of inland water communication between the cities of New York and Philadelphia—extending from Bordentown to New Brunswick, connecting the Delaware and Raritan. The claim of the defendants was next stated to exist under an act of the legislature, approved April 8, 1868.

The claimants deny the constitutionality of

the law, and must therefore maintain these three propositions: (1) That the matter or subject in controversy is within the legislative jurisdiction of the national government. (2) That congress has in fact legislated on the subject, and embraced it within the regulations established by law. (3) That the party impeaching the state legislation has acquired rights in the subject matter which is in dispute, and that these rights have been invaded by such legislation.

The whole question in issue is embraced in the consideration of this: Whether the present case is one where the state, either by the action of congress or in the exercise of its power to regulate commerce, or by its own legislation, has been divested of its sovereignty over a public river within its borders, and this may be resolved by considering: (1) Whether the law authorizing the construction of the bridge is within the scope of the power of the state; and, if this inquiry is answered in the affirmative (2), whether the state by contract with the Delaware & Raritan Canal Company has disabled itself from exercising its constitutional power.

The judge then proceeded to the discussion of these several points, and in regard to the first point reiterated the doctrine generally held that the state had not surrendered to the general government its right to bridge the navigable streams within its borders, that such legislation was only unconstitutional when it came in collision with the exclusive jurisdiction of congress in the regulation of foreign and interstate commerce, and in the present case there had been no expression of the national will, in regard to the waters of the Raritan, conflicting with the law under which the defendants justified their action. Numerous authorities were cited showing the relative powers of the national and state governments. Among the matters not surrendered by a state were the right to regulate its internal commerce. The authority to build a bridge over a navigable stream falls within the police power of a state, and is as absolute as the commercial power in congress. The point as to whether there had been any national legislation over the waters of the Raritan to which the law of the state authorizing the bridge must yield, was next examined at length. A number of interesting facts and authorities were produced, and the judge yields to these authorities, and holds that it is within the scope of the power of New Jersey to authorize the erection of the bridge in controversy.

The last inquiry was whether the state by contract with the Delaware & Raritan Canal Company has disabled itself from exercising its constitutional power? The contract between the state and the canal company was examined—its object stated to perfect an expeditious and complete line of communication from Philadelphia to New York. It is not obvious from a review of the charter, that the legislature had in its mind the establishment of a water communication between Philadelphia and New York, and intended to confer upon the company the means of completing it. There was no exclusive right to collect tolls on the rivers; in respect to them, there is no abridgement of the public rights to navigate them. The charter, therefore, contains no grant which impairs the right of the state to legalize the erection of the bridge in controversy. The sovereignty of the state over the river is unsurrendered, except as to the authority to improve its navigation, and that authority does not carry with it any privileges of navigation that the public do not equally enjoy. The legislature has decided that a bridge over the river, containing one draw of not less than one hundred feet in width, will be of greater benefit to the state than any obstruction which its building may cause will be a loss or injury. The defendants are constructing their bridge with a pivot draw, having two openings of one hundred feet each on the clear, and in this respect are more liberal in providing facilities for passing and repassing than the legislature of the state required.

After some remarks about the location, which is left in the law to the discretion of the defendants, the judge said the preventive relief asked for must be denied, and the bill dismissed with costs.

[See Easton v. New York & L. B. R. Co., Case No. 4,259.]

PENNSYLVANIA R. CO. (DOWDALL v.). See Case No. 4,038.

PENNSYLVANIA R. CO. (KELSEY v.). See Case No. 7,679.

PENNSYLVANIA R. CO. (LOCK v.). See Case No. 8,438.

PENNSYLVANIA R. CO. (LOCOMOTIVE ENGINE SAFETY TRUCK CO. v.). See Case No. 8,453.

PENNSYLVANIA R. CO. (SHERMAN v.). See Case No. 12,769.

PENNSYLVANIA R. CO. (WARNER v.). See Case No. 17,186.

PENNSYLVANIA R. CO. (WRIGHT v.). See Case No. 18,089.

Case No. 10,954.

PENNSYLVANIA SALT MANUF'G CO. v. GUGENHEIM et al.

[3 Fish. Pat. Cas. 423; Merw. Pat. Inv. 265.] [1]

Circuit Court, E. D. Pennsylvania. May, 1868.

PATENTS—METHOD OF PUTTING UP CAUSTIC ALKALI.

1. A claim for caustic alkali, inclosed in an integument or casing of anti-corrosive impervious fabric, substantially describes a proper subject of letters patent.

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[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 265, contains only a partial report.]

2. A claim for caustic alkali in cases or enveloped in a tight metallic integument or metallic casing is good, as being a proper subject of letters patent.

[Cited in Pennsylvania Salt Manuf'g Co. v. Thomas, Case No. 10,956; Milligan & Higgins Glue Co. v. Upton, Id. 9,607.]

3. The improvements patented to George Thompson, October 21, 1856, and reissued in three divisions, April 16, 1867, are new, useful, and patentable.

This was a bill in equity, filed to restrain the defendants [Gugenheim, Dreifuss & Co.] from infringing letters patent granted for an "improvement in devices for putting up caustic alkalies," granted to George Thompson, October 21, 1856, reissued to him April 16, 1867, in three divisions, Nos. 2569, 2570, and 2571, of which Nos. 2569 and 2571 were for "improvements in the manufacture of caustic alkalies," and 2570 was for an "improved process of putting up caustic alkali." The invention consisted in wrapping cakes of caustic soda in paper impregnated by a preparation of beeswax and rosin by which said paper was rendered impervious so as to protect said soda from the action of the atmosphere, or in incasing caustic soda in small metallic boxes, and in the process of putting up the alkali in such boxes by pouring in in a melted state into the same. The claim of the original patent was as follows: "The mode described or its equivalent, of protecting small packages of caustic soda or potash from the action of the atmosphere in the manner and for the purposes described." The claims of the several reissues were as follows: Reissue 2569: "Caustic alkali inclosed in an integument, or casing, of anti-corrosive, impervious fabric, substantially as above described." Reissue 2570: "The process of putting up caustic alkali in metallic casing or integument, by pouring the molten caustic alkali into the casing, substantially as above described, and then closing the top of the case." Reissue 2571: "Caustic alkali incased or enveloped in a tight metallic integument or metallic casing, substantially as above described."

George Harding, for complainants.
J. B. Gest, for defendants.

GRIER, Circuit Justice. The patent of George Thompson (the infringement of which, and its validity, are the questions now proposed for our decision), has been amended and reissued more than once. The difficulty in the case was to describe the invention or discovery, or the improvement in the art, without claiming too much so as to make the patent inoperative and void. Caustic alkali was not a new substance, nor was it a new composition of matter, nor its manufacture a new art, yet the fact was clear that the patentee had made a very important improvement in the art, and one of great practical value. This fact is patent and can not be denied. Has he succeeded in so describing his improvement in the art by a process discovered or invented by himself?

The state of the art prior to his invention is well described by the witness Bancroft: "Prior to the invention of George Thompson, the manufacture of soap was carried on at large establishments, like my own, by purchasing the soda ash of commerce, making it caustic by boiling with lime, and then treating the solution of caustic soda with fat and making soap of it. Throughout the country the farmers used to keep their wood ashes and leach them down and use lime to make caustic potash, and then boil with fat. This was a very troublesome and uncertain operation, and could not be applied where wood ashes were not used. The great bulk of soap was manufactured at soap works from soda ash, as above described. The manufacture of soap from soda ash was a nice chemical operation, which could not be carried on with success generally in families."

Without entering into the chemical and scientific history of the substances used in the manufacture of this valuable article of commerce, I adopt the clear statement made by the learned counsel as to the nature of complainant's claim: "Such being the state of the art, it occurred to George Thompson, in 1853, that if hydrate of soda, freed from its combination with carbolic acid, could be manufactured as an article of commerce, and generally used, the troublesome and difficult operation of making soap would be simplified to the soap-maker, but more especially to families. The refuse household fat could be as easily made into soap as the simplest culinary operation could be carried on. At that time caustic soda or hydrate of soda was known to the chemist, and existed only on the shelves of the laboratory in a most expensive form, and was used mainly for illustration and surgical purposes. It was a difficult substance to keep, because of its tendency to seize carbonic acid and moisture from the air, and to pass back into a solution of the carbonate of soda, and also because it destroyed most substances with which it came into contact. He conceived the idea of forming the lye, or solution of hydrate of soda, by the use of carbonate of soda and lime, and then to syphon off the lye, and evaporate down this clear lye until the caustic soda (hydrate of soda) reached a solid state. In this condition it could be melted at a temperature near to the degree of redness, and molded or broken. But the trouble was, how to keep this article in its caustic state, and how to overcome its tendency to pass back to the condition of a carbonate, and also how to avoid trouble from its destructive action upon other substances. The idea then occurred to him to divide the solid caustic soda into such small portions as would answer for a single ordinary operation, and seal up, hermetically, each portion by itself, as soon as produced. His first experiments were tried by molding the solid fused caustic soda into one pound pieces,

and inclosing each in an air-tight envelope composed of paper or muslin, saturated with rosin, and dipped in tar or varnish. He also then adopted the plan of at once sealing up the caustic soda in tin, soldering it in small hermetical one-pound inclosures, as soon as produced. Finally, Thompson adopted the plan of preparing an iron case or mold, made tight at the joints by infusible cement, and at once pouring the hot fused soda into it, and immediately sealing it up. By these several means he produced an article of uniform strength that could be safely transported, which could be certainly used in the manufacture of soap in families, by merely adding a fixed quantity of water and fat, and which material could not pass back to the state of a carbonate. That this was a new and useful invention appears clearly from a review of testimony. Prior to Thompson's invention the alkalies, soda and potash, had existed in commerce only as carbonates, and it was necessary that the carbonic acid should be removed before soap could be made of them; it was thus a difficult and troublesome process." The amended patent of 16th April, 1867, in which, ex majore cautela, the improvement has been unnecessarily split into three distinct patents, may be treated as one patent with three distinct claims.

He describes his invention as "a new and useful improvement in the manufacture of caustic alkalies," which is thus set forth in his specification: "My invention consists in a new article of manufacture, viz: caustic alkalies (soda and potassa) inclosed in an integument of impervious anti-corrosive fabric, thus forming a new article of commerce and manufacture, which may be preserved and transported, and thus introduced into general use for domestic and other purposes, where those concentrated alkalies, owing to their peculiar chemical properties, were not, prior to my invention, susceptible of such preservation, transportation, and use. Hydrate of soda and potassa, commonly known as caustic soda and potash, would prove very useful for domestic and other purposes, but owing to the fact that they speedily deliquesce after being exposed even for a short time to the action of the atmospheric air, and that by their caustic property they attack and destroy almost everything with which they are allowed to come in contact in their deliquescent state, it has been found practically impossible to manufacture these articles in a condition fit for preservation and transportation for family and other uses. I have discovered that an integument can be prepared of muslin, paper, or other similar fabric, by immersing it in a preparation of beeswax and rosin, or other similar substance, which will be alike incorrodible by the alkali, and will, by its imperviousness to moisture, prevent its deliquescence and destruction; and that if caustic alkali be incased or united with such a prepared fabric as an integument, a new and valuable article of manufacture and commerce will be produced. The cakes of caustic soda or potash, so soon as they are sufficiently solid to bear handling, are immediately folded up carefully in the wrapping thus prepared, the sticky nature of the substance with which the wrapping is impregnated causing it to adhere together where the edges fold over each other, and thus serving to exclude entirely the air and moisture from obtaining access to the cakes of caustic alkali within. The package thus wrapped may then, for further protection, be immersed in the same preparation used for preparing the wrapping fabric, which gives it a uniform coating all over, and covers up any opening which may exist in the folds of the wrapping. When thus wrapped and prepared, an exterior coating of common paper is added for cleanliness and convenience of handling and packing, and the packages are then ready for sale, and may be kept, without injury to the alkali, for almost any length of time. When used for making soap, the inner covering of prepared paper need not be removed, as the small quantity of rosin and beeswax will not injuriously affect the soap. It may be readily removed, however, if preferred. Having thus described my invention, what I claim as new, and desire to secure by letters patent as a new article of manufacture, is: caustic alkali inclosed in an integument, or casing of anti-corrosive, impervious fabric, substantially as above described."

(The court then quoted from the other specifications of George Thompson, and concluded as follows:)

In the third reissued patent his claim is caustic alkali incased or enveloped in a tight metallic integument or metallic casing, substantially as above described. The testimony in the case clearly establishes the fact of the novelty and practical utility of Thompson's invention or discovery and his improvement in the art. It is, therefore, the proper subject of a patent. The defendants have infringed the patent, as is clearly proved by the things themselves, "oculis subjecta fidelibus." The complainants are therefore entitled to a decree, as prayed for in the bill.

[For other cases involving this patent, see Pennsylvania Salt Manuf'g Co. v. Thompson, Case No. 10,956; Thompson v. Barry, Id. 13,942; Thompson v. Mendelsohn, Id. 13,968; Pennsylvania Salt Co. v. Myers, Id. 10,955.]

Case No. 10,955.

PENNSYLVANIA SALT MANUF'G CO. v. MYERS.

[1 Wkly. Notes Cas. 377.]

Circuit Court, E. D. Pennsylvania. April 10, 1875.

PRACTICE—ANOTHER SUIT PENDING.

Successive bills for continuing infringement of patent. Interlocutory injunction granted, notwithstanding pendency of another suit in Wis-

consin between same parties upon the same right.

This was a motion for preliminary injunction upon bill filed by complainants, praying an injunction and account for infringement of their letters patent Nos. 2,570 and 2,571 (reissue), alleged to have been committed in the Eastern district of Wisconsin. The defendant pleaded the pendency of a similar suit in said district of Wisconsin, commenced August 18, 1874, between the same parties, for the same infringement, and yet undetermined. Amendment of bill, alleging acts of infringement since the filing of the Wisconsin bill.

Mr. Harding, for complainants, cited Wheeler v. McCormick [Case No. 17,498].

W. J. Budd and F. C. Brewster, for defendants.

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

THE COURT (McKENNAN, Circuit Judge). It seems that upon the face of these bills they are not for the same cause of action. The suit in Wisconsin must necessarily be founded upon infringement committed before the date of the filing of the bill there. It could not be for subsequent infringement, from the very nature of things; and although, according to the practice, the defendant might be required to account for profits down to the time of the accounting, that does not affect the foundation of the bill itself. If, then, another bill is subsequently filed in this district, expressly alleging infringement since the commencement of the former suit, it is manifestly the intention of the complainant not to claim in the first bill accountability for profits accruing after the date of its filing, and the causes of action are not identical.

The question of title, which is before the court in Wisconsin, may possibly be decided against the complainants, and in that event, as the infringement here complained of what was committed in that state, the temporary injunction here would be dissolved; but in this district the circumstances are different. The patents in controversy have been the subjects of frequent litigation here, and have been uniformly held good and valid; and, as there is no denial of the infringement alleged to have been committed since the filing of the Wisconsin bill, the established practice requires that, for the purposes of an interlocutory application like the present, questions which may be open there should be here considered as settled.

CADWALADER, District Judge. It is very important that the precise grounds of this decision should be understood by the bar, lest in future cases it should be deemed applicable to questions not like the present. If there was a court of general equitable jurisdiction throughout the United States, the subject would be differently considered. It is to be observed that this is not a suit for the enforcement of an equitable right, but an equitable proceeding in aid of a legal right. There might be successive actions at law for successive infringements, limited in number only by the power of the court to prevent abuse of its process. But courts of equity, in order to avoid successive bills and the multiplication of suits, allow the account to be taken down to the time of the final accounting. By reason, however, of the absence of a court of general equitable jurisdiction throughout the United States, it has been decided, upon practically sufficient grounds, that successive bills in different districts will lie for successive infringements of a patent. Wheeler v. McCormick, ubi supra. We should, in an ordinary case, put the complainant to his election in which district he would proceed to establish preliminarily his right,—not the question of damages,—but his title to relief.

But, under the peculiar views of courts of equity in cases upon patents for inventions, the decision of a bona fide contest, in which the validity of a patent has been sustained, is held to put the complainant so far in possession of his right as to entitle him to a preliminary injunction in subsequent suits upon the same patent. It is under this rule or practice that the court has acted in this case, and, since the reissues of this patent have frequently been adjudged valid by this court, we do not put the complainant to his election as to which suit shall have priority, but, upon the present interlocutory application, protect his rights until a final hearing. Preliminary injunction ordered.

[For other cases involving this patent, see Cases Nos. 10,954, 10,956, 13,942, and 13,968.]

Case No. 10,956.

PENNSYLVANIA SALT MANUF'G CO. v. THOMAS.

[5 Fish. Pat. Cas. 148;[1] 8 Phila. 144; 28 Leg. Int. 317; 3 Leg. Gaz. 316; 1 Leg. Gaz. Rep. 275.]

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

PATENT—REISSUE IN DIVISIONS—DISCREPANCIES AND VARIATIONS—PATENTABILITY—METHOD OF PUTTING UP CAUSTIC ALKALI.

1. Where an original patent is reissued in divisions, such divisions are to be treated as but one patent with several claims.

[Cited in brief in Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

2. Discrepancy in the titles and variations in the description and claims of the original and reissued patents will not avoid the latter. That can only result from diversity of subject matter.

3. Where the original specification distinctly indicated caustic alkali, prepared for general domestic use, as the invention of the patentee, but did not technically claim it: *Held*, that this was the proper subject of amendment.

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

4. The patentability of an alleged invention is, in many cases, most satisfactorily shown by its utility.

5. Letters patent for caustic alkali, inclosed in a tight metallic casing or integument, as reissued to George Thompson, April 16, 1867, examined and sustained.

6. Differences in the method of incasing the soda and sealing the packages do not relieve the defendant from the charge of infringement.

Final hearing on pleadings and proofs.

Suit brought [by Pennsylvania Salt Manuf'g Co. against E. A. Thomas] upon letters patent for "improvement in devices for putting up caustic alkalies," granted to George Thompson, October 21, 1856, and reissued to him in three divisions, Nos. 2569, 2570, and 2571, of which Nos. 2569 and 2571 were for "improvements in the manufacture of caustic alkali," and No. 2570 was for an "improved process of putting up caustic alkali." The nature of the invention is more fully stated in the report of Pennsylvania Salt Manuf'g Co. v. Gugenheim [Case No. 10,954].

George Harding, for complainant.
John A. Burton, for defendant.

McKENNAN, Circuit Judge. The complainant is the assignee of George Thompson, to whom reissued letters patent, Nos. 2570 and 2571 were granted, for the unexpired term of fourteen years, from October 21, 1856. The first is for the process of putting up caustic alkali (soda or potassa) in metallic casing or integument, by pouring the molten caustic alkali into the casing, and then closing up the top; and the other is for caustic alkali, inclosed in a tight metallic integument or metallic casing. One is for the process of putting up caustic alkali; the other for the product of such process.

The validity of these reissues is assailed upon the ground that they are not for the same invention described in the original patent. They are divisions of the original patent, and are therefore to be treated as but one patent, with two distinct claims. Although this division of the patent may have been unnecessary to effectuate the invention, it in no wise impairs the validity of the reissues. Nor will discrepancy in the titles, and variations in the description and claims of the original and reissued patent avoid the latter. This effect results only from diversity of subject matter. Battin v. Taggart, 17 How. [58 U. S.] 84.

The material inquiry then is: Is the subject matter of both patents the same invention? In other words, are the process and the product claimed in the reissues substantially described in the original? In the original patent the nature of the invention is stated to consist in "a new and useful mode of wrapping cakes of potash or caustic soda in air-tight wrappings, so as to preserve it from the action of the atmosphere, being designed to enable the manufacturer of these caustic alkalies to put them up in original packages of uniform size and weight, of such convenient size that when a package is opened the whole may be used at once." Two modes of carrying the invention into effect are described. One is to provide canisters of thin sheet-iron, cemented at the joints with inflexible cement, into which the caustic alkali is poured in a molten state, and while hot the lid is closely fastened down, so as to exclude the atmosphere. Now, while this patent describes and claims the process of putting up caustic alkali in air-tight integuments, it describes also the object and result of the process. Packages of caustic alkali are produced of uniform weight, and such convenient size that when a package is opened the whole may be used at once. The very object of the description is to indicate a product possessing original merits as the result of an improved process.

In reissue No. 2570, which is for "an improved process of putting up caustic alkali," the description of the process is, manifestly, in substantial accordance with the description in the original specification.

Reissue No. 2571 is for an "improvement in the manufacture of caustic alkali," and claims "caustic alkali, incased or enveloped in a tight metallic integument or casing, substantially as above described." The mode of incasing it, and its peculiar properties when so incased, are distinctly described and stated, and with no material variation of phraseology from that employed in the original specification.

It is apparent that the subject of both specifications is caustic alkali, so put up and prepared as to secure special commercial properties, protection against deliquescence, capability of safe transportation, and adaptation to general use. The reissued patent, then, is for the same alleged invention described in the original specification, and the apparent object of the amendment was to make an explicit claim for it as a new article of manufacture and commerce, which was distinctly indicated as the patentee's invention, but was not technically claimed in the original specification.

It has been repeatedly adjudged that this may be done. "This," says Mr. Justice McLean, in Battin v. Taggart, 17 How. [58 U. S.] 84, "the patentee had a right to do. He had a right to restrict or enlarge his claim, so as to give it validity and effectuate his invention." And so Mr. Justice Grier held, in passing upon this patent, in this court, in Pennsylvania Salt Manuf'g Co. v. Gugenheim [Case No. 10,954].

The respondent further objects to the patent, that the invention claimed is not novel. I do not propose to notice in detail the evidence adduced on this point. It is sufficient to say of it generally that it does not prove that the product, with the distinguishing properties claimed by the patentee to belong to his, was in use before his invention. The hydrate of soda was a well-known chemical substance, rapidly deliquescent when exposed

to the air, and, by reason of its causticity, difficult to handle and dangerous to transport. An obvious security against these risks was to inclose it in anti-corrosive air-tight vessels, and so it was treated; but in the modes adopted for its preservation it was only employed in the laboratory, in surgical operations, and in the arts, which would admit of the use of large quantities of it at one time.

It was not until George Thompson, after repeated experiments, perfected his method of putting it up, that caustic soda was brought into very general household use in the manufacture of soap. This was undoubtedly due to the plan devised by him for its preparation, whereby portability, safety, and convenience in handling and transportation, and special adaptation to domestic use were for the first time secured. The proofs, therefore, fall short of overcoming the presumption of novelty arising from the patent.

A graver objection is that which brings in question the patentability of the alleged invention. A patentable subject must be not only new and useful, but it must involve some exercise of the inventive faculty, and it must not be merely the application of an old thing to a new use. It is undoubtedly true that small metal cans and infusible cement were in use before Thompson's invention, and that caustic alkalies were preserved from deliquescence by inclosure in air-tight packages of glass, iron, and wood; but still the fact remained that caustic soda was unavailable for general use, and especially for the domestic manufacture of soap. By Thompson's method, it was invested with commercial properties and practical adaptabilities which did not pertain to it before.

Its deliquescent tendency and corrosiveness confined its consumption within narrow limits. By Thompson's efforts these difficulties were practically overcome, and it was fitted for general use and the supply of a universal want. In the language of Mr. Justice Livingston, in Langdon v. De Groot [Case No. 8,059], it was rendered "more portable and convenient for use." The effect was immensely to increase its consumption in the domestic production of soap, which was before manufactured by other methods, or in large establishments only. Indeed, it may be considered as originating a new branch of domestic manufacture. This is certainly indicative of original merit, and is demonstrative of its great public utility.

The patentability of an alleged invention is, in many cases, most satisfactorily shown by its utility. In Webster on Subject Matter, 30, it is said: "The utility, then, of the change, as ascertained by its consequences, is the real practical test of the sufficiency of an invention; and since the one can not exist without the other, the existence of one may be presumed in proof of the existence of the other. Wherever the utility is proved to exist in any great degree, a sufficiency of invention to support the patent must be presumed." Judged by the standard of utility, then, a sufficiency of invention to support this patent is to be presumed.

In a commercial sense, it has just claims to be regarded as a new product. It was so treated by Commissioner Mason in the original application for a patent. In his opinion, he very forcibly says: "Had he discovered an ingredient which, mixed with alkali, would, without injury to its properties in other respects, have prevented it from a tendency to deliquescence, he would have made a patentable discovery. Is this not equally so? In fact, the packages of alkali, done up as proposed, may, in substance, be deemed a new commodity, a new article of merchandise, for, although its constituent ingredients are the same as were before known and used, a new property has in reality been communicated to it. In point of fact, the article now offered for sale is the alkali without any tendency to deliquescence; this, though chemically not new, is so commercially, and is so proved by the affidavits filed." Equally satisfactory proof of this has been exhibited in this case, and to this is to be added the wide extension of its use as a significant recognition of its novelty as a commercial product.

The whole question was before this court in Pennsylvania Salt Manuf'g Co. v. Gugenheim, supra, and the patent was held to be valid. Such a judgment, pronounced by a judge whose knowledge, experience, and ability invests his opinion with the weight of high authority, must and ought to overbear all doubts upon the subject in this controversy.

That there are differences in the methods employed by the complainant and respondent to incase the soda and seal the packages is doubtless true; but the product of both is substantially the same, viz., caustic soda incased or enveloped in a tight metallic integument, which may be preserved and transported, and thus introduced into general use. The respondent is, therefore, an infringer.

Inasmuch as the patent of the complainant expired October 21, 1870, a decree for an account only can be entered, which is accordingly directed. Let a similar decree be entered in the case of Pennsylvania Salt Manuf'g Co. v. Barry [unreported].

[For other cases involving this patent, see note to Pennsylvania Salt Manuf'g Co. v. Gugenheim, Case No. 10,954.]

Case No. 10,957.

PENNY v. TAYLOR.

[10 N. B. R. (1874) 200.] [1]

District Court, S. D. Mississippi.

BANKRUPTCY — POWER OF COURT TO ENJOIN — HOMESTEAD EXEMPTION—JOINT JUDGMENT—TERMINATION OF JURISDICTION.

1. The bankrupt court has jurisdiction to enjoin parties from proceeding to judgment and

[1] [Reprinted by permission.]

execution in a state court during the pendency of proceedings in bankruptcy.

2. Where the declaration of bankruptcy has been suggested and not denied, the plaintiff is estopped from further proceeding with his suit in the absence of an order authorizing it.

3. Although a conveyance by a father to his son may be void as to creditors on account of fraud, the father is not thus deprived of his right to an exemption out of the property for a homestead.

4. A joint judgment against the bankrupt and a third party does not in any way affect the right of the plaintiff to proceed against the third party, even though enjoined from enforcing execution against the bankrupt.

5. The jurisdiction of the bankrupt court ceases with the granting of a discharge, and the plaintiff may then apply direct to the state court for relief. Bill dismissed, each party to pay his own costs.

[Cited in Adams v. Crittenden, 17 Fed. 45.]

[This was a proceeding by William Penny against A. H. Taylor. Heard on demurrer.]

HILL, District Judge. The questions now presented arise upon the defendant's demurrers to complainant's bill, some of which, although not necessary for the decision of this case under the conclusions to which I have arrived, are yet important as principles applicable to other cases, and will, therefore, be briefly stated.

The bill states that the complainant, in October, 1868, filed in this court his petition, praying to be declared a bankrupt, and for the benefits of the bankrupt law [of 1867 (14 Stat. 517)], that he was so declared, and, in November, 1868, obtained from the register a certificate of protection; that a suit was pending against him in the circuit court of Chickasaw county, brought by defendant to recover the amount due upon a promissory note executed by one Murdock and himself, in 1859, for the sum of six hundred and twenty-six dollars and eighty-seven cents; that at the February term, 1869, of said court, he suggested his bankruptcy, and asked for a continuance of said cause as to himself, until the question of his discharge should be determined, but that said application was refused, and judgment rendered against him for the sum of eleven hundred and ninety-one dollars and thirty-three cents; that, on the 3d day of March, 1870, by decree of this court, he was duly discharged from all his debts and liabilities existing on the 22d day of October, 1868, and obtained a certificate accordingly; that, in the course of said bankrupt proceedings, the assignee set off to him, as a homestead, the tract of land upon which he then resided, but which, in March, 1867, he had conveyed, for a valuable consideration, to his son, C. Penny, who was then a minor, under twenty-one years of age; that, in claiming said homestead in his petition, the facts were stated and the claim made upon the presumption that said conveyance was void by reason of said minority. The report of the assignee was not excepted to, and was confirmed. But that in November, 1872, defendant caused to be issued upon said judgment an alias execution, and to have the same levied upon said tract of land, and the sale thereof advertised to be had on the 3d of March, 1873, and prays that said proceedings be enjoined.

The demurrer admits the facts stated. The question is, do these facts so admitted entitle the complainant to the relief sought? There are numerous grounds of demurrer stated, some of which need not be considered, but only such as present important principles, and should be settled as rules of decision in such cases.

First. It is insisted that this court has no jurisdiction to enjoin parties from proceeding to judgment and execution in a state court during proceedings in bankruptcy, and that the judgment having been rendered subsequent to the commencement of the bankrupt proceedings, created a new debt and was not discharged by the decree. The constitutionality of the bankrupt law, has not and cannot be successfully assailed, and, by its provisions, the declaration of bankruptcy, without more, enjoins the commencement or further prosecution of any and all suits for the recovery of any demand provable under the act, until the question of discharge shall have been determined; and further provides that, upon the production of evidence of a declaration of bankruptcy, the cause shall be suspended in the court in which it may be pending, except when the amount in suit may be disputed; in such case, by order of the court of bankruptcy, the plaintiff may proceed to ascertain the amount due by the judgment of the state court, but at that point the proceedings are suspended until the question of discharge is determined. This is done both to relieve the bankrupt court and to convenience the parties, but can only be done by order of the bankrupt court, the forum upon which, necessarily, all jurisdiction as to the bankrupt's estate and the demands upon it are, immediately upon the declaration of bankruptcy, conferred. The practice is for the bankrupt to suggest his bankruptcy; if not denied, it is considered admitted; if denied, then he must establish it by proof. The effect of the declaration of bankruptcy, as stated, is, of itself, an injunction against the further prosecution of any suit or other proceedings to enforce payment of a demand provable under the bankruptcy proceedings except in the case stated, and the creditor or plaintiff who, knowing that such declaration has been made without such permission, attempts to proceed further with his suit, is in contempt of this injunction, and his proceedings must be held illegal and void so long as the injunction continues. The declaration of bankruptcy having been suggested and not denied, estopped the plaintiff from further proceeding with his suit in the absence of an order authorizing it, and, if there was such order, from any further attempt to enforce it until

the question of discharge had been determined, or the injunction created by law dissolved by order of the bankrupt court; and the discharge having been granted, and its correctness not then questioned or since set aside, this debt must be held as discharged, it being clearly provable under the bankruptcy, but which the defendant declined in any way to do, but, upon the contrary, has entirely ignored and treated the same with contempt.

It is further insisted, by way of demurrer, that the complainant had, by the conveyance to his son, divested himself of all title or claim to the land, the sale of which is sought to be enjoined, and hence, having no interest in the land, he has no standing in court. The transfer made by the bankrupt to his son, as between them, divested him of his title and ownership, but if made with the intention of defeating his creditors of the means of collecting their debts, the conveyance was void as to them, but, although void, would not deprive him of his homestead right, and hence the necessity of claiming it if such fraud existed. If it was a conveyance in good faith for a valuable consideration and no fraud existed, which would upon general principles avoid it, the defendant having no lien upon it before the bankruptcy, he cannot now assert any, nor can any other creditor, so that the only question would be between the bankrupt and his son, who might not choose to assert it as against his father's right of homestead, so that in any event the homestead having been set off to the bankrupt, as against the defendant and his other creditors, he has a right to protect it. Again, it is insisted that the judgment enjoined is a joint judgment against Murdock and complainant, and that it is enjoined as to Murdock without his being made a party to the proceedings; this is an entire misapprehension; the injunction in no way affects defendant's rights against Murdock, but only enjoins the enforcement of the execution as against complainant.

It is also claimed as ground of demurrer that neither the land nor defendant's judgment were before the bankrupt court, or passed upon by it. This is also a mistake; the bankrupt did bring his claim to the land before the court, and it was set off to him as a homestead. The bankrupt also, by his schedule, brought the claim before the court, and if the defendant did not choose to prove it, it was his own neglect, and he must suffer the consequences. If the conveyance made by the bankrupt to his son was void, and the bankrupt has no interest in it as a homestead, then it should be sold for the benefit of all the creditors, no lien having attached to it at the time of the commencement of the proceedings in bankruptcy. But it is insisted that no matter how these questions may be, this court has no jurisdiction to enjoin parties from proceeding in state courts, and that when parties first commence proceedings in the state courts, they cannot be enjoined from obtaining their judgments and enforcing them in such courts. Were this position correct, it would defeat the very end and purpose of the bankrupt law, with its just and humane provisions. It is unnecessary to go beyond the act itself to find the most full and complete jurisdiction conferred upon the bankrupt court, of the bankrupt, his estate of every kind, accrued or possessed by him at the date of the bankruptcy, and of all persons having any claims thereon, and the most full and ample powers are given to the bankrupt court, to make such orders and decrees upon all such persons as will secure the object of the law, namely, the assertion and protection of the rights of all parties who have priority, and an equal distribution among the general creditors of the remainder, and the discharge of the bankrupt from liability when entitled to it under the provisions of the law. Were it necessary to strengthen the position by reference to adjudicated cases, they will be found unanimous, with one or two exceptions, and which, when the facts in these one or two cases are considered, will scarcely be found exceptions. That the complainant is clearly entitled to the relief sought, as stated in his bill, I have no doubt. The only doubt is as to the forum in which he should assert his rights. The jurisdiction is full and complete in this court until the granting of the discharge, and the estate is completely wound up and closed. There must, however, be a time when its jurisdiction ceases. The decree of discharge and certificate furnish the bankrupt with the means of defense, of which he can avail himself in any court of justice, state or national. It also furnishes a means of defense to all others who may have rights derived from the bankrupt court, and to which, but for such transfers, the bankrupt could have availed himself, had such transfer not been made as against those claiming demands against the bankrupt.

The order and decrees of the bankrupt court, like the judgment and decrees of all other courts of record, when the court has jurisdiction of the subjected matter and of the person, must be held conclusive until reversed or set aside by proper proceedings for that purpose. The record shows that the petition for discharge was filed the 6th of May, 1869, within proper time; the discharge was granted in 1870, the estate having been wound up and settled and the assignee discharged November 6th, 1869. I am therefore of the opinion that, with the granting of the discharge and furnishing the bankrupt with his certificate, the jurisdiction of this court ceases, and that the complainant's remedy is either by an application to the judge of the court in which the judgment was rendered, and from which the execution issued, for a supersedeas of the execution, or to the chancellor of the district in which the land lies, for an injunction, either of which, I doubt not, has jurisdiction, and will afford the relief. Such being the case, for the cause stated, the de-

murrer must be sustained, and the bill dismissed, but without prejudice to the complainant to assert his rights in the proper forum. This question of judgment being a new one, not only in this court, but in all others, so far as I am informed, and being of the opinion that the defendant, by his course, is not entitled to his costs, each party must pay his own costs.

Case No. 10,958.

PENROSE v. PENROSE.

[17 Blatchf. 332.] [1]

Circuit Court, E. D. New York. Nov. 29, 1879.

REMOVAL OF CAUSES — REFUSAL OF STATE COURT TO MAKE ORDER—INJUNCTION.

1. An injunction will not be granted to restrain a defendant from proceeding in the state court in a cause which the plaintiff claims has been removed into this court, although the jurisdiction of this court over the cause is clear, and the state court has refused to make an order for the removal of the cause, and the defendant has noticed the cause for trial in the state court.

2. Such injunction is not required to uphold the jurisdiction of this court over the cause.

[This was a proceeding by Edward Penrose against Thomas B. Penrose. Heard on motion for an injunction.]

Henry C. Place, for plaintiff.
Peckham & Tyler, for defendant.

BENEDICT, District Judge. This is a motion for an injunction to restrain the defendant from taking further proceedings in this cause in the state court, where, as it appears, the defendant has noticed the cause for trial at the November term. The facts stated in the affidavit read in opposition to this motion afford no ground upon which to deny the jurisdiction of this court. No defect in the proceeding taken to remove the cause has been called to my attention, nor do the facts stated in regard to what has occurred in the cause afford any ground upon which to deny that jurisdiction of this court over the cause is complete. It appears, from the moving papers, that the state court has denied the application of the defendant for an order directing the removal of the cause, but no copy of the opinion of the judge assigning his reasons for refusing the order of removal has been furnished me. I am, therefore, without information as to any fact upon which to determine that the cause has not been removed to this court. It is well settled, that no order of the state court directing the removal is necessary, and, as before stated, no defect in the proceedings taken to effect the removal has been pointed out. I cannot, therefore, deny this motion upon the ground of want of jurisdiction over the cause. I must, however, deny it upon the ground that the injunction asked for is not required to uphold the jurisdiction of this court over the cause. The practice in cases like this has been settled for this court, in the case of Fisk v. Union Pacific R. Co. [Case No. 4,827], where an application similar to the present was denied. Upon the authority of that case the present motion must be denied.

[NOTE. The defendant subsequently obtained an order from the state court directing the removal of the cause and taxing the costs of the motion in his favor. The costs not being paid, he moved in this court for a stay of proceedings until the costs should be paid. This motion was denied upon the ground that the state court had lost all jurisdiction over the case, and therefore could not award costs. Penrose v. Penrose, 1 Fed. 479.]

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

PENROSE FERRY BRIDGE CO. (DEVOE v.). See Case No. 3,845.

PENSACOLA (JONES v.). See Case No. 7,488.

PENSACOLA (MILNER v.). See Case No. 9,619.

PENSACOLA & G. R. CO. (UNITED STATES v.). See Case No. 16,028.

Case No. 10,959.

In re PENSACOLA LUMBER CO.

[8 Ben. 171.] [1]

District Court, S. D. New York. June, 1875.

BANKRUPTCY — SETTING ASIDE ADJUDICATION — DISSOLUTION OF CORPORATION—JURISDICTION.

1. On the 6th of February, 1875, a petition of the trustees of a corporation, praying for the dissolution of the corporation, with affidavits accompanying, was presented to the supreme court of the state of New York, and thereupon an order was made "that the said corporation be and the same is hereby dissolved and shall from henceforth cease and determine, except only that power is hereby reserved to the officers of said company to convey its property to the said receiver, as hereby directed." No other order was made by the state court in that proceeding. On the 27th of February a voluntary petition in bankruptcy was filed by the corporation, in the view that the proceeding in the state court had been without jurisdiction and was void. An assignee in bankruptcy was appointed, and the proper steps were taken to vest him with the title to the property of the corporation. Creditors of the corporation, who claimed to have obtained liens by attachment of the property of the corporation, on the 15th of February, applied to have the adjudication in bankruptcy vacated, on the ground that the corporation had been dissolved before the filing of the petition in bankruptcy: *Held*, that, in proceedings in regard to the voluntary dissolution of corporations, under the Revised Statutes of the State of New York (2 Rev. St. 466), no presumption of jurisdiction attends the judgment of the court, but the facts essential to the exercise of jurisdiction must appear upon the record of the court.

2. The order of the state court dissolving the corporation, without a previous order to show cause, its publication, and the report of a master, as required by sections 61, 63, and 65 of the

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

Revised Statutes, was without jurisdiction and was void.

3. The application to vacate the adjudication must be denied.

In bankruptcy.

North, Ward & Wagstaff, for application.
W. R. Darling, for assignee in bankruptcy.

BLATCHFORD, District Judge. On the authority of the case of Galpin v. Page, 18 Wall. [85 U. S.] 350, I must hold that the corporation had not been dissolved at the time it presented its petition in bankruptcy to this court. The provisions of the Revised Statutes of New York (2 Rev. St. 466), in regard to the voluntary dissolution of corporations, confer upon the court of chancery, now the supreme court, special powers, to be exercised in a special manner, and over a subject not within the ordinary jurisdiction of the court. These powers are to be exercised on the performance of prescribed conditions. In such a case no presumption of jurisdiction attends the judgment of the court, but the facts essential to the exercise of the special jurisdiction must appear upon the record of the court. Assuming that the petition presented to the state court contained what is required by section 59 of the statute, and was verified as required by section 60 (facts which are, however, disputed), section 61 requires, that, on the papers provided for by the preceding sections of the statute being filed, "an order shall be entered requiring all persons interested in 'such corporation' to show cause, if any they have, why 'such corporation' should not be dissolved, before some master of the court, to be named in such order, at some time and place therein to be specified, not less than three months from the date thereof." Section 62 requires notice of the contents of such order to be published in certain newspapers. Section 63 provides for a hearing before the master and for the taking of testimony by him, and for a report thereon by him to the court. Section 65 provides as follows: "Upon the coming in of the report of the master, if it shall appear to the court that such corporation is insolvent, or that, for any reason, a dissolution thereof will be beneficial to the stockholders, and not injurious to the public interest, a decree shall be entered dissolving such corporation, and appointing one or more receivers of its estate and effects; and such corporation shall thereupon be dissolved and shall cease."

In the present case, the petition of the trustees of the corporation, and the affidavits accompanying it, were verified on the 5th of February, 1875, and were presented to the court on the 6th of February. The order made by the court thereupon was not an order to show cause, as required by section 61 of the statute, but was an order "that the said corporation be and the same hereby is dissolved, and shall from henceforth cease and determine, except only that power is hereby reserved to the officers of said company to convey its property to the said receiver, as hereby directed." No other order was ever made by the state court in the proceeding. The petition in bankruptcy was filed in this court on the 27th of February, 1875, by the corporation, acting on the view that it had not been dissolved, and that the proceeding in the state court was without jurisdiction and void. An assignee in bankruptcy has been appointed, and the proper steps have been taken to vest him with the title to the property of the corporation. Creditors of the corporation, who claim to have obtained liens by attachment of the property of the corporation, on the 15th of February, 1875, after it was, as they now allege, dissolved, apply to this court to vacate the adjudication in bankruptcy, on the ground that the corporation was dissolved when, on the 27th of February, it presented its petition in bankruptcy, by having been dissolved on the 6th of February. Of course, their liens can be maintained only by their insisting elsewhere that the corporation was still in being on the 15th of February, for the purposes of their attachments. Yet, being creditors of the corporation, they have a right to intervene and be heard, to make the application to vacate the adjudication.

The order of the state court dissolving the corporation was without jurisdiction. It had no power to make an order of dissolution, without first making an order to show cause, returnable not less than three months afterwards, and without seeing that the order was duly published, and without receiving the report of the master. Only after that should have been done had it any power to make a decree dissolving the corporation, and only "thereupon" could the corporation be dissolved. It appears affirmatively by the record that none of these prerequisites were complied with. The proceeding in bankruptcy then intervened and laid hold of the property of the corporation. The corporation retained its corporate existence and its title to its property, when the petition in bankruptcy was filed, notwithstanding the order made by the state court on the 6th of February. It makes no difference that the petition in bankruptcy was a voluntary petition, and that the petition was not filed by creditors. The corporation received its corporate existence and its functions, by virtue of which its creditors dealt with it, from the sovereign authority of the state. They remained with it when the petition in bankruptcy was filed, it not having then been dissolved by any competent proceeding. The application to vacate the adjudication is denied.

[NOTE. Subsequently a bill for an injunction was instituted by the Freeman's National Bank against C. Edgar Smith, assignee in bankruptcy of the Pensacola Lumber Company. The injunction asked for was denied. Case No. 5,089.]

Case No. 10,960.

PENSACOLA TEL. CO. v. WESTERN UNION TEL. CO.

[2 Woods, 643.] [1]

Circuit Court, N. D. Florida. March Term, 1875.[2]

CONSTITUTIONAL LAW — EXCLUSIVE PRIVILEGE TO BUILD TELEGRAPH LINES—CONFLICT OF LAWS.

1. The section of an act of a state legislature which purported to give the exclusive right to a telegraph company, incorporated by it, to erect and use lines of telegraph within certain counties of the state, is in conflict with the act of congress approved July 24, 1866 [14 Stat. 221], entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes;" and the section conferring such exclusive right is therefore null and void.

[Cited in Com. v. Louisville Bridge Co., 42 Fed. 245; Mercantile Trust Co. v. Atlantic & P. R. Co., 63 Fed. 519.]

2. Congress has the constitutional power to pass an act giving to telegraph companies, organized under state laws, the right to construct and use lines of telegraph along any of the military or post roads of the United States.

This was a cause in equity which was submitted on the pleadings and evidence for final decree.

Chas. W. Jones, R. L. Campbell, and G. A. Stanley, for complainant.

C. C. Yonge and E. A. Maxwell, for defendant.

WOODS, Circuit Judge. The bill avers in substance that on the 11th day of December, 1866, the legislature of the state of Florida passed an act by which it made the complainant company a body corporate, and conferred upon said company the sole and exclusive right and privilege of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa. [Laws 1866, p. 54.] That in pursuance of authority conferred by its act of incorporation, the said company had erected a line of telegraph along the right of way of the Alabama & Florida Railroad Company, within the county of Escambia, from Pensacola to the Alabama line, a distance of forty-seven miles. That by virtue of the pretended authority contained in an act of the legislature of Florida, approved February 19, 1874 [Laws 1874, p. 59], the defendant company, disregarding the exclusive rights conferred upon complainant by its charter, is proceeding to erect in the county of Escambia, and along the identical railway route where the line of complainant is erected, a line of electric telegraph, and it is the purpose of defendant to use its line, when erected, for the transmission of telegraphic dispatches for hire. That the erection and use of said line will greatly impair the value of the line erected by complainant, and deprive it of the benefit of its exclusive privileges within the counties of Escambia and Santa Rosa, granted by the legislature of Florida. The bill prays that defendant may be restrained from the erection and use of said line of telegraph within the county of Escambia in the state of Florida. The answer admits that the defendant company is erecting a line of telegraph from Pensacola to the Alabama state line, all within the county of Escambia, in the state of Florida. It avers that the line will follow the right of way of the Louisville & Pensacola Railroad Company, from which it has obtained a license to erect its line upon said right of way, and it claims the right to erect and use its line for the purpose of transmitting messages by telegraph for hire, by virtue of authority granted by the legislature of Florida, and also by virtue of an act of congress, approved July 24, 1866. The answer avers that the defendant has filed with the post master general its written acceptance of the restrictions and obligations required by said act.

As in my judgment, the law of congress is sufficient authority for the acts of defendant, it will only be necessary, in deciding this case, to consider its provisions. It is entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," and is found on pages 221, 222, 14 Stat. (Rev. St. tit. "Telegraphs"). The first section declares that any telegraph company now organized, or which may hereafter be organized under the laws of any state of this Union shall have the right to construct, maintain and operate lines of telegraph * * * along any of the military, or post roads of the United States, which have been or may hereafter be declared such by act of congress. Section 2 provides that telegraphic communications between the several departments of the government of the United States, and their officers and agents, shall, in their transmission over the lines of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the post master general. The 3d section, among other things, provides that the United States may, at any time after the expiration of five years from the passage of the act for postal, military or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, to be appointed as is provided in said section. The 4th and last section declares that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file its written acceptance with the post master general of the restrictions and obligations required by this act. By an act of congress approved June 8, 1872 (Rev. St. § 3964 [17 Stat. 283]), all railroads are declared to be post roads. This act of July 22, 1866, the provisions of which have just been stated, was, it will be observed, in

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

[2] [Affirmed in 96 U. S. 1.]

force before the passage of the act of the legislature of Florida, incorporating the complainant, and giving it exclusive privileges. The constitution of the United States (article 5) declares, that "this constitution and the laws of the United States, which shall be made in pursuance thereof, * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary, notwithstanding." If congress had power to pass this act, it would seem to follow, that the act of the legislature of Florida could not override it. It will be observed, that the act contemplates the use of the telegraph lines for postal, military or other purposes; that it gives the business of the several departments and officers of the government the priority over all other business, and at rates to be prescribed by an officer of the government, and that it provides for the purchase, at an appraised value, by the government, if it shall so elect, of the lines of the companies which take advantage of the act, and the companies are required to assent to these conditions. The power of congress to pass the act may be referred to the power to regulate commerce among the several states (Gibbons v. Ogden, 9 Wheat. [22 U. S.] 189–229), or it may be referred to the power to establish post offices and post roads, or to the power to raise and support armies, or to the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. The use of the electric telegraph by the departments and officers of the government has become absolutely necessary to the carrying on of the operations of the government. The functions of the government, either in war or peace, could not now be carried on without its use. The power, therefore, to secure its advantages must necessarily exist in congress. It is not supposed, nor is it claimed by defendant, that the act of congress gives a telegraph company the right to occupy the right of way owned by railroad companies without compensation. The right of way of a railroad company is private property and cannot be taken for public or private use without compensation. The main purpose and effect of the law is to prevent just such legislation by the states as that set up by the complainant in this case. If every state legislature should undertake to pass such charters as that granted to the Pensacola Telegraph Company, the operations of the general government, so far as they are carried on by the telegraph company, would be greatly impeded if not absolutely obstructed. But it is claimed by the counsel for the Pensacola Telegraph Company, that it was not the purpose of the act of congress to authorize the telegraph companies of one state to erect telegraph lines along post roads within the limits of another state. It would seem to be a sufficient answer to this, that the act itself makes no such restriction. Its language is plain and unequivocal: "Any telegraph company now organized or which may hereafter be organized under the laws of any state of this Union shall have the right to construct and operate lines of telegraph * * * along any of the military or post roads of the United States which have been or may hereafter be declared such." Here is no such restriction as the complainant insists upon. Such a restriction, it is plain to see, would defeat the object of the act which is to provide telegraph lines all over the country, of which the government should have the priority of use at reduced rates, and which it may purchase at its option.

Upon the whole case, I am of opinion that so much of the act of the legislature of Florida, as purported to give the exclusive right to the complainant to erect and use lines of telegraph in the counties of Escambia and Santa Rosa was in conflict with the act of congress and, therefore, null and void. These views coincide with the opinion expressed in the case of Western Union Tel. Co. v. Atlantic & P. Tel. Co., 5 Nev. 102. The result is, that the complainant has not shown itself entitled to the injunction prayed for by its bill. The bill must therefore be dismissed at complainant's cost. Decree accordingly.

[NOTE. The decree in this case was affirmed upon appeal to the supreme court, Mr. Chief Justice Waite delivering the opinion; Mr. Justice Field and Mr. Justice Hunt dissenting. 96 U. S. 1.]

PENT v. The CONCORDIA. See Case No. 3,092.

Case No. 10,961.

PENT et al. v. The OCEAN BELLE.[1]

District Court, S. D. Florida. Jan., 1861.

SALVAGE COMPENSATION—HOW DETERMINED—DISTRIBUTION.

[1. Salvage is a reasonable compensation; an adequate reward for saving property, and not any definite proportion of the value saved. The reasonableness of the compensation depends upon a full and fair consideration of time, place, labor, danger, value, and number of salvors who performed or were necessary to perform the salvage service.]

[2. What would be no more than reasonable salvage on the coast of Florida, where so many wrecks occur, and where the assistance of so few transient vessels can be had, and where consequently the employment of so many wrecking vessels has been found necessary, might be unreasonably large in the neighborhood of commercial ports, where wrecks are fewer, and passing vessels numerous.]

[3. Salvors are entitled of right only to a reasonable compensation for work and labor, and no injustice is done them if any reward beyond this is withheld. Such additional reward is not made on account of the salvors at all, but purely for the good of commerce in general, to encourage others to save property in like peril.]

[1] [Not previously reported.]

[4. In places where wrecking is a business, and salvors engage therein more from interest than humanity, the scale of salvage awards should be so adjusted as that it will never be to the interest of a salvor that a ship should be lost, and that it should always be to his interest that she should be saved in a condition as little damaged as possible.]

[5. Where a ship laden with cotton, stranded near Marquisas Island, 30 miles from Key West, was gotten off, in good weather, by the aid of 8 wrecking vessels, aggregating 481 tons, with 64 men, and a steam propeller of 450 tons, with 21 men, after lightening her of 1,140 bales of cotton, and was then towed around an extensive shoal about 70 miles, to the harbor of Key West, *held*, that $17,000 should be allowed upon an aggregate valuation of $165,000, it appearing that, had the weather been bad, the ship, from her exposed situation, would have been in great peril of total loss.]

[6. Licensed wrecking vessels are entitled to be admitted to assist in the order in which they arrive, if further assistance is needed; and, if some are excluded, and a vessel arriving after them, is permitted to render assistance which they could have rendered, they will be permitted to share in the salvage; but they are not entitled to an equal share with the others, and they should be awarded only so much as, under all the circumstances, the court may think them equitably entitled to, and so much as will make it to the interest of the wreckers to conform to the rule above stated.]

[This was a libel by James Pent and others against the ship the Ocean Belle and cargo to recover salvage for services rendered.]

W. C. Maloney, for libel.

S. J. Douglas, for respondent.

MARVIN, District Judge. This ship, laden with 3,048 bales of cotton, bound from New Orleans to Liverpool, ran ashore near Marquisas Island, situated about thirty miles to the westward of this place, on the morning of the 6th of January, 1861. Learning that the ship was ashore, eight wrecking vessels, of the aggregate tonnage of 481 tons, carrying in all sixty-four men, and a steam propeller of the burthen of 450 tons, carrying twenty-one men, proceeded from this port to her assistance, and, after carrying out an anchor, lightened the ship of 1,140 bales of cotton, when, by heaving at the windlass, and tugging by the steamer, the ship came off the reef. She was then towed around an extensive shoal, and brought to this place. She was towed in all about seventy miles. The weather was good, and the ship sustained but little damage while ashore, so that the ship is in a fit condition to proceed on her voyage without being discharged or repaired. Had the weather been bad, her exposed situation would have subjected her to great peril of total loss. The value of the ship, for the purpose of determining the question of salvage, may be estimated at $30,000, and the cargo at $135,000, making the aggregate $165,000. The questions to be decided are, what amount of compensation ought to be allowed for the services rendered in saving the ship and cargo, and how shall the sum allowed be divided among the salvors?

As to the first question, the law has long since been settled in England and the United States that salvage is a reasonable compensation; an adequate reward for saving property exposed to marine peril, and not any definite proportion of the value saved. The reasonableness of the compensation must, in the nature of the case, depend upon a full and fair consideration of all the circumstances of time, place, labor, danger, value, and number of salvors who performed, or were necessary to perform, the salvage service. What would be no more than reasonable on this coast, where so many shipwrecks occur, and where the assistance of so few transient or trading vessels can be had to save the property, and where, consequently, the employment of a number of regular wrecking vessels has been found necessary for that purpose, might be unreasonably large in the neighborhood of commercial ports, or on the coast of England or the United States, or in any place where regular wrecking vessels were unnecessary, because wrecks were fewer, and the assistance of transient persons or vessels could be more easily obtained. But there must be a limit to the augmentation of the rates of salvage for services rendered on this coast, and that limit will be more clearly seen by adverting to the reasons which the law assigns for allowing salvage in any case for services rendered on any other sea or coast. Persons engaging in the business of wrecking are very apt to acquire a habit of thinking that they are entitled of right to a reward for saving property,—to something more than common pay for common labor. And when that reward is withheld from them, or is not so large as they think it ought to be, they think great injustice is done them. Whereas the truth of the matter is, according to all the leading cases on the law of salvage in England and the United States, salvors are entitled of right to a reasonable compensation for work and labor only; and no injustice is done them when they are paid this, and the reward is withheld. The reward—or the excess beyond pay for work and labor—is not awarded to them on their own account at all, but purely on account of commerce in general, to encourage others to save property in the like peril. If persons would as readily and voluntarily save property on the sea as they do on shore from a burning house, no salvage would be decreed by the courts in the one case any more than in the other. Mason v. The Blaican, 2 Cranch [9 U. S.] 240; The Sarah, 1 C. Rob. Adm. 312, note; The Hector, 3 Hagg. Adm. 95. From this view of the subject, it follows that salvages ought never to be graduated at higher rates than the good of commerce really requires; and whenever it appears that more vessels and men are employed in the business of saving property than the good of commerce truly requires, it is evident that the rates of salvage

have been too high,—too stimulating,—and the court should at once be admonished that the good of commerce required that they should be reduced. Commerce may be damnified by too high salvages, not only by being subjected to their payment, but also by increasing the inducement to salvors to collude with shipmasters with a view to the acquisition of such salvages. It is believed that no vessel or cargo has been lost on this coast in many years in consequence of an insufficient supply of wrecking vessels and men to save them. This fact is evidence that the salvages have been sufficiently high for the good of commerce. We have no evidence that they have not been too high; and whether they may not be somewhat reduced and graduated on a lower scale to the advantage of commerce is a question worthy of the very serious consideration of the court. That the interests of persons engaged in the wrecking business cannot be promoted by high rates of salvage, is perfectly obvious to the mind of every impartial and disinterested person. High rates of salvage induce a large number of persons to engage in the business and share its profits. An increase in the number of the sharers diminishes the share of each, in like manner as an increase in the divisor diminishes the quotient. A further increase in the salvages would have the same effect. A progressive series of augmentations in the rates of salvage would end in taking the whole property saved for the salvage, and in collecting a large number of persons upon the coast, dependent upon shipwrecks for their living, whose individual annual shares, on account of their increased numbers, would be no larger than shares of a less number, receiving only salvages graduated on a moderate scale. The interests of the professional salvor cannot, in the long run, be promoted by high rates of salvage; and his interests, when rightly understood, will always be seen to be in harmony with the interests of commerce. Both are best secured, in the long run, by moderate salvages.

We will now advert to number of cases, by way of showing what have been the usual rates of salvage decreed by this court. We shall select the cases indifferently from the two classes: First, from that when the vessel was saved; and, second, where it was lost. The Ellen Hood [Case No. 4,377] was decided in 1855. That ship ran ashore to the northward of Cape Florida, about 150 miles from this place. She was laden with 3,039 bales of cotton. Ten wrecking vessels, carrying in all eighty men, lightened her of 961 bales, heaved her off, and brought her to this port. The ship and cargo were valued at $192,391. The court decreed $20,500 for salvage. The Courier [Id. 3,283], laden with 3,024 bales of cotton, got ashore on Carysfort Reef, and lay in an exposed situation. The master carried out his own anchors, after which the weather became bad, and the crew insubordinate. Six wrecking vessels, carrying sixty-two men, carried out another anchor, lightened the ship of 900 bales, and heaved the ship off. They were employed several days in performing the service, the weather being too bad to work. The ship and cargo were valued at $140,000, and $19,000 were decreed for salvage. The case of Roberts v. The Ocean Star [Id. 11,908] was decided in 1860. This ship, laden with 2,590 bales of cotton, went ashore on the outer side of Brewster Reef,—a dangerous reef situated near Cape Florida. Four wrecking vessels and a number of fishing boats, possessing an aggregate tonnage of 401 tons, and carrying 67 men, carried out three anchors, and lightened the ship of 583 bales. The master left the ship as soon as the first wrecking vessel was loaded (very improperly, as the court thought) to go to Key West to make arrangements with his consignee. The ship was in a very dangerous situation, demanding the utmost care and skill to extricate her. The wreckers exercised both, and saved the ship and cargo. She leaked badly, requiring constant pumping on her way to this port. The ship and cargo were valued at $106,000; salvage, $16,500; seamen's shares, $95. The Maria Pike [Id. 9,081], laden with cotton and molasses, ran ashore on North Key Flats, one of the Tortugas Shoals. Three smacks, carrying twenty men, went to her assistance. They found the master employed in staving his deck load of molasses to ligthen the vessel. She was lying easy, but surrounded with intricate and extensive shoals. On the arrival of the smacks the master ceased the business of staving the casks of molasses, and the next morning forty barrels of molasses were put on board one of the smacks, and, sail being made, she went off the reef into deep water by an inner channel known to the salvors, but unknown to the master. Considerable skill and good judgment were displayed by the salvors in managing the sails to get the vessel clear of the shoals, and in subsequently piloting the vessel through the channel out to sea. The master could have got the vessel afloat by throwing overboard the forty barrels of molasses, but he could not have got her out of her difficulties without a pilot. The court said: "The chief value of the services consisted in the piloting, which very likely was the means of saving the vessel and cargo." The value of vessel and cargo was estimated at $32,000; the salvage was $3,200; shares, $65. The Laura Russ [Id. 8,120] was stranded on Alligator Reef in 1860, laden with an assorted cargo. Two wrecking vessels and several boats, carrying in all twenty-eight men, carried out two anchors, and partly loaded one of the vessels. They then heaved her off, warped her some distance into deep water, and brought her to this port. Value $24,000; salvage, $3,000. In the case of The Pilgrim [Id. 11,166], two wrecking vessels and eighteen men carried out an anchor and heaved

the vessel off the American Shoal. Value, $16,000; salvage, $1,500. The Calcutta [Id. 2,298], valued at $60,000 was piloted from the Washerwoman Shoal where she lay in a perilous situation, into Key West, and $1,500 was decreed for the service.

In the following cases the vessels were lost: The Eliza Mallory [Case No. 4,365] was wrecked in 1860, on the coast north of Cape Florida, laden with 4,923 bales of cotton, weighing 180 pounds each. Twelve wrecking vessels were employed various and different lengths of time—some one week, some five—in saving the cargo. The water in the ship came up about two feet over the lower deck, so that all the cotton saved from the lower hold was saved by diving, but the diving was attended with less difficulty than is usual in cases where the bales are larger. The whole cargo saved was valued at $56,445. The total salvage allowed was $16,241. The rates of salvage were one-fifth on the dry, one-third on that partly wet, and two-fifths on that saved by diving; one-third was allowed on the stores and materials. The shares varied from $21 to $77. The Crown [Id. 3,450], laden with cotton and grain, was lost on Ajax Reef in 1857. Fifteen vessels, possessing an aggregate tonnage of 1,161 tons, carrying 152 men, saved cotton, grain, and materials to the value of $131,000. The salvage was $23,000; the seamen's shares $70. The Yucatan [Id. 18,194], was lost near Cape Florida, laden with an assorted cargo. Nine large wrecking vessels were employed to save the cargo. Forty-three per cent. was allowed for salvage, which made the average shares $62. The Brewster [Id. 1,852] was lost near Cape Florida, laden with cotton. The cargo was saved by twelve vessels carrying 133 men. The salvage was one-third. Shares $50. Where the value of the cargo and materials saved has been comparatively small, and more than one or two wrecking vessels have been employed, the court has been in the habit of allowing forty-five and fifty per cent. for salvage, in order to compensate for the labor; as in the case of The Nathan Hanan [Id. 10,029], where the value saved was $4,554.39, forty-five per cent. was allowed; and in The Thales, where the value was $2,105, one-half was allowed. The most usual rate of salvage, in this court, for saving cotton where the ship was lost, has been twenty-five per cent. on the dry, forty per cent. on the wet saved without actual diving, but taken out from under the water, and fifty per cent., and, in some few instances, fifty-five and sixty per cent., for saving it by diving in the lower hold, as in the cases of The Mulhouse [Id. 9,910], The Indian Hunter [Id. 7,024], The Mary Coe [Id. 9,204], The Cerro Gordo [Id. 2,557], and others.

It is to be remarked in regard to these two classes of cases—first, where the vessel was lost, and, second, where it was saved—that the shares of the individual salvors have, for many years past, in this court, been quite as large in the cases where the vessel was saved, other things being equal, as where it was lost. In some few instances, where a large number of salvors were employed, the aggregate salvage may have been larger where the vessel was lost; but the individual shares in such cases will be found generally to have been less than in most cases where the vessel was saved.

It will be found, too, on looking into the cases on file in the clerk's office, that the court has always judged of the peril by the circumstances of the situation of the ship on the reef, depth of water around her, the winds, tides, &c., more than by the condition of the ship after she had been got off. A chafed or ground keel or bottom, or a leak in the ship, may be evidence of a want of honest persevering exertions on the part of the salvors to relieve her before such damage occurred, as well as evidence of her perilous situation while on the reef. Ships are to be saved, not lost. And the same motive of policy which authorizes the giving of salvage in any case requires on this coast, where wrecking is a business, and the salvor is such more from motives of interest than humanity, that the scale of salvages should be so adjusted as that it shall never be the interest of a salvor that a ship should be lost, but, on the contrary, that it should be saved in a condition as little damaged as possible. I know, from observations of the past, that this policy often thwarts the wishes of the master of the ship, who too often prefers, on account of the insurance, that his ship should be lost. But it is the duty, and the court makes it the interest, of the wreckers of this coast to save the ship, when it is possible, and not to collude with the master in such cases. If the assistance of wreckers is taken any time before the actual bilging of the ship, they are to be held accountable for carrying out anchors in due time, and planting them in the right places, and for the strength and security of their hawsers and chains, and generally for the safety of the ship, unless they show by the facts of the case that it could not be saved, or that the master prevented its being saved. The salvor claims salvage on the ground of meritorious services, and he must show merit. There is but little merit in saving a cargo, or a part of a cargo, when the salvor had it in his power to save the ship, but did not. To encourage the salvor, then, to do his duty, and to harmonize his duty with his interest, as far as is right, he should be well paid when he saves the ship, and more poorly paid when the ship is lost, even without his fault. See remarks on this subject in [Marvin on] "Wreck and Salvage" (section 110, and note, and section 107).

Returning now to the particular case before the court for consideration, and comparing it with the cases of The Ellen Hood, The Courier, and The Ocean Star, already

referred to, I think that seventeen thousand dollars is a reasonable salvage to all the salvors for the whole service. It remains to divide this sum among the salvors. It is a common usage of courts of admiralty both in England and the United States to divide the sum decreed for salvage among the salvors according to their respective merits, or a just and valid agreement of consortship, and to ascertain the share of each. The observance of this usage is particularly important where wrecking is a business, in order to protect the just rights of the weak and ignorant among the salvors themselves, and, in order to prevent sums in the way of gifts or bribes being deducted from the amount and given to the master of the wrecked vessel before it is divided into shares, which might occur when such division is not made under the supervision of the court, the clerk pays into the hand of each salvor his share.

In the present case the eight wrecking vessels first at the ship had carried out an anchor and lightened the ship of about 800 bales of cotton before the steamer came up. The steamer was then employed, and they all labored together in lightening the ship. Nine hundred and forty-eight bales were put on board the wrecking vessels, and 192 bales on board the steamer. The principal labor had been performed by the first set of salvors, before the steamer arrived, and they would undoubtedly have saved the ship without her services. But her services were valuable in getting the ship off the reef, and in towing her into port. I think that thirteen thousand one hundred dollars should be allowed to the eight wrecking vessels and crews, which, when divided among them according to the usual mode, by allowing the vessels one-half, the masters three shares, the mates two, and the seamen one, will make the seamen's share about seventy dollars. There should be allowed to the steamer two thousand one hundred dollars, and sixty dollars for a proctor's fee, which, considering the extraordinary expenses of running steam vessels as compared with sail vessels, and the fact that her crew were at the time of rendering the service on wages, ought to be divided by allowing the owner $1,721 and the crew $379. This latter sum should be divided among the crew by allowing the master $50, the pilot $50, the mate and two engineers each $25, and the rest of the crew each $12. These sums are in addition to their wages. There still remains $1,737, part of the $17,000 allowed for the total salvage, to be disposed of. This brings me to the consideration of some features of the case not hitherto noticed. Five smacks of the aggregate burthen of 188 tons, and carrying in all thirty-two men, arrived at the ship a day after the eight wrecking vessels and a day or two before the steamer. They were at the ship, tendering their services, at the time the steamer was employed. They claim that they were entitled to be employed before the steamer, that they were unjustly excluded from rendering salvage services, and are equitably entitled to a distributive share of the salvage earned. The rule of the high court of admiralty on this subject seems to be that all persons coming up together, or about the same time, to render assistance to a ship in distress, are entitled to share in the salvage, although a part only are actually employed. The Mountaineer, 2 W. Rob. Adm. 7. The rule in this court is: "That licensed wrecking vessels are entitled to be admitted to assist at a wreck or ship in distress, in the order in which they arrive, if further assistance is needed, unless some good cause exists for the contrary; and the master of any wrecking vessel, deeming his vessel and crew excluded without sufficient cause, is at liberty to apply to the court, by petition for a distribution share of the salvage." This rule is obviously just in itself, and sound in policy. It prevents disorders and quarrels at wrecks, and takes away from the first boarder or master wrecker the power, by colluding with the master of the ship, to extort hard terms from those that arrive after him. Before the adoption of this rule and its enforcement by several decisions, it was not uncommon for the first boarder or master wrecker to agree with the master of the ship to give him a portion of the salvage, on condition that the former should be allowed to select the vessels to be employed. The master wrecker being in this way submitted pro hac vice master of the ship, and the real master corrupted, it was an easy matter to extort from the wreckers who subsequently arrived any terms touching the division of the salvage the former might impose. But the right to be employed in the order in which the vessels arrive being now protected by the court, and the salvage decreed being divided and paid out by the court, no such opportunity of extortion from the other salvors or corruption of the master exists. It is to be observed however, that neither the rule nor any decision of the court interferes with the right of the master to employ one wrecking vessel in preference to another. Its effect is to protect him against an attempt by any wrecker to corrupt him, by taking away the inducement, and he is left every way free to employ any vessel he pleases. But when the wreckers come before the court to recover their salvage, he can properly have no interest beyond the amount to be decreed for the whole service. With the distribution of that amount among the salvors he has no concern. If no improper influences are brought to bear upon him, he will ordinarily employ the wrecking vessels, if adapted to the service required, in the order in which they arrive, for this is obviously just; and if he employs them in any other order, unless his reasons for doing so are satisfactory to the court, it may fairly be inferred that improper influences have

been exerted upon him by some of the salvors to the disadvantage of others. Such improper influences are not to be tolerated.

In the case before the court it is obvious that the employment of the steamer was proper and judicious. She could perform a service, and did perform a service, which the excluded vessel could not. But they could have lightened the ship of the 192 bales of cotton as well as she, and, pro tanto, their claim is founded in equity, and is fairly within the rule of the court and the decision of this court in the case of The Gutherie. But neither the rule nor any decision of the court recognizes the right of the excluded vessels to an equal share of the salvage; but to such a share as, under all the circumstances, the court may think they are equitably entitled to, and such as will, under ordinary circumstances, make it the interest of the wreckers, so far as they are concerned, to conform to the rule. I think it is equitable in the present case to allow the five smacks the $1,737 unappropriated. They remained at the work several days, under circumstances that indicated that their services would be needed, when their time, too, could have been profitably employed in fishing. This allowance is not an addition to what would have been the salvage had they not been there, but it is allowed them from what would otherwise have gone to the other salvors. The total salvage has not been increased on their account. Decree accordingly.

Case No. 10,961a.

PENT et al. v. TWO THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS.[1]

District Court, S. D. Florida. July, 1880.

SALVAGE—CONTRACTS OF CONSORTSHIP—LICENSED WRECKERS—DISTRIBUTION OF SALVAGE MONEY.

[1. Contracts of consortship, if within reason, will be sustained when fully proven, but the burden of proof is upon him who sets up an agreement materially changing the rights of salvors, and excluding, without just cause, any one who took part in rendering the service from sharing in the salvage award. *Held*, therefore, that where an alleged contract was set up, which was contrary to all principles of dividing salvage, but the evidence was insufficient to show a common understanding at the time it was entered into as to the terms thereof, the same would be disregarded, and the salvage money divided according to the established rules.]

[2. The law requiring vessels engaged in wrecking on the coast of Florida to have a wrecking license justifies the exclusion of unlicensed vessels from participating in a salvage service, and sharing in the award therefor, only when licensed vessels are present which are capable of rendering the required services, and if the services of unlicensed vessels are accepted, they are entitled to share in the compensation.]

[3. Where salvage services were rendered wholly by the crews of the vessels present, the vessels themselves being unable, from the peculiar circumstances, to participate therein, and being also in the aggregate of only 16 tons of measured tonnage, *held*, that the usual rule, giving one-half to the vessels and one-half to the men, should be varied, and that only two-fifths should be given to the vessels, and the other three-fifths divided among the crews.]

[This was a libel by Anthony Pent and others against $2,850 in the hands of William D. Cash.]

L. W. Bethel, for libellants.

W. C. Maloney, for respondents.

LOCKE, District Judge. The prayer of the libellants is based upon an alleged verbal contract made at the time of rendering salvage service to the Br. S. Benmore, by which it is claimed that only the licensed vessel, the Gleason, was to share in the salvage, and she was to receive as much per ton as the men received per share, and that the other boats were to receive nothing. This contract as alleged would be contrary to all principles of dividing salvage earnings, and could only be sustained by direct and conclusive evidence. Contracts of consortship, if within reason, will be sustained when fully proven, but the burden of proof is upon him who sets up an agreement which materially changes the rights of parties engaged, and excludes from a share of salvage any one without just cause. In regard to such consortship, the law is well established that they are binding only so far as they are reasonable and just, and deprive no party of a fair share of whatever is earned. The duty of protecting the weak or ignorant against the strong or cunning, or those who from some temporary advantage attempt to make hard bargains, justifies courts of admiralty in going back of such bargains, if necessary for such purpose. If they supply a rule which is just and fair, and nearly such as the court itself would be disposed to adopt, they are carried into effect; otherwise not. The Beulah, 1 W. Rob. Adm. 477; The Louisa, 2 W. Rob. Adm. 22; Marv. Wrecks & Salv. 241, 251.

In this case four parties have testified to this agreement, all directly interested in the result of the division and benefited by one according to their understanding. A. J. Pent says: "Capt. Smith made the proposition of consortship, that the Gleason was to draw her tonnage, but the money was to be divided into shares, and she was to draw a share for a ton. He said no vessel should draw unless she was licensed, and that the Gleason was the only one that had a license. The balance of the boats were to be counted out." John Saunders says: "Capt. Smith made consortship. He said all licensed vessels would draw their tonnage. Their tonnage would be this, they would draw a share to each ton. So to the share so to the ton. I heard nothing said about the men and boats." Capt. Smith says: "I told them the steamer was given up to me to get off, and said, 'Gentlemen, you that are licensed will get your tonnage, and you that are not will get your shares.' I meant their shares, and not their

[1] [Not previously reported.]

boats. I did not say that the shares should be arrived at by dividing the net amount into shares, and 'as it was to the share so should it be to the ton.' I did not say that the Gleason, being the only licensed vessel, should draw her tonnage. I thought the Eugene had a license. Her master told me she had. I never agreed that the Gleason should receive a share to a ton." Jeremiah W. Pinder says: "Capt. Smith agreed to take in all the vessels of 5 tons; did not say anything about men. The agreement was 'all boats not 5 tons cannot come in'; that is as near as I can recollect it. Did not hear a word said about how the money was to be divided. I considered my vessel was to come in and earn salvage, as she was over 5 tons. I never agreed that my vessel should not draw salvage. I heard all that was said that night. I did not hear any one say anything at all that night about a license. If anything had been said I should have known it." In this condition of proofs, it is impossible to determine what the agreement of consortship was. Pent and Saunders say that nothing but the Gleason was to share, she being the only licensed vessel, but she was to receive but a share per ton. Smith admits that only the licensed vessels should share, but denies that he agreed to accept a share per ton; but, as he claims, the contract was she was to receive one-half of the entire salvage no other vessel receiving anything, although at the time he says he believed one of the vessels had a license, although Pent and Saunders say that at the time he said that he, being the only licensed vessel, would be the only one to share. Pinder, although present at the time and hearing all that was said, says nothing was said about licensed vessels that night, and he had no idea but what his vessel was to share.

In order that there may be a valid contract, there must be some common ground of understanding, some mutual yielding until a point is reached where the interest and understanding of each party is similar as to the force and effect of the agreement. Each of the witnesses was a party to the alleged contract, and the most generous construction that can be put upon the matter is that there was no common ground of understanding or interest between them; that either the surrounding circumstances, or the terms of the would be contract were so vaguely and indefinitely set forth that no two of them got the same idea of what it meant, and each went away with a view that a bargain most favorable to himself and those of his class had been made. This seems to have been the facts from the testimony, and the circumstances would certainly tend to show that such contract as claimed by Capt. Smith would have been most arbitrary and unjust to many of those who are claimed to have accepted it without the least compensating circumstances in return. Capt. Smith, with but two men, had received permission to get the steamship afloat for a certain amount. He was perfectly helpless. The labor was to be performed by discharging cargo, where vessels or boats could not assist. In order to do anything, it was absolutely necessary that he should have assistance; and that at that time he should force the stipulation that his vessel, while doing nothing, should receive one-half of the salvage money, while no others were to receive anything, and that the other masters, knowing how dependent he was upon them for assistance, should accept such propositions, seems, to say the least, unreasonable. I cannot understand that this could have been the case. On the other hand, there is not evidence enough to satisfy me that they had agreed to divide. Pent and Saunders say a share to the ton, and I am satisfied that the common understanding necessary to a valid contract was entirely wanting in this case; and it therefore devolves upon the court to order such division as may be just, according to the established rules of this court and the circumstances of the case. The requirements of law compelling all vessels engaged in wrecking on this coast to have a wrecking license, although intended to prevent other vessels from engaging in wrecking, and justifying their exclusion when there are other vessels licensed, and also justifying the court in making reasonable discrimination in favor of the licensed vessels when demanded, do not prohibit a compensation to others when, being present, their services come into requisition, and they render valuable aid. It is only when licensed vessels are present capable of rendering the required services that unlicensed ones can be excluded, and if they are accepted, they are entitled to compensation. The relation existing between the vessels of any class and their crews is so intimate that nothing except the most unusual services will justify either crew or owner in attempting to exclude the other from a share of any earnings. The question of the portion of salvage money that is given separately to the vessels and crews in this court, although usually settled by rule so as to apply to all ordinary cases in a fair and just manner, may be varied or changed when justice may require it, or a superabundance of either tonnage or men would render such a variation necessary to give just compensation to either.

This is an unusual case. The large number of men present,—nearly 60,—with only 16 tons of measured tonnage, enabled the vessels to earn without any use of them what will under any circumstances be liberal compensation, yet without doubt the presence of a licensed vessel influenced the master of the Benmore to accept the assistance he did. I consider the circumstances will justify something of a variation from the rule of the court which gives one-half to the men. Two-fifths will, I consider, compensate the vessels present as amply as the remaining three-fifths will the men. There is no reason why all

vessels whose men were engaged should not share. None rendered any service except providing men, and all did this equally. The Gleason, Irene, and Eugene being the only vessels of measured tonnage, they will share from the vessels two-fifths according to their tonnage. The smaller boats each receive an amount equal to a man's share. The three-fifths will be divided among the men, giving Smith, the master of the Gleason, the only licensed vessel, four shares as master wrecker, all others one share each.

Case No. 10,962.

In re PENTLARGE et al.

[17 Blatchf. 306; 4 Ban. & A. 607.] [1]

Circuit Court, E. D. New York. Nov. 14, 1879.

PRACTICE IN EQUITY—CONSENT DECREE—BILL OF REVIEW TO SET ASIDE—ESTOPPEL.

1. R. having sued F., in equity, for the infringement of a patent, F., in writing, admitted R.'s right, and agreed on the damages to be paid, and to consent to a decree therefor and for a perpetual injunction. Such consent was given and the decree was entered, the damages were paid, and the injunction was issued. Many terms of court having elapsed since the entry of the decree, F. applied for leave to file a supplemental bill, to set aside the decree, on the ground that the agreement was entered into under a mistake of fact. *Held*, that the application was really to file a bill of review, and was too late, under rule 88, in equity.

2. The decree having been entered by consent, a bill of review to set it aside could not be entertained.

3. The agreement operated as an estoppel.

[In the matter of the petition of Frederick Pentlarge and William Beeston.]

BENEDICT, District Judge. The petitioners, being parties defendant to an action brought against them by Rafael Pentlarge, to recover damages for the infringement of a certain patent, entered into a written agreement, under seal, with the plaintiff, wherein they expressly admitted the validity of the plaintiff's patent, and his exclusive right to the invention described therein, and agreed upon the amount of damages to be paid for their infringement, and to consent to a decree upholding the patent, and adjudging the sum of $2,000 to be due as damages, and awarding a perpetual injunction against future infringement by them. [See Case No. 10,963, and note.] In accordance with this agreement, a consent to the decree described therein was given, and, upon it, such a decree was duly entered. The damages awarded by the decree were thereafter paid, and the perpetual injunction awarded by the decree was duly issued. The defendants now, many terms of court having elapsed since the entering of the decree, apply, by petition, for leave to file a supplemental bill, for the purpose of procuring the decree so entered by consent to be set aside, upon the ground that the agreement above-mentioned was entered into under a mistake of fact. To such an application there are several fatal objections. In the first place, the application is, in substance, for leave to file a bill of review. It is, therefore, governed by the eighty-eighth equity rule, and comes too late. In the second place, a bill of review, for the purpose of setting aside a decree entered by consent, without fraud, will not be entertained. "A decree taken by consent cannot be set aside by a bill of review, or a bill in the nature of review." 2 Daniell, Ch. Prac. (4th Am. Ed.) 1575; French v. Shotwell, 5 Johns. Ch. 555. In the third place, so long as the agreement made between the parties, prior to the entry of the decree, stands, the admissions of the plaintiff's right to the patent sued on, and to his exclusive right to the invention described therein, made by the petitioners, and set forth in the agreement, under their hands and seals, must operate by way of estoppel, to prevent any different determination as to the plaintiff's right to the invention described in his patent, from that contained in the decree sought to be set aside. Either of these considerations is sufficient to compel a denial of the application. It is, therefore, denied.

[NOTE. This case was again heard upon defendant's motion to stay contempt proceedings. 1 Fed. 862. See, also, Case No. 10,965a. It was again heard upon demurrer to bill and motion to strike out plea. 19 Fed. 817.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 4 Ban. & A. 607, and here compiled and republished by permission.]

Case No. 10,963.

PENTLARGE v. BEESTON et al.

[14 Blatchf. 352; 3 Ban. & A. 142.] [1]

District Court, E. D. New York. Nov. 14, 1877.

PATENTS—PRELIMINARY INJUNCTION—PRIOR PROCEEDINGS.

1. P. obtained a patent, as inventor, in March, 1874, for an "improvement in bungs for casks." In June, 1876, B. applied for a patent, as inventor, for the same invention. An interference was declared, and proofs were taken. The examiner decided in favor of P. On appeal, the board of examiners decided in favor of B. On further appeal, the commissioner of patents decided in favor of P. After the issue of the patent to P., B. and F. were in partnership with P., and the firm made the bungs and advertised them as secured by patent. After the dissolution of such partnership, B. and F. continued to make the bungs: *Held*, that P. was entitled to a preliminary injunction to restrain B. and F. from so doing.

[Cited in Edward Barr Co. v. New York & N. H. Automatic Sprinkler Co., 32 Fed. 80; Dickerson v. De La Vergne Refrigerating Mach. Co., 35 Fed. 147.]

2. The proceedings before the patent office, between the same parties, cast on the defendants the burden of showing the determination of the commissioner to have been manifestly wrong.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 3 Ban. & A. 142, and here compiled and republished by permission.]

[This was a bill in equity by Rafael Pentlarge against William R. Beeston and Frederick Pentlarge for infringement of certain letters patent.]

Preston Stevenson, for plaintiff.
Abbett & Fuller, for defendants.

BENEDICT, District Judge. This action is brought to recover damages for the infringement of a patent for an "improvement in bungs for casks," issued to the plaintiff March 17th, 1874 [No. 148,747], and reissued on June 30th, 1874 [No. 5,937], and to obtain an injunction. The case is now before the court upon a motion for a preliminary injunction, to restrain the defendants from manufacturing a certain form of bung during the pendency of the action. The issue between the parties presents a question of fact, the decision of which must depend largely upon the credibility of the witnesses. There is no dispute as to the novelty and usefulness of the invention described in the plaintiff's patent, but it is denied that the plaintiff was the inventor. An issue of this character is common enough, but, in this case, it presents some peculiar features. It is conceded, on all sides, that the invention in question originated in the factory of Beeston, Pentlarge & Co., a firm engaged in manufacturing bungs; that it was first conceived in the month of February, 1874; and that the circumstance which led to the conception was a visit to the firm of one George W. Gillette. The firm of Beeston, Pentlarge & Co. was, at that time, composed of Rafael Pentlarge, the plaintiff, and William R. Beeston and Frederick Pentlarge, the defendants; and the question in the case is, which of the parties invented this bung. No one claims that there was a joint invention, but Rafael Pentlarge, the plaintiff, and William R. Beeston each claims to have been the sole inventor. This question has before been raised between these same parties, in an interference case before the patent office. The original patent having been issued in March, 1874, on June 13th, 1876, the defendant Beeston applied to the patent office for a patent for the same invention, then for the first time making any public claim to be the inventor. A case of interference was then declared, and, in that case, testimony was taken at considerable length, and by both parties. The case was stoutly contested, and it was three times argued. In the first instance, the decision of the examiner was adverse to the claim of Beeston. An appeal was taken to the board of examiners, and the decision of the board was to issue a patent to Beeston, in order, as the board say, that Beeston should be put on an equal footing with Pentlarge before the courts. From this determination of the board of examiners an appeal was taken to the commissioner of patents, who reversed the decision of the board of examiners, and refused to issue a patent to Beeston. In these several hearings the question at issue was the precise question argued upon this motion, and upon the determination of which at final hearing, the validity of this patent depends. The evidence adduced in support of and in opposition to this motion consists of the evidence taken in the interference case, the parties having seen fit to make that a part of the record, together with certain additional affidavits; and the argument addressed to me has gone over the whole ground of controversy. I do not, however, feel called on, upon this motion, to make a determination of the decisive question of the case. That should be left to be decided upon the hearing of the cause. Without, therefore, determining whether this bung was invented by Pentlarge or by Beeston, I am of the opinion that the motion of Pentlarge for an injunction should be granted, and for the following reasons: Pentlarge has a patent duly issued to him in 1874. Beeston has no patent. A strenuous controversy, wherein the parties and their witnesses, were fully examined, with opportunity for cross-examination, has been had before the patent office, and the defendant Beeston then failed to convince the commissioner that he was the inventor of this bung; and, while it is true that the hearing and decision in an interference case is not equivalent to a judicial determination (Union Paper Bag Mach. Co. v. Crane [Case No. 14,388]), it seems proper to consider, upon a motion like the present, proceedings such as were had before the patent office between the same parties, as having the effect to cast upon the defendants the burden of showing the determination to have been manifestly wrong.

Moreover, it appears in evidence, that, after the patent was issued to the plaintiff, and up to the time when the partnership relation between Beeston and the plaintiff was dissolved, the firm of Beeston, Pentlarge & Co. were making and selling these bungs, and were advertising them to the public as secured by patent. This was a representation by the defendants that the bungs were protected by the plaintiff's patent, that being the only patent ever issued for this invention; and, during this period, there was an acquiescence by the public in the claim thus made. Nor does it now appear that any persons besides the defendants, one of whom is the son, and both the former partners, of the plaintiff, claim the right to use this invention. Furthermore, since the dissolution of the partnership, and up to this time, the defendants, although well aware that the only patent in existence is that of the plaintiff, are making and selling these bungs as patented articles, and, by their advertisements, now represent to the public that the bungs they are making are secured by a patent.

These acts and declarations of the defendants are adverse to the ground they take in the defence of this action, and, coupled with the proceedings before the patent office,

appear to me to constitute a valid ground for asking the interposition of this court, by way of injunction, to compel the defendants to abstain from the manufacture of this bung until the validity of Beeston's claim shall have been passed on at the final hearing. The application for an injunction is, therefore, granted.

[NOTE. An agreement to compromise was entered into by the parties, by which a decree for $2,000 damages was awarded the plaintiff, and a perpetual injunction against the defendants entered. The plaintiff then issued a license, under certain conditions, to the defendants. The license was subsequently revoked, and, the defendants continuing to use the bung, another suit was instituted against them. The case is first reported as heard upon application of defendants for leave to amend answer. Motion denied. Case No. 10,964. Subsequently the defendants applied for leave to file a supplemental bill for the purpose of setting aside the consent decree above noted. The application was denied. Id. 10,962. The case was again heard upon motion of defendants to stay proceedings seeking to punish them for contempt for violating the perpetual injunction. Motion allowed. 1 Fed. 862. The case was again heard upon demurrer and pleas to amended bill. 19 Fed. 817. See, also, Case No. 10,965a. For another action involving this same patent, see Pentlarge v. New York B. & B. Co., Case No. 10,964a.]

Case No. 10,964.

PENTLARGE v. BEESTON et al.

[15 Blatchf. 347; 4 Ban. & A. 23.] [1]

District Court, E. D. New York. Nov. 12, 1878.

PATENTS — PRACTICE IN EQUITY—AMENDMENT TO ANSWER—ESTOPPEL.

In a suit on a patent, in this court, by P. against B., a final decree was made by consent, adjudging the patent to be valid, and awarding $2,000 for infringement. B. had also, by an agreement in writing, acknowledged the validity of the patent and the novelty and utility of the invention. In a second suit, by P. against B., in this court, for infringement of the same patent, B., after answer, moved to amend the answer by denying the novelty and utility of the invention: *Held*, that the motion must be denied.

[This was a bill in equity by Rafael Pentlarge against William R. Beeston and Frederick Pentlarge for the infringement of reissued letters patent No. 5,937, granted plaintiff June 30, 1874, the original letters patent, No. 148,747, having been granted March 17, 1874.]

Preston Stevenson, for plaintiff.

Abbett & Fuller, for defendants.

BENEDICT, District Judge. This action is based upon a patent for an improvement in bungs, dated June 30th, 1874, reissue No. 5,937. The cause is at issue, and a preliminary injunction has been directed. The defendants now apply for leave to file a certain proposed amendment to their answer. The application is addressed to the favor of the court, and it should be denied, among other reasons, for this, that, in a former action between these same parties [see Case No. 10,963] upon this same patent, in this court, by the consent of these defendants, a final decree was rendered, wherein the plaintiff's patent was adjudged to be valid, and the defendants adjudged liable to the plaintiff in the sum of $2,000, for infringing the same. No fraud, surprise or mistake is pretended in regard to that decree, and, in view of the long and heated controversy that has been had over this patent, between these same parties, it is not too much to say, that the idea of denying the novelty and utility of the invention described in the plaintiff's patent is an afterthought. Under the circumstances of this case, there would be no equity in granting to the defendants, at this stage, permission to alter their pleadings, so as to render it possible for them to force the plaintiff to take testimony upon an issue as to the novelty or utility of his invention. Moreover, by an agreement in writing, made between these same parties, on the 3d of January, 1878, in regard to this same patent, it was declared as follows: "The aforesaid parties of the second part, William R. Beeston and Frederick Pentlarge, admit and acknowledge the validity of the aforesaid original and reissued patents of the party of the first part, in every respect and feature thereof, and the validity of the title in and to the said patents, and in the invention described therein, in law and equity, of the said party of the first part, in every particular, as to originality and priority of invention, novelty and utility." This agreement is not disputed or its legality denied. Indeed, it is set up in the answer, and, further, the defendants, in their answer, aver, "that they do not now, by this answer, nor do they intend to, question, dispute, oppose or obstruct the validity of the reissued letters patent granted to the complainant, as aforesaid, or the title of the aforesaid complainant in and to the reissued letters patent, or in and to the invention described therein." Under such circumstances, the plaintiff is certainly entitled to ask that the defendants be denied the favor of amending their answer, for the purpose of inserting averments in direct conflict with the terms of their solemn agreement, and inconsistent with the answer as it now stands. The motion to amend is denied.

[NOTE. Subsequently the defendants applied for leave to file a supplemental bill for the purpose of setting aside the consent decree entered in the prior suit. The application was denied. Case No. 10,962. The case was again heard upon motion of the defendants to stay contempt proceedings instituted by the plaintiff against them. Motion allowed. 1 Fed. 862. At a still later date it was heard upon demurrer to bill and upon motion to strike plea from the files. Demurrer overruled. Motion not allowed. 19 Fed. 817. For another action involving the same patent, see Case No. 10,964a.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 4 Ban. & A. 23, and here compiled and republished by permission.]

Case No. 10,964a.

PENTLARGE v. NEW YORK B. & B. CO.

[5 Ban. & A. 594.] [1]

Circuit Court, S. D. New York. Aug., 1880.

PATENT—PRELIMINARY INJUNCTION—IMPROVEMENT IN BUNGS.

[This was a bill in equity by Rafael Pentlarge against the New York Bung & Bushing Company.]

In this case a motion for a preliminary injunction was denied.

P. Stevenson, for complainant.

Wyllys Hodges, for defendant.

BLATCHFORD, Circuit Judge. If the first claim of the plaintiff's reissue embodies anything more than a bung with the hole and the solid portion opposite to the hole, the defendant has not infringed it. In making a bung with a hole in it, and a solid portion opposite to the hole, the defendant has made only what is described and shown in the English patent to Taylor. The defendant sells its bung as it is. I do not see that the fact that the hole in the defendant's bung is cylindrical, while that in the Taylor is flaring, causes the defendant's article to be like the plaintiff's, and not like Taylor's. The second claim of the plaintiff's reissue is not involved on this motion. The motion for an injunction is denied.

[NOTE. In this case a decree was subsequently entered dismissing the bill. 20 Fed. 314. For other cases involving this same patent, see Cases Nos. 10,963, 10,964, and 10,962; 1 Fed. 862; 19 Fed. 817.]

Case No. 10,965.

PENTLARGE v. PENTLARGE.

[Quoted in U. S. Bung Manuf'g Co. v. Independent Bung & B. Co., 31 Fed. 78. Nowhere reported; opinion not now accessible.]

Case No. 10,965a.

PENTLARGE v. PENTLARGE.

[14 Reporter, 579.] [2]

Circuit Court, E. D. New York. July 25, 1882.

PATENTS—PRELIMINARY INJUNCTION—THREATS.

In a suit for the infringement of a patent the court will not grant a motion for a preliminary injunction to restrain the defendant from threatening to bring suits upon his patent before it is adjudged invalid, and the injunction will not be granted where the court has held the defendant's patent invalid, but the adjudication has been set aside upon an agreement of compromise between the parties.

On motion for a preliminary injunction.

BENEDICT, District Judge. In so far as the object of this action is to set aside the agreement of compromise made between the parties November 22, 1880, upon the ground of duress, manifestly upon a motion like the present for a preliminary injunction the jurisdiction of the court to entertain the action, all the parties thereto being citizens of this state, cannot be assumed, although the subject-matter of such agreement be the rights of the parties in and by virtue of certain letters patent. For the purposes of the present motion the bill can be treated only as a bill filed by virtue of section 4918, Rev. St., for the purpose of having the defendant's patent reissue No. 9,733 declared void as interfering with the plaintiff's patent reissue No. 5,937. In such an action it has been decided by Judge Blatchford, in this circuit, that the court is not authorized to restrain the defendant from bringing suits on his patent before his patent is adjudged to be invalid. Asbestos Felting Co. v. United States & F. S. Felting Co. [Case No. 570]. The present application comes within the principle of that decision. If in such action the defendant cannot before final decree be restrained from bringing suits upon his patent, neither can he be restrained from proclaiming the validity of his patent and threatening with suits all who infringe it. Says Judge Blatchford in the case referred to: "The granting of the patent confers the right to bring suits thereon for infringement." The right to bring suits against infringement involves the right to threaten such persons with suit. How is the case changed by the fact stated by the plaintiff, that the threatenings of the defendant to sue customers of his tend to intimidate them and prevent them from buying of him the article he claims to make under his patent? The want of authority in the court continues the same. Nor is the plaintiff helped in this action by the fact that in former actions between the same parties this court has held the original patent, of which the defendant's patent is a reissue, to be invalid, for by the agreement between the parties contained in the agreement of compromise made in 1880 those adjudications have been set aside, and that agreement must, upon this motion, be treated as valid and subsisting. The application therefore stands upon the same ground as did the application for an injunction in the case before Judge Blatchford, already referred to, and upon the authority of that case it must be held that the court has no authority in this stage of the controversy to grant the preliminary injunction asked for. Motion denied.

[See note to Case No. 10,963.]

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

[2] [Reprinted by permission.]

Case No. 10,966.

PENTLETON v. FORBES.

[1 Cranch, C. C. 507.] [1]

Circuit Court, District of Columbia. July Term, 1808.

DEPOSITION—MANNER OF TAKING—OATH—NOTICE.

A judge who takes a deposition under the act of congress [1 Stat. 73] must certify that the witness was cautioned and sworn to testify the whole truth, and that notice was given to the adverse party, or the reason why it was not given.

Debt by the plaintiff as assignee of a promissory note made by the defendant.

Mr. Youngs, for defendant, offered to read a deposition which had been taken under the act of congress, without notice, before Judge Parker, in Virginia, who certified that it was written by himself, and subscribed and sworn to by the deponent, and that the deponent resided more than one hundred miles from the county of Alexandria, and District of Columbia.

The judge did not state any reason for not giving notice to the plaintiff, nor that the deponent was cautioned and sworn to speak the whole truth, nor the reason of taking the deposition, nor the distance of the place of caption.

THE COURT (DUCKETT, Circuit Judge, absent) rejected the deposition, because the judge had not certified that the witness was cautioned and sworn to testify the whole truth; nor whether the plaintiff was notified of the time and place of caption; nor the precise place of caption. (It was said to be in Westmoreland county, Virginia.) Nor did he certify the place of residence of the plaintiff or his agent.

PENTZ (DORGAN v.). See Case No. 4,121.

PENTZ (DUGAN v.). See Case No. 4,121.

Case No. 10,967.

PEOPLE v. CANNON.

[By the territorial court of Utah. See 14 Int. Rev. Rec. 149.]

Case No. 10,968.

PEOPLE v. GRAY.

[See 66 Cal. 271, 5 Pac. 240.]

Case No. 10,969.

PEOPLE v. SMITH.

[See U. S. v. Smith, Case No. 16,342.]

PEOPLE OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the states; e. g. "People of the State of Illinois v. Chicago & A. R. Co. See Illinois v. Chicago & A. R. Co."]

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

PEOPLE'S BANK (NATIONAL PARK BANK v.). See Case No. 10,049.

PEOPLE'S INS. CO. (ROBBINS v.). See Case No. 11,885.

Case No. 10,970.

In re PEOPLE'S MAIL STEAMSHIP CO.

[3 Ben. 226; [1] 2 N. B. R. 552 (Quarto, 170).]

District Court, E. D. New York. April, 1869.

BANKRUPTCY — LIEN ON BANKRUPT'S PROPERTY—COLLISION.

1. Where the marshal had taken possession, under an order of the bankruptcy court, of the property of a bankrupt, including a steamship, and, after the assignee in bankruptcy was appointed, delivered over the keys of the vessel to the assignee, and remained in charge of her on behalf of the assignee, and thereafter a libel was filed against the vessel, to recover damages for a collision which occurred before the adjudication in bankruptcy, on which libel process was issued to the marshal: *Held*, that the libellants must be enjoined from attempting to hold the vessel, or interfering with her in the hands of the assignee.

[Cited in Re Dole, Case No. 3,965; Re Oregon Iron Works, Id. 10,562; Re Litchfield, 13 Fed. 866.]

2. If the libellants had a prior lien on the vessel, it must be enforced by being submitted to the arbitrament of the bankruptcy court.

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

[Cited in Clifton v. Foster, 103 Mass. 236.]

In bankruptcy.

Beebe, Donohue & Cooke, for assignee.

Foster & Thomson, for West and Nettleton.

BLATCHFORD, District Judge. In this case, the bankrupts were declared such on the 23d of January, 1869. An assignee was chosen on the 20th of February, 1869. The marshal of this district, under an order made by this court, on the 16th of January, 1869, under the 40th section of the bankruptcy act [of 1867 (14 Stat. 536)], took possession provisionally, on or about that day, of all the property of the bankrupts, including the steamship Emily B. Souder. On or immediately after the 20th of February, 1869, the deputy marshal who was in charge of that vessel gave up the keys of it, by direction of the marshal, to the assignee, and thereafter remained in charge of the vessel on behalf of the assignee. On the 3d of March, 1869, Joseph West and Thomas Nettleton filed a libel in rem in this court, in admiralty, against the said vessel, claiming $1,405.28 damages for a collision which occurred between her and the steamer Beaufort, on the Mississippi river, on the 27th of June, 1868. On this libel a monition was issued to the marshal, on the 3d of March, 1869, returnable on the 23d of the same month, commanding him to attach the vessel. To that monition the marshal made return, that he, on

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

the 3d of March, attached the vessel. The assignee now, on a petition setting forth these facts, and his possession of the vessel prior to such attachent of her in the collision suit, prays for an injunction restraining the libellants in such suit from holding or attempting to hold the vessel, or doing any other act interfering with the property of the bankrupts in the hands of the assignee.

This injunction must be granted. The possession of the vessel by the assignee is the possession of her by the court. That possession cannot be lawfully disturbed or ousted by any person. If the libellants in the collision suit have a lien on the vessel, created by the fact of the collision, which is entitled to be satisfied out of the vessel, in preference to the claims of creditors under the bankrupt proceedings, that lien, inasmuch as proceedings to enforce it were not commenced before this court took possession of the vessel for administration in those proceedings, can be enforced, so long as this court holds possession of the vessel, only by being submitted, by those claiming it, to the arbitrament of this court sitting in bankruptcy. Harlan v. The Nassau [Case Nos. 6,066 and 6,067]; The Nassau, 4 Wall. [71 U. S.] 634, 642. If the libellants have, by virtue of the collision, or otherwise, a lien on the vessel, this court, sitting in bankruptcy, has full power, under section 1 of the bankruptcy act, to ascertain and liquidate such lien, on its being presented in proper form, by petition, to this court sitting in bankruptcy. The prayer of the petition is granted.

Case No. 10,971.

In re PEOPLE'S SAFE-DEPOSIT & SAVINGS INST.

[10 Ben. 38; 18 N. B. R. 493; 26 Pittsb. Leg. J. 140.] [1]

District Court, N. D. New York. June, 1878.

BANKRUPTCY—FORMER SUIT—ESTOPPEL.

B. proved a claim against a bankrupt. Before the bankruptcy proceedings were commenced, the bankrupt had sued B. for a debt, and B. had set up said claim in defence, as a distinct cause of action against the bankrupt. The suit was tried after the adjudication of bankruptcy, and, on the trial, B. offered no evidence in support of such defence, and the bankrupt had judgment against B. The assignee in bankruptcy was not a party to the suit. He set up the judgment as an estoppel against the proving of the claim by B.: *Held*, that it was not an estoppel.

In bankruptcy.

A. M. Beardsley, for Buchanan.

G. W. Adams, for the bankrupt.

WALLACE, District Judge. Except as regards the seventh item of the claim of Buchanan, I agree with the register in his conclusions. As to the seventh item, the register holds that it should be allowed, were it not that, having set it up as a defence to the action brought by the bankrupt against him, and judgment having been recovered against him in that action, Buchanan is precluded from from proving it now, upon the doctrine of res adjudicata.

It is not disputed that Buchanan might have litigated the claim now presented in that action, but it is contended in his behalf that, as proceedings in bankruptcy were instituted, and the plaintiff adjudged a bankrupt prior to the trial of that action, the judgment does not estop the assignee, and, therefore, does not estop Buchanan; and it is also contended, that the recovery in that action is not a bar now, because Buchanan offered no evidence upon the trial in support of his defence, and, therefore, there was no adjudication upon the merits of his claim.

It is settled, that the commencement of proceedings in bankruptcy does not, per se, stay the prosecution of pending suits begun against the bankrupt. Eyser v. Gaff, 91 U. S. 521. Proceedings upon such suits may be stayed upon the application of the bankrupt, but, if they are not, the suits proceed to judgment with the same effect as though there had been no proceedings in bankruptcy. If the cause of action involved is of the character of a provable debt, the assignee in bankruptcy, if he desires to contest it, may do so at the charge of his estate. When the suit has been brought by the bankrupt, the assignee may move to be substituted in the action, and, if he does not elect to exercise this privilege, if the case proceeds, he cannot be heard to complain of the result. So, in the present case, if the judgment had been rendered in favor of Buchanan against the bankrupt, that judgment would have been conclusive as against the assignee in bankruptcy, as an adjudication of the validity and amount of Buchanan's claim, and, as it would have been conclusive as against the assignee, it is equally conclusive in his favor, against Buchanan, as to all questions therein determined in favor of the bankrupt.

It remains, then, to inquire if the effect of the judgment is qualified or rendered nugatory because no evidence was in fact offered by Buchanan relative to the issues set up by him by way of defence. The record, upon its face, purports to be a decision in favor of the plaintiff upon an issue between the parties, wherein the plaintiff alleges that the defendant is indebted to him, and defendant alleges that plaintiff is indebted to him—a result which apparently involves the conclusion that the claim of the defendant was unfounded; so that the claim of Buchanan seems to have been decided adversely to him, upon the face of the record. It does not follow, however, that he is precluded from showing that his claim was not actually the subject of judicial inquiry and determination. The general rule is, that the judgment

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 26 Pittsb. Leg. J. 140, contains only a partial report.]

or decree of a court of competent jurisdiction is final as to matters thereby determined, and as to such other matters as the parties might have litigated under the issues, and which might have been determined. This is the rule, however, which prevails in cases where the former judgment is invoked as an absolute bar to a second action upon the same cause of action, and does not apply to the present case, where the judgment is not set up as a technical bar, but is sought to be enforced as an adjudication adverse to the claimant upon an issue which might have been litigated in the former action. In its application to such a case, the rule is well stated by Mr. Justice Field (Cromwell v. County of Sac, 94 U. S. 352): "In all cases where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the former action, not what might have been thus litigated and determined."

While it is true that the claim of Buchanan might have been litigated in the former action, and while the presumption that it was actually litigated arises from the record, yet this is only a presumption, and it may be controverted and overthrown by proof dehors the record. A great variety of cases illustrate the extent to which the presumption arising from the record may be repelled; as, where the trial went off on a technical defect, or because the debt was not due, or because the plaintiff was under a temporary disability. Thus, it is competent to show that a nolle prosequi was entered as to a claim embraced in the pleadings, or that a part of the controversy was specifically withdrawn from the consideration of the court. Brockway v. Kinney, 2 Johns. 210; Snider v. Croy, Id. 227; Louw v. Davis, 13 Johns. 226; Foster v. Milliner, 50 Barb. 395 (in which case the judgment in the former suit is not, as to the claim withdrawn, a bar). It is not necessary to show that the cause of action was affirmatively withdrawn from the consideration of the court. It is only necessary that it appears that the real merits of the second action have not been decided in the first; and this follows, if it is shown that the second suit has not in fact been litigated in the first. Seddon v. Tutop, 6 Term R. 607. If the cause of action has been litigated, however slightly or ineffectually, it cannot be said that it might not have been determined. The case of Seddon v. Tutop was one where the plaintiff in a former action declared on a promissory note and for goods sold, but, upon executing a writ of inquiry, after judgment by default, gave no evidence on the count for goods sold, and it was held that the judgment was not a bar to his recovering for the goods in another action. This case has been recognized and approved by many authorities, and is directly in point here, where, as in Seddon v. Tutop, the proof is that no evidence was given concerning the issue now pending between the parties. Another case directly in point is Burwell v. Knight, 51 Barb. 267.

The effect of the judgment, as to the defence interposed by Buchanan, is analogous to that of a judgment by default upon failure of the party to appear. He was in court, but was silent. If the plaintiff could not have recovered without disproving expressly or by necessary implication, the existence of the facts set up by way of defence, the judgment would be an estoppel, because the estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded. Burlen v. Shannon, 99 Mass. 203.

As an adjudication that Buchanan was liable to the plaintiff in the amount of the judgment, as for an existing and valid indebtedness, the judgment is conclusive; but it does not determine, expressly or by necessary implication, that the plaintiff was not liable to Buchanan upon a distinct and independent cause of action.

From these views it follows, that the claim of Buchanan comprised by the seventh item of his account must be allowed. As I agree with the register in his conclusions, and in the reasons by which they were reached relative to the other items of the claimant's account, it is unnecessary to advert to the questions therein involved.

PEORIA BRIDGE ASS'N (COLUMBUS INS. CO. v.). See Case No. 3,046.

PEORIA, P. & J. R. CO. (LABAREE v.). See Case No. 7,959.

PEPITA, The (STETSON v.). See Case No. 13,382.

Case No. 10,972.

PEPPER v. SALINE COUNTY.

[5 Dill. 270, note.] [1]

Circuit Court, W. D. Missouri. April Term, 1879.

CONSTITUTIONAL LAW — TOWNSHIP RAILWAY AID BONDS—NEGOTIABILITY—BONA FIDE HOLDERS.

[1. The Missouri statute of March 24, 1868 (Laws 1868, p. 97), amending the charter of the Louisiana & Missouri River Railroad Company so as to permit an extension of its road across, and on the south side of, the Missouri river, was within the legislative powers of the state. Foster v. Calloway Co., Case No. 4,967, followed.]

[2. The Missouri statute of March 23, 1868 (Laws 1868, p. 92), authorizing townships to subscribe to the capital stock of a railroad company when two-thirds of the persons voting upon the question vote in favor thereof, is valid and constitutional. County of Cass v. Johnston, 95 U. S. 360, followed.]

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

[3. After a county had voted a subscription to the capital stock of a railroad company, the issuance of bonds therefor was enjoined. Pending the injunction one of the townships composing the county voted a subscription to the railroad, and issued bonds therefor, which contained upon their face a provision that they were to be converted and exchanged for bonds of the county whenever the injunction should be finally dissolved. *Held*, that this provision rendered the bonds nonnegotiable, and hence they were subject, even in the hands of innocent holders, to the defense of invalidity for noncompliance with the conditions upon which they were issued.]

At the April term, 1879, the question of the validity of the bonds of the defendant county arose on a demurrer to the answer in the case of Pepper v. Saline Co.

Thomas K. Skinker, for plaintiff.

Graves & Rathburn and Thomas C. Fletcher, for defendant.

KREKEL, District Judge. This suit is brought on coupons detached from bonds issued in payment of a subscription by Marshall township, in Saline county, to the capital stock of the Louisiana & Missouri River Railroad. A vote was had under the so-called township act of March 23d, 1868, and the requisite two-thirds vote of those voting was given in favor of the subscription, on conditions embodied in the order of the county court.

Saline county, as such, prior to the subscription of Marshall township, had made a county subscription of $400,000 to the same railroad. This last subscription had been attacked for illegality in the circuit court of Saline county, and such proceedings were had in the case as resulted in perpetually enjoining the issuing of said bonds. The grounds mainly relied on in opposition to the issuing of the bonds by Saline county was the unconstitutionality of the amendment of the charter of the company of March 24th, 1868.

The original charter of the Louisiana and Missouri River Railroad Company, granted in 1859, and the several amendments thereto prior to the amendment of March 24th, 1868, authorized the company to build a railroad from Louisiana, on the Mississippi river, to any point on the Missouri river, and authorized the counties along the line of the road to subscribe stock thereto without having the question of subscription submitted, as required by the constitution of 1865. By the amendment of March 24th, 1868, the railroad company sought to obtain the privilege of extending their road across the Missouri river, and, at the same time, to have the provision in regard to subscribing without submission granted to the counties along the line of the extension, on the south side of the Missouri river.

Acting on the supposition that these powers had been granted by the amendment, the company applied for and obtained the subscription of $400,000 of Saline county, the issuing of the bonds for which was enjoined.

While the proceedings to enjoin were pending, the people of Marshall township, under the act of March 23d, 1868, petitioned the county court of Saline county to submit to the voters of Marshall township the question of subscribing $150,000 in aid of extending the road across the Missouri river, on the condition of building it to Marshall, the county seat of Saline county, and within Marshall township, and the further condition of establishing a depot within half a mile of the town of Marshall. Under this submission a vote was had, resulting in a two-thirds majority in favor of the subscription, and the bonds in controversy were issued to pay the same.

The questions to be determined are: First, the constitutionality of the amendment of March 24th, 1868, by which the Louisiana and Missouri River Railroad was extended across and on the south side of the Missouri river; second, the granting of the power to subscribe by the counties on the extension without submission; third, the failing to recite in the title the subject embraced in the act; and, lastly, the negotiability of the bonds.

On the question of power by the legislature to extend the road across the Missouri river, and the question of the title of the act, the Missouri judges in the cases of State v. Saline Co. Ct., 51 Mo. 350, and State v. Callaway Co. Ct., Id. 395, were divided in opinion—the special judge called in deciding against the constitutionality of the amendment on both grounds, Judge Wagner, in a dissenting opinion, reaching an opposite conclusion, and the third judge offering no opinion. See case of Foster v. Callaway Co. [Case No. 4,967]. This court, in the Callaway Case cited, coincided with Judge Wagner, and this view was sustained by the supreme court of the United States on appeal. Upon the second question—the granting of the power to subscribe without submission to a vote on the extended line—all the Missouri judges agreed that the constitution of 1865 prohibited the legislature from granting such a power, and this court, in the case of Sherrard v. Lafayette Co. [Id. 12,771], followed that decision. The so-called township act of March 23d, 1868, under the decision of State v. Linn Co. Ct., 44 Mo. 504, and cases since, has been held constitutional by this court, and is now so held by the supreme court of the United States. County of Cass v. Johnston, 95 U. S. 360. The grant of power to extend the Louisiana and Missouri River Railroad across the Missouri river by the amendment of the charter of the company by the act of March 24th, 1868, having been held within legislative authority, we deem the bonds, so far as the questions are concerned, valid. The question of negotiability and consequent notice remains to be considered. The Marshall township bonds read as follows: "United States of America, State of Missouri. Saline County Bond. No. 3;

Class 'A'; nine years; $100; interest ten per centum per annum. Know all men by these presents, that, on the 1st day of January, A. D. 1880, the county of Saline, in the state of Missouri, promises to pay to the Louisiana and Missouri River Railroad Company, or bearer, the sum of one hundred dollars, at the Bank of America, in the city and state of New York, together with interest at the rate of ten per centum per annum, payable at the said Bank of America on the 1st day of January of each year, on the presentation and delivery of the annexed coupons of interest as they severally become due. This bond is issued in part payment of a subscription of one hundred and fifty thousand dollars made by Marshall township to the capital stock of the Louisiana and Missouri River Railroad Company, pursuant to an order of the county court of Saline county made on the 7th day of September, 1870, and is to be converted and exchanged for bonds of the county of Saline whenever the injunction now covering the subscription of four hundred thousand dollars made by the county court of said county on the 7th day of February, 1868, to said Louisiana and Missouri River Railroad Company shall be finally dissolved, and bonds issued under said order. In testimony whereof," etc.

Do the conditions and contingencies set out in the bond, that on the happening of the dissolution of the injunction (an event apparently anticipated) bonds of the county of Saline should be issued in lieu of those in suit, destroy their negotiability? The case of Vermilye v. Adams Express Co., 21 Wall. [88 U. S. 138], is relied on by both parties. The negotiability of certain treasury notes was in controversy. Upon the back of them the following statement was printed: "At maturity convertible at the option of the holder, into bonds redeemable at the pleasure of the government at any time after five years, and payable twenty years from June 15th, 1868, with interest at the rate of six per cent per annum, payable semi-annually, in coin." Justice Miller, delivering the opinion of the court, said: "They had the ordinary form of negotiable instruments, payable at a definite time. * * * The fact that the holder had an option to convert them into other bonds does not change their character. That this option was to be exercised by the holder, and not by the United States, is all that saves them from losing their character as negotiable paper; for if they had been absolutely payable in other bonds, or in bonds or money, at the option of the maker, they would not, according to all the authorities, be promissory notes, and they can lay claim to no other form of negotiable instrument."

What saved them, according to this authority, from losing their character as negotiable paper, was that the option to convert them into bonds remained to be exercised by the holder. In the case before us, the stipulation on the face of the bond is that they are to be converted and exchanged for bonds of the county of Saline. Converted and exchanged. Converted—that is, to be changed to something else; and then to be exchanged—that is, to be substituted for the converted bonds. This right and obligation to convert and exchange the maker of the bond stipulates for. In the conversion the county of Saline is to be made the payee. The maker stipulates for the conversion and exchange in this case—the very condition which, according to Justice Miller, destroys their negotiability. Judge Catron, in the case of U. S. v. Bank of U. S., 5 How. [46 U. S.] 307, says: "A bill of exchange is an instrument governed by the commercial law; it must carry on its face its authority to command the money drawn for. * * * But if no demand can be made on the bill standing alone, and it depends on other papers or documents to give it force and effect, and these must necessarily accompany the bill, it cannot be a simple bill of exchange, that circulates from hand to hand, or the representative of current cash." The bonds in controversy are encumbered with conditions and contingencies, and are therefore not negotiable, and if negotiated, are subject to the same defences they would have been subject to in the hands of the original owners. The conditions and contingencies set out on the face of the bond may be said to have been notice that the bonds sued on were not to be treated as negotiable paper, and ought to have made commercial men reluctant to touch them. Overton v. Tyler, 3 Pa. St. 346.

If, by reason of the conditions and contingencies, the bonds were not negotiable when they were issued, no subsequent circumstances could render them negotiable. Tindall's Ex'r v. Johnston, 1 Hayw. (N. C.) 372; Campbell v. Mumford, Id. 398; Thompson v. Gaylard, 2 Hayw. (N. C.) 150. These cases dispose of the argument that the conditions and stipulations in the bond having become impossible of performance, are to be disregarded and treated as of no effect.

The defences set up in the several counts of the answer to which the demurrer is filed are as follows: The ordinances of September 7th, 1870, referred to in the bonds, contained, among others, the condition "that said subscription shall be paid in bonds, to be issued in sums of not less than $100 nor more than $5,000, each of said bonds to bear interest at the rate of ten per cent per annum, the interest to be paid annually, on the 1st day of January of each year, at the Bank of America, in the city of New York, and to become due and payable as follows: Class 'A,' the sum of $40,000, to become due on the 1st day of January, 1880; class 'B,' the sum of $50,000, to become due on the 1st day of January, 1885; class 'C,' the sum of $60,000, to become due on the 1st day of January, 1890; and that said bonds should be

delivered to said railroad company, commencing with class 'A,' the sum of $20,000 when the said road shall be put under contract from the Missouri river to the town of Marshall, and work commenced in good faith; the remaining $20,000 when two miles of said road shall be graded within the limits of Saline county. Class 'B,' the sum of $25,000 when six miles of said road shall be graded within said limits of Saline county; and the further sum of $25,000 when ten miles of said road shall be graded within said county. And the sum of $30,000, class 'C,' when fifteen miles of said road shall be graded within the limits of said county; and the further sum of $30,000 of said class 'C' when the road-bed on all of the part of said road between the town of Marshall and the Missouri river shall be finished and ready for the iron."

The bonds being held non-negotiable, the facts set out in the second count of defendant's answer, going to the consideration of the bonds, on account of failure to comply with the conditions on which they were issued, are a proper defence, and the demurrer thereto must be overruled. Judgment accordingly.

[This case was originally published in 5 Dill. 270, as a note to Merriwether v. Saline Co., Case No. 9,485.]

PERAGIO, The (DULANY v.). See Case No. 4,123.

PERALTA (UNITED STATES v.). See Cases Nos. 16,029-16,032.

Case No. 10,973.

PERDICARIES v. CHARLESTON GASLIGHT CO.

[1 Hughes, 69.] [1]

Circuit Court, D. South Carolina. Dec., 1877.

SEQUESTRATION — BY CONFEDERATE GOVERNMENT —WHAT TITLE PASSED.

Stock in a corporation in South Carolina owned, during the Civil War, by citizens of the United States, sequestrated during the period of war by a Confederate court, and sold to citizens of South Carolina at first and second-hand, did not pass by such proceedings to the purchasers, but belongs still to the loyal citizens against whom it was sequestrated.

[Cited in Dorr v. Gibboney, Case No. 4,006.]

[This was a bill in equity by Gregory A. Perdicaries against the Charleston Gaslight Company.]

On the 30th August, 1861, the Confederate states passed an act in retaliation for the act of the 6th August of the United States, sequestrating, with few exceptions, the property of loyal citizens found within their territory. The proceeds of sale of such sequestrated property was paid into the Confederate treasury, to be held as an indemnity to those suffering loss under said act in the United States. Shortly thereafter a vigilance committee in Charleston reported to the officers charged with the execution of this act, that certain shares in the Charleston Gaslight Company were held by such loyal citizens.

Pursuant to the act a writ of garnishment was served on the company, requiring it to make return of its shares so held. On the 27th September, 1861, the company made its return, setting forth that fifteen (15) of its stockholders were, as far as your deponent is informed, living in the several cities of the United States hereinafter set forth, but it cannot pretend to determine whether or not they are alien enemies; and that these held four thousand two hundred and sixty-six (4,266) shares, and were entitled to four thousand and two hundred and sixty-six (4,266) dollars as dividends. Of these, thirteen citizens of New York, Pennsylvania, and New Jersey, were adjudged such alien enemies, and their shares (3,766) and their dividends ($3,766) were sequestrated, the shares being transferred to the Confederate states court on the books of the company, and the dividends being paid to the officers of the Confederate states. The names of the loyal stockholders were erased from the list of the company's stockholders. After advertisement, giving the fullest notice of the sale, these shares were sold at public outcry, and purchased in various parcels by eighteen persons to whom, on the orders of Confederate state officers, scrip bearing the same number as those of the loyal stockholders were issued. Subsequently, 1,000 of these 3,766 shares were sold to other persons, viz., E. M. Black, William Carrington, Dewing, Thayer & Co., G. F. Jackson, People's Bank of South Carolina, and H. H. Williams. Black was a director, and attended all the meetings of the board, which considered the orders of the Confederate states court.

The company followed the advice of eminent counsel in obeying the mandates of this court, and, in fact, the penalties for disobedience were very heavy, and no appeal possible, except on giving heavy security. The holders of the sequestrated stock alleged that the company colluded with the officers of the Confederate states, in the sequestration of the shares of the loyal stockholders, but failed, absolutely, to prove this. Shortly after the capture of Charleston, the military seized the works and property of the gas company as captured property, and turned them over to the treasury department, by which they were restored, on conditions that the loyal stockholders were paid, or secured payment, of all back dividends, and that the names of those holding sequestrated stock should be erased from the books of the company, and those of the loyal stockholders put in their places. In fact the property was not restored till these conditions were performed. The holders of the seques-

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

trated stock claimed that their scrip be also acknowledged as genuine, and threatened to bring suits to establish their claims. The company not moving in the matter, the complainant filed his bill to enjoin such suits, and to have the rights of all the parties adjudicated, claiming that the sequestrated stock was void, not only as issued in hostility to the United States, but as contrary to the company's charter. The holders of the sequestrated stock, both at first and at second-hand, were all made parties defendant. Against some, the bill was taken pro confesso; and others filed answers, claiming that they were entitled to have the stock declared valid, or to have the damages allowed to them. The company were chartered by a public act, and the new scrip was clearly void as an overissue of stock, contrary to the provisions of the charter; but the following decision of the court was not rested on this latter ground alone.

BOND, Circuit Judge. It has been so often decided that acts in furtherance or support of the Rebellion against the United States, or intended to defeat the just rights of its citizens, are null and void, that nothing more than the statement of the facts is necessary to show that the holders of all the sequestrated stock, both the purchasers at first-hand as well as the purchasers at second-hand, have no rights in the premises, and are entitled to no damages.

It is, therefore, ordered, adjudged, and decreed that the scrip issued by the defendants, the Charleston Gaslight Company, in lieu of the shares of the loyal stockholders, sequestrated by the so-called Confederate states, and now outstanding in the names of Thomas Barrett, Otis J. Chaffee, Isaac S. Cohen, John Fraser & Co., Artemus Gould, A. H. Hayden, James Hope, B. D. Lazarus, M. C. Mordecai, B. O'Neil, William Carrington, Dewing, Thayer & Co., G. F. Jackson, the People's Bank of South Carolina, and H. H. Williams are absolutely null and void, and the holders of them will surrender them to the company to be cancelled.

The injunction heretofore granted in this case, enjoining all and singular the defendants in this cause and the holders of the said certificates of stock, issued in lieu of the sequestrated stock, their agents, officers, servants, and attorneys, from bringing or prosecuting any suit or suits, action or actions against the said Charleston Gaslight Company, for and on account of said certificates of stock, or any of them, or of the stock purported to be represented thereby, or of the acts of the said company in creating the same, or for any damages claimed by reason of the issue of said stock, or any act or thing connected therewith, or arising thereout, is made perpetual.

[The case was previously heard upon demurrer and upon motion to dissolve the preliminary injunction. Case No. 10,974.]

Case No. 10,974.

PERDICARIS v. CHARLESTON GAS-LIGHT CO.

[Chase, 435;[1] 2 Am. Law J. Rep. U. S. Cts. 117; 10 Int. Rev. Rec. 110.]

Circuit Court, D. South Carolina. June Term, 1869.

SEQUESTRATION — BY CONFEDERATE GOVERNMENT —SALE—TITLE PASSED—SUIT TO DECLARE REISSUED STOCK VOID.

1. It is settled law that all acts of the Confederate government, or the government of a state hostile to the United States, and prejudicial to the rights of citizens of states adhering to the Union, are void and convey no title.

2. The sequestration acts of the Confederate states, and all acts under them, injurious to citizens of Union adhering states, are null and void, and a court of equity will decree such relief in the premises as may be necessary.

3. Where stock has been sold by a Confederate receiver, and new certificates therefor issued to the purchaser, and after the war is ended, such sale is admitted by the company to have been void, and it recognizes the original stockholder, but neglects to take any step to have the certificate issued under the Confederate sale declared void, cancelled or delivered up—in such case any stockholder has a clear equity to have such stock declared void, because it is a cloud on his title and injures the value of his stock.

4. When the company itself refuses or neglects to bring suit, then it is competent for such stockholder, in his own behalf and that of others in like situation with him, to file his bill in equity and invoke the assistance of the equity jurisdiction.

Perdicaris, a citizen of a state adhering to the United States in the Civil War, was a stockholder in the Charleston Gaslight Company. During the war his stock was seized as that of an alien enemy, by virtue of an act of the Confederate congress for the sequestration of the property of such persons, and was duly sold under a decree of the district court of the Confederate states for the district of South Carolina, by the receiver, as required by law. The company thereupon, being required to do so by the decree of condemnation, issued new certificates of stock to the purchasers under the sale, and transferred the stock from the name of Perdicaris to those of the purchasers; the sale was acknowledged by all parties, and the new stockholders recognized, participating in the government and profits of the corporation. At the end of the war, however, when Perdicaris inquired as to the condition of the property he had left during the period he was prevented from visiting or communicating with Charleston, the company acknowledged him as the true owner of the stock, re-transferred it back to him, and refused to allow the holders of the stock issued under the sequestration sale to be recognized in any manner as stockholders. After the lapse of four years, in which matters stood thus, Perdicaris filed his bill in the court, setting forth the facts and praying that the

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

holders of this new stock be decreed to surrender it, and the company to cancel it, making the company and the holders of the new stock parties defendant to this bill. Part of the defendants filed a general demurrer, on which the cause was heard.

Rutledge & Young, for Perdicaris.

Effect of demurrer. Being a general demurrer, the bill must be bad in every respect in order to be dismissed. If good in any respect, the bill must be sustained. "Upon a general demurrer it is sufficient (for the complainant) to show that his complaint is to any extent right." Bagshaw v. Eastern Union R. Co., 7 Hare, 129. "If any part of the bill is good, and entitles the complainant either to relief or discovery, a demurrer to the whole bill can not be sustained . . . and must be overruled." 5 Johns. 186; 1 Johns. 433; Livingston v. Story, 9 Pet. [34 U. S.] 658; Griffing v. Gibb, 2 Black [67 U. S.] 519. Demurrer is sustained only whenever it is clear "it is an absolute, clear, and certain proposition, that taking all the charges of the bill to be true, it will be dismissed at the hearing" (quoted in substance); Daniell, Ch. Prac. 598, 599; Story, Eq. Pl. § 443, note 1; Brooke v. Hewitt, 3 Ves. 253. Can Perdicaris sustain this suit? It is clear the company could. The case of New York & N. H. R. Co. v. Schuyler [17 N. Y. 596] and about three hundred other defendants, shows this conclusively; also Dodge v. Woolsey [18 How. (59 U. S.) 331], and numerous other cases. But this point is not disputed. Can Perdicaris, a stockholder? Perdicaris claims that his title is clouded, his stock lessened in value, &c., by these outstanding scrip, and the company will do nothing—has, at least, done nothing. Clear that a corporator can sue his corporation. General rule, then, is that none of the members or officers should be made parties, except where a discovery from them is necessary. 1 Daniell, ut supra, p. 179, side page. They (the officers of a corporation) should not be joined generally, where no discovery is sought from them, or where they can be used as witnesses. Daniell, ut supra, p. 180; Story, Eq. Pl. § 235; How v. Best, 5 Madd. 19. The rule that the company should be plaintiff in cases such as the present is claimed by the demurrants to be, that when the object of the bill is to compel the ministerial officers of the company to account for a breach of official duty, then the general rule is that the suit should be brought in the name of the company. Ang. & A. Corp. § 312; Robinson v. Smith, 3 Paige, 233. This is not our case—we go against the company for a wrong act done by it. But admit we are against officers, what is the law in such case? "As a court of equity never suffers a wrong to go unredressed for the sake of form merely, if it appear that the directors refuse by collusion with those who had made themselves responsible by their neglect, or if the corporation is still under the control of those who should be defendants in the suit, the stockholders, who are the parties in interest, will be permitted to file a bill making the corporation a party." Ang. & A. Corp. § 312; Foss v. Harbottle, 2 Hare, 491, 492; Bagshaw v. Eastern Union R. Co., 7 Hare, 114; Robinson v. Smith, 3 Paige, 233; Dodge v. Woolsey, 18 How. [59 U. S.] 331; Hitchens v. Congreve, 4 Russ. 562. Here directors who did the wrong act are directors still—a majority certainly. The rule is also thus laid down, viz., that such a suit "should be brought in the name of the corporation," unless it appears that the directors refuse to prosecute, or are themselves the guilty parties answerable for the wrong. If they do thus refuse, or are thus answerable, the shareholders may sue in their own names; but in such a case, the corporation must be made a defendant either solely or jointly with the directors. New York & N. H. R. Co. v. Schuyler, 17 N. Y. 596, 7 Abb. Prac. 58. Compare same case in 34 N. Y. 30, where this point is sustained; the case in other respects was overruled. Again we find: Therefore though the result of the authorities clearly is that a corporation acting within the scope of, and in obedience to the provisions of its constitution, the will of the majority duly expressed at a legally constituted meeting must govern (Ang. & A. Corp. § 380), yet beyond the limits of the act of incorporation, the will of the majority can not make an act valid, and the powers of a court of equity may be put in motion, at the instance of a single shareholder, if he can show that the corporation is employing its statutory powers for the accomplishment of purposes not within the scope of their institution (Id. § 393). Compare Preston v. Grand Collier Dock Co., 11 Sim. 344. When a bill was filed by a member of a numerous company v. the company, and members charging fraud in a certain transaction which had been confirmed by a note of the company and praying that it might be set aside, seven defendants demurred. The court overruled the demurrers, holding that it was the duty of the company and directors to do what the plaintiffs desired done, and that they (the plaintiffs) had a plain equity for relief, and overruled the demurrer. Page 347. He excluded all idea of fraud. Page 345. See, also, Ward v. Society of Attorneys, 1 Colly, 370. Bill filed by a few members against the company and its secretary alone, of one thousand three hundred and thirteen members, all had voted for the surrender of the charter and acceptance of a new one, and ordered a transfer of property to be held under new charter, twenty-one voted against this surrender, and filed their bill. The court granted an injunction. The earlier cases do seem to establish the doctrine that the corporator can not file his bill against the ministerial officers of a corporation for an alleged breach of duty by them, without showing either that the directors refuse to file the bill in the name of

the company, or that the company is still under the direction of those who should be made parties defendant. Neglect is equivalent in effect to refusal, and it is axiomatic that it is sufficient to make the demand by bringing suit. The company in this case for four years have done nothing, and on the bill appear to be "willing to accede" to complainant's request, but that the purchaser at the sequestration sale holds its scrip; in other words, the company does not think it proper that in changed circumstances it should repudiate its own apparent act, however done under a vis major, while it is perfectly competent for the complainant to do this himself. But if the complainants' case is not under this exception, it certainly is under the second exception, according to the contention of demurrants. They insist that directors should be made parties, "should be defendants in the suit." Hence Perdicaris has the right to file this bill without seeking to put the company in motion, and only must amend by making directors parties. But beyond and above all this, it will be noticed that in all the later cases, the right of the corporator to file his bill against the corporation solely, is allowed without dispute. Not a word in any of these later cases is said about such a requisition. And in the Case of Society of Attorneys, not a director was made party, and yet an injunction, after much opposition, was granted. But lastly on this point, the bill in the present case is not to call the directors, the ministerial officers, to an account for any breach of duty,—none is charged against them,—but to set aside the act of the company, an act sanctioned by the corporators in the South by acquiescence, since 1863. There is no claim that directors are liable. Ang. & A. Corp. § 314. Mere error in judgment is charged against the president. He obeyed the order of a court which had the power to send him to prison for disobedience. He did not go to prison,—did not make himself a martyr as he should and ought to have done,—even though living in this age so poor in martyrs.

CHASE, Circuit Justice. The bill in this case was filed by the plaintiff in his own behalf and in behalf of any others who might come in and contribute to the expenses of the suit. It is stated that the shares in the Charleston Gaslight Company's stock, belonging to the plaintiff and others, were sequestrated under an act of the Confederate government and sold during the Civil War. It is also stated that in lieu of those shares other shares of a corresponding amount were delivered to the purchasers, and the prayer of the bill is that the certificates thus issued may be declared to be invalid; that they may be ordered to be delivered up to be cancelled; that the defendants may be restrained from bringing suit for their transfer, and that the company may be restrained from allowing such transfer and from the payment of dividends. To this bill, there is a general demurrer filed by part of the defendants, and a motion to dissolve the injunction already granted. The only question in the case is, whether the parties are entitled to any relief in this court upon the case made by the bill. This question is twofold: first, whether the plaintiffs have a case of equity; second, whether this court has jurisdiction of the controversy between the plaintiff and defendants. It is not claimed that the transfer of shares sequestered and sold under the authority of the Confederate government conveyed exclusive title to the defendants. It has been repeatedly decided, both by the circuit courts and by the supreme court of the United States, that all acts of the Confederate government, or the government of a state hostile to the United States and prejudicial to the rights of citizens of states adhering to the Union, are void and convey no title.

Perdicaris is a citizen of an adjoining state. It is proper to add that the Gaslight Company has acted upon the principle just stated. It is true that it erased from the books the names of the original stockholders, whose stock was sold under the sequestration act and issued new certificates to the purchasers. But this was during the war. Since the war ended it has reinstated the names of the original stockholders, and recognized fully their right to dividends. The certificates issued to the purchasers from the Confederate receiver are, however, still outstanding. Perdicaris, as owner of original stock, claims the interposition of the court against the defendants, who in virtue of their purchases from the receiver, assert a claim to be recognized as stockholders upon an equality with himself. It is very clear that Mr. Perdicaris has a good case in equity. If the whole stock had belonged to stockholders residing in other states and had been sold under the sequestration act, and it can be maintained, after the war, that the purchasers are entitled to recognition equally with the original stockholders, it is very clear the value of the stock to the latter would be reduced just one-half. This shows very clearly the equity of Mr. Perdicaris. There is no way by which he can be relieved except by a court of equity. But it is insisted that the company itself should bring suit, and that Perdicaris, being only a stockholder, can not be heard in this court. We do not agree to this view. It is not denied that if the company had refused to institute proceedings, the stockholders might do so. There is no principle of equity administration which denies to a stockholder protection in a court of equity. It is true that the corporation represents the corporate interests, and in this case it would, perhaps, be most appropriate that the corporation should bring a suit for its own protection and for the protection of the rights of the original stockholders, but it has at least neglected and omitted to do so. Under such circumstances any stockholder may proceed. We think the bill filed in this case by the

plaintiff for his own benefit and for the benefit of his co-stockholders is properly conceived, and that upon the case made by it the plaintiff is entitled to the relief asked. The demurrer must be overruled, and the motion to dissolve the injunction must be denied.

[Subsequently a final decree was entered in favor of the complainant. Case No. 10,973.]

Case No. 10,975.

In re PERDUE.

[2 N. B. R. 183 (Quarto, 67);[1] 2 West. Jur. 279.]

District Court, N. D. Georgia. 1868.

BANKRUPTCY—HOMESTEAD EXEMPTION—VENDOR'S LIEN.

1. A sold B a certain quantity of land, receiving other land in part payment, and taking B's notes for the balance of the purchase money. A died and his executor sued on the notes and recovered judgment thereon. B was afterwards adjudged a bankrupt. A's executor, in proving the debt, asserted the vendor's lien; subsequently thereto the assignee exempted two hundred and ninety acres of the land in question under the fourteenth section of the bankruptcy act [of 1841 (5 Stat. 448)]. *Held*, that the vendor's equitable lien should be upheld by a court of bankruptcy, and that the assignee erred in setting any of this property apart as exempt.

2. Ordered, that the land be sold by the assignee under the order and direction of the register, and that the proceeds of the sale be brought into court for distribution according to law.

In this case on the 24th of April, 1860, the vendor, Wm. L. Mitchell, now deceased, sold to the vendee, Lindsey Perdue, six hundred and forty acres of land, in Meriwether county, Georgia, for eight thousand eight hundred dollars, receiving in exchange, by way of payment therefor, another tract of land in said county, at the value and price of five thousand one hundred dollars, and taking notes for the balance of the purchase money, to wit: three thousand seven hundred dollars. Afterwards Mitchell died, and John A. Mitchell, being appointed his executor, sued Perdue in the Meriwether superior court, and recovered judgment for three thousand seven hundred and sixty dollars. In proving his debt in bankruptcy proceedings, subsequently taken, he asserted the vendor's lien and filed an exemplification of his judgment in the case. Subsequently thereto the assignee exempted two hundred and ninety acres of the land under the fourteenth section of the bankrupt act. Exceptions thereto were filed within twenty days, and notice was not given of the setting apart the exemption to bankrupt, or of assignee's report on that subject. But afterwards, Mitchell, soon after receiving information of the claim of exemption, filed his petition before the register, and prayed that the question of allowing or disallowing the vendor's lien and disposal of the land, and payment of said unpaid purchase money, be certified to his honor, ERSKINE, J., for his decision and instructions. The register decided sustaining the act of the assignee disallowing the vendor's lien, and allowing the exemption of two hundred and ninety acres of the land, including the homestead. These exceptions and the record, except the agreement of the counsel, upon which the case was certified and the proof of the debt in which the lien was asserted, are now before the court for review and decision. B. H. Bingham,

Solicitor for John A. Mitchell, Executor.

I agree to the above, and say that the law does not require the assignee to give notice that he has set apart to the bankrupt the exemption property. John W. Powell,

Attorney for Lindsey Perdue.

ERSKINE, District Judge. Resting upon the foregoing statement of facts in the matter of Lindsey Derdue, a voluntary bankrupt, the court will pronounce its decision. The controversy is between the immediate parties to the contract of sales of the six hundred and forty acres of land, and not between the vendor and a remote party, as, for instance, a bona fide purchaser from the vendee, who bought the property and paid the purchase money without notice. The matter of the vendor's lien is involved in this case, and it has been elaborately argued. If it were absolutely essential to a determination of this question that a history of the peculiar principles inherent in, and which control the vendor's lien should be discussed, and time permitted me to do so (which it does not) I might, with judicial propriety, decline; for this has already been well done, not only by the supreme court of the nation (in Bayley v. Greenleaf, 7 Wheat. [20 U. S.] 46. See, also, Brown v. Gilman, 4 Wheat. [17 U. S.] 255; Thredgill v. Pintard, 12 How. [53 U. S.] 35) and by Story, J., in Gilman v. Brown [Case No. 5,441], but likewise by Nesbitt. J., in delivering the opinion of the supreme court of Georgia, Welborn v. Williams, 9 Ga. 86, and in Webb v. Robinson, 14 Ga. 216. In these last two cases this eminent judge has given a clear exposition of the doctrine of the vendor's lien, the incidents dependent upon it and the consequences which flow from it. At the time of the alienation of the land by Mitchell to Perdue, the vendor's lien for the unpaid purchase money was of force in this state, and there is no evidence whatever before me indicating that this lien was waived by taking security, or otherwise. In Bass v. Ware, 34 Ga. 386, it was ruled—WALKER, J., delivering the decision of the court—that the abrogation of the vendor's lien applies only to those liens created after the Code went into effect, which was subsequent to the sale of the land.

It was contended for the bankrupt that the vendor's lien could not exist against him, because the vendor received an exchange, by way of payment for the land, another tract of land, at the value or price of five thousand

[1] [Reprinted from 2. N. B. R. 183 (Quarto, 67), by permission.]

one hundred dollars, and three thousand seven hundred dollars in notes. These notes are now in judgment at the suit of the executor of the vendor, and remain unpaid. I cannot rule the point in favor of the bankrupt.

The sale was of six hundred and forty acres of land for eight thousand eight hundred dollars. A tract of land of the value of five thousand one hundred dollars was given as part payment, and the residue of the purchase money in notes. I can see no difference in principle, whether a part of the purchase money was paid in cash or in land at an agreed price; either goes to extinguish the debt, pro tanto. There is, nevertheless, some analogy between this proposition and the case of an exchange of land for other land of equal agreed value. In the former case, the vendor's lien, or equitable mortgage, as it has been called, attaches on the delivery of the conveyance, binding the vendee, who becomes a trustee for the vendor for the unpaid purchase money; it not only exists against the vendee, but his heirs and volunteers and all other purchasers from him with notice of the existence of the vendor's equity. The lien will also prevail against assignee under the bankrupt law, and against the claim of dower by the wife of the purchaser, unless there be a positive law to the contrary. 2 Story, Eq. Jur. §§ 1227, 1228; 4 Kent, Comm. 151; 9 Ga. 86; 14 Ga. 216; Fisher v. Johnson, 5 Ind. 492. In the latter case, that of an exchange, the exchange must be a mutual grant of equal interests in land, the one in consideration of the other. 2 Bl. Comm. 323; Co. Litt. § 62. It is said, however, that an exchange in the United States does not differ from bargain and sale. 2 Bouv. Just. note, 2055.

The assignee set apart two hundred and ninety, of the six hundred and forty acres, to the bankrupt, as exempted under the provisions of the fourteenth section of the bankrupt law. On the part of the executor of the vendor, this allotment by the assignee, which was approved by register McKinley, is now sought to be set aside, for the reason that the purchase money for the land has not been paid, while on the side of the bankrupt, it is insisted that the assignment of the two hundred and ninety acres was legal. The general assembly of the state of Georgia, in December, 1843, passed a statute exempting fifty acres of land from levy and sale, under any judgment, order or decree of any court in this state, founded on any contract made after the first of January, 1844, "except the same shall be for the purchase money of said land, for the payment of which said land shall be bound." Cobb, Dig. 390. And such, I apprehend, is the law, on general principles of equity, without positive enactment. This statute was in force on the 24th of April, 1860, the date of the sale, and so continued until the abrogation of the vendor's lien by the Code. The saving or reservation just quoted was omitted from the Code, obviously, because when the vendor's lien was abrogated, this reservation of the land to the vendor for the unpaid purchase money, would be repugnant to the repeal of the equitable lien by the Code. But the Code did not intend to annul the reservation in the law of 1843 so as to act retrospectively; for to do so would be an attempt to impair the obligation of contracts. The statutory reservation was an incident, indeed a part of the contract of sale. And the seventh section of the Code, itself provides against its violation. "Laws prescribe only for the future." And when the vendor has not waived his equitable lien, this court would not, either in justice or in morals, be warranted in allowing the vendor bankrupt to have dominion over and enjoy an estate in land which he has never paid for. The vendor's lien must prevail. I do not think that congress intended that the bankrupt law should override cases of this nature.

It appears from the statement agreed on by counsel, that it was after the asserting of the vendor's lien and filing of the exemplification of the judgment obtained for the unpaid purchase money, that the assignee exempted the two hundred and ninety acres. But it was argued that exceptions to this act of the assignee must be taken within twenty days next after the allotment of the land to the bankrupt, and that the law does not require the assignee to give notice that the land was set apart; and order nineteen of the general orders in bankruptcy, promulgated by the supreme court of the United States is relied on. This order, after speaking of the duty of the assignee to set off articles to the bankrupt, according to the provisions of the fourteenth section, giving the estimated value of each article, concludes as follows: "And any creditor may take exceptions to the determination of the assignee within twenty days after the filing of the report." Looking to the general intent and scope of the bankrupt law, and to order nineteen, I am of the opinion that the supreme court did not mean that the auxiliary "may," as here used, is to be taken in an imperative sense. On the contrary, it seems, that the supreme court intend to leave a discretion with the district and circuit courts—to permit them to repair accidents, correct mistakes and prevent frauds. No good reason has been given, or authority invoked, going to show that the law does not require the assignee to give notice that exempted property has been set apart, therefore I cannot question the correctness of order nineteen. And upon the question of time, it may not be foreign to remark that the objections taken by the vendor's executor go to the title, and not to the quantity of the land set apart.

It is ordered and adjudged by the court here, that the decision of the register be reversed, and that the actings and doings of the assignee in the premises be, and they are

hereby set aside, and that the said six hundred and forty acres of land, with the rights and appurtenances thereunto belonging, be sold by the assignee under the order and direction of the register, after due and legal public notice, and the proceeds of such sale be brought into the registry of the court for distribution according to law.

PEREGO (BIRDSALL v.). See Case No. 1,435.

Case No. 10,976.

PEREGO et al. v. BONESTEEL et al.

[5 Biss. 66.] [1]

Circuit Court, D. Wisconsin. Aug. Term, 1860.

CREDITORS' BILL—CONFLICTING CLAIMS—PROPERTY SUBSEQUENTLY ATTACHED.

After the appointment of a receiver under a creditors' bill another creditor can acquire no rights by levying an attachment upon property of the judgment debtor. Where the court has obtained jurisdiction under a creditors' bill it will protect the creditor in following up his rights.

[This was a bill in equity by John W. Perego and others against John N. Bonesteel, Henry E. Bonesteel, and Joseph Cary, charging a fraudulent assignment.]

MILLER, District Judge. This bill was filed Oct. 11, 1859. The subpœna, with notice of a rule for an injunction, and for the appointment of a receiver, was served on all the defendants on the 12th of October. An injunction against the two first named defendants was allowed on the 15th of October and was served on the 22d. November 15th an injunction was allowed against Cary, and an order was made and issued for the appointment of a receiver. A receiver was appointed November 21st, who on that day gave his bond. November 23d the bill was amended by making A. J. Langworthy a party defendant. November 25th the answer of Langworthy was filed. In this answer he sets forth that a writ of attachment at the suit of the Farmers' and Millers' Bank against John W. Boonesteel, was placed in his hands on the 15th of November, 1859, which he served by seizing goods as the property of Bonesteel, in the hands of Cary. He does not state the day he seized the goods, but I presume it was the day the writ came to his hands.

The bill is a common judgment creditors' bill upon the return of nulla bona, and also a charge that Bonesteel had made a fraudulent assignment to Cary, which is prayed to be declared null and void.

In Eager v. Price, 2 Paige, 333, 338, a supplemental bill was filed for the purpose of securing a lien on bank stock that came to defendant after filing the original bill, which was sustained. The stock might have been sold under execution. The court say, "The creditors by the bill acquired a specific lien on the property." There is no doubt but the filing of the bill and service of a subpœna gives an equitable lien on property that cannot be seized on execution. In Lansing v. Easton, 7 Paige, 364, the court say: "The ordinary injunction upon a creditors' bill, which only operates upon the defendant, will not, of course, prevent another judgment creditor from levying upon property of the defendant which is the proper subject of a levy, and sale on execution, before the title of the defendant in such property is equitably divested by an order for a sequestration thereof or for the appointment of a receiver." This is an opinion as to the effect of the injunction. In the case of the bill before me, the order for the appointment of a receiver divested the defendant of all interest in the goods liable to execution. By the bill, the complainant acquired an equitable lien thereon, yet, according to the case of Lansing v. Easton, before such order, that lien might not be protected against the legal right obtained to it by another creditor who levied upon it by an execution at law or an attachment. In Storm v. Badger, 8 Paige, 130, the bill was in the usual form of a creditors' bill as to the judgment debtors, and the other defendants were made parties to reach property in their hands belonging to the judgment debtors. And it was alleged that the defendant had property that might have been levied on. The chancellor says: "The object of this suit in this court is to aid the execution at law, and not as a mere substitute of an equitable instead of a legal remedy." The chancellor, in Cuyler v. Moreland, 6 Paige, 273, decides that where the right to file a creditors' bill once exists, by the return of an execution unsatisfied, if the defendant has property which is the subject of sale on execution, but which has been fraudulently assigned, and has other property which can only be reached by a bill, the plaintiff may take out a second execution and levy on property. It is understood, that an order for the appointment of a receiver is equivalent to actual levy. In Ex parte General Assignee [Case No. 5,305], Judge Conkling, in reference to the New York authorities, says that the lien is not created by the filing of the bill alone, but the service of the subpœna is also necessary. He also remarks: "The only case I have met with which seems to militate at all against this doctrine, is that of Lansing v. Easton, 7 Paige, 364. In that case, it is said that a judgment creditor may levy on the property of the defendant, which is the proper subject of levy and sale on execution, before the title of the defendant in such property is divested by an order for the sequestration thereof, or

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for the appointment of a receiver. This is a rule of the court of chancery of New York. But there is nothing in this case, properly understood, which conflicts with the other cases. The particular or more appropriate design of the creditors' bill is to enable the creditor to appropriate such property of the debtor as is not liable to seizure by fi. fa., and, as the practice is to require the debtor to assign to the receiver all his property, whether subject to execution or not, it was probably thought but just to other creditors to take care that no unnecessary impediment should be thrown in the way of their ordinary legal remedy;" and it is there decided that the creditors' bill holds the property in preference to proceedings in bankruptcy commenced after the filing of the bill and service of the subpœna. In Storm v. Waddell, 2 Sandf. Ch. Reports, 494, it is decided that if a judgment creditor files his bill and duly prosecutes his suit, he thereby acquires a lien which cannot be impaired by subsequent proceedings in bankruptcy, although no receiver was appointed until after the debtor was declared a bankrupt. It will be observed that on the same day that Langworthy, the sheriff, received and served the writ of attachment by attaching goods in the hands of Cary, an order was made in this court for an injunction against Cary, and also of reference for the appointment of a receiver. These complainants were proceeding to have the property of the defendants in the hands of Cary, who was holding under Bonesteel, appropriated by law to the payment of their debt, which could not be done until the assignment under which Cary held the property should be vacated, which was the object of the bill. The court had taken cognizance of the case before the attachment was placed in Langworthy's hands. In the case of Wiswall v. Sampson, 14 How. [55 U. S.] 52, the receiver was appointed by a decree of the court, but it does not appear that he gave bond for the faithful discharge of his duties. He was considered in possession of the property. And in Booth v. Clark, 17 How. [58 U. S.] 322, a receiver is stated to be an officer of the court, having full power to attend to this business within the jurisdiction without an assignment from the debtor, but not to maintain a suit outside the jurisdiction without such assignment. By the appointment of a receiver the property is in the custody of the court,—the court having acquired jurisdiction of the case by the filing of the bill and the service of process. The great object of this bill was to set aside a fraudulent assignment, and the court had acquired full jurisdiction of it and had awarded an injunction against Bonesteel, the debtor, which was served a month before the sheriff's attachment.

I am of the opinion that this bill has the preference over the sheriff's attachment.

[For subsequent proceedings, see Case No. 10,977.]

Case No. 10,977.

PEREGO v. BONESTEEL.

[5 Biss. 69.] [1]

Circuit Court, D. Wisconsin. Oct. Term, 1860.

GARNISHMENT—ASSIGNEE UNDER FRAUDULENT ASSIGNMENT—PROPERTY TURNED OVER TO RECEIVER.

1. In Wisconsin an assignee under a fraudulent assignment may be made a garnishee in attachment proceedings, and it is immaterial how the property came into his hands, so it be property liable to seizure by attachment.

2. If the garnishee afterwards turns over property to a receiver appointed under a creditors' bill filed by another creditor, the court will protect him by ordering the proceeds of such property paid to the creditors to whom he was first liable as garnishee.

It appears that an attachment was issued out of this court against John and Henry Bonesteel at the suit of Henry C. Bowen and others, and on the 16th of June, 1859, Joseph Cary was summoned as garnishee; and a writ of attachment was issued out of this court against the same defendants, at the suit of Horace B. Claflin and others, whereupon Joseph Cary was summoned as garnishee on the 20th of July, 1859. By his answer, he held the property of the defendants by virtue of an assignment from them to him for the payment of debts; and that he then had in his hands about three thousand one hundred dollars in money and about ten thousand dollars in goods.

After the decision of this court that the attachment in the case of Alexander Stewart and others against Bonesteel was well founded, for fraud in the assignment, Cary, the garnishee, paid over the funds in his hands to the plaintiffs in that and other attachments, and also in part payment of the debt of Henry C. Bowen and others.

These two attachments and those preceding, in order of time, were issued and proceeded in for the same cause and in the same manner. Cary was summoned as garnishee and was permitted by the plaintiffs to remain in possession of the property until he surrendered it after the decision in the case of Stewart and others. He was as much liable for the property that came to the hands of the receiver as he was for the property and money he paid on the attachments, as it was all in his possession when these two attachments were served. The possession of the receiver was substituted for that of the garnishee Cary. Cary gave up all charge of the remaining property, and the sheriff attached it on the 15th of November. If Cary was legally chargeable as garnishee, the sheriff's attachment would not release him, and he would be chargeable with the value of the goods that came to the receiver's hands on these two attachments of Bowen and others, and Claflin and others. If he was legally chargeable, as garnishee, with

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the goods that passed into the receiver's hands, he could only divest himself of the liability by the consent of these attaching creditors.

It is contended that Cary could not be made chargeable by the attachments, as he held the property of the defendants under an assignment, and that upon the proceeding by garnishee process under the attachments, the validity of the assignment could not be inquired into; that it was the duty of the plaintiffs in the attachments to require the officer to treat the assignment as a nullity and to take the property into custody. It is true that the plaintiffs might have done so after indemnifying the marshal, but the question is, were they bound to do so?

In these cases, affidavits were made according to section 34 of the attachment laws, that Joseph Cary had in his hands property of the defendants, and in pursuance thereof he was summoned. By section 35 of the law, from the day of such service, he stood liable to the plaintiffs in the attachments for the amount of the property and moneys, credits and effects in his hands; and he shall answer under oath all questions put to him touching the property, credits and effects in his possession or within his knowledge. If the garnishee fails to appear and answer, he may be attached and judgment may be rendered against him for the amount of the plaintiff's debt. If it appear from the answer of the garnishee that he was indebted to the defendants, or that he had property in his hands belonging to the defendants at the time he was notified, he shall forthwith deliver such property or pay the amount of his indebtedness to the officer; and in case of his not delivering over the property or paying his indebtedness, the court may enter judgment against him. And if it appear from the answer of the garnishee that he holds the title of any real estate, or any interest therein, in trust for the defendant, or for his benefit, he shall convey the same to the officer, who shall, under the direction of the court, proceed to sell the same in the same manner as a receiver. In case the plaintiff is not satisfied with the answer of the garnishee, the plaintiff may have a trial on the issue formed by such answer. Now, I think from the whole scope of the law, an assignee under a fraudulent assignment may be made a garnishee in attachment. If he confesses in his answer the fraud, or if it is found by a jury, he is in law a trustee of the property in his hands. Under the laws it is immaterial how the property came into his hands, if it is property that is liable to seizure by attachment. When the assignee is satisfied that the assignment is voidable by creditors, he may turn over the property, and he may even convey real estate, to the officer. In the case of Mead v. Purdy [Case No. 9,367], this court has carried out this provision of the law, and proceeded in the sale, and the deed, and in ordering a writ of assistance, the same as if it were a case in equity. It is a law of the state regulating titles, and may be followed in this court.

The attachment law provides for a trial of the issue raised by the answer of the garnishee, and there is no more common issue than the one raised by Joseph Cary in his answer. Such has been the practice of this court, and, I presume, of the courts of the state under the law. The attaching creditors were not bound to have the goods seized in Cary's hands in the first instance, but they may proceed against him as garnishee to test his title, and if successful, to charge him with their value. The attachment, in the first instance, being necessary to prevent the garnishee from disposing of the property, it is proper for the court to proceed in the case to a final determination.

Upon the answer of Joseph Cary, and the proofs submitted, there is no doubt the attachments were issued on legal grounds, and that the alleged fraud is fully established.

Cary was made chargeable to these plaintiffs with the value of the property that passed into the hands of the receiver. If judgments were rendered against Cary for the amount of said property, he would have a right to have the amount realized out of the property by the receiver appropriated to those attachments, he not having possession of the property fraudulently. Upon this consideration, the money paid into court by the receiver will be ordered paid on the two judgments of Bowen and others and Claflin and others; and if there should be a surplus, it will be paid to these complainants.

Case No. 10,978.

The PEREIRE.

[Affirming Case No. 10,979. Nowhere reported; opinion not now accessible.]

Case No. 10,979.

The PEREIRE.

[8 Ben. 301.] [1]

District Court, E. D. New York. Dec., 1875.[2]

BILL OF LADING — EXEMPTION FROM DAMAGE BY BREAKAGE—NEGLIGENCE IN DISCHARGE OF CARGO—BURDEN OF PROOF.

Plate glass was brought by a steamship from Havre to New York, under a bill of lading, by which the steamship was exempted from liability for damage by breakage. When the glass arrived at the store of the consignees three of the cases were found to contain broken plates; and a libel was filed to recover the damage, which, it was alleged, was caused by negligence in the manner of discharging the cases: *Held*,

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

[2] [Affirmed by circuit court; case unreported.]

that the burden of proof was on the libellants, to establish that there had been such negligence on the part of the steamer as caused the breakage; and that, on the evidence, no such negligence was established.

[Cited in The Tommy, 16 Fed. 603; Wolff v. The Vaderland, 18 Fed. 740, 741.]

A French manufacturing corporation shipped plate glass by steamer from Havre to their agents in New York, under a bill of lading, which, by its terms, exempted the ship from liability for breakage. There were fifty cases of different sizes, some very large. When the cargo was unloaded at New York, four cases were put by themselves on the dock, and were there inspected by an agent of Noel & Saurel, the consignees, who at first refused to receive them, claiming that the glass was broken, but finally took them away. When the cases were afterwards opened in store, it appeared that in three of the cases there were one to six plates of glass broken; and suit was brought against the steamer, charging negligence in the transportation and handling of the glass. Much evidence was introduced on both sides, to show the usual manner of discharging such cases, many of which weighed more than a ton, and also the manner of discharging this particular cargo, and as to the marks of damage that appeared on the outside of the cases. The libellants claimed to have proved that the glass was discharged on the flat instead of on the edge, and that the cases were broken by the prongs of a truck on which they were carried off from the ship's side, or that the plates were broken by the pressure of a roller on which the cases were rolled away. The claimants urged that the proof was, that the glass was discharged upon the edge, and in a machine built for the purpose and running on rollers, and that no negligence or carelessness was proved, and that the libellants had failed to prove that the glass was unbroken when the cases were received on board the ship.

G. W. Hoxie and H. G. Hull, for libellants.

R. D. Benedict and Walter L. Livingston, for claimants.

BENEDICT, District Judge. This action is brought to recover damages for the breaking of plates of glass, while being transported on board the steamship Pereire from Havre to New York.

The bill of lading, by its terms, exempts the ship from liability for breakage. In order, therefore, to maintain this action, it is necessary for the libellants to prove some negligent act on the part of the steamer in the transportation of the glass, and that such act caused the breakage in question.

Two different acts of negligence are assigned by the libellants as the cause of this breakage; one is that, in discharging the glass in New York, it was taken from the ship's tackle to a place on the dock some forty feet distant upon a truck, without proper protection for the horns of the truck, and that the weight of the case drove the horns of the truck through the case, splitting the boards, and, as it is inferred, breaking the glass. The other act of negligence assigned is moving the cases upon rollers, whereby, as it is also sought to be inferred, the glass was broken. The shipment consisted of fifty cases of various sizes. In three of these cases, when opened in the warehouse of the consignee, there were found broken plates. In case No. 4, one plate was broken; in one of the others four plates were broken, and in the other case six plates were broken.

Naturally, there is no direct proof of the cause of this breakage. It was not known with certainty that any glass was broken, until the cases were opened after having been carted to and delivered in the warehouse of the libellants. Indirect proof is given, by evidence of facts which indicate a negligence, the natural result of which would be a breaking of the glass. The evidence relied on as proof of negligence consists of testimony as to the outward appearance of the cases when they were delivered, and as to the mode of handling them in New York. In regard to the appearance of the cases, various witnesses are called by the libellants. These witnesses differ greatly among themselves in respect to the condition of the cases. Some speak of having seen "shiny" marks upon the side of a case, indicating resort to rollers in moving it on its flat. Some speak of a separation of the boards of a case; others of a split board, indicating a carriage of the case upon a truck, the prongs of which had penetrated the case. Several speak of a large splinter knocked off; others of marks indicating the use of a grapple, and that a fall had been sustained by reason of the tearing out of the grappling irons. The marks relied on by the libellants are those of truck prongs and roller marks, which, it is insisted, show that the cases were moved on the flat upon rollers and upon trucks. It is impossible from the evidence to say that each of the three cases presented the same marks; some witnesses were led to say so, but it is quite clear, from what they say, that some cases bore marks not found upon the others. For instance, but one case had a splinter knocked off; and, as I gather, but one case had a split board.

It appears that these three cases, after they were landed, were, together with one other case, placed upon the edge, leaning one against the other, and all supported by the side of the dock shed; while there they were examined by Cassidy, a person sent by the consignees to ascertain the condition of the cases, and who is the first witness called by the libellants. According to this witness, there were shiny marks on some of the cases, which he supposed to have been caused by rolling the case upon a roller. He says that some of the boards on more than one of the cases had been separated by a grapple,

but he makes no mention of any split board or any injury by truck prongs, nor does he suggest that the cases appeared to have been moved on trucks. He does mention marks of a slipping from the hooks of a grapple. Upon the testimony of this witness, it would be impossible to say that the cases had been injured by being rolled or while being carried on a truck. The only inference warranted from Cassidy's testimony is that the cases had slipped from a grapple, and this plainly appears to have been his inference.

Noel, one of the consignees and the next witness, proves a splinter knocked off from one case, but he did not see either the "shiny" marks or the marks of a slipping of a grappling iron which Cassidy speaks of. He saw a split in the boards half an inch wide or more, and says the case had been put on a truck with two sharp edges, which edges went into the box and stripped the plank all the way through. Millick, a notary sent for to be present when the cases were opened in the warehouse, is sworn, but gives no evidence in respect to the condition of the cases. Curiously, he was not asked to examine them. Behan, the carman of the consignees, proves the splinter broken off; he saw a broad split as by the spikes of a truck; also marks "like a bruise or something rubbing heavy on it." He speaks of the cases as "shattered," but saw no separation of the boards from each other. The condition of the cases before they were carted from the dock was a subject of conversation between this witness and Cassidy; it is noticeable that Behan does not mention the marks of a grapple which Cassidy found, and which led him to infer that the cases had been injured by a fall.

Max Charronet, the next witness, is a glass polisher, who, as it appears, was sent to several of the steamers of this line to observe how glass consigned to Noel & Saurel was handled. He says that he saw the discharge of all the consignments in question. In respect to the appearance of the cases, his recollection is that none of them showed marks of a grapple or marks of a truck prong, nor was there any board split. All that he recollects as to marks on the cases is that on one of the cases a board appeared "pressed in so that you could put your fingers through," and one of the cases showed marks which indicated that it had been rolled on a roller. If the language of this witness is to be taken literally, these marks were on the cases when they came out of the ship. In respect to this witness, it cannot escape remark that he says his practice was to make a written report of what he saw in respect to the glass he was sent to observe, and that he made such a report in respect to this consignment, drawn out from memoranda taken by him at the time. This report passed to Cassidy, and its contents became known to him, but it seems to have been considered as of little importance, and is not now found. The original memorandum is also lost. This unfortunate circumstance prevents the libellants from deriving any considerable advantage from the testimony of this witness, inasmuch as he declares himself unable to speak with certainty in the absence of his report or memorandum. And it affords ground for the suggestion, that, if the written report had stated any facts tending to support the present claim, it would have been preserved. The further facts, that the witness identified in court a person as present during the discharge of the glass of which he speaks, who is proved not to have been present at the discharge of the glass in question, coupled with the absence of the reports and the obscure recollection of the witness, raise a doubt as to his recollecting anything in regard to this particular glass.

I have now referred to all the evidence touching the external appearance of the cases, which was produced as evidence in chief by the libellants; and when its discrepancies and omissions are considered, and, in the absence of any good reason for not removing all doubt as to the marks upon the cases by producing them in court, it must be said that upon this evidence alone it would be difficult to find as a fact either that these three cases had been rolled on a roller or split by the prongs of a truck.

Nor is this evidence greatly strengthened by the direct evidence offered by the libellants in respect to the mode of discharging this glass. One witness, Squires, says that he saw one of the cases placed on a hand truck, the prongs of which went through the case and split the board; but the witness also states that the case was moved off upon a single truck by a single man, a thing shown to be impossible. Moreover, Squires is a discharged employee, and the circumstance he claims to have seen was not seen by any one else, although many others were present during all the discharging.

There is also some direct evidence tending to show that rollers were used to move the cases; but there is also much evidence to the contrary, and the marks upon the cases, instead of confirming the statement that rollers were used, are such as would be caused by rubbing against the stanchions in the ship's hold. Furthermore, it appears from the libellants' evidence that glass of this description is an article in which some breakage always occurs. Of this consignment of fifty cases, three cases are found to contain broken glass. All the cases were discharged in the same manner in New York. Two of these which contained the broken glass bear marks of having slipped from a grapple, and it is not claimed that any grapple was used on board the ship. The contrary was proved. The fair inference from all this is, that the breakage arose from a fall from a grapple, and not from the mode of discharging.

As against the evidence produced by the libellants, the claimants have presented much testimony, which, if believed, is conceded to be sufficient to disprove negligence. It appears that, for the use of the line of steamers to which the Pereire belongs, there had been constructed a machine or frame, fitted with rollers under it and rollers upon its bottom within, into which large glass could be lowered upon its edge from the ship, and so moved in the machine to its place on the dock. Some six or seven witnesses swear that all the glass of this consignment was discharged in this machine. If this be true, the negligence charged is disproved. But three or four witnesses called by the libellants swear that the machine was not used at all on this occasion. The contradiction is positive, and can only be explained by supposing that the witnesses are speaking of different trips—an explanation hardly admissible in view of the definite statements made. If not thus explained, I am of the opinion that credit must be given to those who testify to the use of the machine; for I mark that one witness called by the libellants, in contradiction of the other witnesses for the libellants, swears that the machine was used to discharge this glass until one of the rollers broke, when it was cast aside and never used after. The breaking of the machine during the discharging is also stated by the witnesses for the respondent, but they further state that, when the roller broke, the frame was at once turned round and used throughout the discharging without difficulty. It would appear, then, that the machine was used, to a certain extent, in discharging this consignment; and, if used at all, the fact is sufficient to discredit the testimony of the witnesses produced by the libellants, who swear positively that it was not used at all.

Furthermore, these three cases were examined by the agent of the line, as well as the master of the steamer, while they were upon the dock, and after notice that their appearance indicated damage; and these witnesses concur in the statement, that the cases bore no evidence of negligent handling in the discharging. These witnesses have no substantial interest in the question; they are not responsible for the discharging. Their interest would be to discover evidence to cast the loss upon the stevedore in case there turned out to be a loss; but they, as well as the second captain of the steamer, are positive that no evidence of injury in the discharging was found upon the cases.

Upon the whole case, therefore, as it is made by the evidence before me my conclusion must be, that the libellants have failed to prove that the breakage in question was caused by the negligence of the ship.

The libel is accordingly dismissed with costs.

[On appeal to the circuit court the decree of this court was affirmed. Case unreported.]

Case No. 10,980.

PERELES v. WATERTOWN.

[6 Biss. 79.] [1]

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

CONSTITUTIONAL LAW—LIMITATIONS — MUNICIPAL BONDS.

1. The Wisconsin limitation act of April 3, 1872 [Laws 1872, p. 56], so far as it affects municipal bonds, issued before its passage, is unconstitutional and void.

2. In passing a statute of limitations, the legislature must allow a reasonable time within which to prosecute existing causes of action; and as to what constitutes such reasonable time, the legislature is not the exclusive authority. The period fixed by the legislature is subject to review by the courts, and if they deem it unreasonable, they will disregard it as impairing the obligation of contracts.

3. A limitation to one year in municipal bonds issued for negotiation in a foreign market, is clearly unreasonable and unconstitutional.

[Cited in Arno v. Wayne Circuit Judge, 42 Mich. 368, 4 N. W. 151.]

This was an action brought [by B. F. Pereles] upon certain bonds of the city of Watertown bearing date on the 1st day of August, 1853, and due and payable on the 1st day of August, 1863, bearing interest at the rate of 8 per cent., payable semi-annually according to interest warrants or coupons attached.

Vilas & Bryant, for plaintiff.

Daniel Hall and Harlow Pease, for defendant.

1. The act does not impair contracts, because it fixed a reasonable time to sue; Ross v. Duval, 13 Pet. [38 U. S.] 45; Ruehl v. Voight, 28 Wis. 153; Wood v. Hustis, 17 Wis. 416; Howell v. Howell, 15 Wis. 55; Call v. Hagger, 8 Mass. 423; Cooley, Const. Lim. 366 et seq.

2. Construction given by state courts binds federal courts. Leffingwell v. Warren, 2 Black, 599.

HOPKINS, District Judge. The bonds are executed under the corporate seal of the city and are not disputed. The only defense interposed is that of the statute of limitations. When they were issued and put into circulation, the period of limitation was twenty years, and so remained until the passage of the act entitled, "An act to limit the time for the commencement of actions against towns, counties, cities and villages, on demands made payable to bearer," which was published and took effect April 3, 1872, and reads as follows, viz.: "Section 1. No action brought to recover any sum of money on any bond, coupon, interest warrant against, or promise in writing, made or issued by any town, county, city or village, or upon any installment of the principal or interest thereof,

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shall be maintained in any court, unless such action shall be commenced within six years from the time such sum of money has or shall become due, when the same has been or shall be made payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order; provided, that any such action may be brought within one year after this act shall take effect; provided further, this act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing." Laws 1872, p. 56.

This action was commenced by service of process, upon the 31st day of July, 1873, more than a year after the passage of the foregoing act, and more than six years after the bonds and coupons matured; indeed, more than six years had elapsed after the bonds and coupons had become due, when the act was passed, so if any right to sue was saved, it was by virtue of the proviso, "that any such action may be brought within one year after this act shall take effect."

This mode of inserting provisos of this kind in statutes of limitation intended to apply to existing causes of action, when the act would otherwise cut off all remedy, is quite customary in the legislation of this state. But notwithstanding it has been practiced for some time past, I do not find that the supreme court of the state has ever considered the effect of such provisions, or determined whether they are effectual in avoiding the constitutional objection to a law that cuts off all remedy. Such clauses have doubtless been suggested and inserted as embodying the principle laid down by the courts, that although a limitation act, by its terms, includes existing causes of action, still, if a reasonable portion of the period fixed remains after the passage, the act is not subject to the constitutional objection of impairing the obligation of the contract. But as to whether the legislature can determine that question by a proviso of this kind, has not been considered by the supreme court of this state; so I have not the benefit of the construction of that learned tribunal.

In the conclusion I have arrived at in this case, it will not be necessary to decide whether any effect should be given to such a proviso or not, for if it is effectual to give a year after the passage of the act to bring suits upon claims where six years had already run, still the legislature is not the exclusive judge of the question as to whether the period stated in the proviso is a reasonable time within which to prosecute the remedy.

This was the important question presented and discussed on the trial. Were it not for decisions of the supreme court of this state to the contrary, and I were at liberty to follow the rule of the supreme court of the United States, as laid down in Sohn v. Waterson, decided October term, 1873, 17 Wall. [84 U. S.] 596, there would be no difficulty, for they there hold that such statutes are to be construed as to existing contracts, as taking effect from their passage, and as giving the full period from that time. That would relieve this case from all difficulty, as the party would have the full six years after the passage in all cases. But, as the supreme court of this state, whose decisions upon such statutes are regarded as binding upon the federal courts (Leffingwell v. Warren, 2 Black [67 U. S.] 599), have held that such statutes are valid, when there is a reasonable portion of the time left within which to commence the suit (Parker v. Kane, 4 Wis. 18; Smith v. Packard, 12 Wis. 371; Ruehl v. Voight, 28 Wis. 152), and that as to claims where the whole period had expired before the passage of the act, the statute does not apply at all (Osborn v. Jaines, 17 Wis. 573; Armond v. Green Bay & M. Canal Co., 31 Wis. 316-342), I have to decide this case in the light of such authorities. In Sohn v. Waterson, supra, the act of the state of Kansas, passed in 1859, limited the bringing of actions upon judgments rendered out of the state, to two years from the time the cause or right of action accrued. The judgment there sued upon was recovered in Ohio, in 1854. So, to give the act its literal meaning, the right to sue the judgment in Kansas would have been cut off instantaneously. But the court held that the act should have prospective operation only, and that the proper time to commence the calculation of the period of limitations "was when the cause of action was first subjected to the operation of the statutes," and that the party had two years after the passage of the act to sue, citing and approving the cases of Ross v. Duval, 13 Pet. [38 U. S.] 45, and Lewis v. Lewis, 7 How. [48 U. S.] 776.

But the court, in Murray v. Gibson, 15 How. [56 U. S.] 421, following the decision of the state courts of the state of Mississippi, in the construction of the statutes of that state, held that the statute applied only to cases arising after the passage of the act.

They did so, because of the deference that court pays to the construction of state statutes by the state courts. They regard their decisions in such cases as authoritative.

Conceding, for the purpose of this case, that the proviso operated to give one year to bring suits in cases otherwise cut off as this was, the question, as before stated, is presented whether the legislature have exclusive authority to determine what is a reasonable time to be allowed within which to commence an action or be barred. The courts of this state hold that they have the right, when a portion of the statutory time has run upon existing actions, to determine whether a reasonable portion of the time remains to enable

the party to bring his action. But it was claimed by the defendant's counsel in this case that those decisions were based upon statutes where the legislature had not itself fixed the period, and hence were distinguishable from this case, for here the legislature had fixed the time for cases of over six years' standing, at one year, and that the courts were bound by that time as much as they were by the six years' time in cases where that was applicable; in other words, that the legislature had thereby fixed one year as a reasonable time, and the courts could not inquire into or question the wisdom of their decision in establishing it, and cited Cooley, Const. Lim. p. 366, in support of this proposition. The cases cited by Mr. Cooley as sustaining that doctrine, I do not think go to that extent, nor do I think he intended to. In Call v. Hagger, 8 Mass. 423, the court held that as the short statute was passed after the cause of action had accrued, it did not extend to the case. What was said upon the discretion of the legislature was therefore not necessary, and the decision was not placed on that ground.

The cases of Stearns v. Gittings, 23 Ill. 387, and Price v. Hopkin, 13 Mich. 318, do not present the question involved here. But the case of Berry v. Ransdall, 4 Metc. (Ky.) 292, lays down a contrary rule, and holds that a limitation of thirty days upon existing causes, was unreasonable. The court did not regard the authority of the legislature to fix the time as absolute, but as subject to the control and judgment of the court. I think this the better rule. When the statute relates to causes of action accruing after the passage, it may be conceded that the power of the legislature is absolute in fixing the time within which an action shall be prosecuted.

In such cases, the parties are supposed to have contracted in reference to it, and the question of its impairing the obligations of the contract would not arise. But a very different rule applies to statutes of limitation intended to apply to existing causes of action. The legislature cannot directly impair the obligation of such contract, nor can it deprive a party of his property without due process of law.

The fixing of an unreasonable time to sue, is deemed an impairment; therefore holding that the legislature were the sole judges of what was reasonable time, is inferentially conceding to them the power of impairing, and even destroying the obligation of a contract.

This seems to me to be the logical result of such a doctrine, and I cannot adopt it.

I think the time fixed by the legislature within which actions must be brought upon existing contracts, is not conclusive, but is subject to be reviewed by courts, and if they deem it unreasonable, it is their duty to disregard such statutes, as violative of the constitutional inhibition against passing laws impairing the obligations of contracts. A statute prescribing an unreasonably short time, is not a statute of limitation, but an unlawful destruction of a right, whatever it may purport to be by its terms. It was claimed that limitation laws were statutes of repose, and were now regarded with favor; they undoubtedly are; but they should allow citizens all needful remedies, and should therefore give a fair opportunity for all to apply to the courts for redress after their passage. The supreme court of this state have as directly passed upon this question as any court whose decision I have been able to find. Von Baumbach v. Bade, 9 Wis. 559–579. Dixon, C. J., says, "So far, then, as the constitution of the United States reaches or affects the alterations of the remedy, such alterations are, first, matters of sound discretion with the legislature; and, secondly, with the courts. The legislature, having power within the limits above stated, to control at their pleasure the remedy, and to determine for themselves whether parties to contracts are left, are, in the first instance, with a substantial remedy, according to the laws as they existed before such change, subject to a revision in the last particular by the courts." This fully sustains my opinion as to the authority of courts in such cases.

This brings me to the question whether the year allowed after the passage of this act for parties holding the bonds to bring suits was a reasonable time. I do not think, in view of the facts and circumstances of the case, that it was. That more time is essential in some cases than in others, is apparent.

These bonds were issued when it must have been known to the defendant that they could not be negotiated in this state, but would necessarily have to find a market in distant places, where money was more abundant than in a new country, and it is well known to all, and may properly be assumed by the court, I think, that the bonds so issued by these defendants, like the bonds of other municipal corporations, were negotiated in the money markets in this country, and perhaps of Europe, and that when this act was passed, a portion of them at least was held by parties residing out of the state. The time of limitation when the bonds were issued was twenty years, and when this act was passed, over ten years still remained for them to enforce their remedy. They had no reason, so far as this case shows, to apprehend any such legislation or any such great and extraordinary change in the policy of the state in its limitation laws. And their position did not impose upon them the duty of a constant watchfulness over the legislature, and they are not therefore chargeable with laches in not sooner finding out the existence of such law.

To hold the bar as valid under such circumstances, would be an act of great injustice to the holders of these bonds, and would greatly depreciate, if not absolutely destroy, the value of large quantities of securities of this character, contrary to the express protection guaranteed in the fundamental law of the land. Such legislation, instead of being regarded with favor, as claimed by the defendant's counsel, is subversive of vested rights, and tends to the destruction of confidence, and to encourage repudiation in violation of the plain letter and spirit of the federal and state constitutions.

Some evidence was given on the trial tending to show that just before the expiration of the year the executive officers of the corporation resigned, and that parties were unable to sue or get service within the year. And it was claimed by the plaintiff's counsel that if such was the case, the creditors had not a full year within which they could sue, and that such conduct on the part of the corporation would estop them from interposing the bar. But, in the view I have taken of the other question, it is unnecessary to pass upon this one. I prefer to put my decision on the broad ground that the act is void as not affording a reasonable time to sue after its passage.

The counsel for the defendant urged, with a good deal of energy, upon the attention of the court, the rule that courts would not pronounce a statute invalid as contrary to the constitution unless it was clearly so; that doubts upon that subject were not sufficient to justify a court in so doing.

I yield a most cordial assent to that doctrine. But when an act does, in the opinion of the court, contravene the fundamental law, no consideration, however important, can justify a court in enforcing it as valid. After the most thorough and deliberate consideration, I have come to the conclusion that the act of 1872 is unconstitutional and void, as to the cause of action set up here, and therefore order judgment for the plaintiff.

NOTE. A statute limiting the time in which stockholders shall be personally liable to one year is reasonable and valid. Adamson v. Davis, 47 Mo. 268; Same v. Wilson, Id. 272; Same v. Marshall, Id. 273. See, further, Coffman v. Bank of Kentucky, 40 Miss. 29; Hill v. Boyland, Id. 618; Burt v. Williams, 24 Ark. 91; Coxe v. Martin, 44 Pa. St. 322.

Where a right springs, not from a contract, but from a legislative enactment, the legislature is the exclusive judge of the reasonableness of the time in which actions may be brought thereunder. De Moss v. Newton, 31 Ind. 219.

PEREW, The MARY E. See Case No. 9,207.

PEREZ (DODGE v.). See Case No. 3,953.

PEREZ (UNITED STATES v.). See Case No. 16,033.

Case No. 10,981.

PERIN & GAFF MANUF'G CO. et al. v. PEALE.

[17 N. B. R. 377.] [1]

District Court, S. D. Mississippi. 1878.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PETITION—DUTY OF MERCHANT TO DISCLOSE HIS ACCOUNTS—SUSPENSION OF PAPER.

1. A merchant is under obligation to his creditors to exhibit a statement of his accounts when demanded, and if he fails to do so he cannot complain of proceedings in bankruptcy commenced against him without the requisite number of creditors joining in the petition, provided a sufficient number join before the trial.

2. The petition should contain an averment that the petitioners believe that they constitute one-fourth in number of the creditors, and that the amount due them constitutes one-third of the unsecured provable debts; it is not required that they should know such to be the fact.

3. An agreement, on the maturity of a note, given in the course of commercial business, that it may lay over for that day, is only a forbearance to sue, and does not destroy the character of the note as commercial paper. Its non-payment is a suspension and non-resumption of payment, and when continued for forty days constitutes an act of bankruptcy.

[This was an action in bankruptcy by the Perin & Gaff Manufacturing Company and others against John A. Peale.]

Shelton & Lea, for petitioning creditors.

Pittman & Pittman and Buck & Clark, for Mississippi Valley Bank.

HILL, District Judge. This is a proceeding in involuntary bankruptcy, instituted by the petitioners against said defendant, praying that he may be adjudicated a bankrupt. The defendant has made no defense, but the Mississippi Valley Bank, by order of the court, as a creditor of the defendant, has been permitted to interpose its defense.

The first defense made goes to the jurisdiction of the court, and will be first considered. The objection stated and relied upon is, that when the petition was sworn to by the first five petitioning creditors, they did not constitute one-fourth in number and one-third in amount of the creditors of said Peale, and that this fact was known to said petitioners or their agent and attorney; that it was only a fishing petition and a fraud upon the jurisdiction of the court. If the proof sustained this averment, the petition should be dismissed. The petition should contain the averment that the petitioners believe they do constitute one-fourth in number, and that the amount due them constitutes one-third of the provable debts of the alleged bankrupt which are unsecured. But that they should know such to be the fact cannot, in the very nature of the case, be required. To require this would in most cases defeat this provision of the law, as each creditor is only presumed to know what is due himself, and not what

[1] [Reprinted by permission.]

is due to others. Again, it is impossible for a creditor to know the amount of indebtedness of a merchant debtor, unless upon examination of his books and accounts. If these are properly kept, he might upon examination of them approximate it. The petition was prepared by the attorney in Vicksburg, and sent to Cincinnati to be sworn to by the creditors there. A memorandum of the names and amounts of other creditors who were to and have joined in the petition was sent with it. The petition was doubtless sworn to with the understanding that they would so join. The defense relies upon the fact that Williams, the agent of the first-named creditors, and Lea, their attorney, were informed by Peale that he owed some twenty-nine thousand dollars, a portion of which was secured and a portion not, and that he had about forty creditors. Peale was again and again applied to to furnish a statement of the names, residence, and amounts due his creditors, which was refused upon the ground that it was desired for the purpose of instituting proceedings in bankruptcy against him. Both the attorney and the agent might well have doubted the truth of Peale's statement in this regard, as he refused to make a detailed exhibit of his indebtedness or to exhibit his books, from which it could be ascertained. They might have well supposed that this large statement was made to bluff them off and to prevent the commencement of bankruptcy proceedings.

I am of opinion that, since the enactment of the bankrupt law [of 1867 (14 Stat. 517)] a merchant is under obligation to his creditors, when demanded, to exhibit a statement of his accounts, and a refusal to do so is a violation of his duty; and, if he fails to do so, he cannot complain at proceedings in bankruptcy being commenced against him without the requisite number and amount of creditors joining in the petition, provided a sufficient number join before the trial; and no one or more of his creditors seeking an advantage over other creditors, caused by such refusal, can occupy a better position than the debtor. There is no evidence that petitioning creditors were informed of Peale's statement of the number of his creditors or the amount he owed. The evidence is that he refused to give a statement of these facts. It is not denied that the requisite number of creditors, holding the requisite amount of debts, have now joined in the petition, and that they have joined in proper time. Without further comment, I must hold that the court has jurisdiction of the proceedings.

There remains the question as to whether or not the alleged act of bankruptcy has been established. But one act of bankruptcy is charged, and that is, that being a merchant and trader he suspended payment of his commercial paper, and did not resume within forty days. The paper upon which the alleged suspension was made is a note made payable to Roach, the cashier of the Vicksburg Bank. That Peale was then badly insolvent is not denied; that he was a merchant is admitted; and that the note was given in the course of his commercial business is not disputed, nor is it denied that it remained unpaid for more than forty days after its maturity. The point relied upon is, that it appears from the proof that, a short time before the maturity of the note, Peale applied to Roach for an extension of time for payment, and that when it was sent out for payment on the day of its maturity, Roach agreed that it might lie over for that day; and that no further steps were taken for its collection until some time after, when suit was brought upon it. It is contended that this agreement that the paper might lie over for the day on which it fell due destroyed its character as commercial paper. It is not contended that there was any agreement for delay except from day to day, or that any further agreement was made, or that any consideration was given for the delay.

I am satisfied that this was only a forbearance to sue, and did not destroy the character of the note as commercial paper. In contemplation of the bankrupt law, it was a suspension and non-resumption of payment, and having continued for more than forty days, constituted an act of bankruptcy. If the judgments held by the contesting creditor constituted liens upon the stock of merchandise of the debtor, then the declaration of bankruptcy cannot prejudice them, and if not there is no reason why they should complain at receiving an equal share with other creditors. I am satisfied that, under all the proof, the debtor should be declared a bankrupt, and it is so ordered. Let an order of adjudication be passed.

PERINE (WALTER v.). See Case No. 17,121.

Case No. 10,982.

Ex parte PERKINS.

[5 Biss. 254;[1] 8 N. B. R. 56.]

Circuit Court, N. D. Illinois. May, 1873.

ASSIGNEE—REMOVAL — DISCLOSURE TO CREDITORS — DEBTOR PURCHASING CLAIMS TO SET-OFF — EXCUSES — WHAT INSUFFICIENT — REPORTS—REMOVAL—WHEN ORDERED—PRACTICE.

1. It is the duty of an assignee to disclose to the creditors, upon inquiry, and, where it appears they are ignorant thereof, the main facts known to him relating to the condition and assets of the bankrupt estate.

2. Where he knows there is a large sum of money on deposit in a bank, belonging to the estate, against which the bank claimed and were purchasing set-offs, it is his imperative duty to state these facts to creditors inquiring concerning the value of their claims.

3. It is not a sufficient excuse that he could not give definite estimates as to what the estate

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

would pay, or that he says he did not intend to mislead any one. He is presumed to intend the necessary consequences of his own acts, and the concealment of the existence of this large deposit must mislead creditors and affect their action. Nor is it a sufficient answer or excuse that the books of the bankrupt could be examined by the creditors.

4. The assignee should also make, in season, the reports prescribed by the rules in bankruptcy.

5. Where an assignee has failed in properly informing creditors in regard to their rights and the value of the assets, and the information has been suppressed in the interest of one class of creditors, it is the duty of the court to remove him.

6. On a revisory petition to the circuit court, the proper practice is to direct the district court to remove the assignee and to appoint some other competent person in his place.

This was a petition by John A. King and Newton S. Taylor, creditors of the State Insurance Company, bankrupt, filed under the second section of the bankrupt act, to review an order of the district court refusing to remove Norman C. Perkins, assignee of the State Insurance Company of Chicago, bankrupt. This corporation, organized under the general law of the state of Illinois, and doing business in the city of Chicago up to the 9th day of October, 1871, sustained such losses on that day that it became insolvent and suspended business. On the 2d of November the attorney-general of the state commenced proceedings in the circuit court of Cook county to wind up the corporation under the statute of the state, in which proceedings Horace A. Hurlburt, the president of the company, was appointed receiver, George C. Smith, president of the bank and treasurer of the insurance company, and his brother, Charles M. Smith, vice-president of the bank and vice-president of the insurance company, signing his bond. On the 8th of December following, a petition in bankruptcy was filed against the company in the district court of the United States for this district, under which the company was, on the 12th of January, 1872, adjudicated a bankrupt by default. No schedule or inventory was filed until the 17th of February, 1873. At the time of the fire, October 9, 1871, the company had in the hands of George C. Smith, its treasurer, on deposit in the National Loan & Trust Company, a bank of which he was president, the sum of sixty thousand dollars in cash, good mortgages to the amount of about one hundred thousand dollars and also United States government bonds of the value of two hundred thousand dollars. These bonds were, at that time, in New York City, but soon afterwards were, by Smith's order, converted into cash, and the proceeds deposited in this bank. The losses of the company by the fire were between $600,000 and $700,000. The books of the company were in the hands of the treasurer, and were not exhibited to any outside persons, and the reports ordinarily given of the liabilities and assets of the company by its officers and those winding up its affairs, were that the losses were about ten times its assets. Immediately after the fire the bank commenced buying up the proofs of loss as filed against the company, at the rate of ten per cent. on their face, for the purpose of offsetting them against the funds on hand. By the 1st of December they had purchased claims to the amount of two hundred and sixty thousand dollars, upon which they issued certificates of indebtedness in the name of the company, to J. Bradner Smith, and brother of George C. Smith and Charles M. Smith, which certificates were taken to the National Loan & Trust Company Bank and charged up at their face against the deposit of the company. The policies and proofs of loss upon which these certificates were issued were left in the office of the company as taken up, and canceled. The balance still in the bank to the credit of the company was further diminished by deductions for salaries paid, and retaining fees of counsel, and loans to the amount of about twenty thousand dollars, and a further charge was made of forty-two thousand dollars for stock of the insurance company which the bank had bought before the fire. In the schedules all the policy-holders were returned as creditors of the company, but not J. Bradner Smith, to whom the certificates of indebtedness had been issued, nor the National Loan & Trust Company, which had purchased them. The cash on hand was stated at $17,779.33, being the amount of the deposit in the bank after deducting all charges made against it. The other assets were returned as bills, notes and other securities to the amount of about one hundred and twenty-five thousand dollars. At the election on the 12th of April, Norman C. Perkins, who had previously been the attorney for both the bank and insurance company, was elected assignee by an almost unanimous vote. Shufeldt & Ball, the brokers through whom the bank had purchased the claims against the company, casting all their votes for him; and on the 15th of the same month he was confirmed by the district court, and gave bond in the sum of one hundred thousand dollars, with Charles M. Smith and J. Bradner Smith as sureties. No attempt was ever made by Perkins to recover from the bank the money or securities in its hands, except the balance of $17,779.33; nor to dispute the charges made by the bank against its deposits; nor was any report or statement ever made by him that the bank was indebted to the company, or that the company ever had assets in the hands of the bank above that amount, or any claim against the bank in any way. On the 12th of July of the same year, a petition for the removal of Mr. Perkins as assignee was filed in the bankruptcy proceedings by Newton S. Taylor, a creditor of the bankrupt, and subsequently various other petitions, additional and supplemental, were filed for the same purpose. The principal causes of complaint against the assignee in these petitions were

the receiving of four hundred dollars for services rendered the bankrupt as counsel, which was claimed to be a preference under the bankrupt law, and also the settlement, at too small an amount, of a claim of re-insurance against the Teutonia Insurance Company of Cleveland, Ohio; and principally, that in his conduct as assignee he had suppressed from the creditors of the bankrupt, material facts in relation to the affairs of the company and its assets, particularly the transactions of the bank and its officers, and the large deposit and securities in their hands, which, it was claimed, he should, in good faith, have communicated to them. Upon these petitions, the answers of the assignee and proof taken before the register, the district court refused to grant the prayer of the petitioners and to remove the assignee. Thereupon this petition for review was filed in the circuit court, under the second section of the bankrupt law.

Cooper, Garnet & Packard, for petitioner, cited as to what were sufficient grounds for removing assignee: Ex parte Stagg, 2 Mont. D. & D. 186; In re Burton, Id.; Ex parte Molineux, 1 Deac. 603; In re Keat, Id.; Ex parte Ashmore, 3 Mont. D. & D. 461; In re Lucas, Id.; Ex parte Carter, 3 De Gex & J. 116; In re Robinson, Id.; Ex parte Perryer, 1 Mont. D. & D. 276; In re Innes, Id.; Ex parte Leman, 13 Ves. 271; Ex parte Copeland, 3 Deac. & C. 561; In re Weston, Id.; Ex parte Shaw, 1 Glyn & J. 127, 156; In re Howard, Id.; In re Morse [Case No. 9,852].

Sidney Smith, for assignee.

DRUMMOND, Circuit Judge. I shall discuss but one of the points made in the petition, viz.: that when application was from time to time made to the assignee by creditors of the company, the very object of which it must have been apparent was to ascertain the condition of the company, he suppressed facts which were within his knowledge, and which it was his duty to communicate. I will proceed to state very briefly the reason why I think this information was suppressed, and why it was his duty to communicate it.

We have to assume that the creditors thus inquiring of the assignee as to the condition of the assets of this company, were claimants against those assets, and were inquiring as to their own property. Now, I am aware that it is no uncommon thing for an assignee to be annoyed by numerous applications and inquiries about the affairs of a bankrupt, and I make all due allowance for the natural impatience which might thus be created. If that were all of which complaint could be made against this assignee, the court would not interfere with the ruling of the district court; but this was not all. The books of the company came into his possession, according to his own statement, about the 2d or 3d of May, 1872. These books show certain facts, and the court will presume that the assignee, at the time or shortly after these books came into his possession, knew them, some of which were these: That the principal managers of the State Insurance Company and of the National Loan & Trust Company were the same; that George C. Smith was the treasurer of the company and president of the bank; and that, at the time of the insolvency of the company, there was on deposit with the National Loan & Trust Company to the credit of the company over three hundred thousand dollars; that, between the date of the insolvency of the company and the time when the books came into the possession of the assignee, and he became acquainted with their contents, the parties who had the management, to a greater or less extent, both of the insurance company and the bank, had been concerned in purchasing claims against the insurance company with a view to set off those claims against this deposit account, and I may add, he knew that these purchases were made under circumstances which showed that the parties purchasing were endeavoring to depreciate the value of the claims against the company with a view of obtaining them for less than their value.

These are facts which were known to the assignee, or ought to have been known to him, immediately after the books came into his possession. One leading fact to which I have adverted was this: That there was on deposit to the credit of the company the sum of over three hundred thousand dollars. Another fact that he knew was that Mr. Hurlburt, as the receiver under the appointment of the state court, did not set up any claim to this large deposit.

Whatever view may be entertained of the right of a debtor of a bankrupt corporation to go into the market and purchase claims against that corporation for the purpose of setting them off against his own debt, having knowledge, at the time that he makes the purchase, of the bankruptcy of the corporation, about which members of the profession and judges may differ (though this court, on the 5th of June last, decided that, under such a state of facts, the set-off could not be allowed. See Drake v. Rollo [Case No. 4,066]; Hitchcock v. Rollo [Id. 6,535]; Sawyer v. Hoag [Id. 12,400]), there can be no doubt, in my opinion, that, under the circumstances connected with the deposit in the National Loan & Trust Company and the purchase of the claims against the insurance company with a view to set them off against the deposit account, a court of equity would never allow such a set-off, obtained by parties occupying a fiduciary relation to the company, and so connected with the bank, and possessing knowledge that no other parties possessed.

Now, this assignee, whatever might be his opinion as to the set-off, must be presumed to know the facts under which the set-off

was sought to be made. Possessing this knowledge, let us see what he did, and what he omitted to do, when application was made to him by various parties who had a right to know some of these facts. For instance, Mr. Millard testifies that about July 1st, 1872, ten days before the first petition was filed, he called on Mr. Perkins in relation to the purchase of claims which he represented. Mr. Perkins referred him to Mr. Truman, who was in the office. The witness asked if Truman was buying up the policies. Truman said he was, and was paying thirteen cents for them. Afterwards he called upon Mr. Truman, and he said he was paying seventeen cents.

Now, there was a person who called upon the assignee, the very object of whose call, it must have been known, was to ascertain something about the value of the policies, and of the claim which he had against the company.

Mr. Thomas testifies that an application was made by him to the same effect as that made by Mr. Millard. The assignee told him he could not purchase the claim himself, but he knew a party who was purchasing. The assignee asked how much had been offered for the claim and he told him twelve and a half per cent. The assignee gave the impression, "It was worth, he thought, something more than that, but don't think he mentioned any figures."

T. W. Brophy testifies that about the 18th of May, he had an interview with Mr. Perkins in reference to a claim. The assignee said he did not know what the company could pay; that many policies could be bought for ten cents on a dollar; he had sold his for that, but did not know whether more could be realized or not. The assets of the company consisted of some mortgages —"don't know whether he said it had any bonds or not; don't remember as he said anything about that; think that was all." The mortgages were on buildings that had been destroyed.

Newton S. Taylor testifies that he called on the assignee the last of May, or the 1st of June, to ascertain what the prospects were for receiving anything from the company; that he asked the assignee what the assets of the company were; that the assignee replied that there was a bond of thirty thousand dollars which he thought was good, and a few mortgages,—one of five thousand dollars on the North side which he thought wasn't good; that the assignee represented nothing else. He asked the assignee when any dividends would be declared, and he replied that if there were any it would be very late in the fall—probably not until spring.

George Gardner testifies that he called on the assignee some time in July stating that he called to obtain information about the affairs of the company. The assignee in substance replied that the company "was in a pretty bad box, didn't amount to much, and wouldn't pay a great deal;" the witness did not enquire about the specific assets of the company, nor did the assignee state; nothing was said by either party about any funds on deposit in the National Loan & Trust Company Bank.

These are statements made by various parties purporting to have, and who, it is not disputed, did have, claims against this bankrupt insurance company, who called upon the assignee at the various times mentioned, for the purpose of obtaining information of its affairs.

Now, it is extraordinary that with the knowledge of the assignee of the fact—that there was or had been on deposit over three hundred thousand dollars to the credit of the company—it was not communicated to any one of these parties making inquiries. It certainly was a fact calculated greatly to affect their interests and their subsequent conduct in relation to their various claims. It was a fact that had a very important bearing upon the value of the claims, as they then existed, in the market.

If we concede that the assignee knew of the claim of set-off and believed that claim was well founded, still it is singular that in not one of these instances did he communicate so important a fact. It was for these various creditors to judge of the legal effect of that fact and to determine what their conduct would be. If it was not necessary for the assignee to go into any general details about the character of the claims, still I must insist that it is not possible to explain his silence in relation to this large deposit consistently with what I conceive to be entire fair dealing to the creditors who were inquiring about what belonged to them. The assignee had no further interest in them than what he might receive as compensation for administering them. The true course was to state this fact and say that the value of the assets might very much depend upon the validity of the claim of the bank against the deposit account as a set-off, and leave the parties to judge for themselves.

It is clear that many of the parties did not know of the existence of this fact, and it is also clear that several of these interviews took place after the decision of the court in relation to the general law of set-off, on the 5th of June, 1872.

It cannot be said that the assignee did not disclose this fact because it was notorious. It certainly was not known to most of these applicants, even if to any of them. I think the duty was the more imperative upon the assignee to make this disclosure, because of the proceedings in the state court under the state law to wind up the company, the appointment of the receiver, and report that he had only a little more than seventeen thousand dollars in his hands.

But the assignee has a right to be heard as to his own conduct. Let us examine and see what his account is when being examined as to whether he communicated this principal fact to any of these creditors.

This question is put to him:

"Q. Did you report the fact of these moneys in the National Loan & Trust Company Bank to any of the creditors before the 12th of July, and, if so, to whom,—any creditors of the insurance company?"

That is a plain, distinct question as to a matter within his personal knowledge, and which admitted of a distinct answer, and this is the answer:

"A. I don't know that I had any occasion to make any report to any of the creditors concerning the particulars. I answered questions as they asked them of me."

He is asked as to a fact, and he says that he does not know that he had any occasion to make any report, and that he answered questions as they were asked.

Then this question was put:

"Did you make a report to any of the creditors before the 12th of July, and before King & Taylor's petition was filed?

"A. I made no report to any creditor concerned. I made no report until the second creditors' meeting. I answered questions and gave such information as I was able to from time to time."

Then this question is put to him:

"Q. Did you ever give any information to any creditor, before the 12th of July, of the moneys on deposit in the National Loan & Trust Company Bank? If so, to whom?"

A very clear question, admitting of a distinct answer,—and what is the answer?

"A. I never made reports to any. I answered questions asked me, and gave information required of me."

The next question is this:

"Q. Was that question ever asked you,—that is, as to the deposit in the National Loan & Trust Company Bank?"

The answer is: "I don't think it ever was."

"Q. And you never volunteered the information to any creditors?

"A. I don't know I had any occasion to say anything to any creditor you represent."

Now, I think this testimony is not fair, candid, nor creditable to the assignee. I have already said, and I now repeat, that it was the imperative duty of the assignee to disclose this fact to the parties who made the application; that good faith required him to do it, and that he was not acting fairly to the creditors when he refused or declined to make the disclosure, and it is impossible to avoid asking the question whether, if this had been a deposit account in a bank managed by persons or parties who had not elected him assignee, and with whom his associations, personal and professional, had not been more or less intimate, he would have refused to make the disclosure.

Let us examine a little further the testimony of Mr. Perkins, in order to form an opinion as to his own view of his conduct. He says: "At the outset I consider that if I should give people estimates and conjectures as to what must be uncertain—the amount finally paid—I should certainly mislead some, and subject myself to blame, and I accordingly resolved to make no such estimates to any person; and I never have. Mr. Gardner mentions in his testimony that he had been previously told, by other persons, that the company would not pay more than ten or twelve cents, and he may have mentioned those figures in our interview. Likely enough he did; and, if he did, I probably did not contradict him."

Now, no one pretends that it was the duty of the assignee to state how much the assets of the company would pay, for that depended upon circumstances not within his knowledge. That is not the question. It is not that he did not state how much the assets of the company would pay, but that he did not state a fact which would constitute an all-important element in the calculation as to how much the company might pay, and thus leave creditors to determine for themselves, having knowledge of that fact, how much it would probably pay. When he says Mr. Gardner "may have mentioned those figures in our interview; * * * and, if he did, I probably didn't contradict him,"—is he not condemning himself by thus admitting that he did not disclose this fact to those who had an absolute right to be informed of it?

But, let us hear him further:

"2. Was there any reason to contradict him?"

"A. I should have no reason to. I abstained conscientiously and invariably from making figures, or giving figures to anybody, in reference to the matter, and have until the present time."

"Q. Now, sir, have you either to Mr. Gardner, or anybody else, said anything or done anything to mislead them in relation to the value of their claims?"

"A. I certainly have not intended to. It is impossible for me to tell what effect the interviews with me have had. I have not had the intention to mislead anyone."

A man must intend—such is the rule of morals, of law, and of common sense—the necessary consequences of his own acts; and when the assignee says that he did not intend to mislead anyone, he, as a man of intelligence, must know that no one can avoid the conclusion that his conduct was of such a character as necessarily to produce that result,—that such was the legitimate effect of his conduct, not, perhaps, by a deliberate misstatement, but by the suppression of a fact within his knowledge, and which it was his duty to communicate to the parties.

The assignee afterwards gives a further ex-

planation when this question was put to him.

"Q. Now, then, Mr. Perkins, I want you to explain, if you have any explanation to give, why it was you didn't explain to them something about this large amount of money on deposit in the National Loan & Trust Company Bank?"

A very natural question, and one which would seem, to an indifferent person, to require some sort of an explanation. The answer is:

"A. I didn't undertake to take every creditor who came in, and explain to him at length everything I had in my hands, from which I expected to realize anything. If I had, I would be able to do nothing else, for a great many people came there. My time was fully occupied in attending to the affairs of the company, which needed immediate and constant attention, and I didn't undertake to, nor did I regard it as my duty, to go over with every man who came in there and asked me a question, a long statement of what I had got on hand and expected to receive, or to go into conjectures of what the company would probably pay. I didn't regard that as my business. I answered very cheerfully and fully all questions asked of me, and gave every information I knew anybody wanted so far as I could."

Now, is that exactly true? Certainly, the fact that there were over three hundred thousand dollars on deposit in the National Loan & Trust Company Bank was information that the creditors of the bankrupt company would have been very glad to obtain. That information was certainly wanted. That information was not communicated.

It may be said that the books were at the disposition of, and could be examined by, the creditors. That may be true. I suppose that any of the creditors could have examined these books, either upon application to the assignee or to the court. But the fact that the creditors had the power to examine books constitutes no reason why the assignee, under the circumstances which have been mentioned, should suppress a fact so material, and which was within his knowledge, and which he must have known was not within the knowledge of the applicants.

I make no comment upon a great deal in the testimony of the assignee, which exhibits a flippancy entirely out of character with the investigation and subject of inquiry, and which, to say the least, is a violation of good taste.

There are many objections to the removal of this assignee, and it is with some hesitation that I have come to the conclusion that he must be removed. He has become familiar with the business of the bankrupt company; he is a man of intelligence, and is, probably, in many respects, considering the knowledge he possesses of its affairs, especially well qualified to go on and finish up the administration of its assets; but I have felt it impossible to pass over his conduct, under the circumstances which have been mentioned, and where, as I think, he suppressed information that he ought to have communicated.

I feel that he was not acting under that rule which is the only safe rule for men in their transactions with each other; that he was not doing to these creditors as he would have required any one of them to do to him, under similar circumstances. Therefore, I cannot excuse or pass by such an omission as I find actually existed in this case.

It is not disputed that the assignee did not comply with the rule of the supreme court of the United States, made at the December term, 1871, relative to the reports of assignees. The assignee himself admits this, and one of the reasons given for non-compliance is that he was not aware of the existence of the rule. But he also admits that in July he knew such a rule had been made, and yet there was no report made by him, either to the register or to the court, until about the 1st of September, 1872.

I only refer to this, without laying any great stress upon it, although he might and ought to have made a report earlier than he did. It is not on that ground that the court acts.

I am aware of the objections to the appointment of another assignee, but other considerations influence me, independent of what I have already stated. It is clear, although the assignee does not admit, but disavows it, that there is such a feeling in his own mind for some of the creditors of this company, and against others, that his conduct is influenced, and has been, and may be again, by these feelings.

It is also clear that a large and respectable portion of the creditors of this company entertain such feelings toward the assignee, that they have no confidence in his administration of the assets of the company, and without saying that they are justified in all the sentiments of hostility which they entertain toward him, it is apparent, from what the court has already said, that in its opinion their hostility is, to some extent at least, justified by the facts.

Taking all these circumstances together, in my opinion, the best interests of all parties who have any claims against this company will be promoted by having some one else act in place of the present assignee.

It has been somewhat a question with the court, whether it is the duty of the circuit court to appoint the assignee, but the conclusion arrived at is that the court must remit the matter to the district court, requiring that court to remove the assignee, and to appoint another in his place.

The order of the court will therefore be that the district court be required to remove the assignee, and to appoint another competent person in his place.

Case No. 10,983.

In re PERKINS et al.

[6 Biss. 185; [1] 10 N. B. R. 529; 7 Chi. Leg. News, 9; 10 Alb. Law J. 247; 20 Int. Rev. Rec. 135; 1 Cent. Law J. 507; 22 Pittsb. Leg. J. 43.]

District Court, W. D. Wisconsin. Sept. 26, 1874.

BANKRUPTCY — DISCHARGE — CLASSIFICATION OF DEBTS—DATE OF CONTRACTION—PRINCIPAL AND SURETY.

1. [18 Stat. 178, June 22, 1874.] In cases commenced before above date both voluntary and involuntary bankrupts may be discharged without reference to the amount of their assets, or the number of creditors assenting.

[Cited in brief in Re Watson, Case No. 17,273. Cited in Re Montgomery, Id. 9,732.]

2. A renewal note is but an evidence of the debt, and the bankrupt should be allowed to show when it originated; and if before January 1, 1869, it should be classed as a debt contracted before that date.

3. Liability of principal to surety must be considered as having been contracted when the instrument was signed, not when the surety made payment.

[Cited in Post v. Losey, 111 Ind. 80, 12 N. E. 121.]

In bankruptcy.

Orton, Keyes & Chynoweth, for creditors.

Cassoday & Carpenter and Geo. B. Smith, for bankrupts.

HOPKINS, District Judge. The above-named bankrupts, who were adjudged such, on their own petition, in March, 1873, in January last filed a petition for their discharge. Parker & Stone, two of their creditors, opposed it, on the ground: 1st, that their assets did not amount to 50 per cent. of their debts; and, 2d, that they had not the assent of a sufficient number of their creditors. These objections, although filed before the recent amendments, were not brought to a hearing until after, and, as a matter of course, the first question which arose was as to the effect of those amendments. The counsel for the creditors claimed that the amend ments applied, and had changed the prior conditions upon which a discharge might be granted, and maintained that under section 9 of the act of June 22, 1874 (18 Stat. 180), these bankrupts, as these proceedings were voluntary, could not be discharged unless their assets were equal to 30 per cent. of their debts, or the prescribed number of their creditors had filed their consent thereto; that the other exceptions in section 33 of the original act [of 1867 (14 Stat. 533)], as amended, were repealed, and that it was now immaterial when the debts were contracted; that no discharge could now be granted unless the assets equaled 30 per cent. of all debts.

These various positions were controverted by the bankrupts' counsel. So it becomes necessary, first, to determine whether the provisions of section 9 of the act of 1874, apply to cases pending, where an adjudication had been made before that act passed. On this question I am assisted by the opinion of Judge Blatchford in Re Francke [Case No. 5,046]. In that case he holds that this section (9) is prospective only, that its provisions do not apply to pending cases, and that the provisions upon the same subject in the prior acts are not repealed by section 21 of the act of 1874, as to pending cases, because (he says) the provisions of section 9, have reference only to cases commenced after the passage of the act of 1874.

The conclusion that section 21 does not repeal the prior statutes as to pending cases is incontrovertible, provided section 9 does not apply to such cases, for there would be no inconsistency between the acts unless they both applied to the same case or cases. So when it is settled that the last act refers only to future cases, it follows as a necessary sequence that the former acts are not repealed as to pending cases. I fully concur with the learned judge in his interpretation of the amended act, and agree with him that the provisions of the 9th section apply only to cases commenced after its passage. His views are in accord with those I expressed in Hamlin v. Pettibone [Case No. 5,995], in construing another provision of the act of 1874. I held in that case that section 11 applied to cases commenced after the passage of the act, and was not intended to apply to cases pending when passed, so as to make contracts valid that were void by the terms of the prior statutes (Hackley v. Sprague, 10 Wend. 113; Morton v. Rutherford, 18 Wis. 295, 298 [2 Wis. 237] [2]), and that the repealing clause in section 21 was inoperative, except as to cases where the provisions of the amended act applied, and that as those provisions, then under consideration, did not apply to pending cases, the prior statutes were in force and unaffected by the repealing clause of the amended act.

The learned judge, in his opinion, referred to section 17, not noticed by me, as bearing upon the question as to what cases congress intended the provisions of the amended act to affect. In that section it is enacted that "its provisions shall apply to cases of bankruptcy now pending or to be hereafter pending," from which, as well as from sections 10 to 12, it is fair to infer that the general provisions of the act were not intended to apply to pending cases. The general rule is that statutes are to have a prospective operation. In Harvey v. Tyler, 2 Wall. [69 U. S.] 328, it is said that "it is a rule of construction that all statutes are to be considered prospective, unless the language is expressly to the contrary, or there is a necessary implication to that effect." And in U. S. v. Heth, 3 Cranch [7 U. S.] 399, 413, that "words in a statute ought not to have a retrospective

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

[2] [From 10 N. B. R. 529.]

operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." Sohn v. Waterson, 17 Wall. [84 U. S.] 596. The act of 1874, construed according to these rules, must be held to apply to future cases except when otherwise provided.

If this were all there was of the 9th section I should hold that the provisions of the prior law in reference to the conditions upon which a discharge could be granted were still in force. This section, in the first place, provides, that in involuntary cases the provisions of the original act, and of the amendments and supplements thereto, requiring the payment of any proportion of the debts by the bankrupt as a condition of his discharge, shall not apply; but that he may be discharged the same as if he had paid the required amount or had procured the consent of the requisite number of his creditors thereto.

But these provisions, according to our construction, only apply to cases commenced after the passage of the act, and do not authorize a court to order a discharge in pending cases without a compliance with the provisions of the prior statutes.

The next provision of the section (9) applies to voluntary cases, and reduces the value of assets from 50 to 30 per cent. and the proportion of creditors from one-half to one-fourth, to entitle a party to a discharge.

But this provision, like the preceding one, only applies to future cases, and does not affect the law as to existing cases.

If this were all there was of the section I should have no hesitancy in holding that the power of the court in granting discharges in pending cases was not changed. But it is not all. After prescribing these new conditions as to future cases, it reads: "And the provision in section 33 of said act of March 2, 1867, requiring fifty per centum of such assets, is hereby repealed." This cannot be treated as mere tautology. It must have some significance. It is true that section 33 had been amended by the act of July 27, 1868 (15 Stat. 227; Rev. St. 1874, § 5112), by inserting among other things, in lieu of the word "pay," the words "equal to," but the 50 per cent. clause was retained.

The same section was further amended by the act of July 14, 1870 (16 Stat. 276; Rev. St. 1874, § 5112), by declaring that the second clause of section 33 of the act of 1867, as amended by the act of 1868, should not apply to debts contracted prior to the first day of January, 1869.

Now, it seems to me that the obvious intention of this repealing clause in section 9 was to repeal the existing law requiring assets of the value of 50 per cent. of debts as a condition of obtaining a discharge. Unless this was the intention of congress, the clause is destitute of meaning or operation. It is an express repeal of the provision of what was evidently supposed by congress to be the law. It is different from the repealing clause in section 21, which depends wholly upon repugnancy. Judge Blatchford construed it as only repealing the section as originally passed, leaving the act of 1868 amending it in force. I think such construction too strict, and as not carrying out the palpable intention of congress. It virtually nullifies the whole effect of the clause.

Technically, the 33d section of the act of 1867, in such respects as it has been changed by the amendatory act of 1868, had been repealed, so that unless the clause can be construed as embracing not only the original section and its amendments, or the "section as amended," as it is spoken of in the act of July 14, 1870, it really has no significance or operation.

It was unnecessary to insert such a clause for the purpose of giving effect to the 30 per cent. clause which preceded it, for, that, being inconsistent with the 50 per cent. clause in the prior statutes, was repealed by implication, so that unless it repealed the 50 per cent. requirement in the prior acts, I do not see that any effect can be given to it, which is contrary to all rules governing the construction of statutes. It is uniformly held to be the duty of courts to so construe a statute as to give effect to every part and clause if possible, and in this case effect can only be given to this clause, by holding that the repeal covers the 50 per cent. clause in the original section, and the amendments of 1868.

I am, therefore, constrained to differ with the learned judge upon the meaning of this repealing clause, and must hold that the repeal of the provision "requiring 50 per centum of such assets," applies to the amendatory act of 1868, as well as to the act of 1867.

The changes made by the act of 1874 are clearly in the interest of the debtor, and may be regarded as a disapproval by congress of the energetic provisions of the original act as to him, and as expressive of its intention to relieve him of many of its requirements, among which the conditions imposed upon his obtaining a discharge were perhaps the most embarrassing. Having been often needlessly thrown into bankruptcy and ruined in business, it was not unnatural to increase the facilities for his discharge, by authorizing the court to order a discharge without reference to the amount of his assets in cases theretofore commenced. As the creditor had previously possessed great facilities for proceeding against him, it is apparent that congress meant to give him increased facilities to obtain his rights—a discharge. This seems to be the spirit and meaning of the act of 1874, and I therefore hold that parties in both voluntary and involuntary cases, commenced before the 22d of June, 1874, may be discharged without reference to the question of the amount of assets, or the number of creditors assenting, provided they comply with the law in other respects.

But if I am wrong in this view, there is an-

other answer to the objections interposed. If the statutes of 1868 and 1870 are in force, they do not include debts contracted before the first day of January, 1869. The claims proved up by the creditors opposing the discharge, are upon notes dated since that time, but the evidence, on the hearing, shows that they were given in renewal of notes given for a debt contracted before the first day of January, 1869. Now, when was the debt contracted? when the renewal notes were given, or when the liability was incurred? Notes are but the evidence of a debt, and the holder may surrender them and recover on the original consideration at his option. They are presumptively but an extension of the time of payment. Cole v. Sackett, 1 Hill, 516; The Kimball, 3 Wall. [70 U. S.] 37. The relation of debtor and creditor is considered for remedial purposes as having existed from the origin of the liability, and on application for a discharge, a bankrupt should be allowed to show when the debt originated or was contracted, and if before the 1st of January, 1869, I do not think a note given after that time would bring it within the category of a debt contracted after that date. But it is insisted that this is not a complete answer to the objection, as the opposing creditors Parker & Stone were sureties for the bankrupts upon the notes, and have paid them, and proved their claims as sureties thereon. This is so, but the evidence shows also that they were sureties upon the original notes given before the 1st of January, 1869. The proof also shows that they did not pay until after January, 1869, and that they have proved their claim as of the date of payment, and they insist that as between them and the bankrupts the debt must be considered as contracted at that time.

Section 19 in the bankrupt act authorizes sureties, indorsers and persons liable for the bankrupt to prove the debt for which they are liable, when not proven by the creditor, without first paying it, and such debts being provable are released by the discharge. Now, does the payment change the relation of the parties? A surety cannot sue his principal at law until he has paid, and in such case, the suit is not upon the note, but for money paid at the request of the principal. But the contract that the principal will pay the surety if he has to pay the debt arises at the time of making the instrument. The promise is implied from the request and signing. The obligation of the principal arises when the surety becomes liable for his debt. Stedman v. Martinnant, 13 East, 427. The surety's right of action is not complete until he pays, so the statute of limitations does not begin to run until that time. This liability of the principal is recognized by the bankrupt act in the provision that allows him to prove the claim before payment. I therefore hold that within the meaning of the bankrupt act, the liability of the principal to his surety must be considered as having been contracted when the instrument was signed.

This conclusion is supported by the cases of Mace v. Wells, 7 How. [48 U. S.] 272; Baker v. Vasse [Case No. 784]; Crafts v. Mott, 4 Comst. [4 N. Y.] 604; and Vansandau v. Corsbie, 8 Taunt. 550.[3]

As in this case the signing was before January 1, 1869, it necessarily follows that the opposing creditors do not occupy a position to insist upon payment of any portion of their debt before it can be discharged. Their objections are overruled and discharge ordered.

NOTE. This decision is approved and followed in the district of Indiana. In re Montgomery [Case No. 9,732].

Upon the point decided in this case there is some conflict of opinion, but the weight of authority appears to sustain the construction here given. Such is the uniform practice in the Northern district of Illinois, where Judge Blodgett has uniformly granted discharges to both voluntary and involuntary bankrupts in such cases, irrespective of the amount of assets or number of creditors assenting.

It has been approved and followed by Judge Blodgett, in the Northern district of Illinois, in Re Jones [Case No. 7,452], and by Judge Miller, of the supreme court, in Re King [Id. 7,781]. In Re Sheldon [Id. 12,747], Judge Blatchford re-affirms his construction of the act in the Francke Case.

In Re Cerf [Case No. 2,556] the court appears to have held that the amendment of June 22, 1874, applied to all cases, whether commenced before or after the passage of the amendment, and that in cases commenced before the amendment the bankrupt, in order to secure a discharge, must have assets of 30 per cent., or procure the assent of ⅓ in value and ¼ in number of his creditors, and the same opinion is held in Re Griffiths [Id. 5,825].

The amendment of June 22, 1874, to the bankrupt act, does not affect cases commenced before December 1, 1873, nor does the repealing clause affect suits by assignees then pending. The amendments are not inconsistent with the original act except as to cases commenced since December 1, 1873. Hamlin v. Pettibone [Case No. 5,995].

A petition filed on the same day that the amendment was approved, is governed by it, as the amendment took effect the beginning of the day it was approved, and the amendment is retrospective as to pending cases where there had been no adjudication. In Re Williams [Case No. 17,700]. In cases of compulsory bankruptcy actually commenced, though not determined, prior to December 1, 1873, the amendments of June 22, 1874, do not apply, and in voluntary cases, undetermined as well as compulsory cases, section 9 of the amendatory act governs. Singer v. Sloan [Id. 12,899].

Case No. 10,984.

PERKINS v. BECK.

[4 Cranch, C. C. 68.][1]

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

TENDER—NOT EXACT AMOUNT—CHANGE ASKED FOR.

A tender of money upon condition of receiving change, and a receipt in full for rent, is not a legal tender.

[Cited in Appeal of Forest Oil Co., 118 Pa. St. 146, 12 Atl. 442.]

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[3] [10 N. B. R. gives 3 Barn. & Ald. 13.]

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

Trespass for distraining for more rent than was due. The plaintiff [Caleb Perkins] offered evidence to prove that before the distress he offered to pay the landlord [Joseph W. Beck] $60, if he would give him change (the rent due being $54.19, and a receipt in full for rent.

THE COURT (MORSELL, Circuit Judge, absent) decided that it was not a legal tender.

Case No. 10,985.

PERKINS et al. v. CURRIER et al.

[3 Woodb. & M. 69.] [1]

Circuit Court, D. Maine. May Term, 1847.

PRINCIPAL AND AGENT—AGENT ADMITTING PARTNER—ASSENT OF PRINCIPAL—LEASE—LESSOR'S RIGHT—PARTNERSHIP.

1. Where a power of attorney is given to conduct all one's business at a particular place, and subsequently most of his property there is leased to the attorney for twenty years, this does not revoke the power, but modifies and limits it to the property and interest and business still retained by the principal.

2. Under a great necessity, the attorney may sell property, or admit partners to conduct such of the business as may be left in the principal; but if the principal assigns his interest in the lease and the leasehold property to his son, the attorney cannot, by virtue of the power, any longer dispose of that, or put it under the direction of new partners.

3. Nor can the attorney, as lessee, (when he is a brother, confided in, and covenants to carry on the business with the property leased for half the net profits,) allow others to possess any rights in that property, inconsistent with his contract, or put the business in charge of strangers, or alter the proportion of profits to be received by the lessor.

4. But if he does this, and the lessor or his assignee subsequently assent to it, the change is binding on them.

5. As between the original parties, however, it binds the lessor only to the terms and constructions of the new articles, stated by the lessee before the assent to be intended.

6. To that extent it will bind, though the representations as to the exigencies for a change were in some respects strong and of doubtful correctness, though not so clearly exaggerated as to amount to falsehood or fraud.

7. If doubts exist in such cases as to facts, from mere length of time, they operate against a complainant who has omitted for several years to institute legal proceedings and settle the difficulties while the facts are fresh. But if some of them are rendered questionable, by the neglect of the lessee to keep and return full accounts, this circumstance must operate unfavorably to him.

8. The assignee is entitled to a return of the articles at the end of the lease which the lessor originally furnished, or their full value at the end of the term, with interest, if they have not been worn out.

9. He has the same right to those purchased with the earnings before the new partnership; and to that portion which his interest covers in the company, of the value of the new tools, plates, materials and machinery, bought or made by the company, while the lessee was a partner in his behalf.

10. So, in proportion to his share, he has a right in what was due the lessee in 1833, as well as to the company in 1839, for work previously performed.

11. The partnership property is responsible for what is due to a partner retiring, and if not enough to satisfy the claim, each member is liable for the residue in a ratio with his interest.

[These were bills in equity by Angier M. Perkins and Jacob Perkins against Solomon H. Currier and Nathaniel Perkins, executors of Abraham Perkins, and the same plaintiffs against Hazen Morse, Isaac Cary, and Vistus Balch, in addition to the same defendants.]

They related to the same transaction, but the latter part of it, after 1833, included additional respondents. These last were proceeded against in a second bill. The substance of the allegations in both was, that in 1817, Jacob and Abraham Perkins were brothers, residing at Newburyport, Mass. That the former had invented the stereotype steel plates for engraving bank notes, and obtained a patent for the same, and also had procured a law to be passed by the state of Massachusetts, requiring the bank notes of that state to be printed thereon; and being about to remove to Philadelphia, to give his brother Abraham a general power of attorney to carry on his business. That in 1819, concluding to remove still further from Newburyport and remain some time in London in England, Jacob, on the 29th of May in that year, leased to Abraham all his plates and tools, valued then at $22,500, for the term of twenty years, the said Abraham agreeing to continue to conduct with them the business of bank note engraving, and account to said Jacob for half the net proceeds after deducting all necessary expenses. The said Abraham was also to keep regular accounts of the business, open to inspection, and to surrender the tools and plates at the end of the term in good repair. Thereupon, the business was afterwards conducted at Newburyport by Abraham, with large profits till 1833, Jacob in 1829 assigning all his interests to Angier March Perkins, his son, and giving due notice thereof to Abraham. That Abraham neglected to keep and transmit accurate accounts, but till 1833 received large profits from the business and remitted to said Jacob or Angier near $25,000 in all, though not the whole, which as they believe was justly due, the whole profits having probably been from $10,000 to $12,000 yearly. The balance of the one-half, still claimed, is averred to have been demanded of the executors of Abraham, but not paid. The bills then averred, that about 1829, Nathaniel Perkins, the son of Abraham, was employed by him, and in 1831, desired to become a partner in the business, and receive a portion of its profits; but Angier declined the proposition, and thereupon Nathaniel, becoming dissatisfied, did, about the 12th of February, 1833, from a company

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

for engraving bank notes, composed of himself, Abraham, Morse, &c. That, in violation of the lease and agreement with Jacob, the said Abraham then transferred to this company all the plates and tools, and improvements, of Jacob and Angier, and removed the business from Newburyport to Boston to be conducted, afterwards, there; and all this without the consent of said Jacob or Angier. That Abraham thus got Nathaniel interested as a partner with himself, and proposed to exclude Jacob and Angier, unless they consented to relinquish the former lease, and their rights under it, which did not expire till 1839.

It was further alleged, that the New England Bank Note Company, then formed, included, not only Nathaniel, and Abraham, and Morse, but Pendleton; and afterwards Cary and Balch, who all derived great advantages from the use of the plates and tools of Jacob, and his improvements and good will. That the company have thus realized $12,000 yearly, as profits, and after paying large salaries to each other, divided the residue among themselves, without regard to the rights of said Angier. That, living beyond seas, Angier was kept in ignorance of much of the matter by Abraham, and misled, and not furnished with proper accounts. About the time when the lease was to expire, in 1839, he therefore selected an agent to examine into the business, and report to him the facts, which being done in 1840, he protested against the whole, in writing. That Abraham had acted as agent of Jacob, in some other matters, and paid certain debts for him, and mingled erroneously those concerns with their mutual business, under the lease. And that Abraham, though requested, neglected to render his accounts in due form, and furnished none after 1829; though he afterwards remitted $11,000 in 1830, and about $10,000 between that and 1834, and some in 1838, but without suitable exhibits to show its application, and no money since, though often demanded. And that Abraham died, April 5th, 1839, and left large assets; and Currier and Nathaniel Perkins were his executors, and should have returned the plates, machinery and tools, but have neglected to do it. The bill prayed for answers to various interrogations, and an account for the sums received, and the expenses incurred; and a return of the property leased, or its value and interest, since 1839.

The second bill is confined, chiefly, to matters after the new company was formed, in 1833; and Pendleton was not included in it, because living in Pennsylvania the court would not possess jurisdiction over him. It charged a combination among them all, to defraud Angier by means of the new company, and that he never assented to the same, and is entitled to half the profits made by it; because, though the expenses were greater, yet the income was larger, and equalled at least, $12,000, yearly. It prayed a discovery of facts—an account—payment of dues, and delivery of tools and plates.

The answers of the respondents, though in fact, separate, were not unlike, so far as they related to the same matters. Those of the executors of Abraham admit the lease of 1819, as set out in the bill, but deny that the plates and tools were then worth $22,000, or in 1838, over $4,000. They admit that Jacob had obtained a patent for the stereotype steel plates, discovered by him, but aver that it had expired before 1819, and the improvements by Jacob had then ceased to be a secret. That his patent to suppress counterfeits, by small letters and words, expired in 1824, and the law he obtained from the state of Massachusetts against the use of bank notes, except those engraved by stereotype plates, did not prohibit others than Jacob from making such plates, and was repealed entirely in 1836. They admitted Jacob's experience and skill in this business, and that the plates were not easily counterfeited, but averred that they were little used out of New England. They admit that Abraham was agent of Jacob for the two years before the lease, but denied any procurement from him of valuable secrets, he having made public all his modes of engraving, and Abraham having become acquainted with them as a workman and agent, and not in confidence. They also admit the business, from 1819 to 1833, to have been profitable in some years, but insist it was a loss in others —the average income not exceeding $4,850 yearly. They admit, further, that the assignment was duly made to Angier, and they notified, as alleged. They admit that Nathaniel applied, without success, to become a partner, but deny that Jacob and Abraham were partners. They admit that Nathaniel had been well educated, with Jacob and Angier, in London, and with Abraham, at Newburyport; that Morse was a hired man at the latter place, and not Pendleton; and knew the business to be lucrative, as did Nathaniel.

They further averred, that in 1831–2, the stereotype notes became counterfeited extensively, and hence an effort was made to repeal the Massachusetts statute confining the banks to the use of said plates; and to form a new company with some persons from the South, skilled in engraving, as persons from the South, so skilled and acquainted with Jacob Perkins' improvements, were preparing to embark in the business, in Boston. That the reasons were urgent for immediate action, as the legislature was in session, and new plans arranging, and a great demand for the business to be done in Boston, as a more convenient place, and with increased guards against counterfeiting, by a superior style of engraving, and vignettes, and at a larger expense. But the new company was then formed—a repeal of the law prevented by this—and new plates and vignettes, in an improved style, were soon furnished. That Abraham,

being old, could not prosecute the old business alone, to advantage, if the law in that event had been left in force, and that he had no right to retain the services of Nathaniel or Morse, and was not likely to make so large profits as he would by his share, though reduced, in the new company—half of which was meant to be paid over to Angier. The new company—so as to embrace the Perkinses—it was averred, was proposed by Morse, and not by Nathaniel, when Morse had been requested to unite with him in a company to compete with the Perkinses; and that the one-third of the profits to be received by Abraham, would exceed all the gain in the old concern. That the business in Boston was the same as that in Newburyport; but many of the tools were new and better, and the style of engraving superior. That over $10,000 was expended in what was new, and that all this was necessary in order to avoid a repeal of the Massachusetts laws, and a general competition for the engraving in that state; and that this being done under the exigency of the times, Angier, on being informed of the new arrangement, virtually ratified it.

If any other portions of the bill and answer become material to be stated, they will be given in the opinion of the court.

The evidence offered in the case, on both sides, consisted of the various documents and contracts mentioned, with several letters of the parties, and a number of depositions. When parts of these require explanation or quotation, they will be given in the opinion; but otherwise, only the conclusions from them will be stated which are clear or undisputed. There had been a reference, under bonds, between the parties in the first bill, and a report after a revocation, by the complainants. The validity of it being questioned, the respondents moved for leave to introduce it under a supplemental answer, or otherwise, hereafter, if it should become expedient, after a decision by the court on the case as it now stands; and that motion remains for future consideration.

The cause was argued in September, 1847, at an adjourned session of the May term.

English & Gardner, for complainants.
G. Minot and R. Choate, for respondents.

WOODBURY, Circuit Justice. This is one of those unfortunate family quarrels, where the conduct of the parties on both sides has probably been different between near relations, from what it would have been between strangers. Greater liberties have been taken on the one side, and more confidence reposed, and greater forbearance exercised on the other, than is usual. And yet, it is not without considerable difficulty, that, in most of the points of controversy, a line can be drawn, beyond which, in law and equity, either side has clearly passed, and cannot be justified in it. The chief parties are two brothers. One, a man of remarkable genius in his business, and, as is often found in such cases, inattentive to pecuniary matters, and who became ambitious of exhibiting his professional distinction and powers on a wider theatre. The other, a more practical man, not desirous of change, and undistinguished as an artist, was, therefore, entrusted with the management of all the pecuniary matters of him who was about to leave their native home, probably forever. The form of arranging this business at first, was by a power of attorney. But from the embarrassments of Jacob Perkins, exposing his property to be attached by creditors and his prospect of otherwise paying them out of the liberal income, likely to be derived from his patents and improvements, in relation to bank note engraving to be defeated, the form of enabling Abraham to prosecute the business in his absence was changed, in 1819, and a lease was executed to him of all the plates, tools and other property for twenty years.

It is conceded, that from the language used, as well as the nature of the case—the rent in the lease not being a gross sum but half the net profits—the lessee was bound to carry on the business "diligently." Otherwise, no income whatever might be realized from property which the parties then valued at something like $22,500. The words of the lease, on this point, were, that the lessee will, "in some convenient place within the state of Massachusetts, diligently exercise and carry on the art, mystery," &c., of engraving "bank notes and other securities, and that after deducting the necessary expenses of the establishment," shall pay "half the remaining sums," to the lessor. Whether regarding Abraham, then, as a technical lessee of this personal property, or as agent to carry on the business, it cannot be doubted that he was to be industrious and careful, in attention to it, and pay to Jacob half the net proceeds. Furthermore, by another covenant in the lease, as well as by the nature of the case, Abraham was bound to render fair and prompt accounts of the expenses and receipts. The words used as to this, were, "will keep regular and just account-books of all the affairs and transactions of the said establishment," and allow the lessor "to inspect the said account books, and to enter and view" "the said establishment." There is no allegation in the bill, that this part of the obligation of Abraham was not duly performed, till 1833, except the not accounting and paying over in full, the half due to Jacob, till 1829, and the half due to Angier, instead of Jacob, after the assignment to the former, in 1829. A master must, therefore, be appointed, and examine the expenses and receipts by Abraham, from 1819, to February 12th, 1833, when the new company was formed, and took charge of the business under their new contract of copartnership. And should the master find that Abraham has not paid over either to Jacob or Angier what each

was entitled to receive, before that date, the balance unpaid must be decreed with interest, and against the executors of Abraham, and in favor of Jacob and Angier, severally, their respective amounts. This must be done in the first bill. The master, in forming his conclusions as to debts and credits, during this period—so remote and so obscured, as it may be in a few cases, by the lapse of time—would seem bound in some views to allow all doubts to operate against the complainants, on account of their unusual forbearance, if not neglect, to compel an adjustment of this business at an earlier period. But, considering here that it was the duty of Abraham, under his covenant, "to keep regular and just account-books of all the affairs and transactions of the said establishment," and to pay over half the net income, it would follow that if he neglected to keep such accounts, and the obscurity or difficulty grows out of that particular neglect, the presumptions in those cases of doubt are to operate rather against Abraham, whose procrastination and irregularity may appear to have caused the doubts and tended much to involve the affairs of the brothers in controversy. It looks like crassa negligentia, and under Jacob's poverty and embarrassments, can hardly be justified even if little was in reality due. Because, if so, Jacob, knowing the unpleasant truth, seasonably, other resources might have been sought by him, or expenditures not indispensable have been curtailed. The amounts, charged as expense by Abraham during this period, ought, also, to be closely scrutinized, as the wages—and especially those of Abraham's son, Nathaniel—have been charged without the sanction of Jacob or Angier to the amount, and the latter under influences of near relationship, to increase them, which were likely to mislead; and which, in fact, did cause objections and heart-burnings on the part of Angier.

But the great difficulty arises in respect to the liabilities and rights of the parties, from 1833 to the expiration of the lease in 1839. During that period, it is admitted that Abraham did not continue to conduct the business at Newburyport as before, and under his own sole guidance, and professing to pay over to Angier, the assignee of Jacob, one-half of all the net profits; but he allowed the establishment to be removed to Boston—the business to be there conducted under the direction of Nathaniel, and Morse, and Pendleton, in copartnership with himself—and he professed to account for and pay over to Angier merely one-sixth of the net income, and that, after the deduction of large salaries to the other three, in addition to expenses very much augmented. Now, whatever new arrangements Abraham might, in law, be competent to make as to the mode of conducting the business; whether by himself alone and hired persons under him, or other persons, as copartners with him, or sole lessees, it is certain, that if his personal control ceases, or is divided with others, a part of the covenant to the lessor is violated. Because by that he himself was to conduct the business, and his nephew, as well as brother, undoubtedly reposed in him, personally, a confidence which they could not be expected to extend to strangers. And though if the business was as well conducted in that way as by him alone, the actual injury would be little or nothing to Angier, the assignee of Jacob, yet the burthen of proof to show it to have been as well conducted must devolve on Abraham; and, in any points of doubt, must be decided against him.

In the next place, the lessee would have no right under the lease, as lessee, to alter the share of profits from the business to which Angier was entitled by the covenants. Litera scripta manet. The compact as drawn up must govern, and as to any new one, not authorized by Angier, he may properly say that it is not his compact—in hæc vincula non veni. If Abraham, unempowered, agreed henceforward to take one-sixth for Angier instead of one-half the net profits, the difference must be paid by himself, as the loss was caused by himself, unless his liability for it has been since waived. In this case, three justifications are set up by Abraham, for the changes in the manner of carrying on the business, and in the diminished share of profits allowed to Angier. One is, that the business, as carried on after 1833, may be deemed conducted by Abraham in substantial conformity to the lease and its covenants. See Smith v. Morris, 2 Brown, Ch. 311, 2 Dickens, 697; 2 Story, Eq. Jur. § 736; 9 Sim. 519; [Mechanics' Bank of Alexandria v. Lynn] 1 Pet. [26 U. S.] 383. Expenses might become necessary, and a change of residence, and style in engraving, and he might have been justified in doing all this if the change was only a formal one. If such an one was demanded by an alteration in public taste or public wants, and was likely, from its terms and conditions, to be beneficial to the lessor, it would not depart from the spirit of the contract. But in this case, several of the requisites seem not very clearly to be proved. The income of Angier from this business, after this change, almost entirely disappeared, being swallowed up by new expenses and the large salaries and two-thirds of the profits paid to others. If these could be considered a part of the necessary expenses, only flung into the form of salary and profit, yet some of the latter seem exorbitant in that view, and the conducting of the business with others jointly, rather than by himself alone, and under new articles of partnership rather than the old lease, seems to be an entire departure from the covenant and the personal confidence reposed by Jacob in Abraham, alone, and not in his partners. It was not conforming, virtually, any more than in form, to the lease. However judicious it might have been to make such alteration, under all the circumstances,—which

is much questioned by the plaintiffs,—it is a sufficient answer to it, as a question of power, that he had not the authority to do it under the stipulations in the lease. It was a change not contemplated in the words or spirit of any clause in it; and if proposed beforehand, to Jacob, in 1819, or to Angier, in 1829, would probably have been rejected by both without hesitation. That is a good test, showing it was too unlimited a trust to be reposed in any one, when involving so large amounts, and especially when the parties had themselves limited the power in writing, previously.

In respect to the other two excuses: One is a supposed overwhelming necessity that rendered a change proper, and justified Abraham, as agent of Jacob, in making it, either as lessee or by the force of the power of attorney, in 1817. And the other is a subsequent assent by Angier, to it, in such a manner as to amount to a subsequent ratification. In relation to the first, it is certain that a mere lessee has no warrant to alter the terms of the lease, or the amount of rent, by any circumstances considered as an overwhelming necessity. What he contracts to pay unconditionally, he must fulfill absolutely. See Weston v. Minot [Case No. 17,453]. When the rent is a gross sum, it must be paid even if the leasehold property is destroyed by fire; provided there is no exception in the lease, and no covenant by the lessor to repair. Fowler v. Bott, 6 Mass. 63; 16 Mass. 238; Hallett v. Wylie, 3 Johns. 44; 4 Har. & J. 564; 4 Taunt. 45; 7 Scott, 537; 1 Durn. & E. [1 Term R.] 310. But much more, if the property remains good, as here, and is used, half of the net profit of that use must, as stipulated, be accounted for. But how is it in the other respect? Considered as an agent of Jacob, under the power of attorney, of 1817, Abraham's authority over this property would be much larger than that derived from the lease. As an agent, cases certainly exist of an implied power to sell, hypothecate, &c., under what is termed an "overwhelming necessity." Some of this description may be seen in Story, Ag. §§ 237, 118, 192, and Story, Bailm. § 455; and they are common in mercantile law, in respect to the acts of captains abroad, in hypothecating and selling. 13 Pick. 543; 4 Car. & P. 276; Joy v. Allen [Case No. 7,552], and precedents there cited. Sometimes a moral necessity is enough to justify a change by a mere agent. 4 Car. & P. 276. But, as agent to Jacob, under the instrument of 1817, Abraham had some express authority—almost unlimited—beside what might, in an exigency, be implied. That power of attorney authorized him very broadly, for Jacob; "for me, and in my name, to perform all and every act and acts which he may deem expedient in any business, in which I have been, am now, or may hereafter be engaged," &c., &c. Now, though this was in 1817, and afterwards in 1819, the lease made a specific disposal of most of Jacob's property, by leasing it to Abraham, and pro tanto, so far as others had become interested in it, placed it out of the reach of this power of attorney (Story, Ag. § 395; Allen v. Ogden [Case No. 233]), yet all the rights which still remained in Jacob, and all his property and business at Newburyport, were open to the interference of Abraham, under this standing and remaining power of attorney. Jacob needed his assistance and discretion to act for him for some purposes, in respect to them, in his absence, as much as he had before the lease. By this power, then, if Jacob had continued interested in the lease, as lessee, up to 1833, I entertain little doubt, Abraham might, in an emergency, as his attorney, have changed the place of business, and even the partners, and the shares of profits reserved in the lease. But it will be remembered, that Jacob had, in 1833, ceased to possess any interest in this matter, as all the lease and leasehold property had before that been assigned to Angier, as early as 1829, and Abraham at once notified of the fact. Thenceforward, therefore, he had no power to act in relation to them, under the instrument of 1817, as Jacob's interest had ceased, and Angier had given to Abraham nothing of the kind. Abraham, in 1833, had only the authority over what was then Angier's estate, which he possessed under the lease of 1819, as lessee, with the covenants before referred to; and that, we have seen, did not enable him, in law, to do what he attempted. The other, and last justification remains, which rests on the supposed assent, by Angier, to the change. This, in my view, is made out to a certain extent. It is true, that no formal nor express assent is proved. There was also much dissatisfaction expressed by Angier, as to the change; and he cannot, from all the evidence, be considered as yielding his assent in the end, to anything, as regards Abraham, except the terms and representations made to him by Abraham and Nathaniel, in connection with the articles of partnership. Proposing to him to fall off from half the large profits of a lucrative business to one-sixth, and that when it had been in the full career of success, and banks were multiplying by hundreds over the country, and being unwarned and unalarmed till the blow was struck, must at first have been a severe shock; and tempted him strongly to repudiate the whole transaction. Nothing but the numerous reasons for it, urged by Abraham and Nathaniel, and an unwilling belief in their correctness, could have prevented a decided denial, at once. But on their representations and terms, deeming the case hopeless for any better terms after the threatened desertion of Nathaniel; he, on these terms and representations, however hard and unexpected, probably did acquiesce in the business going on in the new form and under the new conditions. But doing this so reluctantly, and after many statements to

him by Abraham and Nathaniel, his assent must be presumed to have been given as between him and them, to the terms and constructions they had exhibited to him as to what was to be understood, between them, to be the amount he was to receive.

The whole evidence is not very clear even to this extent and with these limitations. Such of his letters written about that time, as are produced, express much dissatisfaction and no assent to any terms. The alleged letter of September, 1833, in which a subsequent ratification on some terms is supposed to have existed, is not produced. A part of another of his letters about that time is missing, and both have been in the possession of Abraham, if not of his executors. If the assent was to be inferred from the missing letter alone, and its non-production stood as poorly accounted for as it now is, a strong inference would arise that this letter had been suppressed by some person interested to do it, and the inference in odium spoliatorum would be very violent. But, the assent is more clearly shown by subsequent letters and conduct of Angier, than any particular proof which has been made of the contents or disposition of that letter. It is obvious that some assent was likely to have been contained in some letter, judging from the fact that he had been specially informed that the contract was only for a year, and yet it was not in truth terminated at the end of it, in consequence of any dissent by Angier, as it probably would have been had this dissent been expressed. So, judging from the tone of his subsequent letters, he must have acquiesced, none of them speaking of any dissent, but rather looking to the new business at Boston as a source of some expected income. This apparent acquiescence continued for years. He also actually received some money afterwards, which probably came from the new company. This, in case of an ordinary lease, would waive a forfeiture and virtually ratify or assent to any objectionable act done by the lessee, which, like this, was known to the lessor. 2 Coke, 65b; 4 Bac. Abr. "Leases," T; 2 Durn. & E. [2 Term R.] 431; Co. Litt. 215; Plow. 131; Cro. Eliz. 220; 3 Cow. 220; Bleecker v. Smith, 13 Wend. 530. Even his protest in 1840, speaks against any "previous" assent rather than any assent whatever. The suggestion that some other intermediate letters from Angier, between March and July, had been received, containing important matter, perhaps in disaffirmance of the change, had been suppressed, is not, in my view, made out satisfactorily, and is repelled by Abraham's answer in July referring merely to Angier's letter in March, and none since, and replying directly to some of the language as well as ideas of the March letter. The length of time, also, during which Angier forbore, after 1833, to prosecute the lessee, or appoint an agent to look after him, or call on the new company for his property, and also, still later, to institute any legal proceedings, disaffirming the change in 1833, operates very unfavorably on this point, under all the attendant excitement and dissatisfaction at first expressed. However amiable may have been forbearance towards relatives, and an indisposition to commence family litigation, yet the state of feeling apparent between these parties, in the correspondence, does not indicate that so long a silence and so urgent demands for further remittances of money, and bills in equity or actions so long postponed, would have been likely to have occurred, unless Angier had concluded to acquiesce in what had been done.

From all the testimony and circumstances in the case, therefore, justified by the express declaration under oath of Nathaniel, in his answer, I am inclined to think that Angier allowed the business to go on as if he had acceded to the change; that he led all concerned to act on that conclusion, and this must be deemed sufficient, when he had full information of the change, and was bound to affirm or disaffirm what was proposed. Story, Ag. § 243; [Ownings v. Hull] 9 Pet. [34 U. S.] 607; [Bell v. Cunningham] 3 Pet. [28 U. S.] 69; Loraine v. Cartwright [Case No. 8,500]; Cunningham v. Bell [Id. 3,479]; 12 Johns. 306. Nor do I perceive sufficient evidence to show clearly fraud or mistake in procuring this assent or acquiescence. It looks highly probable that there may have been some coloring and exaggeration in some of the representations, as made by Nathaniel and Abraham to induce Angier to assent to their conditions though modified, and better in some respects than the literal construction of the terms in the articles. But the evidence is contradictory how the facts really stood. It is so, for instance, as to the extent of the counterfeits, which was a leading cause assigned for the change. So as to the extent of competition likely if the law of Massachusetts was repealed. So as to the probability of an immediate repeal of that law, if a new arrangement was not at once made.

Again, though Abraham may, in acting so hastily on the matter, have been actuated by a real belief that the emergency required it, without risking time to consult with Angier, and without sending him early a copy of the agreement and a full exhibit of his old accounts and profits up to that date, yet the appearances on this are rather that his advanced age had induced him to entrust most of the business to his son Nathaniel; that the latter, as well as himself, were disappointed at Angier's unwillingness to receive Nathaniel as a partner into the old concern, and that Nathaniel, partly, at least, in order to obtain a higher compensation and become a partner in the business under the new firm, made strong representations to the father, and hastened his decision, and obtained it, on terms less favorable to Angier than the

latter had a right to expect. Nor do I think there was any designed falsification of the date of the new articles, which is imputed. The letter of Abraham was dated at Newburyport, on the 9th of February, '33, when the articles had not been signed at Boston; and hence he could not enclose a copy of them. And though Nathaniel's letter was dated at Boston, on the 13th of February, after their signature, he did not, and might not feel bound to enclose a copy, as he was not the lessee. When it was afterwards enclosed in July, Abraham does not appear to have had anything to conceal or effect by putting the date the 14th instead of the 11th of February, though Nathaniel might, if he felt there had been any obligation on him to send a copy in his letter of the 13th of February. After the lapse of so long a time as twelve or fourteen years, it is not expected that the memory of witnesses will be very exact, or the present generation be so competent to judge of the true extent and danger of the crisis, as that which was in the midst of it, and could appreciate better many circumstances now forgotten or vanished. This delay to investigate and sue, for so many years, is the fault of Angier, and the doubts incident to it are caused by him. I am inclined to think, therefore, that though the case stated to Angier was quite as strong as the truth would justify, yet after so long a time and so much conflict in the evidence, I should not feel justified in holding that actual fraud is proved in these representations by parties so respectable, or a gross mistake so clearly shown as to justify a court of equity in setting the ratification aside on either of those accounts.

But though I have come to the conclusion that actual fraud is not proved, yet it is natural that both Abraham and Nathaniel should have been anxious to procure Angier's consent, and it is manifest that they took and improved strong grounds to effect it. Accordingly, we find in the proof facts like these, adopting the change first and not consulting Angier till afterwards,—threatening to have Nathaniel leave his business at all events and having only Abraham left, then become sixty-three years of age and unskilled personally in engraving—new companies to compete with, embracing Morse, their other chief workman, as well as Nathaniel—the Massachusetts law much exposed to repeal or important modifications—the Atlantic between the lessor and the scene of action—accounts not rendered to him and embarrassment for means. All these united seem to have imposed a sort of moral duress on Angier to acquiesce, however unwillingly. They may not be sufficient among men of business, intelligent and adults, to constitute that restraint which would entirely avoid a ratification in equity. See Jenkins v. Eldredge [Case No. 7,266]; 17 Pick. 550; 1 Story, Eq. Jur. § 239; 1 Greenl. Ev. § 197; 2 Ball & B. 304; 14 Ves. 91. But, certainly, they furnish, under such peculiarities strong reasons for holding Abraham to account to him fully for all after 1833, which was, in any way, held out by him or his son Nathaniel, with his knowledge, as intended for Angier to receive. It would not be thus had he obtained a copy of the articles and without any explanations or constructions adopted them. Then, of course, he must have been bound by the whole of them in their obvious and natural meaning, and hence he is now, probably, so far as respects the partners in the new company, who did not communicate with him and had with him no previous arrangements in business, bound to that extent. 2 Vt. 351; 2 Johns. Ch. 441; Story, Ag. § 250.

But the question here is, when those who had previous engagements with him in business proposed modifications of them, and under certain written explanations and constructions, whether they must not conform to these, and carry them into effect as understood and represented between them? Clearly they must. What then did Angier thus assent to, and what was he proposed by Abraham to receive? It is highly probable, as well as equitable, to suppose that his assent was given, so far as regards Abraham, to the construction of the articles and the additions, if any, as between them, which the letters and other evidence disclose. (1) According to these he was to have not only half the technical profits reserved to Abraham expressly in the new partnership, which was one-sixth of the whole and one-half of the twenty-five per cent. expressly reserved for what was received for printing notes on the old plates; but one-half the one-sixth of the profits given to Nathaniel, it being expressly stated to him that such was the understanding, as he had not assented to Nathaniel's being a partner, and the whole Perkins property and improvements were considered as entitled to one-third of the whole profits. Nor is this illiberal to Nathaniel, who substantially united in giving this view, and whose large salary at $1,000 per year would seem to be an ample compensation as between these parties for his services, and much more than Angier had been willing at any former period to allow to him. (2) Beside this, the $500 salary to Abraham, considering his situation as lessee and his obligation to pay half of all received by him from the business, should go, and was doubtless understood to go, in equal shares to Angier, under the original lease, and the representations made by Abraham and Nathaniel, on which Angier allowed the business to proceed in the new form. Whether in this way Angier was likely to receive less or more than he would, had the old business been continued under the risk of the Massachusetts law being repealed and under the counterfeits which existed, and the new and improved style of plates, likely to be introduced in competition, it is impossible now to decide. One party thinks the income to Angier would have

been less, looking to the impression that counterfeits were numerous, public confidence in stereotype plates much impaired, a demand arising for a more showy as well as safer style of engraving, by having special plates for each denomination of bills for each bank, and a strong probability of a repeal of the Massachusetts law.

The other party, less anxious for any change, less in the midst of the agitation, less impressible, less intimidated, less inclined to magnify new and vague dangers, thinks the reverse. But if we could, there is no necessity we should settle this moot point between them; because, coming to the conclusion that Angier did subsequently assent to new terms and new conditions connected with the lease, he is bound by them, whether they proved on trial to be in fact less profitable than the business would otherwise have been or not. The master must go into this examination closely, and, in all doubtful items, where the person chargeable has not kept good accounts, nor transmitted them punctually when requested, should incline against him. In all the subsequent modifications of the articles of partnership, lessening Abraham's salary or share in the profits, or the receipts for using the plates, Angier is not to be affected, in respect to Abraham, where there was no notice of the change nor any assent to it. None is pretended, after the first agreement and assent in 1833.

Finally, then, Angier is to receive of Abraham, yearly, till 1839, what was understood and arranged in 1833, to the extent just decided. Nor is this sum to be affected and diminished by any share of profits afterwards allowed to new partners, like Cary and Balch, of whom Angier knew nothing and to whom he never assented. He is entitled to interest on all this from the time due, when the sum has not been paid over. In 1839, when the twenty years expired, Angier was likewise entitled to all the leased property which remained, and consequently must recover of Abraham its value then and interest on it since. He also owns all the additions, made to those tools by Abraham with the earnings, and charged to expenses, or made by the labor of those then in his employ, before 1833, if any of the tools remained not worn out in 1839. Beside this, there is an interest in the new tools, new plates, and machinery of the company, which belongs to Angier. These tools, plates, &c., were bought, in part, by the funds of the assignee, entitled, as a partner in the new company, to one-half of one-third of the income in the new company, so far as regards Nathaniel and Abraham. Angier is to receive one-half of one-third the value of those plates and tools in 1839. The interests of Angier in the firm then ended, by the death of Abraham, his lessee, and the limitations of the lease. The firm, who have kept all these new tools, are liable to Angier for his share of one-third of their value, they having to that extent, been purchased by the funds and earnings of all, and of the joint exertions of all, and by the use of the plates and old tools belonging to Angier. He, by his representative in the new company to the extent of one-third, seems entitled, when retiring from it by the end of the lease and the death of that representative, to receive half the value of one-third of the new plates, tools and materials then retained by the company, and interest on them since.

This last item will constitute the basis of a decree against these parties in the second bill, and against their share of the partnership property. It being a partnership debt, those who are parties in this bill must now be made to help to discharge the amount, due to Angier, if not able to be collected out of their property in the firm. The respondents may thus hereafter be held responsible in their private property, severally, for any balance, in a ratio with their respective interests. But their liability for it in solido, or that of the partnership property in solido, is not now decided. Going thus far seems fair and equitable as regards the firm, when they have got their large salaries yearly, a share in the profits, and the whole of the new tools and plates and materials, and a retiring partner only asks to be paid out of these latter the share he and his means have contributed towards them. There is no decree in this case in favor of Abraham and his executors against the new company, for the other one-sixth of the value of these articles, as none is asked by interpleader, or otherwise. Nor is there any against Pendleton and his share, as he is not a party to the present bill. It is gratifying to discover this means of giving to Angier some substitute for the larger income he expected, and was induced by others to expect, but failed to receive during the first years of the new company. Much of the earnings then doubtless went to purchase those new tools and materials. The large salaries paid out and which lessened the profits, went to pay for services and skill in making new and improved plates, and now, on an adjustment of the partnership concern at the end of six years, the remaining partners can, neither in law nor equity, refuse to account to one withdrawing, for his share in those new plates, materials and tools, whether bought with the partnership funds or made by the skill and labor of the partners themselves and their workmen. So the notes and accounts then due in 1839 to the company, belong one-third to Angier and Abraham, in equal proportions, and one-sixth must be accounted for to Angier by the company.

It will be seen, that, as to these items of new tools, materials, plates and notes, and accounts due in 1839, I have spoken as if Abraham, in respect to the company, then remained entitled to one-third. But if his share, by subsequent arrangements, had, by

his consent, become less, Angier may still have a decree against the company for one-sixth, if Abraham retained as large a share, and if not, to the extent of his share remaining in 1839, and for the residue a separate decree against Abraham's executors. If a portion of the materials and tools which were owned by Jacob in 1819, or had been afterwards purchased by the earnings or funds of Jacob, and were then, in 1833, delivered to the new company, and used by them, were never returned, that company should be held accountable to Angier for the whole value of what was thus situated and belonged to Jacob at first, or had been afterwards purchased by the funds earned before 1833. Their amount and interest should constitute another item of charge against the new company.

Much has been said in the argument for Angier, as to the good will of the old establishment for engraving notes, and which was transferred to the new company and should be paid for them. The complainants contend, it existed with the business and skill of Jacob and Abraham, and could be recognized in equity and pass with that business. Story Partn. §§ 99, 100; 3 Mer. 441; 5 Russ. 29; 1 Hare, 253; Smith, Merc. Law, 109, note; England v. Downs, 6 Beav. 269; 8 Paige, 75; 17 Ves. 336; 1 Hoff. Ch. 68; Story, Partn. § 99; 5 Ves. 539; 2 Keen, 219; Taylor v. Carpenter [Case No. 13,784]. The respondents argue, that the good will, which is recognized as possessing value, and subject to be paid for, when transferred, belongs only to a particular place or stand for business, and not to business itself, transacted elsewhere. Story, Partn. § 99; 16 Am. Jur. 87. But it seems to me, that whichever of these is the true view, the plaintiff, Angier, by continuing in the business at the new place, and under the new company, and receiving a share in the profits of it, obtained for the good will all he was entitled to. That is, he received all he agreed to ask for it, by assenting afterwards to take a share in the profits of the business under the new firm; and which profits and share were, doubtless, much enhanced in value by the Perkinses still being partners in the business, and their kind of plates protected in Massachusetts, by its special law, till 1836, and rendered more popular elsewhere by that protection. At the end of the interest of the Perkinses, (Angier and Abraham,) in the business, if they did not choose to continue it, either in the firm or by themselves, they cannot claim for any future good will which they thus voluntarily renounced.

Considerable attention has been, also, bestowed in the argument on the question, whether the plates, tools, &c., were not trust property in the hands of Abraham; and if so, and this was known to the new company, and they took and used them, knowing the trust which existed concerning them, whether they were not responsible for the trust thenceforward. But it is very questionable whether any trust existed here beyond what exists in all contracts. Certainly none beyond what happens between lessee and lessor, when the former is to account for half the proceeds of the use of the property, and not pay a gross rent, at all events. In such case, a sub-lessee, or an assignee, with notice, would, undoubtedly, be liable to fulfill the original agreement, if no new or different contract was made by the parties and confirmed by the lessor. Story, Eq. Jur. §§ 1231, 395, 323; 1 Ves. Jr. 477; 1 Ball & B. 52; 1 Turn. & R. 469; 2 Vern. 421, 271; 1 Vern. 365; 20 Johns. 421; 2 Dru. & War. 31; 2 Ves. Sr. 498; 1 Schoales & L. 262; 1 Johns. Ch. 305. Here was express notice of Angier's rights to, or in Nathaniel, and probably in Morse, as well as Abraham; and enough, probably to put all on inquiry. That suffices. 16 Ves. 249; 3 Mer. 704; 5 Price, 306; 2 Ball & B. 290, 416; Story, Eq. Jur. §§ 400, 1257; Jenkins v. Eldredge [Case No. 7,266]. Even a common lease, once made and assigned, or transferred, by the lessee, binds all taking it to the terms of the lease. 3 Pa. St. 16, 461; 8 Wend. 175; 5 Cow. 123; McMurphy v. Minot, 4 N. H. 251; 4 Bligh (N. S.) 380; 3 Beav. 373. But there being a new and special agreement here, subsequently ratified by the lessor, I think the new company would not be liable to do more than that agreement stipulated on their part. So far they probably are liable in aid of Abraham; and if his estate is insufficient for what is payable by it, after 1833, those of the company here prosecuted would be subject to a decree in aid of him to the extent of their liability to him, under the articles and the ordinary construction of them, if his estate be so much in arrears. But, of course, they cannot be held beyond that, as assignees from the lessee of the residue of the lease, modified according to the new articles as respects Angier, and assented to by him.

It ought to be added, before closing, that we think sufficient ground exists in equity to charge all these parties, without turning them over to an action at law. To be sure, an action would lie on Abraham's covenants against his executors, and against the partners, for the old tools and materials of Jacob, which they have not accounted for. But either of these would be very inadequate to the nature of this case—both a discovery of various parts being wanted, and a full account from all the parties, where an obligation existed to keep and render accounts, where a partnership existed for a time, and where the transactions in detail, most especially the expenses and receipts, were, in their nature, known only to some of the respondents. These are all grounds for jurisdiction in chancery. Nor was there a sufficient and ample remedy at law alone, which is necessary, even here, to oust jurisdiction in chancery. See the cases alluded to in Pierpont v. Fowle [Case No. 11,152].

Let this case, then, be referred to a master, to ascertain any sums which may be due

either from Abraham's estate or the new firm, on these principles, and how much for Jacob, and how much for Angier, from Abraham's estate; and reporting the amount due from the new company, for new tools, plates, materials, notes and accounts. The final decrees can then be entered up without difficulty, unless some further question arises as to proportions and separate liabilities, on which a further hearing may be proper. I do not see that there can be any decree in favor of Jacob, in the second bill, as he does not appear in any view to possess any claim against the new parties there, having assigned all his interest to Angier before the new company was formed. But with this exception, the other parties, in both the first and second bill, seem properly introduced.

PERKINS (DODGE v.). See Case No. 3,954.

PERKINS (DUNNING v.). See Case No. 4,180.

Case No. 10,986.

PERKINS v. HILL.

[1 Spr. 123.] [1]

District Court, D. Massachusetts. Feb., 1846.[2]

CHARTER PARTY — SHIPMENT BY THIRD PARTY — BILL OF LADING—AFFREIGHTMENT.

Where a vessel was chartered at $400 a month, for a voyage from Boston to Cuba and back, payable in three days after her return, and a person other than the charterer shipped a part of the outward cargo, and took a bill of lading, signed by the master, in the usual form, adding, "as per charter-party,"—the master being ignorant of any arrangement between the shipper and the charterer,—*held*, that the shipper was liable to pay a reasonable freight for his goods, in three days after the return of the vessel.

[Cited in The Eliza, Case No. 4,347; Snow v. Edwards, Id. 13,145; The Peer of the Realm, 19 Fed. 217; The Chadwicke, 29 Fed. 524.]

This was a libel in personam, promoted by George Perkins, Jr., claiming freight for certain merchandize belonging to the respondent [John S. Hill], on a voyage from Boston to Havana, on board the schooner Austin, of which the libellant was master and part owner.

It appeared that the Austin was chartered at $400 a month by one Joseph Green, for a voyage to Cuba and back, payable in three days after her return; that he and the respondent, Hill, put a cargo on board; that this cargo was consigned to Hill's consignee in Havana, and that a bill of lading was signed by Perkins to Hill, declaring freight payable "as per charter-party;" and making all freights due, on the voyage home, payable to the master, on account of the amount due from Green on the charter-party. The goods, on arrival in Boston, were delivered to, and received by the respondent.

C. P. & B. R. Curtis, for libellant.
Edward Blake, for respondent.

SPRAGUE, District Judge. The question is, whether the owners of this vessel can hold the respondent, Hill, personally liable for the freight of the goods shipped by him, or whether they are to look to the charterer alone.

Perkins and his associates, undoubtedly continued the owners for the voyage. The Volunteer [Case No. 16,991]. Green, the charterer, might have put these goods on board, and the libellant must have conveyed them, by virtue of the charter-party, with no other security than the personal covenants of Green, and a lien on the homeward cargo. But Green did not see fit to put these goods on board, but permitted the respondent to lade them,in his own name, and as his own property, under a contract between him and the libellant. That contract is shown by the bill of lading, and by it, Hill obtained the personal responsibility of the owner, as carrier, and the liability of the ship (The Rebecca [Id. 11,619]); and the owner, by its express terms, was to be paid freight, as per charter-party. The language is, that the goods are to be delivered to the consignees, naming them, he or they paying freight; and then it is added, "as per charter-party." What would have been the obligation, if the last three words, "as per charter-party," had not been added? The respondent being the owner of the goods, and the consignees merely his agents, having a right to call upon him to pay whatever freight they should advance, the respondent would be personally liable to the carrier for the freight; and no rate being specified in the contract, the law determines that it shall be a reasonable rate.

What then is to be the effect of the words "as per charter-party"? That instrument provides for no rate of freight on goods transported, but that $400 a month for the use of the vessel shall be paid, in three days after her return to Boston. How then is the freight to be paid, as per charter-party? It cannot be supposed that it was the intention of the parties, that the whole hire of the ship, under the charter-party, was to be paid for the mere transportation of the small part of the outward cargo; and some effect is to be given to this clause in the bill of lading. The fair and rational construction is, that a reasonable freight for the transportation of the goods named in the bill of lading, should be paid, and the payment be made as per charter-party; that is, in three days after the arrival of the vessel in Boston.

This was the obligation which the respondent assumed, when he took the bill of lading from the libellant, and no arrangement between him and Green, without the knowledge

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 10,987.]

of the libellant, can exonerate him from its performance.

This case is very similar to that of Churchill v. Churchill [unreported], decided in this court; the only material difference being, that in that case, the bill of lading declared, that the goods were to be delivered to the consignee, or assigns, he or they paying freight, sixty cents per quintal, to the owner or his agent, at Boston.

The respondent contends, that while the bill of lading binds the owner of the ship to the safe transportation and delivery of the goods, it imposes no obligation whatever upon the shipper; that the clause as to the payment of freight, instead of meaning that payment should be made to the carrier by the shipper, or his consignee, for the transportation of these goods, has no meaning or effect. To this I cannot accede.

Subsequently the respondent made a motion for a re-hearing, which was granted by the court. He then introduced new and material evidence, which so changed the facts of the case, that the libel was dismissed. This decree was affirmed upon appeal [Case No. 10,987].

Case No. 10,987.

PERKINS v. HILL.

[2 Woodb. & M. 158.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.[2]

CHARTER-PARTY—LOADING—FREIGHT LIENS—BILL OF LADING.

1. Where A. takes a charter-party of a vessel for a voyage to Cuba and back, at $400 per month, payable three days after her return, the owners furnishing officers, crew, and provisions, he has a right to load the vessel himself, or allow others to do it, under express contract with him.

[Cited in Donahoe v. Kettell, Case No. 3,980; Grand v. The Ibis, Id. 5,682.]

2. In such case no implied promise or obligation seems to arise in others, who make such contract with him, to pay freight to the captain or owners, but any liens or implied obligations, which are raised, were to him, or in his behalf, in aid of the express contract with him.

[Cited in The Eliza, Case No. 4,347.]

3. More especially is this the case, when at the bottom of the charter-party is a memorandum, stipulating by the hirer of the vessel, that the captain or owners may collect the freights on the voyage back, towards payment of the sum due from the hirer in the charter-party; and the freight now in dispute is on goods carried out, and not back.

4. A bill of lading, taken from the captain by him who makes the contract for freight with A., and containing no express promise or condition to pay freight to any particular person, does not change the obligation as to freight under the special contract to pay it to A., but is taken as evidence of property, to be forwarded to the consignee in Cuba.

5. The consignee there may be liable for freight before the goods are delivered; but it is to A., and not the captain, unless as agent and in behalf of A., and that lien is lost by the delivery of the article to the consignee.

This was an appeal from the decree of the district court, dismissing the following libel. [Case No. 10,986.] It was one purporting to claim compensation for the freight of certain merchandise belonging to the respondent [John S. Hill] on board the schooner Austin, from Boston to Havana, commanded and partly owned by the libellant [George Perkins, Jr.]. It contained averments that the vessel was chartered by the owners to one Joseph Green, April 15, 1845, for the voyage to Cuba and back, at $400 per month, payable in three days after her return. It was further stated, that Hill had taken of the libellant a bill of lading of the goods, freight payable "as by charter-party," and that a reasonable freight for what Hill owned on board was $1000, which had not been paid by him or his consignee.

The answer averred, that under the charter-party, Green had the exclusive right to load the schooner with his own goods or those of others, and receive the freight therefor; that the libellee agreed with Green for the carriage of the articles he shipped on board, and owed him alone therefor; that accordingly no demand for freight was made by the libellant of the consignee of the goods when delivered in Havana; that only one-third of the fish and none of the onions, which constituted his articles, belonged to the libellee; and that Green being indebted to him more than the amount of freight, and an express contract having been made with Green to pay him, no implied promise ought to be raised for the payment of the freight to the master. In a supplemental answer the libellee added further, that the property was all placed on board by Green, but a portion of it afterwards sold to the libellee; and that this was known to the libellant; and no agreement was asked or made to pay to him any specific sum as freight therefor. The charter-party and bill of lading were put into the case, and agreed in substance with what is averred about them in the libel. At the bottom of the latter, however, was a memorandum to this effect, that any freights due on the voyage home, might be received by the master, the libellant, and accounted for towards the amount Green was to pay monthly for the vessel under the charter-party.

The following statement of facts was agreed upon, which contains more details on some points than has already been given:

Joseph W. Green chartered the schooner Austin for the voyage referred to in the charter-party, on the 15th day of April, A. D. 1845. He had previously chartered the same vessel five or six times. The vessel was wholly laden by Green. The cargo consisted of 250 casks codfish, 1400 qtls., $3850; 200 barrels onions, $250; 100 barrels potatoes, $125; 3,000 feet lumber, $42,—$4267. After

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

[2] [Affirming Case No. 10,986.]

the vessel was chartered, about the twenty-second day of April, Green being in debt to Hill, proposed to him that he should take an interest in the fish, in order to discharge the debt in part. Accordingly Hill agreed to become interested in one third the value of the fish, and Green the remaining two thirds. Hill advanced three fourths of the value of the fish and onions; bill of lading and invoice made out in the name of Hill by his clerk, and consigned to his correspondent, and by the clerk carried to Green's store, and bill of lading returned, signed by the captain, it being the usual course of business to obtain advances and ship the property in the name of the merchant making the advances for his protection. The fish was delivered from the store of Green, onions purchased by Green, placed on board by him, and shipped on his account by Hill. Hill agreed to account with Green for two thirds of the net proceeds of the fish, and to allow him in account the freight of one third of the invoice of the fish at a just and customary rate. The proceeds of the fish and onions were returned by some other vessel than the Austin, but were not sufficient with the freight of one third of the invoice of fish to satisfy Green's indebtedness to Hill. Perkins was in and out of the counting-room of Green, or on board the vessel while the cargo was loading, but did not know that Hill had any interest in the cargo until he signed the bill of lading. It was the usual course between Perkins and Green to have the bills of lading filled out "as per charter-party." Green testified that Perkins did not trouble himself about agreements he (Green) had made with others; he signed the bills of lading and went to sea; he knew to whom the property belonged when he signed the bills of lading, but Perkins had requested to have bills of lading in previous charters made out as per charter-party. And Green also testified that he told Hill he might fill out the bill of lading, freight free, or as per charter-party, and Green told Hill, that it would be well for him (Hill) to have the bill of lading filled out as per charter-party. The balance demanded by the libellant, $239.65, would be a fair freight for the fish, by a general ship.

Record of the court is in evidence, containing libel, answer, and amended answer, charter-party, bill of lading, and also the original invoices of the fish and onions which Hill received from Green, one being "Invoice of fish delivered schooner Austin, by J. W. Green, to be shipped to Havana by Mr. John S. Hill, he having one third interest, the balance for account of said J. W. Green;" and the other being, "Invoice onions delivered schooner Austin, by J. W. Green, to be shipped for his account to Havana by John S. Hill."

C. P. & B. R. Curtis and Mr. Hubbard, for libellants.

Edward Blake, for respondents.

WOODBURY, Circuit Justice. There can be little doubt in this case as to the original intent of these parties. Green had hired the whole of the schooner for a voyage out to Havana and back; and was to make no payment for the price agreed on in the charter-party till three days after the return of the vessel. Hill, a creditor of Green, after the latter had loaded the schooner out, purchased of him a part of the cargo, and agreed to have it carried by Green for him to Havana, and there delivered to Hill's consignee; and a bill of lading was taken of it from the master to show that this portion of the property belonged to Hill, and was to be forwarded and delivered to his consignee, in order that the latter might sell the cargo for him at Havana. There is no doubt that Green had a right to make such a contract with Hill for carrying the property sold to the latter. Abb. Shipp. 167, 246; Poth. Mar. Cont. p. 14, § 20. Green had acquired the authority to load the whole vessel with goods, either his own or belonging to other people; and neither the master nor owners had a right to take goods on board of others and charge freight without his permission, or unless in his behalf. Nor had they any right, by the charter-party, to demand freight for the use of the vessel, except as stipulated in the charter-party from Green himself, and that not till three days after the return voyage ended. Again, Hill, in point of fact, made no contract with Perkins to pay him freight; and Perkins was entitled to none on the cargo out till after the return of the vessel home, and then from Green alone. It also deserves special notice, that there is a memorandum at the bottom of the charter-party just referred to, in which Green agreed with Perkins that the latter might collect and apply the freights home towards what Green would owe, after her arrival here, for her whole voyage out and back. This memorandum is not only evidence that, without it, Green was understood between them as entitled to receive from others all the freights both ways, where he did not load the vessel entirely himself; but that they intended to except nothing from that general understanding but the freights home, mentioned in the memorandum.

In most cases, in charter-parties like these, the cargo is expressly made bound or liable for the freight due on the charter-party, and with no such memorandum as is before referred to, then the cargo may be under a lien for the freight to the owners. But here the existence of such a provision, and the insertion of a memorandum qualifying it, such as has been recited, leads to the opposite conclusion, as to all the cargo and freights on it, belonging to third persons on the voyage out. And it is very questionable whether the cargo belonging to third persons is ever held by that customary clause in the charter-party, but merely the cargo belonging to the charterer. Such was the

cargo in The Volunteer [Case No. 16,991]. It may be held in aid of the freight to the charterer, but not in aid to the owner. His own cargo the charterer might well pledge, to secure the freight due to the owners, but not so well the cargo, which belonged to third persons, and the freight for which was to be paid by agreement to himself, and not the owners of the ship. Hill then not only made his bargain with Green, but Perkins had no right to make one with him, unless as agent for Green, for freight outwards, and to which Green, and not he in his own right, would be entitled. For these reasons, also, Hill could be liable to nobody for the freight different from his express bargain with Green, unless he made a new and express arrangement with Perkins, assented to or authorized by Green. See cases of that kind collected in The Volunteer [supra].

The only pretence set up for such a new arrangement here, which is plausible on the evidence, is the bill of lading taken of Perkins, and arguing that this constitutes a new and express agreement to pay freight to the master. But this bill was taken and given not to create any new contract as to freight, as is inferred from some cases, such as The Rebecca [Case No. 11,619], and from 3 Kent, Comm. 218. It promises to pay freight to no person by name. It specifies no new amount, or, indeed, any amount except as by the charter-party. That expression must mean at the rate in the charter-party, according to his quantity of goods, and at the time mentioned therein, or it was a form in this case used without much meaning of any kind. Under the circumstances, and being so general, it could not be presumed as intending to depart from what had before been arranged with Green, and who had the exclusive right to make or permit such arrangement with Hill binding the freight. In truth, the bill of lading was probably given in this, as in most other cases, as an acknowledgment that the property, named in it, was on board and belonged to the person to whom the bill ran, the libellee in this case, and not as an obligation from the shipper to pay freight to the master, when it was not so expressed, and when the master had no right to demand it by the charter-party. If taken as security for the freight, the obligation should run to the captain, and not from the captain, or the bill should expressly provide for the delivery of the goods only on the payment of freight to him. But being given here, diverso intuito, and not to secure freight, it would be a perversion of its use and design to treat it as a contract for the payment of freight, and to a different person from the charterer of the whole vessel, and with whom an express arrangement had been made for carrying the articles contained in it. Next, should there be an implication raised here to pay freight to persons different from those named in the express agreement? I think not in this instance.

The cases where an implication is raised in favor of the master for freight, are generally those where no express agreement was made with any owner or charterer, and undoubtedly it then arises. Moore v. Wilson, 1 Durn. & E. [1 Term R.] 659; Robinson v. Marine Ins. Co., 2 Johns. 323. So the cases where the goods are at times liable for freight, or a lien exists on them for it, this is in aid of such an implication, when no express contract is made (4 Adol. & E. 260), or, if made, is not opposed to the implication. Abb. Shipp. 376. Or it is in aid of the express contract, and to secure its fulfilment to the same person. Barker v. Havens, 17 Johns. 234; Shepard v. De Bernales, 13 East, 565; 2 Maule & S. 303; Gracie v. Palmer, 8 Wheat. [21 U. S.] 605. Certain Logs of Mahogany [Case No. 2559]. Or it is where the master retains or reserves a part of the vessel when chartered. He might of course use that, or collect freight for that, without conflicting with these principles. The Volunteer [supra]. So retaining a part, and having the whole goods on board, bound to pay the freight to the owner, may be some evidence of a right to receive profits remaining in him, or intrusted to him by the charterer himself. [Talbot v. Seeman] 1 Cranch [5 U. S.] 24; [Gracie v. Palmer] 8 Wheat. [21 U. S.] 605; [Marcardier v. Chesapeake Ins. Co.] 8 Cranch [12 U. S.] 39; 1 Clark & F. 283. But even this evidence may be rebutted or superseded by an express contract with a particular freighter.

On a like principle rests the claim against the consignee. It is either in support of one of those implied or express liabilities, and not for the former against the latter, or it is on account of the lien generally possessed on the goods, and which the master, when it exists, can enforce or not, at his pleasure. Abb. Shipp. 286; Clarkson v. Edes, 4 Cow. 470; 3 Bing. 283; 13 East, 399; Small v. Moates, 9 Bing. 574; Faith v. East India Co., 4 Barn. & Ald. 630. And if the consignor is liable where the consignee is, on the ground of the latter being his agent, and the consignor deriving the benefit, the result, under the views just expressed, would be the same, as it would be a liability to the charterer, and not the master, except in behalf of the former, and would not help in any view the claim now set up by the master, as the consignee and the goods have both been released. If the goods have been delivered to the consignee, or time allowed for payment of freight, the lien is lost. 4 Adol. & E. 260; The Volunteer [supra]; Story, Bailm. § 588; 2 Ld. Raym. 752; 6 East, 622. It is, to be sure, a general rule, that the consignor is bound for freight (Story, Bailm. § 589; 1 Durn. & E. [1 Term R.] 659; 17 Johns. 234; and other cases cited), and continues to be bound till payment or discharge. But to whom is he bound for it, is the great question here; and to whom it is to be paid depends, as before remarked, on the facts

and the contracts. If a bill of lading is taken beside the contract, expressing that the freight is to be paid by any person or to any person, this taking of such a bill may be an implied contract by the shipper, who takes it to conform to that provision, though not signed by him, and certainly binds the consignee if he takes the articles or bill under such a clause, expressly making him liable. Abb. Shipp. pt. 4, c. 9; Dougal v. Kemble, 3 Bing. 383. But if no such stipulation is made expressly in the bill of lading, as none is in this case, the payment to any particular person, or by any particular person, is left to other express arrangements, or to implied obligations from all the facts when there are no such arrangements. What has given rise to an effort to overcome the obvious and natural liabilities here is probably the fact, that after all of them took place, and after the sailing of the vessel, Green proved to be insolvent, and stopped payment July 11, 1845. So that when the hire of the vessel under the charter-party became due from Green to Perkins, three days after the return home of the schooner, Perkins was unable to collect what was due into $239, the amount now demanded of Hill.

The struggle then arose, whether Hill or Perkins, both creditors of Green, should have the benefit of this freight; and when we consider that Hill had contracted to pay it to Green and not to Perkins, and that Perkins had no right to it on the voyage out, except as might be permitted by Green, who had chartered and loaded the whole vessel, and that Perkins' claim on Green for freight was not due at the time, little doubt is entertained, that Hill's right to adjust it with Green is in conformity with the express contract made between them, is prior in time to any right by Perkins, and was not intended to be changed, nor was actually changed by a bill of lading, like this in form, signed by Perkins to Hill, and is strongly fortified by the memorandum, conferring on the libellant some right to collect freights homeward, but none arising on the outward voyage. Judgment below affirmed.

Case No. 10,988.

PERKINS v. INGERSOLL et al.

[1 Dill. 417.] [1]

Circuit Court, D. Kansas. 1871.

PARTIES—PLEADING—CODE CONSTRUED.

[This was an action by George W. Perkins, warden of the state penitentiary, against Ingersoll & Hensley.]

McComas & Danford, for plaintiff.

McKeagan, Martin, Burns & Case, for defendants.

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

DILLON, Circuit Judge. This was an action at law brought in this court in the name of George W. Perkins, the warden of the Illinois state penitentiary, as warden (disclosing his capacity), for goods sold by him as warden, which were manufactured at the penitentiary (a public institution, belonging to the state, and governed and regulated by a public act of the legislature, but which is silent as to the name in which actions shall be brought for property sold), and the answer was simply a general denial of the allegations of the petition.

We hold, under the Civil Code of Kansas (construing sections 10, 28, 89, and 91 thereof), adopted as the practice of this court in actions at law, that the defendant cannot on the trial, after the evidence is closed, for the first time, object (in the state of the pleadings) to a recovery, on the ground that the plaintiff was not the real party in interest, and had no capacity, or right to sue, but that the action should have been brought in the name of the state of Illinois, as the party really concerned. Union Mut. Ins. Co. v. Osgood, 1 Duer, 707; People v. Banker, 8 How. Prac. 258; Petty v. Malier, 14 B. Mon. 198; Fosgate v. Herkimer Manuf'g, etc., Co. 2 Kern. [12 N. Y.] 584; Mayhew v. Robinson, 10 How. Prac. 162; Zafriskie v. Smith, 3 Kern. [13 N. Y.] 336; Ingraham v. Baldwin, 12 Barb. 9; Smith v. Fah, 15 B. Mon. 446.

Whether the state of Illinois had legal capacity to sue in this court was discussed, but not decided.

Case No. 10,989.

PERKINS et al. v. The PROSPECT.

[See Case No. 11,443.]

PERKINS (RUSSELL v.). See Case No. 12,160.

PERKINS (SMITH v.). See Case No. 13,091.

PERKINS (THOMPSON v.). See Case No. 13,972.

Case No. 10,990.

PERKINS et al. v. UNITED STATES.

[4 Cliff. 321.] [1]

Circuit Court, D. Maine. Sept. Term, 1875.

INTERNAL REVENUE—ATTEMPT TO EVADE LIQUOR TAX.

The facts are the same, and the reasons given for the conclusion, in this case, are equally applicable, as in McGlinchy v. United States [Case No. 8,803], and the assigned errors were overruled on the same grounds.

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

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

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

This was an action like the one reported and described in the preceding case [of McGlinchy v. United States, Case No. 8,803]. The case was removed to this court by the same processes, and the same reasons assigned for setting aside the verdict in the district court. [Case unreported.]

Strout & Holmes, for plaintiffs in error.
Nathan Webb, U. S. Dist. Atty.

CLIFFORD, Circuit Justice. Like the preceding case, the charge is that the spirits deposited in the bonded warehouse, as alleged in the declaration, were subsequently withdrawn for exportation without the payment of the internal revenue tax to which the same were subject; and that the spirits were exported from the port of Boston on board the schooner Mary Eliza, bound for St. Peters, a foreign port or place; that the said schooner actually sailed from that port, bound on that voyage, with the spirits on board. When she sailed, the schooner Henry also sailed from that port, and when at sea, the Henry, in pursuance of the previous arrangement with the shipper, took the spirits from on board the schooner Mary Eliza and they were by the Henry transported to the port of Gloucester, where the spirits were transferred from tin cans to liquor-barrels, and were subsequently forwarded, partly to Portland and partly to Boston, without the payment of the internal revenue tax to which the spirits were subject. Such tax remaining unpaid, the United States, under the act of March 3, 1823, instituted in the district court an action of debt, to recover the penalty inflicted upon any person who shall receive, conceal, or buy any goods, wares, or merchandise, knowing the same to have been illegally imported into the United States. 3 Stat. 781. Service was made, and the defendant [John W. Perkins] appeared and pleaded the general issue, which was joined, and he also set up two special defences.

1. That the action is barred by the statute of limitations of the United States.

2. That it is barred by the statute of limitations of the state.

Evidence was introduced for both sides, and the verdict and judgment were for the plaintiffs. Exceptions were taken by the defendant and he sued out a writ of error and removed the cause into this court. All of the material questions involved in the assignment of errors are the same as those presented in the case just decided, and they must all be decided in the same way. Suffice it to refer to the several acts of congress, which support the claims of the plaintiffs, without repeating the reasons given by the court in the other case for the respective conclusions. Provision is made for taxing distilled spirits by act July 13, 1866, § 32, and by act March 2, 1867, § 14 (14 Stat. 157; Id. 480).

Bonded warehouses are provided for by act July 13, 1866, § 28 (14 Stat. 155), and the same act provides for the exportation of property deposited in such warehouses, sections 40 and 41 authorizing distilled spirits to be deposited in warehouses. Articles exported without the payment of the internal revenue tax are, by act March 3, 1823, subjected to the penalty charged in this case. 3 Stat. 781.

It will be sufficient to say that the reasons given for the conclusion in the case just described are equally applicable in this case, and that all the errors assigned are overruled.

Judgment affirmed.

Case No. 10,991.

PERKINS v. WATERTOWN.

[5 Biss. 320;[1] 5 Chi. Leg. News, 472; 12 Am. Law Reg. (N. S.) 777.]

Circuit Court, W. D. Wisconsin. June, 1873.

WRITS—SERVICE OF PROCESS UPON MUNICIPAL CORPORATION.

1. Since the act of congress of June 1, 1872 [17 Stat. 196], the process of the federal courts must be served in the manner prescribed by the state law, and this court has no power to prescribe or substitute any other mode.

[Cited in Jewett v. Garrett, 47 Fed. 631.]

2. Though by the original charter of the city, under which the bonds in suit were issued, service might be made on the mayor or clerk, the legislature has the power to alter the charter in that respect. It is no part of the contract.

3. Service upon the mayor elect, before acceptance or qualification, is not a service upon the mayor of the city. The fact that there was no mayor or acting mayor upon whom service could be made, does not augment the power of the court.

[Cited in Watertown v. Robinson, 69 Wis. 237, 34 N. W. 142.]

[Action by Henry Perkins against the city of Watertown.] This was a motion on behalf of the city to dismiss five suits pending, brought on bonds of the city, on the ground of insufficiency of service.

Wm. F. Vilas and David S. Ordway, for plaintiff.
Harlow Pease, for defendant.

HOPKINS, District Judge. In one of the above entitled cases, the summons was served by delivering a copy to the mayor elect before he had accepted or qualified.

In the other cases the summons was served on the city clerk and city treasurer, the marshal returning that there was neither mayor nor acting mayor upon whom he could serve the same.

The defendants now move to set aside the service as insufficient, and appear specially for such purpose only.

The charter of the city authorizes suits to be commenced against it by the service of process upon the mayor, and the question now presented is, whether it can be served upon any other officer or party, so as to give this court jurisdiction.

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

Rule 30 of this court (common law) is as follows: "In suits against corporations the process may be served in the mode prescribed by the laws of the state. But a judge of the court, in peculiar cases, on motion may prescribe any other mode of service he may deem right and proper." This rule was adopted in 1870. Under it authority is given (in peculiar cases) to a judge of the court to prescribe other modes of service, but in all ordinary cases he adopts the mode of service prescribed by the state statutes.

My associate expressed some doubt as to the power of the court to make such a rule originally, but that question not being necessarily before the court, no decision of it was reached. In these cases no order had been made changing the mode of service from that prescribed by the state statute; but it was claimed by the plaintiff that if an order could have been made authorizing service to have been had on the parties in fact served, the court could now ratify such service; and in that view the power of a judge to grant an order changing the statutory mode of service, since the passage of the act of congress of June 1, 1872, becomes material. It is claimed that it abrogates that part of the rule authorizing any other mode of service than is prescribed by the state statutes.

The 5th section of the act above mentioned adopts the "practice, pleading and forms and modes of proceeding," as near as need be of the state courts in common law cases, and abrogates all rules of the circuit or district courts to the contrary. This court, by the rule itself above quoted, adopted the state mode of service, so that it cannot now consistently hold it to be impracticable to conform to that mode, and if it is practicable, by the act above quoted it is exclusive. The state practice or mode is the rule now on the subject, and this court has no more power to authorize any other mode than the state courts have. State laws, when adopted by congress, become obligatory upon the federal courts. There can be no doubt but the service of process is a "mode of proceeding." Similar phraseology in the act of 1792 (1 Stat. 275) was construed in Wayman v. Southard, 10 Wheat. [23 U. S.] 1, 6 Curt. Dec. 319, to include the service of process. The court there say: "It may, then, and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of 'the proceedings' in the suit." This would seem to settle the question that the service of process is within the meaning of the act of June 1, 1872, and being so, the mode of service prescribed by the state law must be followed, and the power of this court to prescribe or substitute any other mode is necessarily abrogated.

Foreign creditors are placed by that act on equal terms with domestic creditors, and we do not see any reason why the federal courts should be appealed to, or grant any special advantages in their favor. The corporation is created by the state legislature, its powers and rights emanate from that source, and if there are defects in the organic law, it is for the legislature and not the courts to correct them.

It was argued that by the original charter service of process might be made on the mayor or clerk, and that the legislature could not alter the charter in that respect, after the issue of these bonds. That point we do not think well taken. It was not a part of the contract in any sense, and the legislature could prescribe a different mode without impairing the obligation of the contract.

The service on the mayor elect before acceptance or qualification, was not a service on the mayor of the city. We therefore think the service in each case was insufficient to give this court jurisdiction of the defendant.

It was stated and shown by the papers that there was no mayor or acting mayor upon whom service could be made under the state law; but that does not augment the power of this court, nor confer upon it legislative authority. Courts must administer the law as they find it, not supply defects in legislation when a difficult or hard case presents itself.

Such considerations are to be addressed to the law-making power, not to the courts. But as the service in these several cases is wholly insufficient to give jurisdiction, these motions are unnecessary, and defendant is not entitled to any relief, as it is not injured thereby. The plaintiff may withdraw from the files the summons in each case, and redeliver them to the marshal for service according to law, if he wishes to do so. And an order to that effect may be entered.

NOTE. Since the act of June 1, 1872, the practice in the United States circuit and district courts must conform, as nearly as possible, to the state practice, and the regularity of proceedings should be decided by the decisions of the state courts. Republic Ins. Co. v. Williams [Case No. 11,707].

PERKINS (WICKS v.). See Case No. 17,615.

PERKINS, The JOHN. See Case No. 7,360.

PERKINS, The JOHN. See Case No. 10,252.

Case No. 10,992.

In re PERLEY.

[4 N. Y. Leg. Obs. 254.]

District Court, D. Maine. May 14, 19, 1846.

BANKRUPTCY—DISCHARGE AND CERTIFICATE—WITNESS—WILLFUL CONCEALMENT OF PROPERTY.

1. As a general rule, a creditor of a bankrupt is inadmissible as a witness to defeat his discharge. So also is an executor or legal representative of a creditor.

2. When, however, the executor stands in the position of a stakeholder, or trustee for the bankrupt, he may be a witness against him.

3. Where the testator devised to the bankrupt the notes and obligations held against him, the executor must be considered as standing in the place of the bankrupt, and he may be a witness against him, if called by the objecting creditors.

4. Where a bankrupt, prior to the passage of the bankrupt act [5 Stat. 440], causes notes to be sued in the name of a third person, and in his schedule makes no mention of the property, a court will consider such third party as trustee of the bankrupt, to the amount of his interest in the property.

5. Where a bankrupt, who was indebted to his brother in a small amount, caused certain notes to be sued in his name, some years prior to the bankrupt act, which suit was unknown to the brother till after the bankruptcy, and no mention is made of the property in the schedule, the court held that this transfer could not be regarded in the nature of a gift, and the omission to schedule the property, if fraudulently done, would be sufficient to defeat his discharge.

6. Omitting to enter on the schedule certain notes and other property proved to have been in his possession at and since the bankruptcy, if done for the purpose of willfully concealing the property, is a bar to a certificate of discharge.

[In the matter of Daniel J. Perley, a bankrupt.]

This was a case of voluntary bankruptcy. Bankrupt resides at Oldtown; a physician. His petition was filed March 3, 1843, the day of the repeal of the bankrupt act [5 Stat. 614].

Objections were filed by certain of his creditors, alleging: (1) Fraud, and willful concealment of property. (2) Preference of certain creditors. (3) Fraudulent omission to make an accurate inventory of his property, and not surrendering all his property to his assignee. (4) Admitting a fictitious debt.

Two examinations of the bankrupt had been had before F. Hobbs, Esq., commissioner, and a large number of witnesses examined on both sides. The bankrupt was shown to have been in possession of a large amount of property prior to 1837. September 9, 1837, a mortgage was executed by him to his father, Allen Perley, residing at Ipswich, Mass., of certain parcels of real estate, to secure a note for $10,000, due January 1, 1840. In 1838 the bankrupt caused two notes of $1,000 each, originally payable to himself, to be sued in the name of his brother, Joseph Perley, of Rowley, which suit came to judgment and execution in 1843, and was levied on certain real estate in Bangor, amounting to about $3,000. He was shown, also, to have notes and bonds for the conveyance of valuable property, which was in his possession at the time of his bankruptcy, and not scheduled. He had mortgaged his personal estate to his brother, Abraham Perley, April 11, 1840, as security for a note of $572, and pledged to him notes to the amount of over $800, as further security, at the same time, though the notes remained in his own possession at the time of his bankruptcy, or such as were uncollected. His father died June 24, 1843, and by his will devised to Daniel J. Perley all notes he might hold against him at his decease. Col. Edward Todd, of Rowley, was appointed executor. In his schedule A. the bankrupt sets forth a debt to his father for about $7,000. Abraham Perley, his brother, is put down a creditor for $572. Joseph was not named as a creditor. On schedule B. the real estate mortgage September 9, 1837, was entered as subject to said mortgage to the father. The personal estate mortgaged to Abraham was also scheduled. The notes sued in Joseph's name, and the other notes and bonds above named, were omitted from the schedule.

The objecting creditors called Todd, the executor, as a witness, and after a hearing on the question, the court permitted him to testify, reserving the question of the competency of the testimony. Col. Todd testified that he witnessed and certified the acknowledgment of the mortgage deed of September 9, 1837, at Rowley, but saw no note given, or money paid. That within a day or two after the decease of Allen Perley, the father, he took possession of all his property in the presence of and assisted by the three brothers of the bankrupt. That he found the mortgage deed in three pieces, among the receipts and papers of no value, of the father's estate. That he could find no note corresponding with the mortgage, and no appraisal was made of the mortgaged property. He saw the bankrupt before the sale of his property in bankruptcy, inquired of him if any such note existed, but could not ascertain from him that any such note was given. He found among the papers of the father two notes against Daniel J. Perley, one of six hundred odd dollars, and the other for $100.

The sale of the bankrupt's property took place at Bangor, November 4, 1843. The property scheduled as mortgaged to the father was bid off by the objecting creditors. November 6, 1843, the bankrupt wrote a letter to his brother Abraham, which was produced, informing him of the sale, and telling him that the $10,000 note was in existence, and to give it to Col. Todd if he called for it. On the 13th of November, 1843, he wrote to Col. Todd, telling him of the sale, and asking him to call on Abraham for the $10,000 note. Abraham produced to the executor a $10,000 note with one endorsement across the back of it, and it was alleged on the trial, that this note was torn from the bottom of the letter to Abraham, of November 6th. A commission issued to examine the bankrupt, March 12, 1844. In January, 1844, bankrupt went to Rowley, and there endorsed and placed in the hands of the executor, 6 notes amounting to over $700, and two bonds taken to himself for the conveyance of property. These bonds were assigned to the father at that time, but the assignments dated back to a period prior to his death, and the bankrupt then declared that they were the property of the father, as additional security for the $10,000 note. In January, 1844, he got permission of the ex-

ecutor to examine the mortgage and note, and secretly took the $10,000 note, and left another corresponding in date and amount, though having different endorsements. The bankrupt's first examination was completed at Bangor, April 2, 1844. On the 12th of April, at Rowley, he got possession of the six notes and bonds, and claimed them as his property and retained them, giving a bond of indemnity to the executor. His interest in these notes and the two bonds was sold in bankruptcy February 3, 1844, under license of court granted on petition of the assignee, filed on the motion of the creditors, and bid off by the creditors. It was also proved that Joseph Perley had repeatedly stated that he had no knowledge of the suit in his name, till after the levy of execution and Daniel's bankruptcy; and that his only claim on Daniel was $428, and for this he held Abraham and the father as sureties.

A large amount of testimony was introduced on both sides, including several of the bankrupt's letters, and among other testimony, a second examination of the bankrupt, had in February, 1846. Various other points were raised, which were not noticed in the opinion of the court.

Preble & Hilliard, for bankrupt.
J. A. Poor, for creditors.

WARE, District Judge. This case has been heard on the objection of certain creditors to allowing a certificate of discharge The bankrupt has been examined, and a large volume of testimony taken on both sides. A preliminary question arose, and was discussed at the hearing, as to the admissibility of Edward Todd as a witness, who was called by the creditors and examined, subject to the objection. The objection is that he is a creditor, and excluded on the ground of interest. He is not a creditor in his own right, but only as executor of the last will of Allen Perley, the father of the bankrupt, who died June, 1843. The testator, by his will, devised to the bankrupt all the notes and other obligations he held against him. As executor of Allen Perley he is a creditor, and may prove his claim against the estate; and as a creditor he is also interested to defeat the discharge, and then he will be entitled not only to a dividend, but also his claim for the balance will be good against the bankrupt. But the will gives all these notes and obligations to the bankrupt; and therefore the executor, so far as he has an interest, has the same with the bankrupt himself. His interest, therefore, is against the party calling him, and it does not lie with the other party to make the objection, if he is willing to testify.

Several objections are made to the discharge, but that principally relied on is a fraudulent concealment of his property, in the hands in part of his father, and in part in the hands of his brother, Joseph Perley. I do not propose to go into a critical examination of the great mass of testimony in the case, but to state shortly the conclusion to which I have arrived.

I. With respect to property in the hands of Joseph Perley, his brother, it appears that he held two notes against Dwinal, and another some time before the bankrupt law was passed, and commenced a suit upon them in the name of Joseph, on which certain real estate in the city of Bangor was attached. Judgment was obtained, and the execution was levied on this property to the full value of the judgment obtained. It was not known to Joseph that any such suit was commenced, or that it was in his name, and the notes were the property of the bankrupt. Joseph, therefore, took them as trustee to the bankrupt, and would, by a court of equity, be declared to be such. He has, therefore, a right of property in the levy, which ought to have been disclosed. But it is said that he was indebted to Joseph, and that the suit was brought in his name, in order that the judgment might be appropriated to the payment of this debt, and that these proceedings thus operated as an assignment of the property to Joseph. Without relying, in answer to this, on the fact that the suit on the notes was unknown to Joseph until after the levy, it is sufficient to say, that the debt of Joseph was, at all events, less than the amount of the judgment or levy; and I think, on the evidence, less than one-quarter of the judgment. It cannot be construed as a gift to Joseph, for he had never accepted it, and it is not therefore analogous to the case. Ex parte Robinson, Law Rep. 307. And, moreover, it was never intended as a gift. It is plain enough, from the whole testimony, that the object of the bankrupt in bringing this suit in Joseph's name was to conceal his own interest in the property. Here was, then, a valuable property, which ought to have been put in the schedule of his effects; and it appears to me impossible to doubt that the concealment of his interest was intentional. It is, therefore, in my opinion, a conclusive objection to the allowance of a certificate.

And then as to the six promissory notes, amounting to about $700, and two bonds for the conveyance of real estate charged to be in the hands of his father, as collateral security for a debt due on mortgage. My opinion on the whole evidence is, that these notes were not in the hands of his father at the time when he filed his petition in bankruptcy, but in his own hands, as his own property, and ought to have been put into his schedule. I do not choose to comment on the evidence touching this part of the case, for reasons which I trust will be understood by the counsel, but merely observe, that I am fully satisfied, from the whole evidence, that it was a willful concealment of the property, and is a bar to a certificate of discharge. Costs to be charged to the estate.

PEROT (FREEMAN v.). See Case No. 5,087.

Case No. 10,993.

PEROTS et al. v. UNITED STATES.

[1 Pet. C. C. 256.] [1]

Circuit Court, D. Pennsylvania. April Term, 1816.

CUSTOMS DUTIES—CONSTRUCTION OF ACTS—IMPORTATION.

1. The cargo of an American vessel, which arrived at Philadelphia on the 16th June, 1812, from British possessions in India, where the owner of the cargo had been obliged to give a bond to land the cargo in the United States, is not liable to double duties, under the act of congress passed the 1st of July, 1812 (4 Laws U. S. [B. & D.] 459; [2 Stat. 768]).

2. Construction of Acts Cong. July 5, 1812 (4 Laws U. S. [B. & D.] 470; [2 Stat. 776]) and 27th January, 1813 (4 Laws U. S. [B. & D.] 490; [2 Stat. 794]).

3. There is no statute of the United States, nor principle of law, which requires an entry to be made, in order to render an importation of merchandise complete.

4. What constitutes an importation.

[Cited in The Gertrude, Case No. 5,370; McAndrew v. Robertson, 29 Fed. 246.]

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

This was an action [against Perots and Chamberlain] brought by the United States, in the district court, to recover the additional duties on a cargo, imported into the United States, from the British East Indies, in the year 1812. Upon a special verdict [case unreported], the district court gave judgment against the defendants, who removed the cause, by writ of error, into this court.

C. J. Ingersoll, Dist. Atty., for United States.

Chauncey & Rawle, for plaintiffs in error.

WASHINGTON, Circuit Justice. The only question in this cause is, whether the cargo, imported in this vessel, be liable to pay double duties or not; it being found by the verdict, that the single duties have been fully paid. The facts stated in the special verdict are, that the Aurora sailed from the United States in July, 1809, having cleared out for Brazil; but with instructions to the master, to proceed thence to the South Sea, and ultimately to Canton or Manilla. She arrived at Calcutta, in September, 1811; where she was chartered to citizens of the United States, and a cargo was taken in, on account of Chamberlain, the plaintiff in error, and others, all citizens of the United States. Prior to her sailing from Calcutta, a bond was given, with condition to land the cargo in the United States, according to the laws of that place. She arrived at Philadelphia, on the 16th of June, 1812, and an application was immediately made for an entry. On the 26th of June, 1812, the vessel and cargo were seized by the collector as forfeited under the non-importation law. On the 20th of March, 1813, the forfeiture was remitted by the secretary of the treasury.

[1] [Reported by Richard Peters, Jr., Esq.]

It is admitted, on the part of the United States, that if the Aurora and her cargo had not been exposed to forfeiture for a breach of the non-importation laws, her cargo would have been subject to the payment of single duties only; in as much as she arrived at her port of destination on the 16th of June; and the law imposing double duties did not pass until the 1st of July, 1812. But it is contended that being obnoxious to the penalty imposed by those laws, and therefore legally denied the privilege of an entry, the double duties attached, as much so as if she had arrived after the 1st of July; and that the subsequent laws, which were passed to exempt vessels and cargoes in the situation of the Aurora and her cargo from forfeiture, if correctly interpreted, require the payment of double duties. In answer to this, it is to be observed, that there is no statute of the United States, nor any general principle of law, which requires an entry to be made, in order to render the importation complete. The arrival of a vessel at her port of destination with intent to land her cargo, constitutes an importation. If the cargo was not liable to the payment of single duties, upon the ground of an importation on the 16th of June, duties could not be demanded under the act of the 1st of July; which imposes an additional duty of one hundred per cent. upon the permanent duties, upon goods which should, from and after the passage of the act, be imported into the United States, from any foreign port. If an entry be necessary to complete the importation, still when the law permits it to be made, it must relate back to the period of the arrival of the vessel at her port of destination; since it is absurd to say that goods so brought in, and even landed in June, 1812, were imported or brought in at any subsequent period, when the entry was made in virtue of the act of the 5th July of the same year. I think, then, there can be no doubt that if the act of the 27th February, 1813 [4 B. & D. Laws U. S. 507; 2 Stat. 804], does not require the payment of double duties, as a condition upon which the forfeiture was excused, they are not demandable, under the act of the 1st of July, 1812. 4 B. & D. Laws U. S. [2 Stat. 768] 459.

The first law which passed in relation to vessels arriving with cargoes from India, in breach of the non-importation law, is that of the 5th of July, 1812 (4 B. & D. Laws U. S. [2 Stat. 776] 470), which goes no further than to authorise their entry, upon the duties being paid, or secured, agreeable to law; and requires the cargoes to be deposited in public stores, under the care of the collector, there to remain, subject to the future disposition of the government, in relation to the vessel and cargo. That a remission of the forfeitures in these cases, was at that time contemplated by the legislature, is very obvious, from the circumstance of the owners of the cargo being required to pay or secure the duties. At the next session of congress, the act of the 27th of

January, 1813 (4 B. & D. Laws U. S. [2 Stat. 794] 490), was passed, upon the correct construction of which the present case must be decided. This law authorises the secretary of the treasury, in all cases where goods, &c., the property of citizens of the United States, have been imported from British ports beyond the Cape of Good Hope, and bonds have been given at such ports, for landing the said cargoes in the United States, if he shall be satisfied, upon the certificate of the district judge, and other proof, that the said goods belong to citizens of the United States, and that such bond was given, to remit all penalties and forfeitures, incurred in consequence of such shipment or importation, and to deliver to the owner the possession of the vessel and cargo. The conditions upon which such remission is thus granted, are expressed in the following terms: "Upon the costs and charges that have arisen or may arise, being paid, and the duties payable on such goods, or which would have been payable, if they had been legally imported, being paid or secured to be paid, according to law; as if the same had been imported and entered, at the time of the release thereof."

It is contended, for the United States, that the above words refer to the period of the release, and not to that of the importation, for the rate at which the duties are to be charged. Now I think it most apparent, that the first part of the above clause, relates to the rate or amount of duties to be paid or secured, and the latter to the time of payment. According to this division of the sentence, the words which constitute the first part, are: "Upon the costs and charges being paid, and the duties payable on such goods, or which would have been payable, if they had been legally imported." Duties payable, most obviously mean, such duties as may by law be demanded; and if such duties are to be paid, as if the goods had been legally imported, let me ask, what duties would have been payable, if those goods had been legally imported? The counsel for the United States has already answered the question, by candidly admitting, that but for the illegality of the importation, the additional duties could not have been demanded. If then, the first part of this clause or paragraph, can be no otherwise construed than in reference to the rate of duties payable by law on the 16th of June, when this vessel arrived, to construe the latter part of it, in reference to the duties imposed by the act of the 1st of July, would be to involve the legislature in the absurdity of contradicting by one part of a sentence what it had expressly declared in another,—a construction, which should be avoided, if it can fairly be done. I think there is no difficulty in making all parts of this sentence harmonise together. The latter words are, "being paid or secured to be paid, according to law, as if the same had been imported and entered, at the time of the release thereof." The former part of the sentence, having declared what duties were to be paid, the question would naturally occur, at what time are these duties to be paid; in as much, as the cargoes may have been imported, at different periods, and have been laying in the public stores, unproductive to the owners? The just, the humane answer, to this question was, and so the law provides, that the duties should be paid, where prompt payment was required by law, or secured, where a credit was allowed; in like manner, as if the importation had been made, at the period when the possession of the goods was restored to the owners. So that if A.'s goods were imported in May, and B.'s goods in June, still, as they were equally deprived of the possession and use of them, until the time of their release; they should be entitled to the same length of credit, if their goods were released at the same time. The latter part of the sentence, does not declare that the duties shall be payable, as if the same had been imported and entered at the time of the release; but that they shall be paid, as if they had been so imported, and entered; clearly referring to the time of payment. This construction, is still further corroborated, by the second section of the act of congress of the 27th February, 1813 (4 B. & D. Laws U. S. [2 Stat. 804] 507), which is in pari materia with the above law, and is intended as a supplement to it. This section declares, that the duties required to be paid or secured by the above act, shall not be so paid or secured, in such manner as to postpone the payment, or, in other words, prolong the credit, beyond the time at which they would be payable, if the importation and entry had taken place, on the 27th February, 1813, when this law passed. Now this section clearly refers to the latter part of the clause or paragraph, of the act of the 27th January, before commented upon; and substitutes, for the most distant period from which the credit for duties was to run, the 27th of February, instead of the time of release as provided by that law; which might have been more distant.

Upon the whole I am of opinion that the plaintiffs are not liable to pay the double duties on these goods, and therefore that the judgment below must be reversed, and entered for the plaintiffs in error.

PEROTT (HALL v.). See Case No. 5,942.

PEROTTO, The VINCENZO. See Case No. 16,947.

Case No. 10,994.

PERRIGO et al. v. SPAULDING.

[13 Blatchf. 389; 2 Ban. & A. 348; 12 O. G. 352.] [1]

Circuit Court, N. D. New York. June 7, 1876.

PATENTS—AGREEMENT—THIRD PARTIES — EFFECT OF DECREE.

1. In a suit in equity on a patent for a machine, brought by B. against W., B. obtained a decree that W. had infringed, by making and selling machines, and ordering that W. account to B., both for the damages B. had sustained and for the profits W. had made, by the infringement, and fixing the amount of such damages and profits and directing the mode of payment. The amount was paid. Among the machines embraced in such suit, and covered by such decree, was one which W. had sold to S. After the decree was made, B. made an agreement with P., which was claimed by P. to affect the rights of S. in respect to such machine, and P., as owner of the patent, sued S., in equity, for an infringement by continuing to use the machine, and applied for an injunction to restrain such use: *Held*, that the application must be refused.

[Cited in Booth v. Seevers, Case No. 1,648a; Kelley v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 21.]

2. The agreement between B. and P. could not affect the rights of S.

3. S., by means of the decree and its payment, acquired the right to use the machine until it should be incapable of further use.

[Cited in Booth v. Seevers, Case No. 1,648a; Steam Stone Cutter Co. v. Sheldons, 21 Fed. 878; Kelley v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 21.]

4. The rules stated, as to when a recovery by a patentee against an infringer, and its payment, will carry a right, and when it will not.

[Quoted in Allis v. Stowell, 16 Fed. 786.]

[Cited in Porter v. Standard Measuring Mach. Co., 142 Mass. 195, 7 N. E. 928.]

[This was a motion for an injunction against the defendant on a bill in equity under letters patent granted to one Birdsall, to enjoin the use of an infringing machine. Prior to this the patentee Birdsall had sued the makers and vendors of the defendant's machine and recovered from them their gains and profits for all machines made and sold by them, among which was the defendant's machine. The complainants having acquired a territorial right from Birdsall now attempt to enjoin the use of the defendant's machine.] [2]

W. W. Hare, for plaintiffs.

Edgar P. Glass, for defendant.

JOHNSON, Circuit Judge. The rights of the defendant became fixed at the date of the decree in the suit between Birdsall and Wickson & Van Wickle, the vendors to Spaulding of the machine the use of which is sought in this suit to be enjoined. That decree was made in January, 1875. Its force and effect, as between the parties and their privies, could not be affected by a subsequent agreement between the plaintiff in that suit, Birdsall, and the plaintiffs in the present suit. Their agreement bore date in September, 1875. It attempted to engraft a clause contained in it upon an earlier agreement between them, which bore date in September, 1874. This it was competent for them to do, so far as their own rights were concerned; but the previously existing rights of third persons could not be thus affected. The decree against Spaulding's vendors must be looked to, in order to determine whether its effect was to authorize the use by Spaulding of the patented machine which he had purchased of them, until it should be incapable of further use. There is no question that the machine now owned by the defendant Spaulding was one of those for the making and selling of which Wickson & Van Wickle were sued by Birdsall, and for which he claimed to recover both profits and damages; nor that it was embraced in the decree in that suit; nor that the decree has been fully satisfied, in respect to the damages and profits awarded. The question is, therefore, what effect is to be given to the decree. By its terms, it adjudges that the defendants Wickson & Van Wickle have infringed the patents owned by Birdsall, by making and vending the machines manufactured by them, and orders that they account to the plaintiff both for the damages sustained by him and the profits made by them, in consequence of such infringement. It then declares that the amount of such damages and profits is adjudged to be the sum of one thousand dollars, and directs the mode of payment.

It seems to be well established, that, when a patentee gets his remuneration by patent or license fees, a recovery of the license or patent fee from an infringer, and its payment, authorizes him to use the particular articles for which such recovery has been had. On the other hand, when a patentee chooses to use his invention himself, and find his remuneration in the sale of the products of its use, and to prevent others from using his invention, it is his right, and then a recovery for profits and damages will be limited to the profits and damages up to the time of the recovery. Such a recovery will not carry with it any right to the further use by the infringer, of the invention. Suffolk Manuf'g Co. v. Hayden, 3 Wall. [70 U. S.] 315; Spaulding v. Page [Case No. 13,219]. But, where the patentee sells his patented instrument or machine for use by others, finding his remuneration in the profit of the sale of the manufactured machine or instrument, it is obvious that his interest is promoted by increasing the sale, and that into his profit enters the value of the patented invention over and above the cost of manufacture and the ordinary fair profit of the manufacture. Even if no patent or license fee is fixed, the value thereof, as a profit, enters into the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission.]

[2] [From 12 O. G. 352.]

selling price, and, if not capable of exact ascertainment, may, nevertheless, be approximated to by estimation, when necessary. When the patentee sells, he receives this profit, and thus obtains full compensation for the article sold and for the right to use it while it lasts. When, for an infringement, he obtains both the profits and damages, he will be presumed to have obtained a full compensation for all the injury he has sustained, and to be placed in as good a position as if he had made and sold the article himself. Such is, I think the presumption between parties thus situated, and, if any different rule is sought to be applied in any particular case, it should appear that a recovery has not been sought or obtained for the whole gains of the manufacture as well as for all the damages sustained. Spaulding v. Page, before cited; Gilbert & B. Manuf'g Co. v. Bussing [Case No. 5,416]. When a patentee manufactures and sells his patented article for use, the right to use passes by the sale. If an infringer manufactures and sells, he must account for and pay the profits, which are to be calculated upon the principle that the gain by the appropriation of the patentee's invention is their measure. If there are damages sustained and proved by the plaintiff, beyond the profits made by the infringer, these also may be recovered. But, when a full recovery and satisfaction from one party has been had, the patentee has obtained all that the law gives him, and the particular article or machine, if it be a machine, becomes, in effect, licensed by the patentee, and may be used so long as it lasts, free from any further claim by the patentee.

The motion for an injunction must be denied.

PERRILL (NORTHWESTERN MUT. LIFE INS. CO. v.). See Case No. 10,339.

Case No. 10,995.

In re PERRIN et al.

[7 N. B. R. (1873) 283.] [1]

District Court, S. D. New York.

MORTGAGE—VOID IN PART—PAYMENT OF CONSIDERATION—RECORDING—BANKRUPTCY.

1. A mortgage covering "a stock of lumber and moldings, and all renewals thereof from time to time," and other property, although void as to the lumber and moldings, may still be valid as to the other property.

2. Although the mortgage was recorded only the day before the petition in bankruptcy was filed, the evidence showed that the consideration did not pass until the mortgage was recorded. *Held*, that the transaction was an inchoate one, not consummated until the mortgage was recorded, but still, in point of time, a unit; being marked by good faith, the consideration ought to be regarded as passing when the mortgage was recorded. The court further *held* that the proceeds of the sale of the property, other than moldings and lumber, must be applied on the amount due on the mortgage.

[Cited in Sparhawk v. Richards, Case No. 13,205; Clark v. Hezekiah, 24 Fed. 667.]

[Cited in Cook v. Whipple, 55 N. Y. 156.]

[In the matter of Raymond S. Perrin and Isaac A. Hance, bankrupts.]

T. M. North, for assignee in bankruptcy.

W. B. Putney, for Collerd.

G. C. King, for Woods.

BLATCHFORD, District Judge. There can be no doubt that the mortgage to Collerd is void as respects the provision in it covering "the stock of moldings and lumber, and all renewals thereof" at Jersey City, and "the stock of moldings and renewals thereof from time to time" at New York. But it does not follow that the invalidity of this provision renders the mortgage void as respects the property other than the moldings and lumber. As respects such other property, the consideration of the mortgage was a present one and a valid one; and although the mortgage be regarded as having no validity whatever until it was filed as against creditors of the mortgagors represented by the assignee in bankruptcy, yet it was filed both in New York and in New Jersey before the petition in bankruptcy was filed. The title of the assignee relates back only to the filing of the petition; and although he may challenge transfers made by the bankrupt in fraud of his creditors, yet there is nothing to show that the mortgage to Collerd, considered as a mortgage of the property other than the molding and lumber, was one in fraud of the creditors of the mortgagors, even though not made until the time when it was filed. Considered with reference to the provisions of the thirty-fifth and thirty-ninth sections of the bankruptcy act, the mortgage, though not made until it was filed, cannot on the facts of the case be properly regarded as having been given for a precedent debt. The transaction was an inchoate one, not consummated till the mortgage was filed, but still, in point of time, a unit, and being marked by good faith, as the evidence shows, the consideration ought to be regarded as passing when the mortgage was filed, and not before. Although it was filed only the day before the petition in bankruptcy was filed, the conclusion cannot properly be reached, on the facts, that Collerd in consummating the transaction by filing the mortgage intended a fraud on the act [of 1867 (14 Stat. 517)], or had reasonable cause to believe that a fraud on the act was intended.

I am of opinion, therefore, that the proceeds of the sale of the property other than moldings and lumber covered by the mortgage to Collerd, must be applied on the amount due on that mortgage. As to the mortgage to Woods, it is a lien on that one of the two machines named in it which was at Jersey City when it was made, but not on the other one of the two machines. Any

[1] [Reprinted by permission.]

proceeds of the sale of the machine on which such mortgage is a lien must be applied on that mortgage as the first lien on such proceeds.

Case No. 10,996.

PERRIN v. EPPING.

[Chase, 430.] [1]

Circuit Court, D. South Carolina. 1869.

MARSHAL—COMPENSATION—FEES—RENTING BUILDING—DAMAGE TO BUILDING.

1. The United States marshal is compensated for his official service by fees, and can not lawfully rent any building in his custody, except under order of the court.

2. If he rents such property without authority, he is responsible in damages for any injury done to it in consequence.

The plaintiff in this cause had a mortgage on a building in Beresford street, and instituted proper proceedings to foreclose the same, in the course of which, after the decree of foreclosure, the house was taken possession of by the defendant, as marshal of this court, in order to hold it until the day of sale. The marshal rented the building to a large number of negroes,—some twenty or thirty of them, who occupied the rooms, six in number,—and, as the plaintiff alleged, injured it so as greatly to impair its value at the sale. The house was sold under the decree of foreclosure, and the marshal's bill for fees and costs paid under protest, among the costs being a charge of two dollars per day for taking care of this very house. Thereupon the plaintiff brings this suit against the marshal. He offered evidence to prove the facts as above stated, and, in addition, that the negroes had greatly damaged the house, had in fact almost torn it to pieces, and that the proceeds of sale were not near enough to pay the mortgage and also the fees and costs. The defendant, on the other side, offered evidence to prove that when he took charge of the building it was in a very dilapidated condition, very much out of repair, and required some one to live in it to prevent still further destruction. That believing it to be for the best interests of the mortgage creditor and mortgagor also, and for the benefit of the property, he rented it out to some negroes who were the most respectable people he could get to live in such a house, and to take charge of it, and that it was not injured by those tenants.

Porter & Conner, for plaintiff.
Simonton & Barker, for defendant.

CHASE, Circuit Justice. Gentlemen of the jury, there is very little in this case except a simple question of fact. The marshal is compensated for his official services by fees, and can not lawfully rent any building in his custody, except under the order of the court.

If the evidence in this case satisfies you that he did so rent the building in question, and that in consequence of such renting damages were sustained by the plaintiff, it will be your duty to render a verdict accordingly.

The evidence is conflicting. It is your business, gentlemen, to sift it. The amount of damages, if you find that any has been caused by the act of the defendant, is for your determination.

The jury returned into court with a verdict for plaintiff of $800 damages.

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

PERRIN (WHITE v.). See Case No. 17,555.

Case No. 10,997.

PERRINE v. THOMPSON.

[17 Blatchf. 18; [1] 8 Reporter, 329.]

Circuit Court, S. D. New York. August 11, 1879.

COURTS—CONFLICTING DECISIONS—MUNICIPAL BONDS—COUPONS.

1. After the court decided Cooper v. Thompson [Case No. 3,202], the court of appeals of New York decided, in Horton v. Town of Thompson, 71 N. Y. 513, that the act of the legislature of New York, passed April 28th, 1871 (Laws N. Y. 1871, c. 809, p. 1838), validating the irregularities of the commissioners in issuing the bonds of the town, was unconstitutional, and, after that decision, this court, in an action between the parties to this suit, adhered to the former decision of this court. In the present case this court adhered to its former decisions, there being no difficulties in the way of a review of the case by the supreme court.

2. The case of Warren Co. v. Marcy, 97 U. S. 96, followed, as conclusive against a defence predicated on People v. Benedict [47 N. Y. 667].

3. Where a plaintiff has the legal title to coupons, he can sue upon them, although he bought them merely with the object of bringing suit upon them in this court, and intending, if he collected them, to pay over a portion of the recovery to some other person.

4. Coupons payable to bearer are promissory notes, within section 1 of the act of March 3d, 1875 (18 Stat. 470), and the holder of them is not an assignee, but acquires his title by delivery.

[This was an action by Orlando Perrine against the town of Thompson.]

James K. Hill, for plaintiff.
Timothy F. Bush, for defendant.

WALLACE, District Judge. Since the decision of this court in Cooper v. Thompson [supra], the highest court of the state has decided (Horton v. Town of Thompson, 71 N. Y. 513) that the act of the legislature, passed April 28th, 1871, validating the irregularities of the commissioners in issuing the bonds (Laws N. Y. 1871, c. 809, p. 1838) was unconstitutional; and, since that decision by the

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state court, Judge Shipman, in this court, in an action between the present parties, adhered to the former decision of this court. The supreme court of the United States has sustained the validity of legislative acts of the same general character as the one in question (Thomson v. Lee Co., 3 Wall. [70 U. S.] 327; The City v. Lamson, 9 Wall. [76 U. S.] 477; Ritchie v. Franklin Co., 22 Wall. [89 U. S.] 67), but in no case of which I am aware, where the highest court of the state in which the action was tried had pronounced the legislation unconstitutional. But, in Town of Venice v. Murdock, 92 U. S. 494, the supreme court refused to consider itself required to yield its own convictions as to the right of a holder of municipal bonds to recover, although the highest court of the state had decided, that, under the construction to be given to the statute under which the bonds had been issued, there could be no recovery upon the bonds. Under these circumstances, I think the more seemly disposition of the case requires me to adhere to the former decisions of this court, until the case is reviewed by the supreme court. If there were any difficulties in the way of such a review, I should certainly suspend the determination of the case until the cases now in the supreme court, involving the same question, should be adjudged. The case of Warren Co. v. Marcy, 97 U. S. 96, is a conclusive authority against the defence predicated upon the action and judgment in People v. Benedict [47 N. Y. 667]. The evidence would not have authorized the jury to find that the plaintiff's purchase of the coupons in suit was colorable and fictitious merely. Quite likely he bought them mainly with the object of bringing suit upon them in this court, and intending, if he collected, to pay over a portion of the recovery to some other person; and, perhaps, the jury would have been justified in finding that the coupons were sold by the owner, as well as bought by the plaintiff, with this understanding. Nevertheless, the plaintiff acquired the legal title, and, this being so, the motive of the transaction is not material. McDonald v. Smalley, 1 Pet. [26 U. S.] 620; Smith v. Kernochen, 7 How. [48 U. S.] 198, 216. The plaintiff is not an assignee, but acquired his title by delivery, and the coupons are promissory notes within section 1 of the act of March 3d, 1875 (18 Stat. 470). Cooper v. Thompson, supra, and cases there cited. The motion for a new trial is denied.

[NOTE. There were several similar actions brought by the same plaintiff against the town of Thompson. In each of these there was judgment in the circuit court in favor of the plaintiff. The plaintiff's right to so recover was affirmed in the supreme court in Town of Thompson v. Perrine, 103 U. S. 806; Id., 106 U. S. 589, 1 Sup. Ct. 564; Id., 106 U. S. (Lawy. Ed.) 300, 1 Sup. Ct. 568.]

PERROT (TABER v.). See Case No. 13,721.

Case No. 10,998.

In re PERRY.

[1 N. B. R. (1868) 220 (Quarto, 2);[1] 1 Am. Law T. Rep. Bankr. 4.]

District Court, N. D. New York.

BANKRUPTCY — CREDITORS OMITTED FROM SCHEDULES—NEW WARRANT—APPLICATION TO REMOVE ASSIGNEE—NOTICE.

1. A bankrupt omitted the names of certain creditors from his schedules, for the reason that he supposed the statute of limitations was a bar to the debts due these creditors. *Held*, that the debts in question should have been included in the schedules, and that those creditors were entitled to notices of the proceedings.

[Cited in Re Hertzog, Case No. 6,433.]

2. After the schedules are amended, a new warrant should issue, to be served on the creditors whose names have been introduced by the amendment.

[Cited in Re Heller, Case No. 6,339.]

3. The notices should contain the names of all the creditors; if these have been properly published under the original warrant, they need not be repeated.

4. When an assignee has been chosen by creditors under the first warrant, notice of the application to remove him should be given, so that all the creditors who have proved their debts may be heard in such application.

In bankruptcy.

HALL, District Judge. In this case of voluntary bankruptcy, the petition was filed on the 5th day of September last, and on the 10th day of September the petitioner was adjudged a bankrupt. The usual warrant was issued requiring notices of the first meeting of creditors, on the 28th day of that month, to be given by the marshal. On the 25th day of the same month, an affidavit was presented showing that the names of certain creditors had been, by mistake, omitted in making up the schedule annexed to the original petition, but that their names, residences, &c., had been furnished to the marshal, so that notice of such warrant and meeting would be served on them; and an application was made upon such affidavit for an order allowing the proper amendment of such schedule. The order allowing such amendment was made, and on the 28th September the register, upon the failure of the creditors to choose an assignee, appointed an assignee of the bankrupt. This appointment was approved by the judge, and the assignee has made and filed his report.

The bankrupt now presents an affidavit showing that the names, &c., of some twenty other creditors, to whom he was indebted in considerable sums, amounting in the aggregate to more than $200,000, were omitted from the schedules annexed to the original petition, by reason of the debtor's understanding, and belief, that the statute of limitations was a bar to the debts due to such creditors. The omission is satisfactorily ex-

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[1] [Reprinted from 1 N. B. R. 220 (Quarto, 2), by permission.]

plained, and no doubt is entertained in regard to the propriety of allowing the proposed amendment. The debts, though perhaps barred by the statute of limitations of this state, might yet be enforced against the petitioner under the laws of another state, and they should have been embraced in the petitioner's schedule; and the parties, to whom those debts are due, are entitled to notice of the proceedings under the petition of the bankrupt. The only questions which require consideration are those relating to the practice which should be adopted in this and similar cases, in order to secure to the creditors whose debts were not embraced in the original schedule, the rights to which they are entitled under the bankrupt act, and, as these questions may frequently arise, it is deemed proper (although the application in this case is not opposed) to indicate what practice should be pursued in similar cases. Under the 26th section of the bankrupt act [of 1867 (14 Stat. 529)] and the 5th and 33d general orders, this application may be made to the register to whom the case stands referred; and such register may allow and act upon the amendment when applied for and made as provided for in general order No. 33.

The more difficult questions relate to the practice to be pursued after the amendments have been made. After the best consideration I have been able to give these questions, I am inclined to think that when the amendments have been made, the register should issue a new warrant, briefly reciting the proceedings, and commanding the marshal to serve upon the creditors whose names have been introduced by the amendments, proper notice of a meeting of the bankrupt's creditors, to prove their debts, and to choose an assignee or assignees of his estate—substantially in the form required by the original warrant. These notices should include the names and residences of all the creditors, with the amount of their debts, &c., as in the first notices, and should be served in the same manner, and the same length of time before the day of meeting, as would have been proper if their names had been included in the original warrant. The newspaper notices, if they have been properly given under the original warrant, need not be repeated, nor need the creditors on whom the former notices were served be served with new notices unless such creditors appeared at the meetings held under the prior notice or have proved their debts. At the meeting held under the notices required by the warrant issued upon these amendments, the creditors appearing may, if they choose, select an assignee, and may then apply to the district court to remove the assignee already appointed, and to appoint the person so chosen in his place. In a case where an assignee has been chosen by creditors under the first warrant, or where creditors not voting at the second meeting have proved their debts, notice of the application to remove the assignee so chosen should be given to all creditors who have proved their debts, in order that they may be heard on such application.

The affidavit and proposed amendments will be returned to the petitioner, that he may make an application to the register to allow the amendments proposed.

Case No. 10,999.

In re PERRY et al.

[7 West. Jur. 379; 20 Pittsb. Leg. J. 184.]

District Court, E. D. Massachusetts. April Term, 1873.

BANKRUPTCY—PREFERENCES—PAYMENTS WHEN INSOLVENT—DISCHARGE—BAR—FAILURE TO KEEP PROPER BOOKS.

1. A trader who is insolvent and knows it, and pays in full or secures the debt of one creditor, may be presumed to intend to prefer that creditor.

2. This rule should not be adopted as a rigid and unvarying test of a technical fraud on the act under section 29 [14 Stat. 531].

3. A bankrupt is presumed to know the contents of his books, and if they show him insolvent just before he stops payment, some payments can always be pointed out which were preferences.

4. He "suffering" his estate to be taken by creditors, by failing to go into voluntary bankruptcy when his property is seized or attached by one or more creditors, is at best but a doubtful bar to a discharge.

5. Where it is customary with a firm to carry forward a large part of the firm's cash account from day to day on slips of paper, and the items are not recorded or fully shown on the account books at any time, so that creditors are prevented from acquiring information relative thereto, this amounts to a failure to keep proper books of accounts, and, being objected to at the time of an application by the bankrupts for a discharge, offers a sufficient reason to refuse the discharge.

[In the matter of Perry & Allen, bankrupts.]

Audley W. Gazzam and W. F. Slocum, for objecting creditors.

A. W. Boardman, for bankrupt.

LOWELL, District Judge. It is admitted that the defendants kept a shop at which they sold hats and furs at retail; that they began business with borrowed capital, and were insolvent for many months before they became technically bankrupt; indeed it would hardly be extravagance to say that they never were solvent. The objecting creditors have picked out of the defendants' books of account many of the payments made within four months before the petition was filed, and allege each of them to be an act of fraudulent preference, which must prevent the discharge of these bankrupts. I have had occasion more than once to confess the difficulty which I find in applying the law of preference. There is the best authority for saying that a trader who is insolvent, and knows it, and pays in full or secures the debt of one creditor, may be pre-

sumed to intend to prefer that creditor. Toof v. Martin, 13 Wall. [80 U. S. 40]. This agrees with the law which the lower courts have usually laid down. Yet, if this be adopted as a rigid and unvarying test of a technical fraud on the act under section 29, it is plain that few if any traders can ever obtain a discharge, because it will almost always be practicable to prove that any trader was insolvent before he stopped payment, and it must usually be presumed that he had knowledge of his own affairs, and all that an opposing creditor has to do is to select the last note or debt that has been paid, or the last but one or two or three, and the preference is a mere matter of inference. If the books of the bankrupt show insolvency and he is presumed to know the contents of his books, some payments can always be pointed out which were preferences. I have never been able to bring myself to believe that it was the intention of congress to adopt a standard of that sort, which would leave every merchant and tradesman at the mercy of a single objecting creditor. It is essential to the success of the bankrupt system that the assignee should be able to set aside preferences, and perhaps in aid of this result that the discharge of the debtor should be contingent on his conformity to the law in this respect as in all others. Still, when a trader has been going on in the regular course of his business without really intending to favor one creditor above another, it is rather a hard measure for him that a court or jury should decide after the fact, that because he has gone on too long he shall lose all benefit of the act. It may be that the courts can fairly give a slightly different construction to the "fraudulent preference" of section 29, which is to affect the discharge from that which obtains under the other sections (sections 35 and 39) relating to the avoidance of the payment or security. It seems to be the prevailing opinion that under these latter a mere neglect of the debtor to go into bankruptcy, when his property is seized or attached by one creditor, may be construed into a preference, as "suffering" his estate to be taken; but it does seem to me very doubtful if this can be a bar to the discharge, because in section 29, the word "suffer" is omitted, and the bankrupt is to lose his certificate if within four months he has "procured" his lands, &c., to be seized or sequestered. We must take this difference into account in seeking to discover the meaning of the other clause, "or if he has given any fraudulent preference contrary to the provisions of this act." Nor is it without significance as I pointed out in Re Locke [Case No. 8,439], that section 29 in one of its later changes undertakes to define a preference as being an act done by the debtor in contemplation of becoming bankrupt, which undoubtedly means a contemplation of actually taking the benefit of the statute. Buckingham v. McLean, 13 How. [54 U. S.] 150. There are several cases in which the law uses language which is identical, or nearly so, in different senses. This in prize and joint captors meant one thing in one part of the prize acts, and quite a different thing in another part of the same acts. The Selma [Case No. 12,647]. Or to take a more familiar example, "perils of the seas," has a totally different meaning in a policy of insurance from what is given it in the contract of affreightment, so that an underwriter is bound to indemnify against the loss arising from many acts of the master and crew of a vessel as being perils of the seas, which could not be relied on as such perils to exonerate a carrier whose contract contained the exception of sea perils. In this case the evidence does not show that the bankrupts intended to prefer any friend or any one else excepting by the sort of inference above mentioned, which may be ascertained from the books. They swear that they had no such intent, and the fact seems to be simply that they continued business after they should have known that they were insolvent, and of course paid rent notes and other debts as usual, sometimes to the objecting creditors, sometimes to others, as might chance. I do not find in the statute any discretion vested in me in such a case to grant or withhold the certificate as upon the whole I may deem most just, and can here only report my doubt whether this is a case for refusing it. The other objection taken by the plaintiffs must prevail. This is that the books of account were not kept properly. It was the habit of the partner who was the book-keeper of the firm to carry forward a large part of his cash account from day to day on slips of paper. I do not know that this practice can be wholly avoided, but if resorted to it should be so managed that the items can be recorded on the books at any time and thus give the creditors the necessary information of the bankrupt's transactions. In this instance something above $2,600 is accounted for by six items on the debtor side and three on the creditor side. Showing among other things, $2,000 borrowed of one person, and over $1,000 drawn out by each of the bankrupts. The evidence disclosed that these three items were made up of numerous lesser ones, made at different times, of which there remains no record, because the habit was to carry to a new memorandum only the footings of the old one. It is impossible therefore, for the assignee to tell from the books and memorandum together when or in what sums or for what purpose $2,100, or thereabouts, was received and drawn out. This sum, considering the scale of the bankrupts' business, was a considerable one, and I feel bound to say that the neglect to keep a permanent account of it, which could be verified and examined, seems to me to amount to a failure to keep proper books of account under the circumstances of the business. It is a question which must be decided in each case upon the facts as they appear, and not upon any

strict rule that such and such books and such and such entries are essential in all cases. Discharge refused.

PERRY v. BARNEY. See Case No. 11,013.

Case No. 11,000.

PERRY et al. v. BARRY.

[1 Cranch, C. C. 204.] [1]

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

PARTIES — ASSIGNEES OF BANKRUPT UNDER ENGLISH STATUTE—PROMISE TO PAY—NO CONSIDERATION.

The assignees of a British bankrupt cannot maintain a suit in their own names, in Maryland, against a debtor of the bankrupt, and it seems that a promise to pay the money to them would be void for want of a consideration.

Indebitatus assumpsit for money had and received by defendant [James Barry] to the use of the bankrupt [Nantes, surviving partner of R. Muilman & Co.], and of the plaintiffs as his assignees. Hadfield, of London, held a protested bill for $19,000, drawn by Browne, of Richmond, Virginia, and assigned it to Muilman & Co., of London, for collection, who employed Barry (the defendant) as their agent to collect it. Muilman & Co. became bankrupt. Barry collected the money and remitted it to Hadfield, who afterwards also became bankrupt. The assignees of Muilman & Co. contended that the money belonged to that house, and brought this action to recover it.

C. Lee, for plaintiff, contended, 1st. That all the right of Muilman & Co. was transferred to their assignees; 2d. That they were competent to receive a promise from the defendant to pay, and to maintain this action upon such a promise; 3d. That the letter of the 18th of July, 1798, and the other letters amount to a special assumpsit and account current with Muilman & Co., and a promise to pay to the plaintiffs; and prayed the court to instruct the jury, 1. That plaintiffs had a good title to the money, and, 2. That it was not defeated by the payment to Hadfield. Upon the first point he cited the following cases: Phillips v. Hunter, 2 H. Bl. 409; Young v. Willing, 2 Dall. [2 U. S.] 276; Harris v. Mandeville, Id. 256; Emory v. Greenough, 3 Dall. [3 U. S.] 369; Bruce v. Bruce, 2 Bos. & P. 229, note; Pipon v. Pipon, Amb. 25; Cook, Bankr. Law, 497; Hunter v. Potts, 4 Term R. 182.

Mr. Mason, for defendant, contended, 1st. That the assignees, under the British bankrupt laws, have no power to maintain an action, as such, in this court; 2d. That nothing which has passed between James Barry and the assignees has given them that right. 1. The laws of one country have no effect in another. Cheston v. Page, 4 Har. & McH. 463 (in the court of appeals in Maryland); Sill v. Worswick, 1 H. Bl. 665; Hunter v. Potts, 4 Term R. 182; Phillips v. Hunter (in the exchequer) 2 H. Bl. 409. The point decided in these cases is, that in case of a British bankruptcy, if a British subject sends to a foreign country and gets effects of the bankrupt, and brings them to England, the assignees have a right to recover them. But that is not the present case. This debt was not contracted in England, but in America. Mr. Barry, the defendant, is not a British subject. The bankrupt laws of England were never considered as of force in Maryland, and many tracts of land in that state are now held under attachments against bankrupts. A large tract, called "Bradford's Rest," is now thus held by Colonel George Plater. Mr. Brown of Annapolis, a fugitive bankrupt, now maintains actions in his own name. If this should be considered as a voluntary assignment, yet it will not authorize the assignees to sue in their own name. A chose in action is not assignable. By the local law of this country, this debt cannot be assigned. Assignees may sue in the name of the bankrupt. The acts of assembly of Maryland, 1704, c. 29, and 1753, c. 36, give the commissioners of bankruptcy a right to sue, provided they shall give bond, &c.; this shows that the statutes of bankruptcy did not extend to this country. 2. Nothing has passed between the plaintiffs and the defendant which will authorize them to maintain this action. 1. There is no promise contained in the letter; 2. If there is such a promise, it is void for want of consideration. The assignment was of no force (according to the acts of 1704 and 1753) until the assignees should give bond, &c., which they never did. The remedy must be pursued according to the laws of this country.

THE COURT was of opinion, 1. That the assignment did not give the assignees a right to maintain an action in their own names in right of the bankrupt, and that whatever may be the general principle, it must yield to the laws of Maryland (1704 and 1753) enacted upon that subject; 2. That there was no evidence of an express assumpsit by the defendant to the plaintiffs, and if there was, yet as the assignment is to be considered as totally void, there was no consideration; 3. That if the action had been in the name of the bankrupt, the assignment, being void, could not have been set up as a bar.

The plaintiffs became nonsuit.

[For an action by the same plaintiffs against other defendants, see Perry v. Crammond, Case No. 11,005.]

PERRY (CARROLL v.). See Case No. 2,456.

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

Case No. 11,001.

PERRY v. CORNELL.

[1 McA. Pat. Cas. 66; Cranch, Pat. Dec. 130.]

Circuit Court, District of Columbia. June 23, 1847.

PATENTS—INTERFERENCE PROCEEDINGS — TAKING DEPOSITIONS—NOTICE—PRACTICE ON APPEAL.

[1. Depositions taken without notice to one of the parties to an interference cannot be used against him, unless he has waived his right to notice. And such waiver is not shown by the fact that he gave notice to the other party to produce the depositions before a commissioner for inspection and examination of counsel, and that he refused an offer of the other party to again have the witnesses before the commissioner for cross-examination, for he was entitled to be present at the examination in chief.]

[2. There is no impropriety in the patent office having present at the hearing on appeal one of its officers, who attends, not as counsel for the commissioner or the office, or as an advocate of either party, but for the purpose of explaining the commissioner's decision.]

[This was an appeal by Alonzo D. Perry from a decision of the commissioner of patents, in interference, awarding priority to Samuel G. Cornell in respect to an invention of an improvement in machines for making lead pipe.]

Chas. M. Keller, for appellant.

E. B. Stoughton, for appellee.

W. P. N. Fitzgerald, for commissioner.

CRANCH, Chief Judge. The first reason of appeal is, that the evidence does not show Cornell to be the first to conceive the idea of a machine such as he now claims. The question, therefore, is, what is the evidence? The counsel for Mr. Perry offered to the commissioner of patents the deposition of Robert J. Craig and twenty other witnesses taken without notice to this applicant, Samuel G. Cornell. These depositions, therefore, cannot be used against him, unless he has waived his right to notice and agreed to admit them to be read in evidence before the commissioner of patents. It is suggested that the notice given by Mr. Cornell's counsel to the other parties litigant to produce these depositions before a commissioner for inspection and examination by his counsel, and the offer by Mr. Perry to have witnesses again before the commissioner, to be cross-examined by Mr. Cornell's counsel, and his refusal to cross-examine them when produced, was equivalent to a waiver of notice. I am not, however, of that opinion. Mr. Cornell had a right to be present at the direct examination-in-chief. But it is said that the commissioner of patents has received these depositions in evidence; and as he decided in favor of Mr. Cornell, he cannot appeal upon that ground. But the commissioner in his judgment says it is unnecessary to decide the question raised in reference to the admissibility of the evidence, as its rejection would not vary the result. It is plain, therefore, that he did not decide that question. There is no evidence that Mr. Cornell or his counsel has ever agreed to admit these depositions as evidence against him. They must therefore be rejected. Mr. Keller, the agent of the defeated applicant, objects to my hearing any argument by an officer or counsel of the patent office. Heretofore it has been usual for some officer of the patent office to attend the hearings before the judge upon appeals from the judgment of the commissioner, and no objection to that course has been taken until this time. The officer who attends is not considered as counsel for the commissioner or for the office, and I should think he could not with propriety be considered as an advocate of either of the parties litigant. I have heretofore considered him as attending for the purpose of explaining the decision of the commissioner, and not as arguing the cause of either of the litigants. He can only appear as an officer of the department; as such, I shall always be willing to avail myself of his assistance in the investigation of the truth.

[Upon final hearing the decision of the commissioner of patents was affirmed. Case No. 11,002.]

Case No. 11,002.

PERRY v. CORNELL.

[1 MacA. Pat. Cas. 68; Cranch, Pat. Dec. 132.]

Circuit Court, District of Columbia. July 7, 1847.

PATENTS — PRIORITY OF INVENTION — REDUCTION TO PRACTICE—LACHES OF INVENTOR.

[1. To be the first inventor, it is not necessary that he who first conceived the idea should first reduce it to practice in any other sense than to so describe it on paper, with such drawings or model as to enable any person skilled in the art to make and use the same.]

[2. A delay of three years after showing forth the complete invention on paper *held* not to bar the issuance of a patent, where no patent had been previously granted, and the case involved only conflicting applications.]

[This was an appeal by Alonzo D. Perry from a decision of the commissioner in interference proceedings awarding priority to Samuel G. Cornell in respect to the invention of an improvement in machines for making lead pipe.]

The Commissioner:

Cornell is not debarred from obtaining a patent by reason of the fact that he did not reduce the invention to practice until after the other parties had built their machines. It is sufficient for the present purpose to state the law as understood by the office, and show its application to the facts presented in the testimony. It appears by the testimony that Cornell described the machine fully to a practical mechanic, so that he perfectly understood it; that he repeatedly made working drawings representing the machine in so clear a manner that the mechanic was

able to make drafts and estimates of its cost, and absolutely did both without the assistance of Cornell. In a word, Cornell made the invention as clearly understood as if the machine had been built and put into operation. The principal merit of the invention in this case was in the conception of the idea, and not, as in many cases, in devising means for carrying it out. After the principle was suggested, any competent mechanic could build the machine without inventing or contriving any devices, but by merely the exercise of his trade or art as previously applied to machinery for the same purpose. It appears, therefore, that Cornell had done all that an inventor, as such, could do, and nothing remains to complete the machine but the labor of the mechanic, which certainly cannot be confounded with invention. The greater number of inventions daily patented have never been reduced to practice, and the office holds that invention may be as distinct from reduction to practice as it is from the sale of a machine. There is always a line of demarkation between the province of the inventor and that of the mechanic; and although the boundary is not always obvious, in the present case it is sufficiently so, and it is urged that Cornell covered the whole ground appropriated to the inventor, and that he left nothing undone, except what belongs to the capitalist. There is nothing whatever to militate against this position, except the dictum that "he who first reduces the invention to practice is the first inventor" —a dictum which, though often quoted and reiterated, was not applicable to nor borne out by the case in which it was first pronounced, nor by any of the cases in which it has subsequently been repeated, and which, in the broad terms in which it was announced, is not, and never has been, the law. If by reduction to practice is meant rendering a principle practicable or useful in a new way, and clearly pointing out the way in which it may thus be made useful, so that any competent mechanic can avail himself of it, then and in that sense an invention must be reduced to practice. Neither the statutes nor the decisions of the courts require that a machine should be built or used as a part of the invention, and before the party can be considered an inventor. The explanation here given of the proper reduction to practice is the only one which will reconcile the decisions and make them conform to the statutes respecting patent rights.

Chas. M. Kellar and J. J. Greenough, for appellant.

E. B. Stoughton, for appellee.

W. P. N. Fitzgerald, for commissioner.

CRANCH, Chief Judge. There were four conflicting applications for a patent for the improvement: (1) By John Robertson, on the 9th of September, 1846. (2) By Alonzo D. Perry, on the 6th of October, 1846. (3) By Stephen Parks, Jr., on the 12th of November, 1846: and (4) By Samuel G. Cornell, on the 21st of December, 1846. Before the application of Samuel G. Cornell, and while the litigation was going on between the other three applicants, the depositions of twenty-one witnesses had been taken on the part of those applicants, respectively, and, of course, without notice to Mr. Cornell, who had not then made his application. These depositions were returned to the commissioner of patents, and objected to by Mr. Cornell's counsel for want of notice. [See Case No. 11,001.] The commissioner, without deciding upon the question of admissibility of the evidence as to Mr. Cornell, awarded to him the priority of invention, saying: "The decision of the question raised in reference to the admissibility of testimony is unnecessary to decide. Its rejection would not vary the result; the testimony is therefore received, and priority of invention awarded to Samuel G. Cornell, March 24th, 1847."

From this decision Mr. Perry has appealed, and his reasons of appeal are, in effect: (1) That the evidence does not show that Mr. Cornell was the first to conceive the idea of a machine such as he now claims, but that the plan proved to have been so conceived is essentially different and mechanically inferior to the one claimed and now awarded to him by the commissioner; (2) that the evidence on which the decision in favor of Mr. Cornell is based is contradictory, and insufficient to establish his claim even to the conception of the idea of the principle or mode of operation of the machine now sought to be patented, but, on the contrary, shows that the plan said to have been conceived was entirely different; and (3) that if he did conceive the idea of the principle or mode of operation of a machine substantially similar to the one now claimed, and did describe to the witness such a machine prior to the date of invention claimed by the applicant (Perry), yet it was merely an intellectual invention, based on theory, and not an invention in the meaning of the law.

The commissioner has laid before me "the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal," to which my revision must be confined, as provided in the eleventh section of the act of March 3, 1839, c. 88 (Pamph. Ed.) pp. 75, 76. The grounds of the decision of the commissioner, as set forth in writing, are, in substance: "That it is proved by the testimony of William Frost, and confirmed by that of Benjamin Peck, that the said Cornell invented the machine in dispute as early as the summer of 1843; and there is no testimony that tends to show that either of the other parties invented it until a considerable time afterwards." That "it appears by the testimony of Frost that Cornell described the invention to him fully, so that he perfectly under-

stood it; that he repeatedly made draughts representing it in so clear a manner that the said Frost was able to make draughts and estimates of cost, and absolutely did make both with the assistance of Cornell." That "Cornell made the invention as clearly understood as if the machine had been built and in operation." It appears, therefore, that he had done all that an inventor as such could do, and nothing remained to complete the machine but the labor of the mechanic, which cannot be confounded with invention. The greater number of inventions daily patented have never been reduced to practice. In the grounds of his decision the commissioner controverts the dictum found in some of the books, that "he who first reduces an invention to practice is the first inventor"—a dictum which, he says, "although often quoted and reiterated, was not applicable to nor borne out by the case in which it was first pronounced, nor by any of the cases in which it has subsequently been repeated, and which in the broad terms in which it is announced, is not, and never has been, the law. If by reduction to practice is meant rendering a principle practicable or useful in a new way, and clearly pointing out the manner in which it may be thus made useful, so that any competent mechanic can avail himself of it, then, and in that sense, an invention must be reduced to practice;" but "neither the statutes nor the decisions of the courts require that a machine should be built and used as a part of the invention before the party can be considered an inventor, but that the sense above alluded to is the sense in which the courts have used the phrase 'reduction to practice,'" and the only sense which will reconcile the "decisions and make them conform to the statutes regulating patent rights."

The other two applicants—Mr. Robertson and Mr. Parks—have not appealed; so that the contest is now between Mr. Perry and Mr. Cornell only.

It is admitted that a great and valuable improvement has been made in the old machine for making lead pipe; and the principal, if not the only, point involved in the reasons of appeal is the question "which, or whether either, of these two applicants is entitled to receive the patent prayed for;" and this is to be decided by the evidence produced before the commissioner. The twenty-one depositions taken in the conflict between Robertson, Perry, and Parks, being taken without notice to Cornell, are not evidence against him, and therefore cannot be considered by the judge upon appeal. The only evidence which he can consider is that which is contained in the depositions of William Frost and Benjamin Peck and in the cross-examination of Mr. Cornell himself by the counsel of Mr. Perry. The question, then, is, whether the machine described by Mr. Cornell to those two witnesses is substantially the same as that for which he asks a patent. The improvement consists in the great diminution of the friction of the machine, by which the same effect is produced by a power much less than that which was necessary to work the old machine. As the question is merely priority of invention, it is not necessary to describe the particular alterations of the old machine which constitute the improvement. It is, however, necessary to examine the testimony to see whether the improvement which Mr. Cornell described to the witness is substantially the same as that for which he now claims a patent. It appears by the deposition of Mr. William Frost, the principal witness, and who seems to have testified fairly and intelligently, that Mr. Cornell, in June or July, 1843, described to the witness a plan for a machine for making lead pipe different from any machine for that purpose then in use; and that he intended to use a hollow ram with an aperture in the bottom coming out at the side of the ram; that he intended to place a die on the top of the ram, then to have a mandril pass through the top of the cylinder long enough to pass through the interior of the die, leaving a space between the mandril and the die for the lead pipe to pass through when the ram was forced up against the lead, making the pipe from that portion of the lead which was first acted upon by the top of the ram being pressed against it; his object being, as he stated it, to avoid the immense friction that was produced by driving so large a mass of lead before the ram out through the aperture, as used in many other machines then in use; that he (Mr. Cornell) exhibited to the witness a sketch or drawing of his plan, and the witness then prepared and produced a drawing of Mr. Cornell's plan, as he then drew and described it, which is annexed to his deposition, and marked "A;" that about a fortnight afterward the witness had a further conversation with Mr. Cornell in relation to his said plan for a pipe-machine in Mr. Cornell's office in New York; that he then stated to the witness and described the manner in which he intended to construct a pipe-machine for the purpose of passing the lead through the interior of the ram and forming a movable mandril in connection with the hollow ram, and for forming the pipe at the point on which the ram pressed against the lead; that Mr. Cornell made a sketch of such machine, a copy of which this witness has made, thinking it might be called for, and to explain the arrangement which he then described. Mr. Cornell said he intended to make such a machine. The counsel for Mr. Perry objected to the introduction of the copy of Mr. Cornell's sketch unless the loss of the original should first be proved. After the proof of the loss of the original, the witness produced and filed his copy, which is annexed to the deposition, and marked "B."

It further appears by the testimony of the witness William Frost that the sketch or

drawing "B" differs from the sketch or drawing "A" in having two cross-heads and two rods to connect them together; also an upper movable mandril, which was connected to the upper cross-head and kept in its proper position by means of a stand or frame, which was secured to the lead cylinder, the lower cross being secured to the ram rising from the hydraulic cylinder; the upper mandril or ram, he stated, might be hollow or solid, for the purpose of holding either the short mandril or die; that these drawings do not exhibit the nuts, bolts, or screws, or the manner in which the different parts are guided or secured to each other, but merely the arrangement of the raised dies and mandrils to each other, and as he designed to place them for the purpose of manufacturing lead or other pipe; that the leading essential feature of those two plans, which distinguished them from machines previously known for the purpose of making lead pipe, is the hollow ram and the die placed on the top of it, and the forming of the pipe on the head of that ram from the point where it presses against the lead, and the passing of the pipe when so formed in the interior of the ram; that the second plan drawn and described to this witness contained this essential feature or difference, with the addition of the parts which are before described; that from the drawings and descriptions so made by Mr. Cornell to this witness he could make and construct machines for making pipe upon those plans; that the drawing marked "Exhibit B" shows the relations of the rams to each other, of the die, of the short mandril, of the cross-heads, and the rods which connect them together, as also the lead cylinder, the cast-iron stand or frame, the hydraulic cylinder, and a portion of the ram rising therefrom, as also the columns for connecting the hydraulic and lead cylinders together; it also shows the upper hollow ram, as also the lower hollow ram, with the apertures through the ram. It does not describe the manner in which the different parts are secured to each other, but simply the arrangement described by Mr. Cornell in New York. The witness says he is not aware that Mr. Cornell ever built a machine with the improvements which he described to the witness. He further testified that Mr. Cornell, at different times, showed him at least half a dozen drawings like Exhibit B, on separate and distinct pieces of paper; also two in Connecticut and two in Brooklyn; also two like Exhibit A—one of them on board of the steamboat Croton, in June or July, 1845, and the other at his factory in Glenville, Connecticut; that in the fall of 1844 he made, at the request of Mr. Cornell, an estimate of the cost of such a machine as that described in Exhibit B.

The witness Benjamin Peck testified that in June, 1843, before Mr. Cornell had applied for a patent for his invention of an improvement in the machine for the manufacture of lead pipe, he communicated to this witness his plan for the construction thereof; that he stated that the die was to be attached to the end of the ram, the ram to be hollow, the pipe to form at the end of the ram, and pass down through the hollow ram; that the object was to prevent friction; the core was to pass through the cylinder, the end of it to be inserted in the die, the die and mandril to move together; that the mandril forms the inside of the pipe; it is sometimes called the core; the pipe is formed over the mandril or core; the hollow ram and the movable mandril were to move together by force of an hydraulic press; that Mr. Frost was present at this communication. This witness states that the machine for which Mr. Cornell seeks a patent contains, among other things, the lead cylinder, the ram, the die, and the core-rod or mandril. That the construction of this machine differs from that of the old machine which was worked by Parks in this: the die is placed at the head of the ram; in the old one at the top of the cylinder. In this the pipe forms at the head of the ram; in the old one at the top of the cylinder. That the advantage of this over the old one is, that in the old one the whole body of lead from the body to the top of the cylinder was required to move in a body in order to form the pipe at the top of the cylinder, whereas in this improvement the main body of lead is not required to move, because the pipe forms at the head of the ram immediately after the pressure is put on, and passes out through the ram. That about two months ago (November, 1846) Mr. Cornell showed this witness a pencil sketch of his improvement, saying that that was his plan for the machine for which he was about to get a patent and to have a model made of it. That sketch did not show the hollow ram. That when Mr. Cornell showed to this witness that sketch, he said that was a sketch of his invention, which he had before disclosed to this witness, and that there was a die at the head of the ram, and that the ram was hollow. That on the sketch he saw he could not say whether the ram was hollow or not; he thinks there was no hydraulic press on that sketch; there was a lead cylinder and a mandril, core, or ram; the end of the core or mandril extended out of the top of the cylinder, and down to the head of the ram, or near to it. This witness was sure there was a representation of a ram; one end of the ram was placed near the cylinder, the other below. He thinks that no part of the ram, as represented in the sketch, entered the lead cylinder. That the ram of the lead cylinder, as represented in the sketch, was a round piece of iron. This witness only saw the sketch for a few minutes, and handed it back to Mr. Cornell. Being asked, in cross-examination, to describe the frame-work of the machine as it appeared on the said sketch, he says there was a mark across the top, which he supposed represented a piece, and

one straight line down each side; the core was in the centre of the cylinder; one end projected at the top, and came down near the bottom cylinder; there was a piece across the top. He does not recollect seeing the die. He does not know by whom the sketch was made. This, he says, was a rough and, to all appearances, an imperfect, sketch.

Mr. Cornell, the appellee, having been affirmed and examined as to the loss of the two original drawings or sketches, of which the witness (Mr. Frost) testified that the Exhibits A and B are copies made by him, was cross-examined by the counsel of Mr. Perry at large, as if he (Mr. Cornell) were a competent witness-in-chief, thereby making the answer of Mr. Cornell evidence for himself. Upon that cross-examination he stated that he had a distinct recollection of making a sketch, and has no doubt it was at the time referred to by Mr. Frost; thinks it was made on foolscap paper with a lead pencil, but it might have been with ink; it was made in the office at his works (in Connecticut); presumes it was at the time Mr. Frost speaks of; they had many conversations on the subject. He showed the drawings to Mr. Peck, and he thinks to Mr. Parks, who was at work for him. He affirms positively, that he showed them to Mr. Peck and Mr. Frost. He does not wish to identify any particular drawings. He made a number at different times, and had frequent conversations with Mr. Peck and Mr. Frost on the subject. He is not certain whether he mentioned it first to Mr. Frost or Mr. Peck; the first time to Mr. Peck was, no doubt, in his works in Connecticut, in June, 1843; he cannot recollect when the first time he mentioned it to Mr. Frost, but it was either in June or July, 1843; he thinks it was early in June. He has none of his drawings at present. The first drawing showed the appearance of a lead cylinder, the ram at the mouth of the cylinder, which ram should be hollow; a die, to be placed in the head of the ram; the pipe should form at the head of the ram as the ram rose by any power that might be applied to it, and pass out through the bottom of the ram; the mandril or core, to form the calibre of the pipe, should come from the head of the cylinder.

From comparing this evidence with Mr. Cornell's specification, it will be seen that the invention therein described is substantially, if not exactly, that for which he now claims a patent. That it is a great improvement is admitted; and the only question is, Who is entitled to the priority of invention? There being no evidence that any other person invented it, Mr. Cornell must be adjudged to be the first inventor. But it is said that Mr. Cornell is not entitled to a patent because he has never reduced the invention to practice. But reducing to practice differs from bringing into use. There is no law requiring the applicant to reduce his invention to actual use before he can obtain a patent. On the contrary, the use of the invention before obtaining a patent is one of the reasons for refusing it. An inventor has reduced his invention to practice when he has so described it on paper, with such drawings or model, as to enable any person skilled in the art to make and use the same. He must show that it is practicable, and the manner in which it may be used. But it is not necessary that he should do this until he has perfected his invention and is ready to apply for a patent. He may have conceived the idea years ago, but is not obliged to furnish drawings or model until he makes his application. In the present case, the specification and drawings and model have been filed, showing the invention to be practicable and the manner in which it can be used.

It is suggested that Mr. Cornell has not used "reasonable diligence in adapting and perfecting" his invention, having done nothing from the spring of 1843 to the winter of 1846, and therefore has lost the benefit of his priority of invention. That clause of the section is only applicable to the case of a patent surreptitiously or unjustly obtained while the first inventor was using reasonable diligence in adapting and perfecting his invention—not to the case of conflicting applicants before any patent is granted. It is one of the pleas which the defendant, who is a supposed violator of the surreptitious patent, may plead; and if pleaded, it may be necessary for the defendant to show, in order to vacate the patent, that he was using reasonable diligence, &c., when the patent was obtained. But before a patent is granted to any one for the invention, there is no law that requires the first inventor to disclose his invention within any limited time before application for a patent; and there is no limitation, unless the lapse of time be sufficient to show an abandonment of the invention, which is a question for the jury and not for the commissioner; nor does the priority of application for a patent decide the priority of invention. It should be borne in mind that the cases cited from the books are all cases at law or in equity in actions for violations of patents already granted. The proceedings before the commissioner of patents are initiatory. The question is "whether the patent shall be granted"—not "whether it shall be vacated;" and a patent may be granted or refused upon less evidence than would be required to sustain or amend it.

Upon all points made in this case, I refer to the opinion in the case of appeal of Heath v. Hildreth [Case No. 6,309], filed in the patent office on the 15th of October, 1841. Upon consideration of the whole case, I am of opinion that Samuel G. Cornell is the first inventor of the improvement in the machine for making lead pipe, as claimed in his specification, and that the decision of the commissioner of patents awarding the priority of invention to the said Samuel G. Cornell be, and the same is hereby, affirmed, and that

he is entitled to receive a patent as prayed for.

[See Tatham v. Leroy, Case No. 13,760.]

Case No. 11,003.

PERRY v. CORNING et al.

[6 Blatchf. 134.] [1]

Circuit Court, N. D. New York. May 7, 1868.

EQUITY PRACTICE—BILL FOR DISCOVERY—ADMISSION OF COUNSEL.

1. Where a bill, founded on the alleged infringement of a patent, contained no special allegation that a discovery was necessary, and had no special interrogatories annexed to it, but contained the usual general prayer for an answer on oath, and a prayer for an account of profits, and it was demurred to on the ground that the court had no jurisdiction of the case made by the bill, because it did not pray for either a discovery or an injunction: *Held*, that, under the 93d rule in equity, the bill was a bill for a discovery and account, and that the demurrer must be overruled.

[Cited in Vaughn v. East Tennessee, V. & G. R. Co., Case No. 16,898.]

2. The admission of the counsel for the plaintiff, on the argument of the demurrer, that a discovery was not necessary, and that he did not seek a discovery, disregarded.

3. Whether the bill could be sustained as a bill for an account alone, quere.

The bill in this case alleged the infringement, by the manufacture and sale of stoves, of letters patent granted by the United States, and owned by the plaintiff [John S. Perry, trustee and executor]. It further alleged that the defendants [Erastus Corning and others] "did receive large profits and gains from said manufacture and sale," * * * "amounting, according to the information and belief of the plaintiff, to the sum of $10,000;" and that, by reason of the aforesaid unlawful acts and doings of the defendants in the premises, he had "sustained great loss and damage, and had been deprived of his lawful gains and profits, in the said sum of $10,000." After fully stating the case of the plaintiff, the bill prayed for a discovery and an account, as follows: "And forasmuch as your orator can have no adequate relief, except in this court—to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may, upon their and each of their corporal oaths, and according to their and each of their best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if interrogated as to each and every of said matters, and may be compelled to account for, and pay, to your orator, the profits by them acquired, amounting to the sum of ten thousand dollars ($10,000), which your orator avers are the damages suffered by him from the aforesaid unlawful acts; and that the said defendants may be decreed to pay the costs of this suit." The bill also contains the usual prayer for general relief. To this bill the defendants demurred, on the ground that this court had no jurisdiction of the case made by the bill.

HALL, District Judge. Upon the argument of the demurrer, it was insisted that the bill could not be sustained, because it prayed neither for an injunction, nor for a discovery. The counsel for the plaintiff admitted that a discovery was not necessary, and that he did not seek a discovery; but he insisted that the bill could be sustained as a bill for an account alone. It may well be doubted whether, upon this demurrer, the court can act upon the admission of the plaintiff's counsel, that no discovery is required, provided the bill itself, upon its face, requires such discovery; and my impression is, that it cannot. I shall, therefore, consider the case as made by the bill.

There is no special allegation that a discovery is necessary, and there are no special interrogatories annexed to the bill. It was, therefore, insisted, that no discovery could be required under it. The 40th rule in equity, while in force, relieved the defendant from making any discovery under a bill framed like the one in the present case, and containing no special interrogatories; but this rule was expressly repealed by the 93d rule, which provides that "it shall not hereafter be necessary to interrogate a defendant specially and particularly, upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery." I am inclined to think that, under this rule, the plaintiff is entitled to an answer, upon oath, to all the material allegations of his bill; and that it is, therefore, properly a bill for a discovery and account, like the bill in the case of Nevins v. Johnson [Case No. 10,136]. If this be so, the case last mentioned, and the cases of Sickels v. Gloucester Manuf'g Co. [Id. 12,841] and Imlay v. Norwich & W. R. Co. [Id. 7,012] would seem to be decisive of this case, and to require that the demurrer should be overruled.

There was another ground of jurisdiction insisted upon by the plaintiff's counsel, which, to say the least, is deserving of consideration. It was urged that, in an action at law for the infringement of a patent, the plaintiff can recover only the actual damages which he can prove he has sustained in consequence of the infringement (Hall v. Wiles [Case No. 5,954]; Buck v. Hermance [Id. 2,082]; Mayor, etc., of New York v. Ransom, 23 How. [64 U. S.] 487); while, in equity, he is entitled to recover the full amount of the profits made by the defendant by reason of the infringement (Livingston v. Woodworth, 15 How. [56 U. S.] 546; Dean v. Mason, 20 How. [61 U. S.] 198). It may often happen that the profits of the infringing defendant are much greater than any damages the plaintiff could prove he had sus-

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

tained; and, in such cases, it could hardly be said that the plaintiff had a full and adequate remedy at law. In such a case, as, in matters of account, courts of equity possess a concurrent jurisdiction, in most cases, with courts of law (Mitchell v. Great Works Milling & Manuf'g Co. [Case No. 9,662]) it would seem that there could be little doubt of the jurisdiction of a court of equity to order an account. But, without deciding this question, and upon the authority of the three cases first above cited, the demurrer is overruled, with costs. See, also, Potter v. Dixon [Id. 11,325]; Livingston v. Jones [Id. 8,414]; Jenkins v. Greenwald [Id. 7,270]. The decree upon the demurrer must be for the plaintiff, and will be final, unless the defendants, within thirty days after notice of the order overruling the demurrer, file their answer to the bill, and pay the costs occasioned by the demurrer.

[See Cases Nos. 11,004, 11,008, and 11,012.]

Case No. 11,004.

PERRY v. CORNING et al.

[7 Blatchf. 195.] [1]

Circuit Court, N. D. New York. March, 1870.

PATENTS — SUIT BY ASSIGNEE FOR INFRINGEMENT —UNRECORDED ASSIGNMENT—DISCOVERY AND ACCOUNTING—EQUITY.

1. Where a patentee assigns all his right, title and interest in his invention and patent within and throughout a specified territory, this is such a grant of exclusive right as warrants a suit in the name of the grantee for an infringement within such territory.

2. The omission to record such an instrument in the patent office within three months from the execution thereof, does not render it invalid, as between the parties thereto.

3. Such an instrument, if unrecorded, is of no validity, after the expiration of the three months, as against a subsequent purchaser from the patentee, for a valuable consideration, acting in good faith, without notice.

4. Whether, if such an instrument be not recorded within the three months, an assignment afterwards made would prevail, although received with notice of the prior instrument, quere.

5. A plaintiff who claims title through such an instrument, and sues in equity for an infringement of the patent, need not aver in his bill the recording of the instrument, but may treat the defendant as a wrongdoer and put him to set up in his answer that he is a bona fide purchaser for value, without notice.

[Cited in Empire State Nail Co. v. Faulkner, 55 Fed. 822.]

6. Where a bill in equity for the infringement of a patent prays for a discovery and an account of profits, and alleges that the plaintiff has no adequate remedy except in equity, it is not demurrable on the ground that the plaintiff has an adequate remedy at law.

7. This court, as a court of equity, has a full concurrent jurisdiction with the circuit court, as a court of law, of all actions for the infringement of a patent. But, whether, as a court of equity, it can or will award damages irrespective of the gains and profits accrued to the defendant from the infringement, or in addition to such gains and profits, quere.

[Cited in Atwood v. Portland Co., 10 Fed. 285.]

8. Where T. transferred to S. all his right, title and interest in a patent, and subsequently transferred to D. all his right, title and interest in the same patent, and subsequently S. retransferred to T. all the interest T. had conveyed to him: *Held*, that D. acquired nothing by the transfer to him, and that such retransfer to T. did not enure to the benefit of D., so as to perfect his title.

This was a demurrer to a bill in equity. The bill alleged, that one Dennis G. Littlefield was the inventor of an improvement in stoves and received letters patent [No. 8,047] therefor, dated April 15th, 1851; that he made a further improvement, called a "supplying cylinder," for which he received letters patent December 30th, 1852; that, on the 5th of April, 1853, he entered into a contract with the firm of Treadwell & Perry, whereby he "did assign and transfer to the said firm of Treadwell & Perry all the right, title and interest which the said Littlefield possessed, and which he might thereafter possess, to the aforesaid invention, improvement or patent, or the patent or patents that might be granted for said inventions or any improvements therein, and in any extension or extensions thereof, within and throughout the district and territory embraced within the states of New York and Connecticut, for and during the term for which the aforesaid letters patent were granted, and the terms for which any patent for the aforesaid improvement, and any other improvement or improvements thereof, or extensions for or of either thereof, might be granted, either to the said party of the first part, or his heirs, executors, administrators or assigns, to manufacture and sell the same within the states of New York and Connecticut." There was no averment that that instrument had been at any time recorded in the patent office of the United States. The bill then set out a further agreement between Littlefield and Treadwell & Perry, dated September 10th, 1853, by which Littlefield sold, assigned, &c., to Treadwell & Perry, their executors, administrators, and successors in business, "the exclusive right to make, use and vend a certain invention of a coal-burner, embraced within certain letters patent of the United States granted to him, bearing date the 15th day of April, 1851, and all improvements therein made or which may hereafter be made, within and throughout the whole United States," except Lowell, Massachusetts, for and during the term or terms for which any patents therefor had already been or might be thereafter issued, and for and during any extensions thereof which might be granted either to the said Littlefield or to his heirs, &c., as applied to stationary and hot air furnaces. Then followed a guaranty to Treadwell & Perry of the full and uninterrupted enjoyment of the said use, as applied to hot air furnaces, as

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against all persons in the United States, except in Lowell, and an agreement by Littlefield to defend any suit or suits which might be brought against Treadwell & Perry, affecting the validity of the said patent, or for any alleged violation of any previous patent by the use and enjoyment of the rights therein conveyed to them, and to save them harmless, and to prosecute, when required by them, all persons who should infringe the patent or patents. In consideration thereof, Treadwell & Perry agreed to make and sell furnaces embracing such coal burner, to advertise, &c., to bring them into use, and to pay him ten per cent. of the amount of their sales of said furnaces embracing the said invention. Then followed some other provisions relating solely to such air-furnaces, and providing for the contingency that the aforesaid furnaces should be found not to answer the purpose. This instrument was recorded in the patent office. The bill alleged, that, by that and the prior assignment, the sole and exclusive right to the whole interest in the letters patent aforesaid, and all improvements thereon and extensions thereof, became vested in Treadwell & Perry. It then continued: "And your orator avers, that he has succeeded to, and is now vested with, all their legal and equitable rights." The bill then set out numerous reissues and patents for further improvements made and procured by Littlefield. It then averred, that Treadwell & Perry sold and transferred to one George W. Sterling all their interest in the before-mentioned contracts and patents and improvements, by assignment dated March 5th, 1862, and recorded May 31st, 1862; that, on the 7th of April, 1862, the said Treadwell & Perry assigned all their interest in the said contracts and patents to one Andrew Dickey, by assignment recorded June 26th, 1862; that, on the last-named day, by assignment recorded on the same day, Sterling assigned to Treadwell & Perry all the interest they had transferred to him; and that, on the 2d of July, 1862, Dickey assigned all his interest to Mary J. Perry, by an assignment which was recorded July 29th, 1862. Of these several assignments the plaintiff [John H. Perry, trustee and executor] made profert. Then followed this averment: "And your orator further shows unto your honors, that, in or about the month of August, 1862, Mary J. Perry, of, &c., had, by legal assignment, become and was then vested with all the legal rights in said letters patent which, by the agreements and assignments hereinbefore referred to, had been transferred to the said Treadwell & Perry, and then, as your orator avers, had the exclusive right to practise the inventions and improvements secured thereby within the states of New York and Connecticut." The bill then averred, that Mary J. Perry thereupon, filed a bill against Littlefield and Ira Jagger, in this court, alleging infringement by them and praying damages. It then set forth proceedings in that suit, including a revival of it, on the death of Mary J. Perry, in the name of the plaintiff, as trustee and executor, and a decree affirming that, by virtue of the agreement of April 5th, 1853, Mary J. Perry was, and the plaintiff, as trustee and executor, had become, vested with the exclusive right, within the states of New York and Connecticut, of making, using and vending stoves embracing the improvements mentioned in the several letters patent referred to, awarding to the plaintiff all the gains, &c., which had arisen or accrued to the defendants in that suit, and directing an account to be taken by one of the masters of this court. The only further statement in the bill, which is material to the points raised by the demurrer, was this: "that the said defendants, Erastus Corning, Erastus Corning, Jr., and Gilbert C. Davidson, were, at the times hereinafter mentioned, co-partners in business in the city of Albany and state of New York, under the firm name and style of Erastus Corning & Company; that, some time between the first day of January, 1861, and the first day of January, 1863, said defendants, as such firm of Erastus Corning & Company, entered into a certain contract or agreement with the said Dennis G. Littlefield, whereby the said defendants were to manufacture and sell, within the states of New York and Connecticut, certain stoves containing some or all of the inventions and improvements secured to the said Littlefield by virtue of the several letters patent and re-issues of the same herein before-mentioned and referred to," and that "the defendants proceeded to manufacture and sell, and did manufacture and sell, within the territory aforesaid, stoves of the patents and re-issues of patents as herein before-mentioned." It then avers great gains, &c., by the defendants and prays an account and the payment thereof by the defendants, as damages for their infringement of the plaintiff's rights.

The defendants demurred to the bill, assigning various special grounds of demurrer. The two grounds mainly relied upon were: (1) That it appeared, by the bill, that Mary J. Perry had no title to the patent, invention or improvements claimed, nor had the plaintiff, as her trustee or executor, because, on the 7th of April, 1862, when Treadwell & Perry assigned to her assignor, Dickey, they had no right, title, or interest therein, which they could assign, they having already, on the 5th of March, 1862, assigned all their interest to Sterling, who then held the same; and (2) that the alleged transfer of the patent or exclusive right by Littlefield to Treadwell & Perry, on the 5th of April, 1853, under which alone they or the plaintiff could claim the exclusive right to make or use the invention in the manufacture of stoves, and which was the only right which the defendants were charged with infringing, was of no validity as against the defendants, and could warrant no suit against them, because it had not been recorded in the patent office.

John H. Reynolds, for plaintiff.
Amasa J. Parker, for defendants.

WOODRUFF, Circuit Judge. The charge made against the defendants in the bill is, that they have manufactured and sold, within the states of New York and Connecticut, stoves containing some or all of certain inventions and improvements secured by letters patent issued to Dennis G. Littlefield. The title of the plaintiff is derived through an instrument executed by the patentee, Littlefield, by which, as alleged in the bill, he assigned and transferred to the firm of Treadwell & Perry all the right, title and interest of Littlefield in the invention, patent and patents in question, and in any extension thereof and any improvements thereon and any patents that might be granted therefor, "within and throughout the district or territory embraced within the states of New York and Connecticut." The terms of this instrument, as more fully set forth in the bill, import an absolute sale and transfer of the patents, inventions and improvements, for a valuable consideration, but only so far as relates to a specified territory or district. As to such district, the assignment is unqualified, and, ex vi termini, excludes the patentee from any interest in or control over the rights secured by the letters patent. Such an instrument, if not technically an assignment of the patent or an undivided part thereof, is a grant of the exclusive right under the patent to use, and to grant to others to make and use, the thing patented within and throughout a specified part of the United States, and warrants a suit in the name of the grantee or assignee, for an infringement within the territory named. Act July 4, 1836, §§ 11, 14 (5 Stat. 121, 123); Brooks v. Byam [Case No. 1,948]; Gibson v. Cook [Id. 5,393]; Potter v. Holland [Id. 11,329]; Gayler v. Wilder, 10 How. [51 U. S.] 477, 494. As to such an instrument, the act of congress provides explicitly, that it "shall be recorded in the patent office within three months from the execution thereof." The meaning and effect of this provision must be regarded as settled to this extent, at least, namely: (1) The omission to record the instrument within three months does not render it invalid, as between the parties thereto; (2) the unrecorded instrument is of no validity, after the expiration of three months, as against a subsequent purchaser from the patentee, for a valuable consideration, acting in good faith, without notice. Brooks v. Byam [supra]; Pitts v. Whitman [Case No. 11,196]; Blanchard's Gun-Stock Turning Factory v. Warner [Id. 1,521]; Gibson v. Cook [supra]; Potter v. Holland [supra]; Boyd v. McAlpin [Case No. 1,748]; Case v. Redfield [Id. 2,494]. Mr. Justice McLean, in Boyd v. McAlpin, expresses the opinion, that, if an assignment be not recorded within three months, an assignment afterwards made would prevail, although received with notice of such prior assignment. But this dictum was not material to the point decided, namely, that, as against a mere wrongdoer, the assignment was valid though not recorded; and it is not in harmony with other cases. And the language of the court in Brooks v. Byam [supra], and Pitts v. Whitman [supra], seems to import that, although such unrecorded assignment is not void, no suit can be maintained, and no recovery be had, against any third person by virtue thereof, unless it be recorded before or pending the suit. This, however, is inconsistent with the case of Boyd v. McAlpin [supra], and is not, I think, to be regarded as settled.

For the purposes of the present case, it is not material to discuss either of these last-named points. It is sufficient to say, that, as against a purchaser in good faith, for value, without notice of any prior assignment, an assignment not recorded within the time limited in the act is not valid, and will not affect his rights acquired from the patentee before such record is made; and that, on the other hand, the instrument, though not recorded, is a perfectly valid instrument, and effectual according to its purport, as against the assignor and all others except third persons who, in good faith, for value, without notice, become purchasers or acquire rights or interests in or under the patent. The plaintiff here has, therefore, set out an assignment which was sufficient to vest the title in Treadwell & Perry. He had a right, as matter of pleading, to treat the defendants as wrongdoers, and put them to set up in their answer that they were bona fide purchasers for value, without notice, or that, in like good faith, they entered into the agreement with the patentee and assignor, by which they acquired the right to use the patent.

I do not perceive the materiality or pertinency of the agreement of September, 1853, by which Treadwell & Perry were given the exclusive right to use the invention, as applied to hot air furnaces, throughout the United States. Though recorded, it gave no notice of their right to use it for the manufacture of stoves in New York and Connecticut; and it is for making stoves that the defendants are sought to be charged. It contains no reference to the prior agreement. I have carefully considered the claim of the defendants' counsel, most earnestly insisted upon, that the instrument of the 5th of April, 1853, is not only not an assignment of the whole or of an undivided part of the patent, but is not even a grant of the exclusive right to make and use, and to grant to others to make and use, within the act of congress requiring such assignments and grants to be recorded, and authorizing suits in the name of the assignee or grantee of the exclusive right above referred to. Although the instrument does not employ the terms, "to grant to others to make and use" the invention, &c., I think its just construction fully excludes the patentee from all interest in, or control over, the invention, or the manufacture or use of

the thing patented, within the specified territory, and so excludes him from any right to confer the privilege upon any others. He assigns all his right, title and interest in the invention, improvement or patent, within and throughout the two states mentioned, for the term of the patent, and the terms of any patent for the same or other improvements thereof, or any extensions for or of either thereof, which might be granted to the assignor, or his heirs, executors, administrators or assigns, to manufacture and sell the same within the states of New York and Connecticut. This transfers the whole interest of the patentee in those states; and the concluding words of the granting clause do not restrict the grantees to the manufacture in their own persons. They are descriptive of the future and other improvements and extensions which might thereafter be granted to the patentee, to manufacture and sell in New York and Connecticut, and are not limitations or qualifications of the full right, title and interest in the invention and its use, previously therein granted. That the assignment gave to Treadwell & Perry the entire monopoly which the patentee before had in those states, and to the exclusion of the patentee himself, is, I think, quite certain; and this is made the test of the right to sue, in Gayler v. Wilder, 10 How. [51 U. S.] 477, 494, by Chief Justice Taney.

As to the objection that the plaintiff has an adequate remedy at law, it might suffice to say, that this objection was overruled in this court on the former demurrer herein, and no sufficient reason exists for reconsidering that determination made before I became a member of the court. But I am clearly of opinion, that, under the 17th section of the act of July 4th, 1836 (5 Stat. 124), a party is at liberty to select his forum, although he seeks a recovery of money only, and neither seeks nor requires a discovery or other ancillary or further relief. No language could be employed to declare the jurisdiction of the courts at law and in equity more completely concurrent than is there found, or which would more clearly indicate that the party aggrieved may resort to either. Holding the jurisdiction of the subject-matter to be concurrent does not, however, necessarily imply that the measure of relief or recovery will be the same in either court. At law, the plaintiff recovers damages, as such, and the plaintiff must prove the damages sustained by him from the infringement. In equity, the plaintiff may seek and may require an account of the gains and profits derived by the defendant from the unlawful infringement, and these gains and profits he may recover. This is what the plaintiff here prays, and his prayer, in this respect, is not prejudiced because he says that those gains and profits are the damages which he has suffered. The question whether a plaintiff can in equity recover damages, as such, irrespective of the gains and profits derived by the defendant from the unlawful use of the plaintiff's invention, does not arise on this demurrer. That question appertains to the measure or quality of the relief which may be granted in the courts respectively, and not to the jurisdiction of either court to entertain the subject and give the relief, whatever it may be, which it is competent to give, according to the principles governing it, when its jurisdiction is duly invoked.

The objection that the plaintiff fails to show title under the assignment to Treadwell & Perry seems to me well taken. At the date of the transfer by Treadwell & Perry to Dickey, April 7th, 1862, under which transfer the plaintiff now claims title, they had, so far as is disclosed by the bill, no right, title or interest in the patent, which they could transfer. They had already, March 5th, 1862, transferred all their right, title and interest to Sterling, and Dickey, therefore, took nothing by their transfer to him. The bill alleges that, on the 26th of June, 1862, Sterling assigned and transferred to Treadwell & Perry all the interest they had transferred to him on the 5th of March, 1862; and the plaintiff insists that this last-named transfer enured to the benefit of Dickey, and so perfected his title, and the brief seems to intimate that Mr. Justice Nelson has so held in the case of Perry v. Littlefield [case unreported]. I should hesitate in holding the contrary in respect to the title of the same plaintiff, if, upon the same facts, and on consideration of the same question, that learned and greatly esteemed judge, and my senior in this circuit, has pronounced the plaintiff's title good. But, neither the pleadings nor the proofs nor his opinion are submitted to me. Upon the best consideration I have been able to give to the question, I am not able to perceive how Dickey acquired title, upon the mere facts alleged in this bill. It would be easy to suggest not only a possibility, but even a probability, that he did so, by supposing facts which are quite probable and yet are not averred; and, it is quite possible that such facts were proved in the case before Mr. Justice Nelson. Thus, it does appear that the transfer from Sterling to Treadwell & Perry, though dated June 26th, 1862, more than two months after the date of their transfer to Dickey, was recorded at the same time with the latter. Now it is quite possible that they were delivered at the same time, and that Dickey, aware of the outstanding title of Sterling, did not accept the transfer of April 7th, 1862, until the retransfer by Sterling to Treadwell & Perry was obtained; or, the nature of Sterling's interest may have been such that it had, in equity, wholly ceased at the time when the transfer to Dickey was made; or, there may be other facts and reasons why Dickey acquired the whole equitable, if not legal, title, both as to Sterling and Treadwell & Perry, notwithstanding the retrans-

fer had not then been made. But this bill cannot be aided by indulging in such conjectures. The case must be dealt with as the plaintiff has stated it; and, on the face of his statement, the title was in Sterling and did not pass by the assignment to Dickey.

There is no question here as to the effect of an after acquired title upon the rights of an assignor or his assignee, where the former has warranted the title which he transfers. No warranty is here alleged. Nor, if the implied warranty of title which has been held to arise in favor of the purchaser on the sale of a chattel, would operate as an estoppel, and so secure to the purchaser a title subsequently acquired by the vendor, will such implied warranty aid the plaintiff here. This was a mere assignment of the right, title and interest of Treadwell & Perry. As alleged in the bill, it was that and nothing else; and no facts, in respect of consideration, or otherwise, are stated, which would have made it inequitable in Treadwell & Perry to set up a title afterwards acquired, even against Dickey. Nor is the case in this respect aided by the decree which is set out in the bill, and which purports to establish the title of the plaintiff as trustee. It unquestionably has that effect as between the plaintiff and Littlefield and Jagger, the defendants in that suit; and, as against persons claiming under them by title subsequently acquired, it may have such effect. But it is not even averred in the bill that that suit was commenced before these defendants acquired from Littlefield the right to manufacture. They were not parties to that litigation, and neither on the ground of notice by lis pendens, nor otherwise, can they be affected by a suit commenced after their rights accrued. Upon the ground, therefore, that it is not shown by the bill that the rights and interests of Treadwell & Perry under the assignment of April 5th, 1853, were, either at law or in equity, vested in Mary J. Perry, under whose will the plaintiff claims as trustee, I conclude that the bill is defective. I do not overlook the general averments of title in Mary J. Perry and in the plaintiff. They are not, in the connection in which they stand, independent allegations of facts, but inferences or averments by way of giving construction to the facts which are alleged, or declarations of the legal effect of the facts stated. Judgment should be ordered for the defendants on the demurrer, with leave to the plaintiff to amend, on payment of the costs of the demurrer.

HALL, District Judge. I concur. I also suggest, that the bill does not contain any sufficient averment of the infringement of the patent, after the time when it is alleged that the right of Mrs. Perry accrued. The bill states the assignment to her to have been made on the 2d day of July, 1862, and only alleges that the infringement was after the making of the contract between the defendants and Littlefield, which it is averred was "entered into" some time between January 1st, 1861, and January 1st, 1863.

[For other case involving this patent, see note to Perry v. Littlefield, Case No. 11,008. See, also, Same v. Corning, Id. 11,003, and Same v. Starrett, Id. 11,012.]

Case No. 11,005.

PERRY et al. v. CRAMMOND et al.

[1 Wash. C. C. 100.] [1]

Circuit Court, D. Pennsylvania. April Term, 1804.

BILLS AND NOTES — BONA FIDE HOLDER OF ACCOMMODATION BILL—ILLEGAL CONSIDERATION—DELIVERY AFTER DEATH OF DRAWER.

1. When an accommodation bill goes into the hands of a bona fide holder, even with notice of its particular character, he is entitled to recover the amount thereof from the drawer.

2. Bills, drawn for an illegal consideration, or for one which happens to fail, cannot be enforced by one having notice of their character.

3. Bills, delivered after the death of the drawer, to a person who had made advances upon their faith, to the drawer, who had them in his possession, for the purpose of raising money for the drawer; may be enforced against the representatives of the drawer.

This suit was brought by the assignees of Nantes, surviving partner of Muilman & Company [against Crammond and others, executors of Cay, surviving partner of Clow & Cay], to recover £18,000 sterling, the amount of forty-seven bills of exchange, with damages at the rate of twenty per cent. The case, from the evidence, was as follows: Joseph Hadfield, in London, was the confidential friend of Clow & Cay of Philadelphia, received their remittances, and negotiated their business to a large amount. The affairs of Clow & Cay getting considerably embarrassed, and Hadfield, having exhausted his ingenuity to keep their credit afloat, by accepting and taking up a great number of bills drawn on him and others; at length advised him to send on to him a number of bills drawn upon him, Hadfield, in favour of any one of his clerks, varying the name, which he, Hadfield, could use as occasion might require, to raise money, until remittances of a more substantial kind could come. In pursuance of this advice, the bills in question were sent forward, drawn on Hadfield, at sixty days, part of them in favour of Murdock, and part in favour of Reddick, two of the clerks of Clow & Cay, and were endorsed in blank. They were received by Hadfield in February and March, and remained in his possession until the transfer to Nantes took place. Muilman & Company were the friends of Hadfield, and enabled him, by great advances, to keep up

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

not only his own credit, but that of Clow & Cay; who, by letter to Muilman & Company, in March or April, agreed to guaranty any negotiations which might take place between them and Hadfield, their friend; and, on their account, subsequent to this letter, and on the ground of it, viz. in April and May, 1793, upwards of £19,000 were advanced by Muilman & Company to Hadfield, which was by him applied to the use of Clow & Cay. It appears, by an account stated by the master, in a suit instituted in the court of chancery, in England, by the defendants, against the plaintiffs and Hadfield; that, during the months of April, May, June, July, and August, 1793, balances, from £6,000 to £17,000, were due from Clow & Cay to Hadfield; but, by remittances made in August and September, they were discharged: and, finally, a balance of about £8,000 was reported to be due from Hadfield to Clow & Cay, without including the bills in question. Clow died on the 24th of September, of which Hadfield and Nantes heard the last of October, and it was confirmed the 6th of November, 1793; on which day, also, the death of Cay was known; and Nantes, knowing that Hadfield had in his possession the bills in question, and the purpose for which they were deposited with him; he, on the 6th of November, demanded of Hadfield, that he would accept those bills as of the 4th of September, that they might be protested on that day, viz. the 6th November, and delivered to him, Nantes, as a further and better security for the advances made by Muilman & Company, for the use of Clow & Cay. All this was accordingly done, and the bills were then sent over here to be put in suit. At a subsequent period, an arbitration took place between Nantes and Hadfield, and a balance found due from the latter to the former of the £19,000; and £100 said to have been advanced to Hadfield, and by him applied to the use of Clow & Cay; but it does not appear by this award, or by the report of the master in the suit above mentioned, that this £19,000 was, or was not introduced into the account between Hadfield and Clow & Cay. Muilman & Company kept no account whatever with Clow & Cay; and, by Hadfield's accounts, none of his advances are stated as being made by Muilman & Company, but generally as by himself. Hadfield, in his answer to the defendants' bill, and in his deposition taken in this cause, states, that the advances were made for the use of Clow & Cay, and were so applied; and, that the bills in question were delivered to Nantes, in order to give him a priority against the estate of Clow & Cay; and that the amount of them was to be carried to the credit of Hadfield, on account of the advances made by Muilman & Company to him for the use of Clow & Cay, and otherwise; and, by that means, to lessen the balance due from Clow & Cay to Hadfield, or, in other words, the balance due from Hadfield to Muilman & Company.

It further appeared by the evidence, that Hadfield communicated, at all times, freely and fully, to Muilman & Company, respecting the affairs of Clow & Cay; and that the remittances made by Clow & Cay to Hadfield, passed into the hands of Muilman & Company. Hadfield, in his answer and deposition, states that the bills were deposited with him for his own indemnification, as well as to enable him to obtain advances. When Hadfield delivered the bills to Nantes, it was agreed that Nantes should proceed immediately against Clow & Cay; it not being intended that he, Hadfield, was to pay when they became due.

The defendants' counsel objected to the recovery: 1. That these were accommodation bills, sent to Hadfield for a particular purpose, and used for a different one; and this being known to Nantes, he stood in the shoes of Hadfield, and could not recover. The letter from Hadfield to Clow & Cay, of November, 1792, calling for these bills, states, that "they may be useful to support our mutual credit," which shows that they were not merely for the use of Clow & Cay; and, therefore, passed to Hadfield without consideration, or with a knowledge that they were not to return here as protested bills. They cited 3 Term R. 80. 2. The agreement of Nantes, not to resort to Hadfield, defeats his remedy against the drawer, as such an agreement is repugnant to the acceptance, which binds the acceptor absolutely to pay; and such a discharge defeats the remedy over which the drawer might have. Chit. 82, 84; 3 Brown, Ch. 1; 2 Bos. & P. 62; 4 Ves. 829. 3. The debt due from Clow & Cay, if it existed at all, was for the advances made to Hadfield on their account, and on the foot of the guarantee; and it was, therefore, a mere simple contract debt; and Hadfield, as an agent, had no right, after the death of Clow & Cay, to change the nature and dignity of the debt, to one upon protested bills of exchange; which, by the laws of Pennsylvania, have a preference over other debts due from a deceased person. The authority of the agent was superseded by the death of Clow & Cay, and notice thereof to the agent. 4. The antedating the acceptance was an irregularity, contrary to the usual course of mercantile negotiations; and, upon this ground, the plaintiffs cannot recover. It was precipitating the time of payment, which the drawer could not lawfully do.

In answer to these objections by the plaintiffs' counsel, it was said: 1. That though these may be called accommodation bills, yet, they were for the accommodation of the drawers, and to indemnify the drawee for his own advances, or to enable him to raise money upon; consequently, not only Hadfield, but any person making such advances, were entitled to recover upon them. Hadfield, as agent, had a lien for any balance due

him, as well on these bills as upon any other property of the drawers in his hands. Cowp. 251. 2. The doctrine was admitted, in cases where, by the discharge of the drawer, or a prior endorser, you destroy the remedy over which the endorsee might have. That case is unlike the present; for Hadfield, being a creditor of the drawers, to the full amount of the advances made by Muilman & Company for their use, the discharge of the drawee, could not, in any event, affect the rights of Clow & Cay. 3. The bills being deposited with Hadfield, for the purposes before mentioned, he had an interest coupled with his powers as agent, and might endorse the notes for the purpose of his own indemnification, as well after, as before the death of the drawers. 2 East, 227. 4. In cases of bills regularly negotiated, the doctrine contended for is admitted. But this is a peculiar case; and the purpose for which the bills were lodged, impliedly authorized Hadfield to accept or use them, in any manner most likely to effect those purposes.

Messrs. Ingersoll, Lewis, and Binney, for plaintiffs.

Edward Tilghman and Mr. Rawle, for defendants.

WASHINGTON, Circuit Justice (charging jury). These have been called accommodation bills, and, in one sense of the term, they may be so considered; but it does not follow, that an endorsee of them, for a valuable consideration, though with full notice of every circumstance attending them, may not recover. If they were deposited with Hadfield for the accommodation of the drawers, to enable him to raise money for their use, or for his own indemnification; they were given for a consideration, and would give a right of recovery to any person who might choose to purchase, and pay a full consideration of them. Nay, if they had been drawn for the accommodation of Hadfield, and with a view to enable him to raise money upon the credit of the drawers; they, after thus lending their names, could not resist payment to a bona fide purchaser of them, though notice was given at the time of transfer, of the purpose for which they were drawn. Wherever a bill is drawn for a consideration which is illegal, or which happens to fail, neither the payee, nor any subsequent endorsee, with notice, can recover; but that is quite a different case from the present.

The nature of this transaction, the purpose for which these bills were drawn and remitted, and the double character in which Hadfield stood as drawer and agent; furnish answers to most of the objections against the plaintiffs' right of recovery. The bills were sent over with blank endorsements, and were to be used as occasion might require, for supporting the credit of Clow & Cay. No doubt the plan contemplated by Clow & Cay, and also by Hadfield, was to dispose of as many of these bills at a time, as would raise money to enable Hadfield to take up such bills as were becoming due; and in case remittances should arrive in time, again to take up such of these bills, as had been negotiated, and were becoming due, by a negotiation of more of them; so as to postpone the protest of any of them, until remittances should arrive. If Hadfield should be able, from his own funds, or from the aid of friends, to raise money for the above purposes; he was authorized, by Clow & Cay, as he expressly swears in his answer to the defendant's bill in England, to hold or use those bills for his indemnification and repayment; or he might at any time have delivered them over to any person, advancing money for the use of Clow & Cay; and therefore, if he had delivered these bills to Muilman & Company, as they made their advances, or even if the advances had been made upon the security of these bills, and under a promise to deliver them when called for; in the former case, no doubt could exist of the plaintiffs' right to recover; and even in the latter case, I should incline to think that the delivery, after the death of Clow & Cay, might not be open to the objections which have been made. But, as it appears, obviously, that the advances made by Muilman & Co., were upon the credit of Hadfield, backed by the guarantee of Clow & Cay; Hadfield could not, merely upon the ground of those advances, transfer these bills, after the death of Clow & Cay, for the purpose, as Hadfield declares, of giving Nantes a better security. The intention of sending him the bills, having been, to enable him, on the credit of them, to raise money; not to protest them, with a view to securing prior advances, made upon another account. This however, is of very little consequence in the present case; because, if Hadfield has, from his own funds, or from those of Muilman & Co., advanced for Clow & Cay, a sum equal to the amount of the bills in suit, he thereby became a creditor of Clow & Cay, to that amount; no matter from whom he obtained the money; and in the latter case, being to that amount the creditor of Clow & Cay, and the debtor of Muilman & Co., he had a right, at any time, to pass away these bills, for the purpose of repaying or indemnifying himself; and this brings us to the great question, whether he was a creditor of Clow & Cay, to this or any other amount, at the time he delivered over the bills to Nantes. It must be admitted, that advances, to a larger amount than these bills, were made by Muilman & Co. to Hadfield, for the use of Clow & Cay; but the question is, whether they were not discharged by remittances made by Clow & Cay to Hadfield. In the account stated by the master in England, we find very large sums of money paid by Hadfield for the use of Clow & Cay, leaving at

the end of every month, from February to August, large balances due from the latter to the former. But from that period, remittances came to hand in sufficient abundance to turn the balance in favour of Clow & Cay; and this ultimately settled down to more than £8000. Now, if the advances made by Hadfield during that period, were out of the moneys procured by him from Muilman & Co., and there is not the slightest ground for supposing that they were excluded from the account; then it is plain, that they were ultimately discharged; and as to this question, it is of no consequence whether Hadfield appropriated the remittances to his own use, or paid them over to Muilman & Co.; because, as the plaintiffs' right of recovery can stand only upon the claim of Hadfield to indemnity, if he has been paid, he has been indemnified, and the ground of action is taken away. It is to be remarked, that no accounts were kept between Muilman & Co. and Clow & Cay, but between Muilman & Co. and Hadfield, and between Hadfield and Clow & Cay. If, then, as Hadfield received money from Muilman & Co., he paid it away for the use of Clow & Cay, and charged them with it, as an advance from himself; so soon as he received remittances, they were of course entered to the credit of Clow & Cay; and as far as they extended, discharged those advances. Indeed, it appears from the correspondence between Hadfield and Clow & Cay, that most of the remittances went into the hands of Muilman & Co. That Hadfield is indebted to Muilman & Co. upwards of £19,000, appears by the award made in favour of the latter, and it is as clear that Muilman & Co., at different times, made advances to Hadfield, to an amount exceeding that sum more than five times. These advances, no doubt, enabled Hadfield to support the credit of his different correspondents, as well as his own. But upon what principle, is it to be said, that the balance found due from Hadfield to Muilman & Co. shall be fixed upon the shoulders of Clow & Cay? It is not in proof, that all the advances for Clow & Cay have not been paid to Hadfield, by the remittances made him by Clow & Cay; and if he has failed to pay them over, Muilman & Co. must look to Hadfield for indemnification. It is, certainly, if not a suspicious circumstance, at least one much to be wondered at, that in no part of Hadfield's deposition or answer, does he state that the advances made by Muilman & Co., and applied to the use of Clow & Cay, were not debited in his account with the latter; and in his deposition he states, that the amount of the bills delivered to Nantes, was to be carried to the credit of him, Hadfield, on account of advances by Muilman & Co. to him, for the use of Clow & Cay, and otherwise, so that it is left to conjecture, from this impression, which sum remained unpaid of the advances made by Muilman & Co., and what portion of these bills were to be applied to the credit of other accounts.

As to the objection, on the ground of the acceptance being antedated, as well as other irregularities attending the negotiation of the bills, I will not say that they would be fatal in a transaction so peculiar in its nature as the present, if Nantes appeared to have been a fair bona fide purchaser, upon the ground of a debt due from Hadfield to him for money advanced to him for Clow & Cay, and from them to Hadfield, still remaining unpaid; because from the nature of the trust reposed in Hadfield, he could not easily negotiate them in the ordinary way, to answer the purposes for which they were deposited with him. The question then, for the jury, will be, whether Hadfield was a creditor of Clow & Cay, for advances to the amount of the bills in question; so as to authorize him or his endorsee to recover upon the ground of indemnity. If not, the verdict ought to be for the defendant; if otherwise, for the plaintiff.

Verdict for the defendant.

[For an action by the same plaintiffs against other defendants, see Perry v. Barry, Case No. 11,000.]

PERRY (DETROIT STOVE WORKS v.). See Case No. 3,835.

PERRY (HADEN v.). See Case No. 5,893.

Case No. 11,006.

PERRY v. LANGLEY.

[1 N. B. R. 559 (Quarto, 155);[1] 1 Am. Law T. Rep. Bankr. 34; 7 Am. Law Reg. (N. S.) 429.]

District Court, S. D. Ohio. March, 1868.

ACT OF BANKRUPTCY — ASSIGNMENT UNDER STATE LAW.

1. A general assignment by an insolvent debtor, though made for the benefit of all his creditors, is an act of bankruptcy under the bankrupt act of March 2d, 1867 [14 Stat. 517].

[Approved in Spicer v. Ward, Case No. 13,241. Cited in Re Cohn, Case No. 2,966; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486.]

2. Where a creditor is about to get a judgment against his debtor, and the latter makes a general assignment under a state insolvent law for the benefit of his creditors, this is a conveyance with intent to delay, defraud, and hinder the creditor, and is an act of bankruptcy under section 39 of the bankrupt act.

[Overruled in Langley v. Perry, Case No. 8,067. Cited in Re Louis, Id. 8,527. Approved in Spicer v. Ward, Id. 13,241. Cited in Rison v. Knapp, Id. 11,861; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486.]

3. It comes also under the description of a conveyance to defeat or delay the operation of the bankrupt act.

[Approved in Spicer v. Ward, Case No. 13,241.]

[1] [Reprinted from 1 N. B. R. 559 (Quarto, 155), by permission.]

4. Where a debtor made an assignment under a state insolvent law, and a creditor applied to the state court to have the security of the assignees increased, this was not such an assent to the proceedings as estopped him from claiming that the assignment was an act of bankruptcy.

[Cited in Re Schuyler, Case No. 12,494; Re Williams. Id. 17,706; Re Kraft, 3 Fed. 893; Judson v. Courier Co., 8 Fed. 426.]

5. A debtor made an assignment under the insolvent law of Ohio, on May 25, 1867, and under it, a state court took cognizance of the matter. On July 17th, a petition in bankruptcy was filed by a creditor. *Held*, that as to this matter the bankrupt act of 1867 was in force on May 25th, and the United States court could rightfully take jurisdiction of the whole matter under the petition filed in July.

[Cited in Re Merchants' Ins. Co., Case No. 9,441; Re Bunster, Id. 2,136; Re Brinkman, Id. 1,884.]

This was a petition in bankruptcy, under the act of 1867, praying that Wm. H. Langley be declared a bankrupt. The only distinct act of bankruptcy alleged in the petition is that Langley, then being largely insolvent, on the 25th day of May, 1867, executed an assignment of all his property to two assignees, named in trust for the benefit of all his creditors. This assignment is alleged to be fraudulent and void; as intended, first, to delay, defraud, or hinder his creditors; second, to defeat or delay the operation of the bankrupt law. Langley filed an answer, admitting the assignment of his property as alleged in the petition, and his utter insolvency at the date of its execution; but denied, explicitly, that it was fraudulent, either in fact or in law, or that it was intended to defeat or delay the operation of the bankrupt act. He averred that his object was to prevent the petitioning creditor, Perry, from obtaining an unjust preference over other creditors, and to secure an equal distribution of his property among all his creditors. The facts were, that Langley had been engaged in business at Gallipolis; that in the spring of 1866 he became embarrassed in his pecuniary affairs; that prior to the 25th of May, 1867,—the date of the assignment,—with an admission of his hopeless insolvency, he assigned his entire property [to his son Henry W. Langley and David P. Hibard] [2] in trust for the benefit of all his creditors; that this assignment was filed in the probate court of Gallia county, and put on record on the said 25th of May, and an order made by the probate judge, for security by the assignees, pursuant to the statute of Ohio on that subject; [that at this date the indebtedness of the said Langley was nearly five hundred thousand dollars, while his property of every kind did not exceed in value one hundred and seventy-five thousand dollars;] [2] that the assignees took possession of the property, and were proceeding to administer the same; and that on the 17th of July, the said Perry filed his petition in bankruptcy, embracing a prayer for an order restraining the assignee from any further interference with the property of Langley under said assignment; which prayer was granted by this court; and the assignees have suspended all further proceedings, awaiting the judgment of the court upon the question whether the act of bankruptcy charged in the petition was or was not in violation of the bankrupt law.

Mr. Nash and T. D. Lincoln, for petitioning creditor.

Mr. Coffin, for Langley.

LEAVITT, District Judge. The grounds of opposition to a decree of bankruptcy against Langley, comprehensively stated, are: First. That the assignment by him on the 25th day of May, was not an act of bankruptcy within the purview of the statute. Second. If an act of bankruptcy, the petitioning creditor, Perry, is estopped from urging or relying upon it, by reason of his implied assent to the assignment. Third. That at the date of the assignment (the 25th of May), the bankrupt act of the 2d of March 1867, was not in force, except for a special and limited purpose; and that the probate court of Gallia county, having rightfully obtained jurisdiction of the assignment under the statute of Ohio, on the 25th of May, and prior to the bankrupt act taking full effect, is entitled to retain it; and that the assignees are fully empowered to act under it, and execute its provisions, irrespective of the bankrupt act.

The first question, therefore, is, whether the assignment by Langley is an act of bankruptcy within the meaning of the statute, upon the hypothesis that the law was then in force, as applicable to the transactions involved in the case. It is claimed by the counsel for the petitioning creditor, that the assignment is void: First, as being executed by Langley, with an actual, fraudulent intent; second, that being for his entire property, it is presumptively fraudulent, under the operation of the bankrupt act, and therefore void; and third, that it is void as being with an intent to defeat and delay the operation of that act.

As to the first inquiry suggested, namely, whether the assignment was executed with a positive fraudulent intent, it is perhaps not important to inquire. The consideration of the other points stated, as to the legal effect of the assignment, under the provisions of the bankrupt act, will be decisive of the question before the court. If, subject to the imputation of legal, or constructive fraud, as in conflict with the act, the effect as to its validity is the same as if a fraud in fact were proved. The question involves the construction of the 39th section of the bankrupt law, in connection with the 35th, which defines what shall constitute acts of bankruptcy. And so far as the 39th section relates to the transfer, sale, or conveyance of property by one who is insolvent, it is declared to be an act of bankruptcy when made—First. "With in-

[2] [From 1 Am. Law T. Rep. Bankr. 34.]

tent to delay, defraud, or hinder creditors." Second. "With intent to give a preference to one or more of his creditors, or to any person, or persons, who are, or may be liable for him, as indorsers, bail, sureties, or otherwise." Third. "With intent . . . . to defeat or delay the operation of this act."

First. Was the assignment by Langley intended to delay, defraud, or hinder a creditor, or creditors? The argument in favor of the legality and fairness of the assignment is, that being for the equal benefit of all his creditors, fraud cannot be presumed. Now it is true that an assignment or conveyance of all his property by a bankrupt, for the benefit of his creditors generally, unless with some one of the intents specified in the 39th section above noticed, is not declared to be an act of bankruptcy. Yet it is clear that such an assignment is in contravention of the spirit and policy of the bankrupt law, even when made in good faith. The intention of that law clearly was, that when a failing debtor was conscious of his inability to prosecute his business and pay his debts, he should at once subject his property to such a disposition as the bankrupt act has provided for. The property then becomes a sacred trust for the benefit of his creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent laws of a state, but according to the provisions of the national bankrupt act. Indeed, it has been the settled doctrine in the United States, under any bankrupt law that has been passed, that when congress had called into exercise the clear constitutional grant of power to pass a uniform bankrupt law, the jurisdiction and legislation of the state as to the settlement of insolvent estates, was wholly suspended, to be resumed only when the national law ceased to be in force. This doctrine is not controverted, and it seems hardly necessary to refer to the cases which sustain it. In England the decisions have been uniform from the time of Lord Mansfield, that an assignment of all his property, by an insolvent debtor, for the benefit of all his creditors, was an act of bankruptcy, even where no actual fraud was intended. Deac. Bankr. 72, 73; Griff. Bankr. 107, 119, 120. The same doctrine has been settled in this country under the bankrupt act of August, 1841. McLean v. Meline [Case No. 8,890]; also, McLean v. Johnson [Id. 8,883]; Shawhan v. Wherritt, 7 How. [48 U. S.] 627. And it is understood from newspaper reports, that the same doctrine has been uniformly held by all the judges of the United States, before whom the question has been presented, under the recent act of the 2d of March, 1867. And if there was any doubt upon this question, under the 39th section of this law, it would seem to be removed by reference to a clause in the 35th section of the act. The 35th section does not define acts of bankruptcy, but declares what conveyances or transfers of property by a bankrupt shall be deemed void, and vest no title, as against the assignee in bankruptcy. This clause is in these words: "And if such (any) sale, assignment, transfer, or conveyance, is not made in the usual and ordinary course of business of the debtor, the fact shall be primâ facie evidence of fraud." This clause throws light upon the intention of the legislature in the enactment of the 39th section, and shows that any assignment or transfer of property by a failing debtor, not in the usual and ordinary course of business, is not only void, but evidence of fraud. Now it cannot be claimed that an assignment of all a debtor's property, for any purpose, is in the usual and ordinary line of business. Its effect is to put a stop to all business, by disposing of all the means by which it can be carried on. And this is one of the reasons given by the English courts why a general assignment of all a debtor's property is, per se, an act of bankruptcy.

Second. But whether the assignment is void, on the ground of presumptive fraud, it seems clear it is within the clause of the 39th section of the act, declaring any assignment, or transfer of property, by one in contemplation of bankruptcy, with intent "to delay, defraud, or hinder his creditors," shall be an act of bankruptcy. There would seem to be no doubt, from the facts in evidence, that this intent was in the mind of Langley in making this assignment. Indeed, he avers in his answer that his purpose was to prevent the petitioning creditor, Perry, from obtaining a priority over other creditors. This was an intent, within the meaning of the statute, to delay or hinder a creditor from obtaining his legal rights. Perry had sued Langley in the common pleas court of Gallia county for a debt of some $5,000, some time prior to the 25th of May, 1867, on which, by the rules of the court, he would be entitled to a judgment, and did obtain a judgment on the 1st of June, which, under the statute of Ohio, took effect, and was a lien, from the first day of the term, which was the 27th of May. There can be no doubt that Perry had a right to take all lawful means to secure his debt. No censure could attach to him for doing so, though it might give him an advantage over other creditors. All the creditors had the same right, and all who were thus vigilant would be entitled to all the legal benefits of their diligence. He was defeated and delayed in this, by the act of Langley in assigning all his property, and thus putting it beyond the reach of an execution. This clearly brings the assignment within the words of the statute as an act of bankruptcy. Langley avers in his answer, that one object in view, in making the assignment, was to prevent Perry from obtaining a preference over other creditors; and this, he assumes, was a meritorious purpose. But the law does not so view it. In its effect, it was delaying and hindering a creditor in a legal effort to secure his debt.

Third. But there is still another ground, on which the assignment must be adjudged to be an act of bankruptcy. It was clearly within the provision of the 39th section of the bankrupt act, declaring in substance that any conveyance, or transfer of property, with intent "to defeat or delay the operation of the act," to be an act of bankruptcy. The facts lead, with great certainty, to the conclusion that Langley must have intended to withdraw his property from the operation of the statute, and administer it through trustees of his own selection, and subject to his influence, and not by assignees selected by the creditors. If such was the design of Langley, even if honestly intended, the assignment, in its effect, was to defeat or delay the operation of the law. The bankrupt act was approved on the 2d of March, 1867, to take effect, as to the appointment of officers, and the preparation of rules of proceeding, from that day, and for other purposes, not until the 1st day of June following. The act, immediately after its approval, was published in all the leading newspapers of the country, and its provisions well known to the reading public. Langley, on the 25th of May, made the assignment in question. He had only to wait five days till the bankrupt act would be in full operation, and the way opened for filing his petition, and obtaining an adjudication in bankruptcy; and thus subjecting his property to distribution according to the just requirements of the act. Practically, the assignment delayed or defeated the operation of the law, and, as I think, was so intended by Langley. This was depriving the creditors of a legal right under the statute, and was clearly in contradiction of its spirit and letter. And the fact proved, that a few days after the assignment, Langley made a formal proposition to his creditors to compromise with them, by giving his promissory notes for forty cents on the dollar of his indebtedness, payable in instalments, within five years, may at least justify the suspicion, that the assignment was intended to facilitate such a compromise.

This leads me to the consideration of the second ground of objection to a decree of bankruptcy against Langley, namely, that the petitioning creditor, Perry, is estopped from urging or relying upon the assignment as an act of bankruptcy, for the reason that he assented to it, and cannot now in good faith, object to it. The well known doctrine of estoppel, is undoubtedly applicable in such a case, if the facts justify its application. It would clearly be in violation of a rule of good morals, as well as of law, that one should give his assent and approval to an act, and afterwards, for his own advantage, denounce the act as illegal and immoral. If the proof was that Perry had advised the making of the assignment, or after its execution, had expressly given his assent to it, as a creditor of Langley, he would have been precluded from insisting on it as an act of bankruptcy, and could not have maintained a standing in this court, as a petitioning creditor. But there is no evidence placing him in this position. The only fact relied on is, that, after the assignment had been made, and assignees had been approved of by the probate judge of Gallia county, and a bond ordered and given by the assignees in the very inadequate sum of $15,000 (the assigned estate being in value about $175,000), Perry applied to the court to have the penalty increased, which was done by order of the court. This was clearly no approval of, or assent to, the assignment, and this exception to the petition must be overruled.

There yet remains for consideration the third objection to a decree of bankruptcy against Langley. This, as before stated, is in substance that, on the 25th day of May, 1867, the date of the assignment to the trustees, the bankrupt act, as to this transaction, was not in force; that the statute of Ohio, legalizing such assignments, was then operative; and the probate court, having rightfully acquired jurisdiction of the proceeding, had authority to retain it until it was ended; and that the jurisdiction of that court was not affected by the bankrupt act, which did not take full effect until the 1st of June. This point has been strenuously insisted on by the able counsel representing Langley, and I am free to confess that, as a first impression, it seemed plausible, if not unanswerable. Upon full reflection I am satisfied his argument is untenable, and I will state very briefly the reasons which have led to this conclusion. The 50th section of the act of March 2d, 1867, provides that the act as to the appointment of officers and the promulgation of rules and general orders, shall take effect from its approval, "provided, that no petition or other proceeding under this act shall be filed, received, or commenced, before the 1st day of June, A. D. 1867." The phraseology of this proviso is somewhat peculiar and significant. It does not declare that the statute, as to all matters not included in the preceding part of the section, shall not take effect till the 1st day of June, but merely that no proceedings shall be instituted under the act before that date. Its effect, therefore, is, by a fair construction, that while it suspends the right to proceed until the day named, it was the intention of the law-makers that as to the body of its provisions, it should take effect from its passage. If this were not the intention, why provide specially that no petition should be filed, or other proceeding had before the 1st of June? If it had been intended to postpone the operation of the entire act, except for the specific purpose mentioned in the beginning of the section, until the day named, it may be pertinently asked why it was not so expressed in clear terms? Not being so expressed, and the words used not admitting of such a construction, the conclusion is irresistible that it was not intended that the main provisions of

the act should be a dead letter until the 1st of June. On the contrary, it would seem to be clear that it was intended that these should be operative from the day the act was approved. The reason for the postponement of the law, as to proceedings under it, is well known. The law had made it the duty of the supreme court to prescribe orders and rules in bankruptcy; and these, from the pressure of other duties, could not be prepared before the 1st of June. For the purpose of insuring uniformity in the proceedings, it became necessary to suspend the right of petitioning until that day; but, for all other purposes, it was operative from its passage. And it is most obvious that any other construction of the section referred to, would have had a very decided effect in defeating the object of the statute. If all transactions occurring prior to the 1st of June, though plainly in conflict with the provisions of the bankrupt act, and involving gross frauds, were withdrawn from its operation, and virtually legalized, great facilities would have been afforded for the evasion of the salutary restrictions and prohibitions of the statute. And it can hardly be imputed to congress that such a result could have been intended. But, aside from the 50th section of the act, there are other evidences that it was intended the statute should take effect, in its main provisions, from its passage. In the beginning of the 39th section it is provided "that any person residing and owing debts as aforesaid, who, after the passage of this act," shall commit any of the numerous acts of bankruptcy specified in the section, may be proceeded against in bankruptcy. The words are not, after this act shall take effect, but after the passage of the act, which means plainly, after the 2d of March, the date of the approval of the act. And this is not within the category of retroactive laws, as its operation is upon future transactions, and not those that are past.

In addition to this, light is cast upon the question under review by the 35th section of the statute. The purpose of this section is to point out under what circumstances conveyances and transfers of property, by one in contemplation of bankruptcy, shall be deemed fraudulent and void; and it prescribes the duties and powers of assignees in bankruptcy, in proceedings to set aside such conveyances and transfers, and for the recovery of property thus fraudulently sold, or disposed of. In the beginning of the section it is provided "that if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition, by or against him, shall dispose of his property in the way specified, his acts shall be fraudulent and void, and the property disposed of may be recovered by his assignee in bankruptcy." Here, it will be observed, the limitation as to time is, four months prior to the filing of the petition. And any act within the purview of the section, committed within that time, is declared to be fraudulent and void. Now, in this case, the assignment by Langley was on the 25th of May, and the petition in bankruptcy was filed the 17th of July following; and, as less than four months intervened, the assignment is within the operation of the 35th section. If, therefore, there was a doubt as to the true construction of the 50th section of the act, the reference to the 35th and 39th sections shows conclusively that the statute extends to transactions occurring prior to the 1st of June, 1867, and that they are proper subjects of jurisdiction under the bankrupt law. Now it is not denied by counsel that the bankrupt act of the 2d of March, 1867, so far as it defines what are acts of bankruptcy, and points out the mode of proceedings, supersedes all insolvent laws of the state. I have before referred to this well settled doctrine, and will only cite some of the authorities by which it is sustained: Ex parte Eames [Case No. 4,237]; Judd v. Ives, 4 Metc. [Mass.] 401; [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 195; [Houston v. Moore] 5 Wheat. [18 U. S.] 22; and also a very learned opinion by Judge Williams, of the district court of Allegheny county, Pa., in Com. v. O'Hara, 6 Am. Law Reg. (N. S.) 765; In re Hill [Case No. 6,481]. It results conclusively, that if the provisions of the bankrupt act were in force on the 25th of May, 1867, the date of the assignment, and that assignment was within the scope and intent of the law, and as an act of bankruptcy, altogether null and void, the probate court of Gallia county had no jurisdiction of the assignment, and the acts of that court in regard to it are wholly invalid. And no argument is needed to prove that no court can legitimately obtain jurisdiction by any act against law, and inherently void. The argument, therefore, that the Gallia county probate court, having obtained jurisdiction under the state law, is entitled to retain it to the end of the proceeding, has no force or application. That court had no authority to act in the matter of the assignment, as the jurisdiction of this court was paramount and exclusive. There is, therefore, no conflict of jurisdiction.

A decree in bankruptcy must be entered; and the usual order for a warrant is directed to be made. As a matter of course, the motion to dissolve the injunction heretofore granted, is overruled.

[NOTE. Subsequently a bill in equity was filed by Langley against Perry to revise and reverse the adjudication of bankruptcy entered in this case. Demurrers to this bill were overruled, and the judgment of this court reversed. Case No. 8,067.]

PERRY (LANGLEY v.). See Case No. 8,067.

Case No. 11,007.

PERRY v. LITTLEFIELD.

[Cited in Perry v. Corning, Case No. 11,004. Nowhere reported; opinion not now accessible.]

Case No. 11,008.

PERRY v. LITTLEFIELD et al.

[17 Blatchf. 272; 17 O. G. 51; 4 Ban. & A. 624.] [1]

Circuit Court, N. D. New York. Nov. 10, 1879.

PATENTS—ASSIGNMENT—EQUITY—DEMURRER—DECREE OF TRANSFER.

1. The decision of the supreme court in Littlefield v. Perry, 21 Wall. [88 U. S.] 205, construed.

2. The invention covered by the claim of the letters patent [No. 4,006] re-issued to Dennis G. Littlefield, May 31st, 1870, for an "improvement in the mode of hinging covers to stoves, tea-kettles and other open-topped vessels," on the surrender of the original letters patent [No. 53,251] granted to said Littlefield, March 13th, 1866, namely, "a detachable cover and its seat, respectively provided with a pin and an opening, so constructed as to engage or lock with each other, for the purpose of hinging and securing a cover upon an open-topped vessel, substantially as described," is an invention the exclusive right to which for the states of New York and Connecticut, as applicable to stoves covered by the patents embraced in the assignment of April 5th, 1853, and in the supplemental agreement of the same date, referred to in Littlefield v. Perry [supra], belongs to the plaintiff, as against Littlefield and all persons claiming under him.

3. A bill in equity being maintainable in some respects, a demurrer to the whole bill was overruled.

4. The parties to the suit being all of them citizens of New York, this court has no power to decree that the defendant execute to the plaintiff a transfer of letters patent.

[This was a bill in equity by John S. Perry, trustee and executor, against Dennis G. Littlefield and the Littlefield Stove Manufacturing Company.]

Hamilton Harris, for plaintiff.
Edward F. Bullard, for defendants.

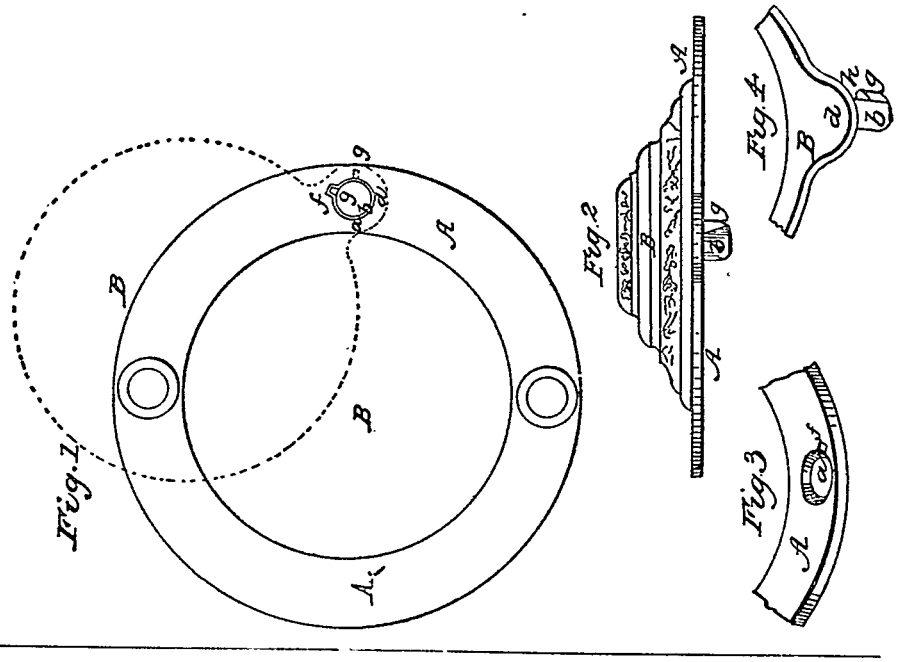
BLATCHFORD, Circuit Judge. The assignment of April 5th, 1853, recites the granting to Littlefield of a patent on the 15th of April, 1851 [No. 8,047], "for a coal burner so constructed as to produce combustion of the inflammable gases of anthracite coal," and the fact that he had applied for a patent "securing to him a certain improvement in the invention so as aforesaid patented by him," and then assigns to Treadwell and Perry all the right, title and interest which Littlefield "now has, or can or may hereafter have, in or to the aforesaid inventions, improvement and patent, or the patent or patents that may be granted for said inventions, or any improvements therein, and in any extension or extensions thereof, within and throughout the district and territory embraced within the states of New York and Connecticut, for and during the term for which the aforesaid letters patent were granted, and the terms for which any patent for the aforesaid improvement, and any other improvement or improvements thereof, or extensions for or of either thereof, may be granted." The supreme court of the United States, in Littlefield v. Perry, 21 Wall. [88 U. S.] 205, held that this assignment, "taken by itself, contains, in most unmistakable language, an absolute conveyance by the patentee of his patent and inventions described, and all improvements thereon, within and throughout the states of New York and Connecticut;" and that this assignment and a supplementary agreement executed between the same parties at the same time, when construed together, operated to constitute Treadwell and Perry the assignees of Littlefield, within the patent laws, in respect to the subject-matter of the assignment, and to give them, and those claiming under them, the right to sue in this court, to prevent any infringement upon their rights. On the 22d of July, 1853, Littlefield withdrew the application before-mentioned, which had been filed December 30th, 1852, and filed a new application, on which a patent [No. 10,448] was issued to him January 24th, 1854. The supreme court held, in the case referred to, that the assignees became, in equity, the owners of this patent of 1854, under the assignment of April, 1853; that all the patents outstanding, and the subject of the controversy in that suit, exclusive of the patent of 1851, were either re-issues of the patent of 1854 or improvements upon it; and that the use of the said patents, issued after January, 1854, by Littlefield and his co-defendant Jagger, was an infringement of the rights of said assignees. The patents so referred to were these: a patent issued June 25th, 1861; re-issues in two parts, 132 and 133, made November 19th, 1861, of the patent of January 24th, 1854; re-issues in four parts, 1,332, 1,333, 1,334 and 1,335, made August 26th, 1862, of the patent of January 24th, 1854, on the surrender of re-issues 132 and 133; re-issues in two parts, 1,426 and 1,427, made March 3d, 1863, of the patent of January 24th, 1854, on the surrender of two of the four re-issues of August 26th, 1862; re-issues in two parts, 1,478 and 1,479, made May 19th, 1863, of the patent of January 24th, 1854, on the surrender of the remaining two of the four re-issues of August 26th, 1862; re-issues in two parts, 1,813 and 1,814, made November 8th, 1864, of the patent of January 24th, 1854, on the surrender of re-issues 1,426 and 1,427; re-issue 1,815, made November 8th, 1864, of the patent of January 24th, 1854, on the surrender of one of the two re-issues of May 19th, 1863; re-issue 1,823, made November 22d, 1864, of the patent of January 24th, 1854, on the surrender of the remaining one of the two re-issues of May 19th, 1863; a patent issued December 19th, 1862; a patent issued August 18th, 1863; and re-issue 1,594, made December 22d, 1863, of the patent of August 18th, 1863. The outstanding patents, when the bill of revivor and supplement was filed by John S. Perry, trustee,

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 624; and here republished by permission.]

&c., against Littlefield and Jagger, on the 6th of February, 1865, were (exclusive of the patent of 1851) the patent of June 25th, 1861, the patent of December 9th, 1862, re-issues 1,813, 1,814, 1,815, and 1,823, of the patent of January 24th, 1854, and the re-issue 1,594, of the patent of August 18th, 1863.

The present bill is filed by the same plaintiff who filed the said bill of revivor and supplement in the former suit and in the same right and on the same title. He claims to be the equitable owner, by said title, of a patent re-issued to the defendant Littlefield, May 31st, 1870, on the surrender of a patent granted to him March 13th, 1866, so far as the states of New York and Connecticut are concerned, and charges that the defendants have infringed said patents of 1866 and 1870. The bill prays for an account of the profits of the defendant and of the plaintiff's loss, and that the plaintiff's title for New York and Connecticut, under said patents of 1866 and 1870, may be established.

[Drawings of re-issued patent No. 4,006, granted May 31, 1870, to D. G. Littlefield. Published from the records of the United States patent office.]



The specification of the re-issue of 1870 states that Littlefield has invented an "improvement in the mode of hinging covers of stoves, tea-kettles and other open-topped vessels." It proceeds: "In covering stoves, tea-kettles and other vessels opening upwardly, it has long been found useful and advantageous to so adjust and cover the vessel, that the former may be swung aside in a horizontal plane, without its falling off, and so connected to its seat that it may be readily detached from it. Some years ago I designed and applied to the covers of a stove oven which opened upwardly, a hinge of novel construction, by which the objections to a permanent fastening were, in a measure, obviated. Said device consisted in placing an oval shaped pivot-pin upon the under side of the cover near its edge, which fitted into an oval shaped aperture in the rim or upper plate of the stove. A recess or notch cut upon a narrow side of the oval pivot, deep and wide enough to embrace the thickness of the stove plate, permitted the cover to be swung open horizontally and supported in all those positions in which there was not a coincidence of the larger axis of the pivot with the oval aperture. This mode of hinging the cover to its seat was defective, in that it made an extremely loose joint, and permitted a detachment of the cover at two distinct points, thereby permitting it to fall off on being swung half around. The object of my present invention is to improve upon the hinge there constructed, and to obtain a hinge for the cover of open-top stoves, tea-kettles and other vessels, which shall work closely and evenly, and be so formed that the cover may be readily swung open, and avoid all possibility of its falling from the vessel by its own weight when so swung aside, and also be removed, when desirable to do so, without trouble or inconvenience. This invention relates to hinging and securing covers upon open-topped vessels, and consists in forming with a cover and its seat respectively, a circular opening and a cylindrical pin, so constructed that they will engage or lock with each other." Drawings are annexed to the specification and it refers to them in these words: "Figure 1 is a plan view of the under side of an annular cast-iron plate, designed as a por-

tion of the top piece of a stove, with a cover attached thereto by means of my improved hinge. Figure 2 is a side elevation of the same. Figures 3 and 4 are views in perspective of detached portions of the top and cover respectively, embracing the pivot and pivot aperture forming my improved hinge."

The specification also says: "My invention, as represented in the drawing, may be described as follows: The plate or rim A has a circular opening a, and the cover B has fitted to or cast with it a cylindrical pin b, or vice versa. The opening a is so formed, that, when the cylindrical pin is introduced therein, the two engage or lock with each other and form a hinge joint, the pin fitting closely and flush in the aperture at all times, whether the cover is at a state of rest or being turned. The close and accurate manner in which the cylindrical pin is embraced within the circular aperture prevents, at the same time, all loose play or movement thereof. Thus, while the cover B, as with the former hinge, has an easy horizontal movement, it cannot, owing to the cylindrical form of the pivot pin, and the circular form of the aperture, become accidentally detached, when swung open, although the cover, as with the former hinge, may be as readily lifted off as if there were no hinge attached to it. Hence, no inconvenience can arise from the employment of my present improvement, and it presents the advantage of creating but little expense in its construction, its parts being cast with the plates proper." The claim of the re-issue is in these words: "A detachable cover and its seat, respectively provided with a pin and an opening, so constructed as to engage or lock with each other, for the purpose of hinging and securing a cover upon an open-topped vessel, substantially as described."

The specification of the surrendered patent of March 13th, 1866, contained this language: "In covering tea-kettles, stoves and other vessels opening upwardly, it has long been found useful and advantageous so to combine the cover proper with the vessel as that the former may be swung aside in a horizontal plane without falling off. Heretofore, however, this result has been accomplished by means of rivets, bolts or other similar secure joints, so formed as that, although the cover had free play horizontally, it could not be lifted off or detached from the vessel without great trouble and inconvenience. Some years ago I designed and applied to the ornamental covers of open stove ovens, an improvement in these swing joints, by which the objection of a permanent fastening was in a measure obviated. This improvement consisted simply in placing an elongated or oval shaped boss or projection upon the under side of the cover, near its edge, which fitted into a similarly shaped aperture in the rim of the upper plate of the stove. A recess or notch, cut upon one end of the oval projection, deep and wide enough to embrace the thickness of the stove plate, permitted the cover to swing around and be supported in all those positions in which there was not a coincidence of the larger axis of the projection and aperture. This mode of pivoting was defective, however, in that it made an extremely loose joint, which, by its complete articulation in opposite positions, allowed a detachment of the cover at two distinct points. The object of my present invention has been to improve upon the plan then invented, and to obtain a pivoted or swing joint for the cover of open-top stoves, tea-kettles, and other vessels having vertical openings or recesses, which shall work closely and evenly, and be so formed as that the cover may be not only readily swung aside, in order to fill the vessel, without the necessity of lifting it off, or the possibility of its falling away by its own weight when so swung aside, but can, also, when closed, and then only, be readily removed without trouble or inconvenience. The nature of my improvement consists chiefly in the substitution of a circular aperture in the rim or top plate of the vessel, and a round pivot pin or projection upon the under side of its cover, in the place of the elongated or oval aperture and projection, heretofore designed. * * * I do not claim broadly the combination of a swing cover with a vessel, in such a manner as that it may be readily detached therefrom, but what I do claim as my invention and desire to secure by letters patent is, the use of a cylindrical keyed pivot pin, in combination with a circular notched aperture, for the purpose of hinging and securing swinging covers upon stoves, tea-kettles, or similar open-topped vessels, substantially in the manner herein set forth." The other parts of the specification of the original patent do not differ substantially from the corresponding parts of the specification of the re-issue.

The bill alleges, that the stove to the cover of the oven of which Littlefield so applied, as stated in said specifications, the hinge made by the oval shaped pivot pin in connection with the oval shaped aperture, was the stove patented by said patent of April 15th, 1851; that, by virtue of the said assignment of April 5th, 1853, and the said supplementary agreement of the same date, the plaintiff has the exclusive title, for the states of New York and Connecticut, to the said patent of 1851; and that, by reason of the premises contained in the original bill in the former suit, and in the bill of revivor and supplement therein, and in the present bill, the plaintiff has the exclusive title, for the states of New York and Connecticut, to the said patent of 1866 and the said re-issue of 1870.

The specification of re-issue 1,823, of the patent of January 24th, 1854, sets forth, that Littlefield has "invented new and useful improvements in stoves for burning anthracite and other concentrated fuels," and that what follows therein is a description of his invention. It also says: "My invention relates to

an improvement in stoves which are supplied with an excess of fuel and the excess or reserve fuel fed to the fire as fast as consumption takes place, and for which I have applied for letters patent in even date herewith, and my invention consists in the adaptation of a swinging cover to the top of the stove, so as to permit said cover to be swung open on a horizontal plane without falling off, when necessary to supply fresh coal or to cool the stove." It further states, that this cover is hinged to the top of the stove by a rivet, so that it may be swung aside on a horizontal plane, without its becoming detached and falling off, "whenever it may be required to open the chamber G, or to supply fresh coal, cool the stove, or for other purposes;" and that the inventor does not broadly claim hinging a cover to the top plate of a stove, but claims "the arrangement, adaptation and combination with a fuel supplying stove, of a cover so hinged to the top plate of the stove that it may be swung open on a horizontal plane, substantially in the manner and for the purposes specified."

The bill is accompanied by an affidavit made by the plaintiff, which states that he has in his possession a stove made by Littlefield about the year 1851 or 1852, in accordance with said patent of April 15th, 1851, which had and still has a double sliding cover attached to its open top, rim or upper plate, and an oval shaped pivot pin upon the under side of the cover, near its edge, fitting into an oval shaped aperture in the rim or upper plate of the stove, substantially according to the description of such arrangement in the specification of said patent of 1866, and in the specification of said re-issue of 1870; that another stove, made by said Littlefield during the year 1853, in accordance with said patent granted January 24th, 1854, and subsequently re-issued as aforesaid, and now in the possession of the plaintiff, had and still has a cover so hinged to the top plate, that it may be swung open on a horizontal plane, as more fully described in said re-issue 1,823; that the exclusive right to the use, within the states of New York and Connecticut, of the said patents of April 15th, 1851, and January 24th, 1854, and of the said re-issue 1,823, has been adjudged to have been conveyed to the plaintiff; that the said bill of revivor and supplement was filed January 25th, 1865; that, subsequently thereto, Littlefield made further inventions in said stove patented April 15th, 1851, and in the subject-matter of the invention patented by re-issue 1,823, which resulted in there being granted to him the said patent of 1866 and the said re-issue of 1870; that said inventions are legitimate improvements upon said inventions shown and described in said patent of April 15th, 1851, and said re-issue 1,823; that it is true that said improvements may also be applied to tea-kettles and other open-top vessels, but they were primarily adapted by Littlefield to stoves of the character conveyed to Treadwell & Perry, and their assigns, by the assignment of April 5th, 1853; that Littlefield, since March 13th, 1866, has, with his associates, made and sold stoves embracing the said improvements, within the states of New York and Connecticut, and licensed other manufacturers of stoves to put in practice the same within the said territory; that Littlefield threatens to continue such invasion of the plaintiff's rights; and that the successors of Treadwell & Perry have on hand a large stock of stoves which embody said inventions patented in 1866 and re-issued in 1870, and are ready to supply the demand therefor in said states of New York and Connecticut.

There is, also, an affidavit by James Gray, a metal plate worker, with an experience of more than thirty years in stoves, ranges and hot air furnaces. He states that he is familiar with the stove constructed by Littlefield under said patent of April 15th, 1851; that such stove is not a cooking stove, as known to the trade, but is a parlor heating stove, combining an oven for culinary or air heating purposes; that the mode of attaching the swinging cover to the top plate of said stove is substantially described in the paragraph commencing "Some years ago I designed and applied," in said patent of March, 1866; that the mode of attaching the swinging cover to the top plate of the stove constructed by Littlefield under the original patent of re-issue 1,823, is substantially in accordance with the claim of re-issue 1,823; and that the device covered by the patent of 1866 and the re-issue of 1870 is a natural and legitimate improvement of the devices applicable to the swinging covers of the open tops of stoves, as patented by Littlefield April 15th, 1851, and by re-issue 1,823. Two other affidavits of experts, to the same purport as the affidavit of Gray, are produced by the plaintiff.

The bill prays for an account and an injunction, and also for a decree that the plaintiff is vested with the exclusive right, within the states of New York and Connecticut, to make and vend, and cause to be made and vended, stoves, embodying the improvement covered by the said patent of 1866 and the said re-issue of 1870, and that Littlefield be decreed to execute and deliver to the plaintiff all further transfers and evidences of title to the said exclusive right within the said territory, as may be necessary for the protection of the plaintiff in his said rights.

The defendants have put in a demurrer to the whole bill, assigning for cause that the plaintiff has not made or stated such a case as entitles him to any such relief as is prayed for, and that the plaintiff has an adequate remedy at law, and specifying the following additional grounds of demurrer: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) it does not show that the plaintiff has any title to the patents set out in the bill; (3) this court

has no jurisdiction to compel the performance of the contract of 1853, referred to in the bill.

It is contended, for the defendants, that the patent of 1866 does not relate to the subject-matter transferred by the assignment of 1853; that the device patented by re-issue 1,823 is different from the subject-matter described in the patent of 1866; that re-issue 1,823 does not describe the construction of any hinge, but describes a cover fastened to the top of the stove by a rivet, and claims the adaptation of such cover to the top of the stove only when combined with a fuel supplying stove; that the patent of 1866 would be infringed by the use of the hinge therein patented in combination with any cover and its seat, where the cover would swing open horizontally; that this court cannot take jurisdiction of the matter in controversy in this suit, for the reason that the only patent alleged to have been infringed was applied for and granted after the assignment of April, 1853, was made; and that the invention of March, 1866, was not an improvement in the inventions involved in the former suit.

The original patent of January 24th, 1854, describes a reservoir over the fire pot serving the purpose of a magazine or receptacle for the fuel, where it is designed to feed the fire but once in twenty-four or forty-eight hours. The invention is stated to consist in employing a cylindrical grated fire pot, surmounted by such reservoir which receives the gases arising from the burning of the fresh coal, besides containing the supply of fuel; and the object of the invention is stated to be to effect a simultaneous combustion of the waste gases with the carbon of the coal. The reservoir and the exterior cylinder of the stove have each of them a cover.

Re-issues 132 and 133 are to the same purport. In each of the re-issues 1,332, 1,333, 1,334 and 1,335, it is stated that the patent of January 24th, 1854, is "for and upon a new method of constructing that class of stoves using a supplying cylinder for the reserve coal." Each of these re-issues describes the outer cylinder and its cover and the reservoir and its cover. Re-issues 1,426 and 1,427 contain, each of them, a like statement with that in re-issues 1,332, 1,333, 1,334 and 1,335 as to the patent of January 24th, 1854, and also describes the outer cylinder and its cover and the reservoir and its cover. The same is true of re-issues 1,478 and 1,479. Re-issue 1,813 states that the invention "relates to improvements in stoves which are supplied with an excess of fuel and the excess or reserve fuel fed to the fire as fast as consumption takes place," and describes the reservoir and its cover and the outer cylinder and its cover. The same is true of re-issues 1,814 and 1,815. The contents of re-issue 1,823 have been before specifically recited. Figure 4 of that re-issue is "a plan view of the top of the stove and cover opening thereto." That re-issue must have been justified by the original specification, drawings and model. Its text shows that Littlefield declared the arrangement, in a fuel supplying stove, of a cover hinged to the top of a stove by a rivet, so as to be swung aside on a horizontal plane without falling off, to be an improvement in a stove for burning anthracite and other concentrated fuels. The specification of the original patent of January 24th, 1854, shows that the stove described was designed and arranged to burn anthracite coal. All the re-issues of that patent show the same thing. The assignment of April 5th, 1853, recites that the patent of April 15th, 1851, is a patent "for a coal burner, so constructed as to produce combustion of the inflammable gases of anthracite coal." By the supplemental agreement of the same date, Littlefield agrees to sue, for the benefit of Treadwell & Perry, all persons who shall infringe, within New York or Connecticut, the said patent of April 15th, 1851, "or any patent or patents which may hereafter be obtained in respect to the subject-matter thereof;" and he also agrees, that, in case the said patent, "or any patents which may hereafter be obtained by him, as aforesaid, for the subject-matter thereof, shall be adjudged invalid," so as to deprive Treadwell & Perry "of the use and enjoyment of the rights and interests conveyed by the aforesaid assignment," the agreements on the part of Treadwell & Perry shall thereby become void; and he also agrees to furnish to Treadwell & Perry, before the first day of August then next, at the cost price thereof, at their furnace, "undress cast iron patterns for four several sizes of the coal burner patented in and by the aforesaid letters patent, and embracing all the improvements therein for which letters patent shall then have been secured, suitable to mould and cast from, and that he will also furnish at the place and price aforesaid, within a reasonable time after letters patent have been secured by him therefor, undressed cast iron patterns of the several sizes, of all improvements upon said coal burner which shall be made or invented by him." It is entirely clear, that the plaintiff is entitled, as against Littlefield and all persons claiming under him, to the exclusive right, title and interest in and to any invention made by Littlefield, so far as it is applicable to the stove covered by the patents embraced in the assignment and the supplemental agreement, which facilitates or improves the method of hinging a cover to the top of the stove, so as to enable it to be swung aside on a horizontal plane without falling off. In re-issue 1,823 the cover is hinged by a rivet. In the original patent of March, 1866, the invention covered by that patent is stated to be an "improvement in the mode of attaching and hinging covers to stoves and other vessels, when said covers are designed to swing open in a hori-

zontal plane." That patent also states, that, "in covering tea-kettles, stoves and other vessels opening upwardly, it has long been found useful and advantageous so to combine the cover proper with the vessel as that the former may be swung aside in a horizontal plane without falling off;" and that "heretofore, however, this result has been accomplished by means of rivets, bolts, or other similar secure joints, so formed as that, although the cover had free play horizontally, it could not be lifted off or detached from the vessel without great trouble and inconvenience." Then follows, in that patent, the statement, that, some years ago, Littlefield "designed and applied to the ornamental covers of open stove ovens, an improvement in these swing joints, by which the objection of a permanent fastening was in a measure obviated," such improvement being the oval shaped projection on the under side of the cover, in connection with the oval shaped aperture in the rim of the upper plate of the stove. Then follows a statement, that the object of the new invention is to improve on the oval projection and oval aperture plan, and obtain a swing joint for the cover, which shall so work as that the cover may be not only readily swung aside without being lifted off or falling when swung aside, but may, when closed, and then only, be removed; and that the improvement consists chiefly in substituting a circular aperture in the rim or top plate, and a round projection on the under side of the cover, in place of the oval aperture and oval projection. This new invention is clearly applicable to the stove covered by the patents embraced in the assignment and the supplemental agreement. It improves the method of hinging a cover to the top of the stove, so as to enable it to be swung aside on a horizontal plane, without falling off. It is an improvement on the rivet method in re-issue 1,823. The rivet method was a permanent fastening. The oval projection and oval aperture method was an improvement which got rid of a permanent fastening, but was yet defective. The round hole and round projection method is a still further improvement. All three of the methods allow the cover to be swung aside in a horizontal plane, and to be supported in pre-determined positions. The re-issue of 1870, in the particulars just referred to, is to the same effect.

The bill complains only that the defendants have made and sold stoves containing the new improvement, and prays an account only in respect to such stoves, and a decree establishing the plaintiff's exclusive right, for New York and Connecticut only, to make and sell stoves embodying the new invention. It does not extend the plaintiff's claim to covers for any vessels but stoves. As regards such stoves as are covered by the patents embraced in the assignment and the supplemental agreement, it seems quite clear that the plaintiff has the exclusive right, as against the defendants, to employ in such stoves the improvement claimed in the re-issue of 1870, and that the bill is well founded in that respect. Whether the plaintiff would have the exclusive or any right to employ such improvement in other vessels than such stoves, is not a material question in this case. Even though the plaintiff, in respect to such re-issue, be a mere licensee in regard to such stoves, and not an assignee, or a grantee of the entire exclusive right under the patent for a specified territory, yet, as such licensee, he can maintain this bill against Littlefield and all persons who claim under him, as was directly determined by the supreme court in the former suit.

As the parties to the suit are all of them citizens of the state of New York, the bill is not maintainable, so far as it asks for a decree that Littlefield execute further transfers to the plaintiff. But, as the demurrer is to the whole bill, and as the bill is maintainable in all other respects, the demurrer must be overruled, with costs to the plaintiff, and with leave to the defendants to answer, on payment of such costs, to be taxed, within twenty days after service of a copy of the order to be entered on this decision.

The plaintiff also asks for a preliminary injunction to restrain the defendants from infringing the plaintiff's exclusive rights under the re-issue of 1870. Such injunction is granted, so far as regards the employment of the invention claimed in the re-issue of 1870 in such stoves as are covered by the patents embraced in the assignment and the supplemental agreement, as determined by this court and the supreme court in the previous litigations between the parties, and by this court in this decision.

[For other cases involving this patent, see Littlefield v. Perry, 21 Wall. (88 U. S.) 205; Perry v. Corning, Case No. 11,004.

[Subsequently a motion to dissolve the injunction granted in this case was refused. 2 Fed. 464.]

Case No. 11,009.

PERRY v. NEWSOME.

[10 Int. Rev. Rec. 20.]

District Court, D. North Carolina. June 12, 1869.

WRITS—SUFFICIENCY OF SERVICE OF SUMMONS.

A supervisor of internal revenue served, in person, a summons upon N., a clerk of a railroad company, to produce certain books and papers and submit to examination, under section 49, Act July 20, 1868 [15 Stat. 144]. *Held*, the service of the summons was sufficient, and rule granted to show cause why attachment should not issue against the party refusing to comply therewith as for contempt.

This was a motion by [P. W. Perry] the supervisor for a rule against the defendant [Daniel R. Newsome], who is clerk of the North Carolina Railroad, having custody of the books of said company, for failing and

refusing to produce certain books and papers belonging to the company for examination by the supervisors, as provided in section 49, of the act of July 20, 1868. The district attorney, Hon. D. N. Starbuck, read a copy of the summons and an affidavit of the supervisor, of personal service on Mr. Newsome, and that he had neglected and refused to comply therewith, and asked for a rule to show cause why an attachment should not issue as for contempt, as provided in section 14 of the act of March 3, 1865, amended July 3, 1866. Hon. B. F. Moore, Jos. T. Weed, Esq., and Gov. Bragg appeared in opposition to the motion, and raised several points of objection, to wit, as to the form and contents of the summons and affidavit, the name of service (contending it should have been served by the assistant assessor), the constitutionality of the law authorizing such examination of private books and papers.

The law was argued at length by Mr. Moore, and the judge, without requiring reply from the district attorney, said: The form of the summons, its contents, and the manner of service, are not prescribed by the act authorizing it, but said act does prescribe the manner in which the supervisor may compel a compliance therewith, to wit, "in the same manner as assessors may do," which manner is pointed out in section 14 of the act of March 3, 1865 [13 Stat. 469], amended July 13, 1866 [14 Stat. 101].

As to the constitutional question, his honor remarked that acts of congress, and of our own state legislature, conferring this high power not only upon committees, but upon officers, to send for persons and papers to be examined in furtherance of a stated purpose, has been for so long a time acquiesced in, and so frequently indulged without the right having been seriously questioned in the courts, that it was now scarcely worth while seriously to debate the question. That as to the question of necessity, alluded to by Mr. Moore, no extraordinary power is granted by our law for any other reason than necessity, and in the opinion of his honor, there was both a necessity and a propriety for the provision here made for the proper enforcement of the internal revenue laws.

The counsel, Mr. Moore, desired to say that he did not mean to be understood as arguing against the constitutionality of the act authorizing the examination sought in this case. He conceded it to be constitutional.

BROOKS, District Judge, then decided that the supervisor had summoned the defendant in the manner provided in said section 49; that he had proceeded correctly in this application, to enforce compliance with the summons, to wit, as provided in said section 14, and was clearly entitled to the rule. Rule granted.

The supervisor, on assurance being given that the examination of the books and papers would be fully permitted, waived further proceedings.

Case No. 11,010.

PERRY et al. v. PARKER et al.

[1 Woodb. & M. 280.] [1]

Circuit Court, D. Massachusetts. May Term, 1846.

INJUNCTION — DENIAL OF COMPLAINANT'S TITLE—MERGER—MILL PRIVILEGES—CONVEYANCE OF DIFFERENT RIGHTS.

1. Injunctions cannot be granted in the courts of the United States without notice, and hence all of them here are special. If the title of the complainant is denied, he must show former recoveries, or long possession, in the case of patents; and in case of waste and trespass, that there are no facts to warrant the denial, or the injunction will be refused till the disputed questions of title are settled at law.

[Cited in Woodworth v. Rogers, Case No. 18,018; Irwin v. Dixion, 9 How. (50 U. S.) 29; U. S. v. Parrott, Case No. 15,998; Le Roy v. Wright, Id. 8,273; Earth Closet Co. v. Fenner, Id. 4,249; Cook v. Ernest, Id. 3,155.]

[Cited in Clayton v. Shoemaker, 67 Md. 219, 9 Atl. 636; Ashurst v. McKenzie (Ala.) 9 South. 264.]

2. Where an estate, out of which a mill privilege has been carved, becomes united in ownership with other estates below, the owner of both may convey different rights and privileges from what were before attached to either estate; but in conveying either to different and new persons, any change in the privileges made appurtenant to each must distinctly appear, or each will be presumed to exist as before the junction of the estates.

[Cited in U. S. v. Parrott, Case No. 15,998.]

[Cited in Dunklee v. Wilton R. Co., 24 N. H. 501.]

This was a bill in equity [by William Perry and others, against Betsy Parker and others] praying an injunction against the respondents not to cut down the dam and gates of the complainants, on Johnson's brook, in Bradford, in this state. It was averred that this dam and gates were used in connection with, and to retain water for, mills and machinery for spinning flax, situated at another dam several rods below, and which machinery was of great value; that they had been used for this and other purposes by the complainants, and those under whom they claim, undisturbed, for sixty years, till the respondents, in February last, destroyed a portion of them, and threatened to persist in cutting them away, greatly to the injury of the complainants; against which a special injunction is prayed for forthwith. Various other matters in connection with these general averments were detailed in the bill, and will be referred to in the opinion of the court, so far as important to the point on which the subject is disposed of for the present. The respondents, on being notified pursuant to law, appeared and resisted the prayer. But the rule for an answer not having expired, none had been filed; and the hearing came on under affidavits filed upon both sides, and a long series of title deeds, and wills, and proceedings in partition in the probate courts

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

in the county of Essex. Such of these as it may be necessary to particularize will be stated by the court, with any admissions or agreements by the parties as to facts deemed material, and not in controversy between them.

B. Rand, for complainants.
Mr. Choate and O. P. Lord, for respondents.

WOODBURY, Circuit Justice. Injunctions being prohibited in the courts of the United States, by an act of congress, without notice first to the opposing party (Act 2d March, 1793, c. 22, § 5 [1 Stat. 334]), it follows that all of them must here be regarded as special, rather than some of them as common, or a matter of course (Drew. Inj. 5; 2 Story, Eq. Pl. 177); and therefore, when resisted under such notice, whether the hearing comes on before or after an answer, no injunction can be granted, unless special and sufficient cause is clearly shown. Thus, by way of illustration, if the complainant asks for an injunction against the use of a patent, he must not only show a patent in his favor, valid on its face, and raising a presumptive title in him to its exclusive use; but, if the respondent denies his title, and casts a shade over it by evidence, the grant of the injunction must be delayed, till the validity of the title can be tried under a proper issue in the case, unless the complainant can strengthen his claim beyond the mere patent, by showing former recoveries in favor of it, or quiet possession of it for some time, or frequent sales and uses of it under him. So in cases of injunction against waste or trespasses, it is not only necessary for the complainant to make out a prima facie title to the premises or property, but if his title, to the extent to which it is set up by him, is denied and contested by the respondent, and evidence enough is offered to show there is some ground, in the facts of the case, for this denial, the court will not grant the injunction till the disputed title is first settled between the parties, on appropriate pleadings and full testimony.

In the present case, there have been no such pleadings and the title, as set up by the complainants, and as proved prima facie, is contested by the respondents. The grant of an injunction, then, must be postponed, under the well established rule I have just referred to, until a suitable issue is framed and tried in respect to the title, provided the respondents have introduced sufficient evidence, not to overturn the plaintiff's title, or to establish their own, (for these are the very questions hereafter to be tried,) but to show that they have some plausible and real grounds for bringing the title in question. The reason of this distinction will be apparent and strong, when it is seen that the extraordinary intervention of a court of equity in issuing an injunction against doing acts concerning so grave and weighty a subject as real estate, can never be proper unless it is clear that the person doing them has no title to the property. Otherwise the true owner might be excluded from the free and lawful use of his own estate. While any reasonable doubt exists on the subject of the title, neither party stands in a position to invoke any extraordinary interference of a court of equity in his behalf, but can and should resort to the courts of law for redress for supposed injuries; or by actions there, or in other modes in equity, first settle the title which is in dispute. On the contrary, likewise, it is equally reasonable not to permit a respondent to deprive a complainant of the remedy in equity by an injunction in a case where irreparable and repeated injuries are anticipated, and where no other form of redress is so speedy and effectual, merely by making a formal denial of the plaintiff's title, without any evidence to show the denial to be made probably in good faith, and to be sustained by something of fact and law.

The cases generally, where an injunction is allowed in connection with the realty, are those in which the interests of the parties in the estate are admitted, but the controversy is concerning what they may do under these interests, and where one may do under color of his interests much more than he is clearly entitled to. Drew. 182; 1 Mylne & C. 516. As, for instance, one being proved or conceded to own a life estate, and the other the reversion, the contest is, what are their rights as to cutting timber; or certain kinds of trees, such as saplings, or mere ornaments; or one being a mortgagor and the other a mortgagee; or one being a tenant in common with the other; or one a contiguous owner, and a contest arising as to the use of water, mines, &c., which each claims. But it seems well settled that if the estate each is entitled to in the premises is not admitted or clear, no injunction will issue till it is made clear by a trial. Drew. Inj. 182, 238; Weller v. Smeaton, 1 Brown, Ch. Append. 572; Chalk v. Wyatt, 3 Mer. 688; Duvall v. Waters, 1 Bland, 569, 585; 1 Ves. Jr. 140, note; 6 Ves. 110; 3 Atk. 496. And this trial will not be on affidavits, but on proper pleadings and process. 1 Am. Ry. Cas. 120. Some cases go so far as to hold it should not issue at first, if the respondent merely denies the title of the plaintiff. Drew. 186, 187; Kinder v. Jones, 17 Ves. 110; Smith v. Collyer, 8 Ves. 89; Hanson v. Gardiner, 7 Ves. 305; Norway v. Rowe, 19 Ves. 144. Some cases of necessity, where the danger is great and the injury irreparable, may in England be regarded as exceptions. Gibson v. Smith, 2 Atk. 182; Davis v. Leo, 6 Ves. 784; 2 Ves. Sr. 453; 3 Mer. 687. And I am inclined to hold that a mere denial of title is never sufficient, as such denial may be made for delay and mischief, unless accompanied, as before remarked, by circumstances showing it to be made in good faith. Johnson v. Gere, 2 Johns. Ch. 546.

Again, if it should turn out on trial, that each is entitled as a tenant in common for however small a share in the property alleged to be injured, though other co-tenants may dissent, such an owner, if doing damage, cannot usually be restrained by an injunction. Drew. Inj. 162; 7 Ves. 589. But extreme abuses may exist there which may justify an interference. 16 Ves. 128. The title of the plaintiffs, then, as set up to the upper dams exclusive of any in the defendants, being controverted, it becomes necessary to ascertain whether that is done without any apparent cause and justification, or with so much in its support as to make it proper, before proceeding further on the present application, to require the parties to have the nature and extent of their interests in those upper dams decided by a full and formal trial of it.

The stream, called Johnson's brook, across which the dams are erected, that the respondents have cut away in part and threaten to continue to do, is fed by water from three small natural ponds, not far distant. On that stream, descending from the last pond, and below these two dams, is another across the brook, at which the mills and machinery of the plaintiffs are situated, and below that is another, at which mills and machinery are situated, in which the defendants claim an interest, in common with some third persons. The two dams, which are nearest to the pond, and at which, it is admitted, there is no machinery, and which the defendants have in part cut away, are made to detain more water in the ponds while there is a great abundance in the spring, which otherwise would run to waste; and to use it in the summer, when, without retaining it in this manner, the supply at all the mills below would be very insufficient for their wants. Those two dams nearest the pond are not far from the sites of two very ancient ones, which it is conceded, have probably been used for this purpose, portions of the year at least, from the first erection of mills on that stream, quite a century ago.

The plaintiffs contend, that as respects the lowest mills, occupied by the defendants and others, they have an exclusive right to keep up and regulate the two upper dams; and that, in doing this, as has been practised by them, the defendants are benefitted rather than injured. This is conceded by some who own the lower mills in common with the defendants, but not by the defendants themselves, as they, on the contrary, set up an interest in common with the plaintiffs in the two upper dams, and allege that as the water is used by the plaintiffs, the bark-mill and saw-mill, in which the defendants are interested, are seriously injured, because the local right of the owners of those mills to the water at all at the lower dam extends only to the surplus not used by the grist-mill there; and hence when the water does not come down in large quantities, the whole of it is used by the grist-mill, and their other establishments become almost worthless. In cutting the gates of two upper dams, therefore, they aver that it has been done only when the plaintiffs have refused to let the water flow down in quantities sufficiently large for the use of the bark and saw-mill of the defendants; and also in those quantities in alternate weeks, such as have long been customary, and as they have a right by deed in the upper dams and water above them, to permit equitably as well as legally, since they own half, and but one half, of the interests in them. Let us look, then, a moment to the state and origin of the conflicting title by deed and wills between the parties to the upper dams, and the use of the water above them. In order to understand it, it will be necessary to notice, that before the erection of the mills and dam of the plaintiffs or the defendants, and early as 1737, one Thomas Carlton owned a fulling-mill, and had a dam for it a few rods above the mills of the plaintiffs, and below the two dams in dispute. That about 1772, he devised them to his sons Daniel and Thomas; that Thomas, the second, released his interest therein to Daniel, in 1786, and Daniel, in 1788, conveyed his to Retire H. Parker, Thomas, the second, having also made another release, from abundant caution, of his interest to the same Parker. In all these conveyances was included, also, one half of the stream and dams above, which are now in controversy.

At this time, it is to be remembered, that this same Retire H. Parker was also owner of one half of the lowest grist-mill and a part of the saw-mill, where the defendants now own and occupy, having obtained the same by deed from Eliphalet Hardy, in 1782; while one Joseph Kimball owned the other half, derived through conveyances from the same E. Hardy. Retire H. Parker, while thus owner of a part of the lowest mills and of the fulling-mill site and dam above, both having gone to ruin and continued so till this time, and of half the stream and dams above the fulling-mill which had been conveyed to his grantors, died. And, in 1801, a committee, appointed by the court of probate, set off to Aaron Parker, his son and heir, his interest in the grist-mill at the lowest dams, with a privilege in all the dams above owned by his father, and to draw water from them, as described in Hardy's deed, and in those of Daniel and Thomas Carlton. They set off the privilege to erect a saw-mill at the fulling-mill site to another son.

Aaron Parker occupied the premises till his death, in 1831. Before his death, and as early as 1814, another change in the estates in controversy had occurred, and made him interested in the whole of them. Because, in that year he purchased the land and grist-mill and dam, where the plaintiffs' mill now are, with all the privileges to the stream of water and dams above, which belonged to the estate of Phineas Carlton. And it fur-

ther appeared, that by sundry new conveyances from Phineas Carlton, since 1766, there had come to him what Phineas Carlton then owned, which was, the corn and grist-mill, and half the saw-mill, then at the place now occupied and owned by the plaintiffs, and half the upper dams and half the stream above. Aaron Parker's estate, then, in 1831, thus embracing a large part of the mills and dam lowest down, where the defendants occupy, and all the mills and dam where the plaintiffs occupy, and all the dams and stream above, was devised and set off in the court of probate, in several lots or shares, one of which was to Betsy Parker, a respondent, for her life, half the grist-mill at the lowest site, with privilege in all the dams above that belonged to Retire H. Parker, and as described in D. Carlton's and Hardy's deeds.

The Woodmans, respondents, claim an interest in the lower premises, as entitled to the reversionary estate after Betsy Parker's death, and by other conveyances of parts of the other mills at the lowest sites. Another lot or share was set off to Elizabeth Dow, a daughter of Aaron Parker, and included the mills and dam at the place occupied by the plaintiffs, with all the privilege of the stream and dams above that belonged to Phineas Carlton. Thus, it will be seen that, in 1831, the privileges now in controversy, however owned or occupied before, had all become merged or collected in certain portions, or in full, in Aaron Parker, and were carved out among his heirs.

Were they so divided anew as to alter the titles as standing previously? There is little pretence, that by any paper title now in evidence, the owners of the lowest mills, till Retire H. Parker's purchase in 1788, had any interest in the dams or stream above the fulling-mill site. While it is very certain, by the paper title, that those owning the mills and dam now occupied by the plaintiffs, had enjoyed a title to one half of the dams and stream above the fulling-mill site, ever since 1766. But in 1788, Retire H. Parker, one of the owners of the lowest site, became entitled to all the fulling-mill and half the dam and stream above, and the first question on the paper titles would be, if that purchase would enable him to use the dams and stream above, except in connection with, and for the use of, the fulling-mill and the privilege there. It was bought with that, and was appurtenant to it, and it is difficult to see how he could legally transfer it to a privilege far below, with that of the plaintiffs' intervening, and when the use of it in connection with a different site below might be very different from what it had been with the fulling-mill, or would be with new machinery there, and might very differently affect and injure the next rights below it belonging to the plaintiffs and their grantors. It would seem to be very questionable that without their consent, shown expressly or by long usage, Retire H. Parker and those claiming merely through him, could make such a transfer of the upper site and its appurtenances. But when the plaintiffs' site and both the others became all united in Aaron Parker in 1831, I do not see the same difficulty in the way of him or his heirs, if they desired to annex an interest in the use of the two upper dams to the lower privilege, if they thought proper.

If the estate, which has an easement in another, becomes united to the other, the easement is extinguished generally, not always. See cases of illustration, in Hazard v. Robinson [Case No. 6,281]. Quære, if by a subsequent grant, all does not pass which was then used with the principal thing passing. 3 Taunt. 24. Nor do I see the same ground to complain in their grantees who choose to take half of the upper privilege, where the plaintiffs occupy, with half the dams and stream above, after the other half has been attached to the mills and privilege lowest down, instead of being attached, as originally, to the fulling-mill and the privilege there alone. But whether the language of the partitions and deeds must on the face of them be construed as intending to transfer the use of half the upper dams and the stream to the lower privilege or not, I do not decide, and it is a little doubtful. It is a question of some nicety and difficulty, and is surely enough so to have it more fully examined and settled, before deciding finally on this application for an injunction on the hypothesis that none of the privileges at first enjoyed at the fulling-mill were intended to be transferred to the owners of the lowest works.

It is worthy of notice too, in connection with this, that in dividing Mr. Parker's estate, the privilege of using the dams and stream above is included in connection with the site below in one paragraph, and assigned together to one heir, and is valued or appraised in conjunction with it as one piece of property. All the different pieces of property, though assigned to one heir, are appraised separately; but these are appraised together, as if intended to be treated as one. Again, the site for a saw-mill above, where the fulling-mill stood, which Retire H. Parker owned, had been set off to another of his sons, and was not owned by Aaron nor set off to any body in his estate. So the evidence as to the manner of occupation and use of the water and dams above, by those owning at the lowest site, is in some respects contradictory, in others strongly in aid of the plaintiffs' views, and in others favorable to the defendants. Some of the evidence on one side can be reconciled, when we advert to the fact of some of the part owners of the lowest and upper site being at one period the same; and I do not find it necessary or expedient to decide on it now, or on the several questions as to the right to flow, under the Massachusetts statute for reservoirs, or to keep up the flash-boards of gates after a

certain period in the spring, or to take them down in alternate weeks without the assent of, or making any compensation to, the plaintiffs. All this must be done when or after the title is decided.

There is also some testimony in the case of occupation by the plaintiffs and their grantors of the soil or land connected with the fulling-mill privilege, and under which they claim a title to that privilege, and also to the use of the whole dam and water above, which were appurtenant to it. That evidence, as bearing on the title they now set up to dams above, as well as on the denial of it by the defendants, will have to be weighed with care, and, in connection with the various facts now or hereafter put in, as to the use of the dams and stream above by the defendants for the last thirty years, may control all the paper title, or at least furnish evidence of a cotemporaneous and continued construction of deeds and partitions, which may be decisive of the rights of the parties under this application. Let the prayer for the injunction, then, be postponed till the question of title between these parties is settled.

Case No. 11,011.

PERRY v. RHODES.

[2 Cranch, C. C. 37.] [1]

Circuit Court, District of Columbia. Dec. Term, 1811.

WAIVER OF NOTICE.

Assumpsit against the indorser of a promissory note. The defendant, knowing that the plaintiff had neglected to give him notice, and had received part of the money from the maker, promised to pay the balance if the maker did not.

THE COURT (FITZHUGH, Circuit Judge, absent), was of the opinion that the defendant had waived notice, and was liable.

Case No. 11,012.

PERRY et al. v. STARRETT.

[3 Ban. & A. 485; [2] 14 O. G. 599; Fent. Pat. 93.]

Circuit Court, S. D. New York. Oct. 17, 1878.

PATENTS — SUIT FOR INFRINGEMENT — EFFECT OF DECISION OF PATENT OFFICE IN INTERFERENCE PROCEEDINGS—DESIGN—PATENT—SIMILARITY.

1. The complainants obtained a patent for a design for a stove; one Smith, another inventor, subsequently applied for a patent for a similar design. An interference was declared, and Smith was adjudged by the patent office to be the first inventor of the design. *Held*, that this decision was not conclusive on the complainants, so as to prevent them from bringing a suit for infringement of their patent.

2. Although, in a design patent, certain parts may resemble parts of other patented designs, yet, if the general result is different from anything known or used before, such difference indicates inventive genius and creative skill, and the design may be patentable.

[Cited in Kraus v. Fitzpatrick, 34 Fed. 40; Stearns v. Beard, 46 Fed. 194.]

3. To constitute infringement of a design patent, the designs must be so similar as to appear to ordinary observers to be the same, but need not be so nearly alike as to appear to experts to be the same.

[Cited in Miller v. Smith, 5 Fed. 365; Redway v. Ohio Stove Co., 38 Fed. 583; Ripley v. Elson Glass Co., 49 Fed. 930.]

4. If two designs are substantially similar, the fact that different names or trade marks are or may be used in connection with them will not distinguish them sufficiently.

5. Design patent No. 7,456, granted to John S. Perry, Andrew Dickey and Absalom C. Williams, May 26, 1874, for a design for stoves, *held* valid.

[This was a bill in equity by John S. Perry and others against George Starrett.]

Samuel A. Duncan, for complainants.

Charles J. Hunt, for defendant.

WHEELER, District Judge. This bill is brought for an alleged infringement of design patent No. 7,456, issued May 26th, 1874, for a design for stoves called the "Argand."

The defences are: want of novelty in the invention patented; that the patent is void because it claims too much; and denial of infringement.

The statute provides, among other things, that any person who by his own industry, genius, efforts and expense, has invented and produced any new and original design for a manufacture, or ornament to be cast on any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented, or described in any printed publication, may obtain a patent therefor. Act 1870, § 71 [16 Stat. 209]; Rev. St. § 4929.

This patent was issued under this statute, and has five claims. The first is for the form and outline of the parts for a design for a stove; the second, for the ornamentation for a design for a stove; the third, for any one of the plates having the form and outline for a design, all as described and represented; the fourth, for the ornamentation, as a design, for any one of the plates; and the fifth, for the form and outline and ornamentation for a stove, each as represented. The first, second and fifth are the only ones upon which a decree is sought.

It might be questionable whether the first claim could stand for the parts of a design separately, as a design, from its nature, is an entirety, if it is anything. But, however that may be, it is insisted for the orators that the claim is in effect for the form and outline of a design for a stove. The parts together would constitute the whole, and

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

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

perhaps it is the same as if the mentioning the parts had been left out. Then it would be for the form and outline of the design. These claims, with the first thus considered, stand as claims for the form and outline and ornamentation, as separate designs, and for them together as one design.

As the novelty of the invention is in issue, it is necessary to ascertain what designs of this sort were in use before it, for it must be new with reference to all others known or used before.

There is controversy as to whether one kind of stoves, as it embodies a design for the form of a stove or the ornaments, was in existence before or not. This controversy is with reference to the Smith stoves, so called, said to have been like defendant's Exhibit 15[1], which, itself, had not then been made, and none like it that had been are shown. Mr. Smith, the inventor of that stove, applied for a patent for his design after the one in suit had been granted, and a question of interference between him and these patentees was raised in the patent office, and decided by the examiner of interferences. In making that decision it was found that Smith was the first inventor of the design he sought a patent for.

It is argued for the defendant, that this finding is conclusive here. But, by the provisions of the statute, it would not be conclusive upon the validity of the Smith patent even, so far as question upon it might arise in court. Rev. St. § 4914. The patent of the orators was not there in controversy. The question to be determined was whether a patent should be issued to Smith. The finding was incidental to that question. And, however it might be as between the orators and Smith, it was not any finding between the parties to this suit. The defendant was not a party there and could not be bound, and such estoppels must be mutual to be operative. If both parties are not bound, neither is.

That a stove of substantially the same construction as Exhibit 15[1] was in existence before, appears upon the evidence beyond any fair doubt. That it had the same ornamentation does not satisfactorily appear. The shape of the shell was probably substantially the same. There may have been slight differences, and may not. The stoves called the "American," and the "Light-House," and the "Oriental" were in existence before.

The ornamentation of the Smith stoves, which were in existence before, is not shown to have been at all like that of the orator's stove, the Argand. Assuming the shape of those Smith stoves to have been like that of Exhibit 15[1], they had not as a whole, the form and outline of the Argand. There are some features of them and of the Argand that are considerably alike. Their legs, ash-pit sections, and lower mica sections, with their rear extensions, and their upper mica sections, except as to the rear extension of that of the Argand, are in shape quite similar. The rest of them are very different from each other. The bases of the Light-House and the Argand, the reservoir sections of the American and the Argand, the tops and urns of the Light-House, the Oriental, and the Argand are all somewhat alike.

Upon these similarities it is argued for the defendant that the patentees have only taken those parts of the other designs and put them together, in mere aggregation, to produce their design, and that in so taking them and putting them together they did not accomplish anything patentable. It is quite clear that any one who should take pages or leaves from several books and put them together into a new book, or take parts of several musical compositions and put them together into a composition by themselves, would not be entitled to a copyright for these productions. Reed v. Carusi (D. Maryland, 1845) [Case No. 11,642]. And if all the patentees did was to take the legs of the Smith stove, the base of the Light-House, the ash-pit and mica sections of the Smith stove, the reservoir and top of the American, and the urn of the Oriental, and join them together, it is also clear that they did nothing entitling themselves to a patent. Binns v. Woodruff [Id. 1,424]; Wooster v. Crane [Id. 18,036]. Or, if they did no more than to join them together with such adaptations to each other as would be made by the exercise of the ordinary skill of workmen in that trade, probably they did not. But the evidence shows that they did much more than either. Although the legs of the Argand and of the Smith stove are cyma reversa in general form, those of the Argand are quite different from the others in proportion and style. The base of the Argand is not exactly like that of the Light-House. The curves of its ash-pit section are different from those of that section of the Smith stove. The lower mica section of the Smith stove is convex below and concave above in outward form, while that of the Argand is slightly convex throughout. The lines and curves of the mica section of the Argand are different from those of the Smith stove, and in the Argand the rear extension, to include the exit-pipe, is carried upward on that section, while in the Smith stove it is not. And the top and the urn of the Argand differ somewhat from those of either the Light-House or the Oriental.

All these parts were made symmetrical of themselves and in respect to each other, and connected together with appropriate devices, and formed into a harmonious whole, in a manner that could not be done without inventive genius and creative skill. The result was different from anything used or known before.

In Gorham Co. v. White, 14 Wall. [81 U. S.] 511, it was held that, to constitute in-

fringement of a design patent, the designs must be so similar as to appear to ordinary observers to be the same, and that they need not be so near alike as to appear to be the same to experts. It would seem to follow that to constitute a new design that would be patentable as such, it must be so different from all others existing before, as to appear to be such to the same class of ordinary observers. Tested by this rule, upon the effect of all the testimony in the case, as well as upon an inspection of the stoves themselves, and considering the Smith stoves to have been in form like Exhibit 15[1], the Argand was new in design in its form and outline. And so of the ornamentation. Well-known devices for ornamenting in different places, upon different articles, were employed; but they were arranged with reference to one another, and upon different parts of the stove with reference to what would be suitable there, so as to produce a new effect. It follows directly that the new form of the stove and new ornamentation upon it together made up a new design for the whole. It was invented and produced by the industry, genius, efforts and expense of the patentees, and according to the statute they were entitled to a patent for the form and ornamentation separately, and for the whole together. If the first claim had stood as a claim for the different parts of the design severally, as described in the specification, there might be a question as to whether some of these parts, by themselves, were not so nearly like the corresponding parts of some of the existing designs as to be substantially the same, and so whether they had not claimed some parts to which they were not entitled. But, upon the construction given to that claim, no such question arises, and it is not shown, in any manner, that they did in any of their claims really claim too much. And, if they did, it does not appear that they would have done so with any wilful default, or intent to defraud or mislead the public, without which the patent would not be absolutely void. Rev. St. § 4916; O'Reilly v. Morse, 15 How. [56 U. S.] 62. Upon these considerations the patent, as to the first, second and fifth claims, appears to be valid.

What is claimed to be an infringement is the sale of stoves called by the name of "Hecla." The question as to this part of the case must be as to the substantial identity of the design of them with that of the Argand, within the rule in Gorham Co. v. White [supra]. The most potent evidence is a comparison of the stoves. In appearance they are substantially alike from top to bottom, and so whether viewed as a whole or section by section. There are minor differences both in form and ornamentation, but the general effect is the same. It requires study of the differences that exist, and fixing them in the mind, to be able to tell one from the other when they are not side by side. They are not only so alike as to deceive ordinary observers, but so as to deceive dealers, large and small, and the ordinary observation of experts, without they go far enough to observe what are really trade-marks. This is not only the result of a comparison of the stoves, but is the effect of the testimony. It is said that they can be distinguished by their names as well as by these marks, and that, therefore, no one would be deceived. This might be true, if the names or trade-marks could always be observed, but they may not be. And, if they should always be, the right to have the products bearing the design distinguished from others is not what is granted by the patent. The patent gives the exclusive right to make, vend and use stoves of that design during the life of the patent. Knowledge of the origin of the patented articles may not be, and probably is not often, the object of the purchaser. The patentees have given the public the benefit of the design, as the fruit of their skill and outlay, and the orators are entitled to a monopoly of the products embodying it during the prescribed time.

Let a decree be entered for an injunction and an account accordingly, with costs.

[See Cases Nos. 11,004 and 11,008.]

PERRY (STOVE-WORKS v.). See Case No. 13,511.

PERRY (THOMAS v.). See Case No. 13,908.

Case No. 11,013.

PERRY et al. v. BANGS.

[Betts' Scr. Bk. 139.]

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

CARRIERS OF FREIGHT—CONSTRUCTION OF BILL OF LADING—DELIVERY OF CARGO—QUANTITY—RECEIPT—EXTRANEOUS EVIDENCE.

[This was a libel by Theodore Perry & Co. against Elkanah Bangs for the nondelivery of certain goods.]

Before BETTS, District Judge.

Held, that the bill of lading of a cargo is only satisfied by the actual delivery of the cargo therein specified; but, as between the owner of the ship and the owner of the cargo, is not conclusive as to quantity of cargo, and may be explained by extraneous evidence. So, also, a written receipt acknowledging the delivery of the cargo may, as between same parties, be corrected by proof. Held, that the delivery in this case to a lighterman was a delivery to the owner of the cargo, and that the receipt of the lighterman of a full delivery was not conclusive of that fact, even if taken by him from the ship, on his own counting or weighing. Held, that the receipt in this case having been given by lighterman on count and report of the officers of the vessel alone, and its correctness not being supported by any

other evidence, the testimony on the part of the libellants is sufficient to show a mistake in that count, and a deficiency of three barrels of pork in the delivery. Held, that the action is maintainable in the name of the libellants: (1) They cannot at law retain the deduction of the value of the pork made by them out of the charges of the lighterman; he being answerable to them for no more cargo than he actually received, and can compel the payment of the sum so retained. (2) If the lighterman elects to pay the loss, to avoid controversy with his employers, he is, in admiralty, entitled to the benefits of their rights and remedies, and may maintain the action in their names or his own. The documents show the action is brought by the authority of the libellants. Decree for the libellants, $42, with interest from the commencement of the action, May 5, 1848, and summary costs.

PERRY, The CHARLES F. See Case No. 2,616.

PERRY, The HIRAM. See Case No. 9,019.

Case No. 11,014.

PERRY MANUF'G CO. v. BROWN et al.

[1 Brunner, Col. Cas. 547; [1] 9 Law Rep. 542.]

Circuit Court, D. Massachusetts. 1847.

WHAT RECOVERABLE AS COSTS.

Where five members of a copartnership were summoned as trustees, and four of them signed and made oath to a special answer, on which they were discharged, several costs of travel and attendance were allowed to the four, but not for counsel fees.

[This was an action by the Perry Manufacturing Company against Brown, Harris, and others.]

In each of these cases, Francis Skinner and four others were summoned as trustees, described as "partners in trade, under the firm of Francis Skinner & Co.," and notified in the writ that they were "summoned as such partnership, and not as individuals." At the return day, their counsel entered five separate appearances, and filed five separate general answers, by attorney, in each case. A single set of special interrogatories was then put to the trustees, with this caption: "Interrogatories addressed to Francis Skinner and others, summoned as trustees under the firm of Francis Skinner & Co., to which their single joint answer by any one member of the firm will be sufficient." To these, the trustees filed a single joint answer, signed "Francis Skinner & Co., by Francis Skinner," and sworn to by Mr. Skinner. The trustees afterwards put in a further voluntary answer, stating facts to which they had not been interrogated, and signed and sworn to by four of the five members, one being out of the commonwealth. On this answer they were discharged, and their counsel claimed ten several bills of costs, viz.: five in each case, which, with counsel fees claimed, amounted to a little more than two hundred dollars. This was resisted by the plaintiffs' counsel, who contended that the costs should be joint in each case.

Charles P. Curtis cited Rev. St. Mass. c. 109, § 49, adopted as a part of the rules of practice in the circuit court, to this effect: "If any person, summoned as a trustee, shall appear at the first term, and submit himself to an examination upon oath, he shall be allowed his costs for travel and attendance, and such further sum, as the court shall think reasonable, for his counsel fees and other necessary expenses." He contended that this statute was peremptory, and ensured costs to each person, making no provision for a partnership, which is not a person. There is a special provision for corporations.

R. H. Dana, Jr., for plaintiffs, contended that this statute, having only the force of a rule, in the circuit court, was not peremptory, but directory, and addressed itself to the discretion of the court. If the plaintiffs clearly confined themselves to the joint debt, and required only the answer of one member of the firm, the attendance and answers of the others were unnecessary, and ought not to entitle them to several costs, any more than would several pleas unnecessarily put in by joint defendants. They become, in fact, one party. There is no decision of the supreme court of the state on this point, but it is because the practice is uniform, and recognized in the state courts. There was also an agreement among the members of the Suffolk bar, several years ago, to which the trustees' counsel was party, to tax but one bill in a case like the present.

Mr. Curtis replied that the agreement referred to was made before the plaintiffs' counsel came to the bar, and as he was not a party to it, he was not entitled to the benefit of it. Also, the agreement was no longer in force, as the association of the bar was dissolved. He doubted the uniformity of the practice, and suggested that, so far as it existed, it probably had its origin in the agreements of the bar.

SPRAGUE, District Judge, intimated an opinion in favor of several costs, but was willing to hear evidence as to the practice in the courts of the state. The case was accordingly postponed for that purpose.

SPRAGUE, District Judge, at a subsequent day, gave the following opinion: The statute seems to me to be peremptory. It says "any person," while the statute regulating costs between principals, uses the term "party." In the latter case, it becomes a ques-

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

tion, whether or not certain persons, joined as defendants, are or are not one party. This statute takes no cognizance of anything but persons and corporations. A partnership is not a person. It is contended that the statute, being only a rule in this court, is directory, and addressed to our discretion. Still, we must construe it according to its terms, and these seem to me distinct. The notice given by the plaintiffs, in their writ, is sufficient to confine their attachment to the joint debt; yet this does not excuse the trustees from appearing, according to the exigency of the writ, and submitting themselves severally to examination, under oath, as to the joint debt. One may know what another does not. The plaintiffs have a right to the answer of each, as to the joint debt. In this case, the plaintiffs have several answers, and agree to receive the answer of any one of the firm; but this does not excuse the others from attendance. They have no leave to go out of court. All are liable to be charged, on the answer of one; and if charged, each is liable, ultimately, to a judgment upon scire facias against his private property and his body. I think each trustee must remain in court until he is discharged, or a discontinuance is entered against him. If so, he should have his costs for attendance. He also has a right to put in a separate answer, if he pleases, notwithstanding the notice.

The evidence, as in the practice in the state courts, has been before me, and I must consider it proved that the practice in Suffolk, Middlesex, and probably all the other counties, is to allow but one bill of costs in a case like the present. This is, however, a custom of the clerks and the gentlemen of the bar, arising perhaps from courtesy or agreement. It has never been officially recognized, nor has the statute ever been solemnly passed upon, by the supreme court. It appears that Chief Justice Williams decided, in conformity with the practice, in the court of common pleas; but the case was not reported, and that learned judge is not able to refer us to the name or date of the case. There may have been circumstances in the case, not now recollected, which would not make it conform altogether to the present. Moreover, so long as this decision, as well as the practice, is liable to be revised and perhaps reversed by the higher tribunal, I feel bound to follow my own judgment. Whereas, if the existing practice had been solemnly recognized and established by the highest tribunal in the state, I should prefer to follow it, for the sake of uniformity of practice, although not legally binding in this court.

As one of the trustees did not sign the special answer, being, as appears, out of the commonwealth, his costs will be disallowed. The other trustees are adjudged several costs, in each case, for travel and attendance, but not for counsel fees.

[For the case between the same parties, The Western Railroad Trustee, see Case No. 11,015.]

Case No. 11,015.

PERRY MANUF'G CO. v. BROWN et al.

[2 Woodb. & M. 449; 10 Law Rep. 264; 17 Hunt, Mer. Mag. 596.] [1]

Circuit Court, D. Massachusetts. Sept., 1847.

INSOLVENCY—WARRANT WITHOUT SEAL—VALIDITY — DEBTS SET OUT IN SECOND PETITION — DISCHARGE UNDER STATE LAW—CONSTITUTIONALITY —OBLIGATION OF CONTRACTS.

1. The want of a seal to a warrant to a messenger in proceedings in insolvency is fatal to its validity; and the master in chancery, upon discovering the omission of the seal, is justified in treating the whole proceedings as void, and in allowing a new petition and warrant.

[Cited in Reynolds v. Damrell, 19 N. H. 396.]

2. The debts set out in the second petition, to the amount of two hundred dollars, are presumed to be the same referred to in the first petition, the second being a substitute, and not an additional petition for a new case.

3. The warrant to the messenger and the publication in the newspapers, under the insolvent law of Massachusetts, divest the debtor of his estate, so that title cannot be made under or from him, after that date, by attachment or trustee suit.

[Cited in Torrens v. Hammond, 10 Fed. 902.]

[Cited in Williams v. Merritt, 103 Mass. 187.]

4. The creation of liens or titles, by those means, are governed by the local and state laws, when no acts of congress or articles of the constitution control. The decisions by the state courts govern the construction of such state laws.

5. The decisions which have been made by the courts of the United States against the validity of insolvent discharges by state laws, in actions on contracts made or to be performed out of the state, and prosecuted in those courts by non-residents, are decisions not on the formation of liens, but on discharges from them and from contracts.

6. Such decisions rest on acts of congress as to forms of process, and on clauses in the constitution against state laws, impairing the obligations of contracts, and on the principle not to give to state laws an extraterritorial operation.

7. Where the insolvent proceedings led to the appointment of a messenger of a valid warrant and publication in May, 1846, but no possession taken of the estate situated in Massachusetts, nor actual notice to a holder of it till the 24th of November in that year; yet a trustee action, in which the writ was served on the 18th of June, 1846, on the holder of the estate will not defeat the inchoate title obtained by the messenger in May, and afterwards on the 18th of June, 1846, conveyed by him to the assignees.

8. The estate in the present case being situated within the limits of Massachusetts and the jurisdiction of her courts, it is not exonerated from their operation, nor from the rule that the title to it is to be governed by the lex rei sitæ. Nor does it come under any exception by the debtor's residence or domicil, as that was also in Massachusetts; and the creditor being a non-resident, and the contract payable abroad, and the trustee action in a court of the United States, does not make the estate foreign, nor the laws foreign which must govern the formation of the lien, or the transfer of the title.

[Cited in Sohier v. Merril, Case No. 13,158.]

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq. 10 Law Rep. 264, and 17 Hunt, Mer. Mag. 596, contain only partial reports.]

This was assumpsit on a promissory note made by the principals to the plaintiff, and payable in New York, for $1,481.07. The plaintiffs were incorporated by the laws of Rhode Island, and were doing business at Newport, in that state. The defendants [Brown and others and the Western Railroad trustees] who were principals, resided in Massachusetts, and were defaulted; and the railroad, which was sued as trustee, was incorporated and doing business in the same state. The trustee disclosed, that when summoned on the 18th June, 1846, the railroad had in its possession certain goods and effects, which belonged to the principals, subject to a lien on them in their behalf for freight. It further appeared, that a petition to be allowed to go into insolvency, under the statutes of Massachusetts, was filed by the principals as early as May 2, 1846; but finding that the master had affixed no seal to the warrant, they were abandoned, and new proceedings instituted May 31, 1846, without having the others generally vacated, and without showing any new debts and liabilities in the new petition. It was further conceded, that the property of the principals was ordered to be taken possession of by a messenger of the insolvent tribunal as early as the 1st of June, and a deed executed of it to the assignees on the 18th of June. But no actual possession had ever been taken of these particular goods, either by the messenger or assignees, no specification of them made in any of the proceedings, nor any sale made of them by the assignees, nor any particular notice given of their claim to them till November, 1846.

Dana & Choate, for plaintiffs.
B. R. Curtis, for trustee.

WOODBURY, Circuit Justice. The contest in this case arises from the fact, that, by the insolvent system of Massachusetts, the property of debtors, though under attachment or trustee process, is discharged from them, and carried into the general fund or assets of the debtor, to be divided among all his creditors pro rata. While, by the practice and decisions of the United States courts, such attachments and trustee suits pending there, being, as they usually are, in favor of persons living out of the state, and on contracts to be performed out of it, are not usually discharged, but may be prosecuted to final judgment, and the property held by them applied exclusively to the payment of such judgment. But these differences severally presuppose that the proceedings in the courts of the United States were so commenced as to constitute a lien on the property, before the rights of other creditors attached, under the state laws. To settle which proceedings were in truth first, so as to give that effect to them, is often a question of no little difficulty, though in some cases the priority on the one side or the other is very palpable. Thus in the case of Towne v. Smith [Case No. 14,115], the attachment in the United States court was made before the debtor petitioned for the benefit of the insolvent act; and hence, under the practice and law in force in the state courts, no less than in the courts of the United States, in such cases, in favor of creditors living out of Massachusetts, and in actions on contracts to be performed elsewhere, the plaintiff was clearly entitled to be considered first in obtaining a lien. But whether that priority should be divested or discharged by subsequent proceedings, was another and different question, and depending on different laws and principles. The chief difficulty arises here from mingling together these two questions, and from the care which is necessary in order to distinguish precedents and rules, that are applicable to one and not to the other. I regard an attachment of goods, or service of a trustee action, as identical in their effect for the purpose of creating a lien; and both are sufficient to constitute a charge or lien on the property, if no other charge has taken precedence, by being prior in time and valid in character, and be not dissolved legally by some subsequent proceedings.

In this case, the service of the trustee action on the 18th of June would have created such a lien, had it not been for the previous insolvent proceedings, which the respondents contend constituted an earlier claim or title to this property, in behalf of all the creditors equally. Amidst the objections to the validity of those proceedings; to their operation, if valid; and to the continuance of them in full force as to this property, after the trustee suit; it is only by a careful scrutiny of analogies and precedents, that a satisfactory conclusion can be formed. The contest is a struggle for the track between different classes of creditors equally meritorious, except as one may or may not exercise superior diligence and skill in securing a priority. If the contest was between creditors of the same character and in the same courts, striving with like means or precepts, the moment of time each attaches or gets his writ served, would usually determine the precedence between them. But here those contend, who not only belong to different classes, one foreign and one domestic, but they strive with different means or precepts, and in different tribunals; one by a trustee suit in this court, and one by a petition in insolvency and the various assignments under it in a state tribunal.

Let us then regard this question, first, as if it was one between citizens of Massachusetts, in a suit on a contract not made and not to be performed in that state; and hence, by the terms of their law, not subject to be affected by insolvent proceedings there. Suppose such a citizen was the plaintiff in a trustee suit in the state court, and had served it

as here on other citizens, would the proceedings in insolvency possess a priority so far as regards this property in the possession of the trustee, looking to those proceedings as kept up and valid from the first petition on the second of May? They surely would. It must be conceded, on both sides, that before any insolvent proceedings were had, that the title to this property was in the debtor, as both claim through him. Nor is it necessary that either should perfect a title from him, before one attaches or commences a specific claim, in order to exclude the other. Because an attachment begun, and still in progress, a service of a trustee process made or going on after begun, is sufficient as an inchoate step and constitutes a lien, that holds the property, if duly prosecuted to judgment, though the property need not be sold, or turned out for execution at the time of a second attachment or trustee suit. So proceedings in insolvency, once commenced and advanced so far as to remove the title from the debtor, though not completed by taking actual possession, or giving actual notice to an occupant or finishing a public sale of the property, are still valid, if still going onward, and not discharged by any subsequent proceeding.

The inquiry is, when the lien is attempted to be created, whether the property is still the debtor's or not. If a creditor has parted with all power and title over property, it cannot afterwards be attached as his. Babcock v. Malbie, 7 Mart. (N. S.) 137; Urie v. Stevens, 2 Rob. (La.) 251; Black v. Zacharie, 3 How. [44 U. S.] 483. Where the United States have a preference over other creditors to property, if the debtor sells or mortgages it before the preference accrues, or the property is actually seized on execution, the property is divested out of the debtor, and the preference of the United States does not attach. Thelussen v. Smith, 10 Wheat. [23 U. S.] 396. The claim being on the estate of the debtor this has ceased to be his, and has vested in third persons, before the right of the United States begins. Mere insolvency does not give the preference there as to property still the debtor's, but insolvency and a conveyance to benefit creditors. [Harrison v. Sterry] 5 Cranch [9 U. S.] 298; [U. S. v. Hooe] 3 Cranch [7 U. S.] 78. But, independent of this legal priority, belonging to the United States in certain cases, whoever comes first is first served. "Potior in tempore, prior in re," is the sound maxim, after establishing what is sufficient to constitute a lien or right. Story, Confl. Laws, § 400. Consequently, in the supposed case here of a suit between citizens, the first lien formed, the first transfer or seizure, would prevail; and the first one here, in form if not in substance, would, by the laws of Massachusetts, be the transfer to the messenger of the insolvent estate. It might not, without the adjudged cases that have taken place, and the peculiar language and spirit of the insolvent system in Massachusetts, be entirely clear what passes the interest of the debtor under that insolvent system, or, in other words, what gives a lien to the assignee, an inchoate title, not to be divested by subsequent attachment of particular creditors. From the data in this case it will be seen, that if the warrant to the messenger and his publication or notice in the newspaper passed, ipso facto, the title of all the debtor's property to the messenger by aid of the statute; or if it was not passed, till the deed to the assignees, and then operated back to the notice by the messenger, then nothing by way of interest was left in the debtor after the 1st of June, which could be attached by the plaintiffs on the 18th of that month. But, on the contrary, if only a right to take possession of, or to convey the property passed to the messenger, and was not carried into effect till possession actually taken, or till a conveyance, so as to bar attachment by favored or preferred creditors; or if, when conveyed to the assignees, there is not a retrospective operation to the time of the publication; then the attachment or trustee process by the plaintiff on that day should hold. There being no proof as to the hours on the 18th at which each happened, if the title of both begun then, it probably should be regarded as stronger in the plaintiffs, because actual possession accompanied theirs by the trustees, but did not accompany the conveyance to the assignees; and because the assignees, who are now defending, go forward and must make out their point or claim satisfactorily. But this last question becomes unimportant, under the decisions which have happened in Massachusetts, on their own statute upon this local question. Such decisions on such statutes and questions must govern this court, in the absence of any act of congress or clause in the constitution regulating the matter. See, on this rule, Smith v. Babcock [Case No. 13,009]; Greely v. Smith [Id. 5,749]; [Shelby v. Guy] 11 Wheat. [24 U. S.] 361; [Elmendorf v. Taylor] 10 Wheat. [23 U. S.] 152; [Cohens v. Virginia] 6 Wheat. [19 U. S.] 297.

The directions of the statute are for the master in chancery to issue a warrant to the messenger to take possession and keep all the debtor's property, and then to give notice to the world, by publication in the newspapers, in order that none may take future transfers of the debtor's estate from the debtor. And it has been settled that the time, when the title of the property passes to the messenger, is the date of such publication. Clarke v. Minot, 4 Metc. [Mass.] 350; Id. 401; 9 Metc. [Mass.] 26. For though actual possession has not then been usually taken of the property, the title to it has been taken from him, and has been passed to another by a statutory provision and a warrant under it, and notice has been given publicly to all of this fact, in order to prevent future conflicts from ignorance of the transfer. Without such a statutory provision, in many cases

such a transfer, till possession was really taken under it, would not prevent creditors of the debtor, without actual notice of it, from attaching and holding the estate; else there might be fraud and the misleading of the world, when in ignorance of what has taken place; while in others an assignment might pass the property, without such notice. 6 Pick. 304; 4 Mass. 450, 512; 16 Pick. 25. But here, the notice by publication in the newspapers was manifestly intended as a substitute for real possession taken by the transferee, and thus giving notice; and it must be regarded under the statute as an equivalent. This accords, likewise, with sound reasoning; because, otherwise, the debtor could convey the title after another, the messenger, is in law the possessor of it, and is enabled himself to convey it to assignees, and because, otherwise, the great design of the insolvent law, to distribute the effects of the debtor equally among his creditors, would be defeated by suits to sweep off most or all of it by preferred creditors living out of the state, or those living within it, but not having received actual notice. This theory preserves the rights of all as fully as any other, because the messenger can then legally pass the title of all the property to the assignees, which otherwise could not be done. Cushing v. Arnold, 9 Metc. [Mass.] 26. So if actual possession of all the property was required by the messenger before he could pass the title, some weeks or months might intervene, in case of a large and scattered estate, before it could be accomplished, and a losing and disreputable scramble would continue, with a view to attach particular articles, previous to possession being actually taken of them all. The same objection exists to making actual possession in the assignee a test, or even actual notice to the creditor or to a casual holder of the debtor's estate, and much less an actual sale to some third person, when there has been this public and legal notice which the law prescribes. That publication, like a registry, is implied and irrebutable notice to all, and works inequality and injustice to none, if they are vigilant, and resort, as they should, to the records for information.

Here this case would end if the question of priority stood insulated, and the plaintiffs were not residents out of Massachusetts, and hence claim some further or higher rights than citizens in this case. But in fact the first insolvent proceedings were abandoned, and new ones commenced, which are argued by the plaintiffs to have been defective and void. I should be sorry to find those insolvent proceedings, or any others of a statutory character, void either for mistakes of the public officers connected with them, or any informality which seems entirely an error of judgment. Though the rule is well settled, that statutory directions, to create a title to property, must be strictly followed, yet I am convinced that errors, such as just referred to, are to be regarded with leniency; and legislatures are constantly making new enactments, to remedy those before considered fatal, and to simplify the evidence required under statutes conferring titles.

Here the objection to the first warrant issued the 2d of May, was its want of a seal; and one being required by law, this objection, under the analogous precedents, was probably fatal. 1 N. H. 139; 2 N. H. 390; 2 Mass. 489. But it is said, that the master could not abandon such a case voluntarily and on request of the petitioner, and let the party start de novo on the 31st of May. There would seem to be something in this, if the first petition had been acted on and was not defective, or if the petition and defective warrant were not so closely connected, one being the direct foundation of the other, and a part being void, the whole proceeding should be treated as a nullity. In any view, however, I see no harm in having a second petition filed before a new warrant issued, as it would be only surplusage, at the worst. A formal and separate proceeding to set aside the warrant seems necessary only where the master is unwilling to regard the case as a nullity, and to begin de novo, or where the defect occurs in a later stage of the proceedings; and doubts exist whether it is important enough to make the whole proceeding void, or only the bad part void or voidable. 8 Metc. [Mass.] 129; Byrnes' Case, 8 Law Rep. 374. In some cases it certainly has been deemed permissible to treat the subsequent portions, which were defective, as null, and start again from the point to which they were good. Wedge's Case, 10 Law Rep. 117. But at the same time it seems permissible, considering the proceedings as a whole, where a defect in one part is fatal, to reverse or quash the whole. That course is not unusual in motions to quash proceedings, as well as in writs of error. The new proceedings in this case are as if the old ones had been all annulled by a motion or writ of error.

The new petition sets out $200 of debts, the same, doubtless, as in the other, the second proceedings being a mere substitute for the first. In that view, the petition and warrant would be sufficient without any new debts being shown, if those named in the first petition were proved and still remained unpaid. But beside this, probably the $200 is named in the petition merely as a matter for inquiry by the master, in order to see, before he proceeds, that the case is of sufficient magnitude to require the trouble and expense of going through the insolvent course. In that view, the master having proceeded further after the petition is filed, is perhaps conclusive evidence of debts existing to that amount, whether looking to the second or first petition. In writs a sum is named as the debt, which is large enough to give jurisdiction; and if the court still sustains the proceedings after an objection, or an in-

quiry, it seems decisive as to the amount being sufficient when no evidence is offered to the contrary. See Brown v. Noyes [Case No. 2,023]; People v. Judges of New York Common Pleas, 2 Denio, 197. The choosing of assignees and a conveyance to them, raises a strong presumption also, that all before has been found to be right, which is to be proved in pais, as, after a verdict, such evidence is to be presumed to have been given, as was necessary to warrant it. Grignon v. Astor, 2 How. [43 U. S.] 319. This, of course, would still leave any important matters that were omitted in the petition, which should appear in reciting to give jurisdiction, to be deemed fatal omissions, such as the petitioner's residence in the county, applying to a magistrate there, being insolvent, &c. 12 Pick. 572, 581; 1 Denio, 331; [U. S. v. Arredondo] 6 Pet. [31 U. S.] 709; [State of Rhode Island v. State of Massachusetts] 12 Pet. [37 U. S.] 718; [Boyce v. Grundy] 3 Pet. [28 U. S.] 205. There being none such here omitted, the proceedings and the transfer of title under them must be regarded as valid.

What appears to be considered the principal question in this case is the remaining and last one, whether this conclusion is varied, or should be by the circumstances, that the plaintiffs reside out of Massachusetts, prosecute a contract to be performed out of that state, and sue in a court not belonging to that state. It is undoubted, that non-resident creditors are not, by the decisions of this court, or by the words of the Massachusetts statute, subject to have their debts barred by state proceedings in insolvency, if the contract originally was made and was to be performed abroad like this. St. 1838, c. 163; Towne v. Smith [Case No. 14,115]; Springer v. Foster [Id. 13,266]. More especially, if prosecuting it in any forum not belonging to the state, does this objection apply under the decision in Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122, and Cook v. Moffat, 5 How. [46 U. S.] 316. But what is the true theory on which this exception rests? and how does it apply to the present question? The exemption of debts incurred or to be paid elsewhere, beside being excluded by the insolvent statute, have been excluded by sound reason, because not being incurred, nor to be fulfilled within the state, they are not made with a view to its local laws, as if those laws constituted a part of the contract; while other contracts are so made, and on that account the local laws as to insolvency bind or control them, as if incorporated into them. See Towne v. Smith [supra]. The exemption, therefore, on this theory in such cases, goes to the subject of discharge. It does not affect the formation of the original lien. That depends on the state laws, and that is the great question here, and has been found to be in favor of the respondents. But as to the other matter, the discharge, this court is bound by the decisions of the supreme court as well as its own, to protect such contracts, and liens duly acquired under them, from a discharge by the insolvent provisions affecting the contract. The obtaining a lien by a suit is one thing, the discharge of that or of the contract sued is another and distinct. What constitutes a contract or a lien is still, as ever, to be settled by the laws of the state in the same way as to non-residents and residents; but what shall discharge them, is to be settled by the constitution and our decisions, and by these the residents alone, and their attachments and local contracts, are held subject to insolvent discharges of the states, whether of the debt or the attachment.

This, it will be seen, throws us back to the inquiry, which has already been exhausted, and which ended in the conclusion, that the supposed lien here by the plaintiffs, not beginning till the 18th of June, and the assignment to the messenger and his publication having been on the 1st of June, the latter did by the laws and judicial decisions of Massachusetts pass the title of the debtor to the messenger, and hence prevented any person subsequently from taking any step which, by an attachment suit or private sale, could create through the debtor a lien on property, that no longer in law belonged to him, or was under his control. It ceases to be his for such a purpose, as much as if it was in the hands of an administrator and the debtor dead, he being as to this civiliter mortuus. Now, if this position can be altered by the fact of the plaintiffs being non-resident, or this court not a state tribunal, or the contract being to be performed elsewhere, it must result from one of two principles; it is either that the plaintiffs have already obtained a lien, which should not be discharged, but which would be, except for those facts; or, that the contract itself is in this way virtually allowed to be discharged, when it ought not to be. But we have already shown, that no such lien has been acquired by the plaintiffs; and it is very clear, that if the trustees are in this case held to be not liable, the principals, the debtors being defaulted, they are so far from being discharged from their contract, that judgment can be taken against them for the whole amount of it. It is conceded, that there will not be so much property to satisfy it with as there would be, if the lien was upheld. But that would be the case, if any other property was claimed, once owned by the debtor, and the sale of it had been made to third persons before insolvency, and appeared to be valid; or even if it had been taken possession of by the assignees and sold. If the claim to such property as security is to be maintained, because the contract is not to be discharged, and taking away the property does this, why cannot this claim be maintained forever, or till the debt is satisfied? And why not as to all property, which belonged to the debtor

when becoming insolvent, till the non-resident creditor is paid? If the security is not to be lessened in any way, the principle must be, that nothing can be done with an insolvent estate, no valid title to it passed within the state, until all non-resident creditors are fully paid. This would be both novel and extraordinary.

Considering, then, that the acts of congress as to process, and the clause in the constitution as to impairing the obligation of contracts, relate only to the discharge of liens or stipulations by state laws, and that the present question is rather one as to the formation of a lien or inchoate title to this property; this last is surely to be settled by the state laws, and they create the first lien or title to the property in the creditors generally. By the thirty-fourth section of the judiciary act the state laws [of 1789 (1 Stat. 92)] as to property and titles and liens, govern the courts of the United States, when no acts of congress interpose and regulate the subject. See cases in U. S. v. Ames [Case No. 14,441]; Clark v. Sohier [Id. 2,835]; Springer v. Foster [supra]. Again, it is a general rule of public law as well as of municipal obligation, that the titles or liens of property, always if real, and generally if personal property, are to be decided by the laws of the state where the property is situated, the lex rei sitæ. 1 H. Bl. 131; 1 Cromp. M. & R. 296; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 364. In this case the property in dispute was situated in Massachusetts and not abroad, and the foreigner is obliged to come into Massachusetts to obtain it; and hence if it be governed by the lex rei sitæ, a title to it cannot be set up abroad, if it has previously, while situated in Massachusetts, been legally transferred to other persons. The error in the analogies and reasoning on this branch of the case, is in supposing that the title to it had not been transferred in Massachusetts before the trustee action was instituted by the plaintiffs. Even in cases of ancillary administrations on personal estate, situated in places where the debtor did not have his domicil, creditors from other states may come there and partake in it, according to the laws there. Goodall v. Marshall, 11 N. H. 88. The balance, if any, is divided among the heirs according to the laws of the state where the debtor had his domicil, because each state recognizes this rule of distribution as a principle of international law, and to be enforced by the usual comity between nations.

This leads to another rule as to personal estate, which rather fortifies than conflicts with the preceding one. It is well settled, that such property, owned at the death of an individual, is to be administered and divided among his creditors and heirs according to the law of the place of the domicil of the deceased debtor. 3 Ves. 198; Harvey v. Richards [Case No. 6,184]; 5 Ves. 750; Saunders v. Williams, 5 N. H. 214; 11 N. H. 89; 2 Kent, Comm. 344. Supposing an insolvent debtor, then, as to his estate, like a deceased person, as he usually is, and the debtor here having his domicil in Massachusetts, the rules as to dividing or disposing of it in that state must govern, rather than any different ones fancied or in force elsewhere. 5 East, 131; 9 Mass. 378; 1 Bin. 336. The debtor here having his domicil in Massachusetts, a fortiori must the laws of this state control the title and liens and division of his property in all respects not contrary to the constitution or acts of congress. It is so even in sales of personal property as a general rule. Black v. Zacharie, 3 How. [44 U. S.] 483. If some defect exist in such a sale, not impairing the equity of the sale, known to a creditor, it is good so far as regards him. Id.; 2 Cow. 777; 11 Wend. 628; 22 Wend. 362; 10 Mass. 476; 8 Pick. 90. Here, in corroboration of the validity of the title or lien, the property was in the same state, where the debtor went into insolvency and had his domicil. All this combines to strengthen the lien, as does the analogy to the case of distribution of estates of deceased persons. The analogy between cases of bankruptcy and estates of deceased persons under administration is, that the bankrupt is civiliter mortuus for many purposes, and hence his property and his creditors' claims should be treated like those connected with persons physically dead and under administration.

Much has been said as to the exception to the general principle, of property passing from the debtor by proceedings in bankruptcy. It is conceded to be the general principle, that it does pass (2 H. Bl. 402; 3 Mass. 517; 8 East, 314); and passes from the date of those proceedings, and not from the act of bankruptcy (Holmes v. Remsen, 4 Johns. Ch. 477, and cases cited; 4 Durn. & E. [4 Term R.] 182; 1 H. Bl. 665; 2 Johns. 342; Story, Confl. Laws, 345, note 2; Id. § 404). But it is contended, that if a part of the property was situated in a foreign government, the proceedings in bankruptcy at the home of the debtor will not pass that part, if an attachment is made of it abroad, before the assignee goes abroad and takes possession of it. Concede this. See 2 Kent, Comm. 330; 5 N. H. 213; 10 N. H. 264; 6 Pick. 286; 20 Johns. 229; 4 Cow. 510, note; [Harrison v. Sterry] 5 Cranch [9 U. S.] 289; Goodall v. Marshall, 11 N. H. 97. Comity, it is thought, which alone gives force here to a foreign bankrupt assignment, does not require us to exercise it so as to drive our own citizens and creditors abroad to satisfy their debts when property for that purpose exists here. Richardson, C. J., in Saunders v. Williams, 5 N. H. 215. See, further, Parker, C. J., in 11 N. H. 98; The Watchman [Case No. 17,251]. Probably in such case the right to attach in the state where the property is, must be held to exist till actual possession is taken by the assignee of the owner, or his grantee. Towne

v. Smith [supra], and cases cited there; U. S. v. Munroe [Case No. 15,835]; Ogden v. Saunders] 12 Wheat. [25 U. S.] 360; Blane v. Drummond [Case No. 1,531]; Dawes v. Boylston, 9 Mass. 337; 11 Mass. 256; 13 Mass. 146; Blake v. Williams, 6 Pick. 286; Fall River Iron Works Co. v. Croade, 15 Pick. 11; Osborn v. Adams, 18 Pick. 245; 5 Greenl. 245; 5 Watts & S. 9; Johnson v. Hunt, 23 Wend. 87; 14 Mart. [La.] 93; [Black v. Zacharie] 3 How. [44 U. S.] 488; 20 Johns. 258; Milne v. Moreton, 6 Bin. 353; Harrison v. Sterry, 5 Cranch [9 U. S.] 290. But here this property, held by these trustees, was not situated abroad. It was and still is within the limits of Massachusetts, and was within its jurisdiction and the control of its courts when the insolvent proceedings were instituted. Again, the exception set up when the property is in another government, is to aid the citizens of that government to procure payment of their debts. But to extend the exception to a case like this would be to defeat and injure creditors, who are citizens of Massachusetts, and this for the benefit of foreigners. Again, analogous proceedings do not favor such an exception, because it is raised in them only to aid creditors belonging to the state where the property is situated, and in the single cases of intestate estates and technical bankruptcies. For though once it was held, that a valid assignment abroad could not hold against a subsequent attachment at home made before possession was taken actually (Fox v. Adams, 5 Greenl. 245; Meeker v. Wilson [Case No. 9,392]; Semb., Ingraham v. Geyer, 13 Mass. 146; [Harrison v. Sterry] 5 Cranch [9 U. S.] 289; 3 Pick. 313; Le Chevalier v. Lynch, Doug. 170; Semb., though both at home), yet this is overruled in Means v. Hapgood, 19 Pick. 105, in case of a voluntary assignment in another state. And it seems to be now settled, that if the property here is transferred by the owner abroad, by deed or voluntary assignment, in usual form, it passes even as against creditors here. Johnson v. Hunt, 23 Wend. 87; 10 N. H. 264; 5 N. H. 214; 6 Pick. 307; 4 Johns. Ch. 487; 1 H. Bl. 690; 2 H. Bl. 405. Though it might not then, if such assignment gave peculiar preferences, or excluded our own citizens as creditors from equal rights. Id. And it may be an exception to this to allow the creditors of the debtor residing where the property is, to satisfy their demands out of this property, if attaching it before the sale or transfer abroad is completed according to any law of the place where the property is situated. Story, Confl. Laws, §§ 391, 398; Sanderson v. Bradford, 10 N. H. 264. But such an exception would yield no relief to the plaintiffs, as they do not reside where the property is situated. If the property is on the ocean, the title at home governs as the laws of the place, where the sale or lien is attempted, apply. 7 Mart. [La.] 318, 353; Story, Confl. Laws, § 391. If it be in another state than that where the title is attempted to be passed, it succeeds, if not contrary to the laws of the locus sitæ of the property, and if good by the laws of the place where the transfer is attempted. 7 Mart. [La.] 707; 12 Mass. 54; 17 Mass. 110; Black v. Zacharie, 3 How. [44 U. S.] 483. Semble, aliter, Story, Confl. Laws, §§ 407, 409, 512; [Harrison v. Sterry] 5 Cranch [9 U. S.] 290. If legally transferred, it binds, though the person holding the property or owing the debt has no notice at the time, if he has it before he is subjected elsewhere. Story, Confl. Laws, §§ 396, 397; 4 Mass. 450, 508; 13 Mass. 286; 11 Mass. 488; Bholen v. Cleveland [Case No. 1,381]; 4 Johns. Ch. 460; 3 Burge, Col. Law, 777; [Harrison v. Sterry] 5 Cranch [9 U. S.] 289; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 361. When the plaintiffs are citizens of a different state from that where the property is, much less can they claim any peculiar favor in a third state, where the property happens to be, not being the state where the creditor lives, and if where the debtor lives, and as to whose laws some reference may have been had in the contract, they do not give the creditor any such favor in attachments. Id. Again, in a case equivocal, the leaning always is to pass the title by the act of the debtor. Thus if A. before bankruptcy order goods abroad to be delivered to B., a creditor, and A. become bankrupt, and then the agent delivering them or the order before knowing of the bankruptcy, B. is entitled to hold them in equity, though delivered to him after the bankruptcy of the former owner. Burn v. Carvalho, 4 Mylne & C. 690.

Most of the exceptions claimed or set up by the plaintiffs rest on facts as to the foreign position of the property, or its being in a foreign jurisdiction, which in truth do not exist here, and on a principle which is dependent entirely on those facts. The principle is, not to permit the representatives of one deceased or bankrupt in one government, to remove portions of his property situated in another, till the creditors, living in the latter, are satisfied if they choose to attach, or, in case of death, to take out administration and proceed against it. But in the present case, though the foreigner elects to proceed in the courts of the United States, a quasi foreign tribunal in Massachusetts, yet the property was situated within the limits of Massachusetts. It is conceded, the property was not in another state nor country; but it is contended, it was within the jurisdiction of the United States. So in one sense and for some purposes is all property within the limits of the Union. But it is not within the exclusive jurisdiction of the United States, unless situated in the District of Columbia, or some of the navy yards, forts, arsenals, or other places where a cession has been made to the United States of such exclusive jurisdiction. U. S. v. Ames [Case No. 14,441]. It was not so situated here; and hence it was to be governed by the laws of Massachusetts, except where conflicting with some act of congress.

or some clause of the constitution. Probably this might be the case, even if the property had been situated in one of those places over which exclusive jurisdiction has been ceded. U. S. v. Ames [supra]. But this need not be, and is not decided. Admit, then, that the analogy holds; that the plaintiffs are foreigners; that this court is, for many purposes, a foreign one; and even that this property is situated within the limits of its mixed, or, in some respects, concurrent jurisdiction; yet, in other important respects, the analogy fails, because that jurisdiction is not, as in the precedents, exclusive in us within those limits; it being limited and special in us, and in common or mixed with the local tribunals of Massachusetts over the same territory; and the laws to govern the case being not, as in the precedents, foreign and exclusive in the United States, but the laws of Massachusetts alone, with the exception before named as to the discharges merely of contracts and liens, rather than the creation of them. Our reasoning is, not that the states can do every thing within their limits which the general government can, any more than every thing exclusive of that government; but it is, that the states can do certain acts, and the general government certain other acts, each travelling in its own path or orbit within a certain space.

The United States courts enjoin proceedings in their own courts only. Diggs v. Wolcott, 4 Cranch [8 U. S.] 179. And the states enjoin in their own only. [Wallen v. Williams] 7 Cranch [11 U. S.] 279. Each acts independently, and still each usually, in private rights, acts to enforce the same laws; the latter generally enforcing them between its own citizens, and the former between such citizens and inhabitants of other states or countries. If there was a foreign exclusive jurisdiction and limits, and a foreign code to control the formation of a lien or contract there, different from what they should be in the state court, it would furnish a different state of things, and might justify different conclusions. But, as it is, the guides in this court, on those points, in settling rights, are usually the same as in the state courts, differing only where the constitution and acts of congress differ. By the latter we have different forms of mesne process at times, adhering chiefly to those adopted in 1792, and hence still make attachments and arrests (7 Greenl. 337; [Beers v. Haughton] 9 Pet. 359); and create liens by trustee suits, and after an assignment in insolvency often proceed to render judgment and issue execution, and seize the property before attached, though a certificate of discharge is pleaded. Towne v. Smith [supra]; Springer v. Foster [supra]. We do this, and differ in this, not only by force of those acts of congress prescribing our forms of process, and which the states cannot lawfully change or modify so as to affect proceedings here; but by force of the constitution, which, according to the decisions of the supreme court, does not permit a state insolvent system to discharge a contract made or to be performed out of the state, or prosecuted by a citizen of another state in the courts of the United States, lest the obligation of the contract be impaired, or the local discharge have an extraterritorial operation, and bind a foreign forum. But in other respects, and as to other questions than those regulated by the constitution and acts of congress, we are almost entirely dependent on the state laws; and instead of foreigners being allowed to sue in this court, in order to try their rights by different rules from what are applied to citizens, or by superior rules, it is merely to insure to them the same, with more impartiality, perhaps, than might possibly be meted out to them in contests with citizens of the state by state judges. The law of trial of the merits is usually the same; not one law for A. and another for B., in a suit within the limits of the same state; not one in this north wing of this granite courthouse, and another in the south wing, where the state courts sit,—"Non est alia lex Romæ, alia Athenis." Besides this being the general principle, several special decisions have made the state laws govern in this court, in cases of some doubt, and which by their details may tend to throw some light on this inquiry. Thus they have governed as to the alteration of rules of evidence ([M'Niel v. Holbrook] 12 Pet. [37 U. S.] 89); the usages of states ([Swift v. Tyson] 16 Pet. [41 U. S.] 18); the swearing out of jail on execution ([Fowler v. Brantly] 14 Pet. [39 U. S.] 315); statutes of limitation ([Ross v. Duval] 13 Pet. [38 U. S.] 60); the allowance of new trials by petition (Clark v. Sohier [Case No. 2,835]); granting partition of lands (Ex parte Biddle [Id. 1,391]); and liens on judgments (Thompson v. Phillips [Id. 13,974]).

The case of insolvent discharges by state laws, as affecting contracts made or to be performed out of a state, or in favor of persons living and suing out of the state, or of the courts of the state where the discharge issues, is an exception under the constitution by the decisions of this and the supreme court. [Ogden v. Saunders] 12 Wheat. [25 U. S.] 360; Springer v. Foster [Case No. 13,266]; Towne v. Smith [supra]. The case of liens on insolvent estates, created by attachments or trustee suits, is a branch of the same exception; and the liens are not discharged in such cases, when first and previously created by suits in the courts of the United States. Springer v. Foster [Case No. 13,265]; Springer v. Foster [Id. 13,266]; Towne v. Smith [supra]. The case also of a conflict between the state laws and the United States, when one of the latter exists on the same point, always constitutes another exception, as the state law must then give way. U. S. v. Ames [supra]; U. S. v. New Bedford Bridge [Case No. 15,867]; License Cases, 5 How. [46 U. S.] 504. But here no previous lien having been created

under the process by this court, which issued after the estate had legally been transferred from the debtor; and no act of congress or article of the constitution conflicting with the state laws, creating titles and liens in cases like this; these discriminations will dispose of the principal question in controversy in favor of the trustee. Though that question is one quite complicated, and to be placed on its true grounds only by a careful analysis and comparison of precedents and their governing principles, I trust the more that my conclusions are the correct ones, as they are forced on me by the weight of argument in their favor, somewhat against my previous impressions as to what was right.

The summary of this decision on this last question is, that the non-resident creditor, suing in this court on his contract made or to be performed out of the state where the insolvent proceedings are instituted, and attaching property by writ or trustee process, which is situated within the same state, has no lien, if, by the laws of the state, the title had previously passed from the control of the debtor; but when, by those laws, he once obtains a lien, and is first in doing it, his priority, by acts of congress and the constitution, is not to be superseded or discharged by that insolvent system, nor is the suit or contract to be thus discharged. The advantages belonging to the non-resident creditor thus suing, are not the creation of a lien in any different way, or to any extent different from a resident creditor; but the retention of one, when earliest created, and saving it and the contract and suit from being discharged under the insolvent system, as they are discharged by it in the state courts, and the being able to attach any future earnings or property of the debtor, which the resident creditors cannot do, after the insolvent proceedings in their own domestic tribunals.

[For the matter of costs in a collateral proceeding, see Case No. 11,014.]

PERRY, The THEODORE. See Cases Nos. 13,879 and 13,880.

Case No. 11,016.

PERSEE v. The CLARENCE.

[14 Law Rep. 453; 4 Am. Law J. (N. S.) 335.]

District Court, S. D. New York. Oct. 11, 1851.

BOTTOMRY BOND—LIEN, WHEN LOST.

In admiralty. The bark Clarence was owned in Galway, Ireland, and arrived in this port disabled by perils of the sea, and consigned to the libellants, residing here. In order to make the necessary repairs the master borrowed $7,535.77 of the libellants; he drew bills on the owners in Ireland for a portion of the loan, and on the 28th of April, 1849, executed a bond for $15,000, conditioned to pay for the sum loaned, together with $1,130.36 bottomry premium, within ten days after the safe arrival of the ship at Galway. The vessel arrived out safely May 25th thereafter, and returned to this port in June, 1850. On the 27th of that month she was attached by process from a state court, by creditors of the foreign owners, and was ordered to the sold by decree of the court, July 31st, and was sold at auction thereupon by the sheriff, August 8, 1850. All the proceedings on the attachment were legal and regular. A bill of sale was executed by the sheriff to the claimants, who were bona fide purchasers, at the sale, and it does not appear that they had any notice of this bottomry claim, other than that implied from the suit being commenced prior to the day of sale. The master drew bills in favor of the claimants, on the owners, for the amount included in the bottomry. The libel was filed August 3, 1851.

Held, that the bond given by the master was a bottomry security, legally binding upon the vessel, and that the bills of exchange drawn by the master in favor of the libellants on the owners were not the original security contemplated by the parties, but were collateral to the bottomry bond.

Held, that the libellants lost the bottomry lien by neglecting to enforce it within a reasonable time after the return of the ship to this port, and until after her arrest in this city, and a decree rendered for her sale in due course of law, in a state court. A bottomry lien is not an incumbrance binding a vessel indefinitely. It must be pursued within a reasonable time after it is perfected by the happening of the contingencies on which it rests, and may be cut off or barred by a bona fide purchase of the vessel, when a reasonable period for enforcing the lien has elapsed.

Case No. 11,017.

The PERSEVERANCE.

[Blatchf. & H. 385.] [1]

District Court, S. D. New York. July 5, 1833.

ADMIRALTY JURISDICTION—CONTRACTS TO BE PERFORMED AT SEA — MONEY ADVANCED TO PURCHASE SHIP—BILL OF SALE—HYPOTHECATION.

1. A contract, in order to be within the jurisdiction of admiralty, must be one which is to be performed upon the sea, or which has relation to a maritime service.

[Cited in Wenberg v. Cargo of Mineral Phosphate, 15 Fed. 287, 288.]

2. Where money was advanced to purchase a ship, and her bill of sale was deposited with the lender, by way of security, with a power of attorney to him to sell the ship for his reimbursement: *Held*, that such a contract was not cognizable in admiralty.

[Cited in Wenberg v. Cargo of Mineral Phosphate, 15 Fed. 287, 288.]

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

3. The party holding such bill of sale, acquired, by its delivery to him, no hypothecation of the vessel or interest in her, enabling him to maintain a petitory or possessory action. He took only a naked power to sell, which did not amount to a pledge in præsenti.

4. Admiralty cannot give relief by converting such contract into a hypothecation, nor does such contract carry with it any of the ingredients of a lien, either express or implied.

This was a libel in rem, against the brig Perseverance. The libel set forth that the libellant advanced $4,500 to one Thompson, at his request, to enable him to purchase the brig, and, on the purchase, took from him, as security, the bill of sale executed by the former owners to Thompson, and also a power of attorney constituting the libellant the irrevocable attorney of Thompson, to transfer the vessel by a bill of sale; that an indenture was at the same time entered into between the libellant and Thompson, by which it was agreed that if Thompson should repay the libellant, on demand, the sum advanced by him, then the power of attorney should be delivered up, otherwise, the libellant should have full power to dispose of the vessel, to repay himself for his advances and expenses, subject to an account for the remainder; and that the vessel remained in the possession of Thompson, and was navigated by him, and the freight was appropriated to the repayment of the advances made by the libellant. The libel then alleged, on information, a sale of the vessel by Thompson to one Higbee, and that Thompson was about to depart in the vessel, and concluded with the usual prayer for the arrest and sale of the vessel, &c. The claim and answer of Higbee excepted to the jurisdiction of the court, and alleged a bona fide purchase of the vessel by him from Thompson, and that the libellant had shown no property in the vessel, or lien upon her.

Francis B. Cutting, for libellant.
Daniel Lord, Jr., for claimant.

BETTS, District Judge. The essential requisite of a contract, to bring it within the jurisdiction of an admiralty court, is, that it must be one which is to be performed on the high seas, or which has relation to a maritime service. The most enlarged interpretation of the term "maritime," as applied to the jurisdiction of this court, has not been extended beyond subjects or engagements which are necessarily connected with services to be rendered on tide waters; or supplies furnished to vessels in aid of a voyage; or labor, or materials, or cash advanced to obtain such supplies; or loans on hypothecation, subject to the event of a voyage, or payable at the end of the voyage; or questions directly touching the right of possession or ownership of ships. De Lovio v. Boit [Case No. 3,776]; Plummer v. Webb [Id. 11,233]; Andrews v. Essex Fire & Marine Ins. Co. [Id. 374]; The Mary [Id. 9,187]; The Tilton [Id. 14,054]; Drinkwater v. The Spartan [Id. 4,085]. Although it is difficult to discern any principle which distinguishes one kind of water, adapted to general navigation, from another, yet the adjudged cases and elementary writers regard the particular of tide water as an essential element to the jurisdiction of admiralty. The undertaking upon which this libel is founded partakes of a maritime character, in the usual acceptation of the term, in no other respect than that the loan of money thereby sought to be secured was made with the view of aiding the borrower in the purchase of the brig now arrested, and with the expectation that her earnings at sea would enable him to repay the loan. The vessel could not be hypothecated or mortgaged to the libellant at the time of the loan, because she was not then owned by him; and the question, whether the libellant can, as mortgagee, have a remedy in this court in rem, does not arise. The depositing, afterwards, with the libellant, of her bill of sale, transferred no title to the vessel, and could not affect the right of the actual owner in possession to make sale of her, with full title, to another. The plain purpose of the whole transaction was, to make sure a power of disposal in the libellant over the vessel, through which his debt might be collected, and not to vest the ownership of her in him. The vessel thus becomes connected with the contract only by means of a special power of attorney, given by the owner to the libellant, to sell the brig and repay himself out of her proceeds. He had no higher title than that of agent or ship-broker. The instrument imparted to him merely a naked power, and vested in him no interest in the vessel (Hunt v. Rousmaniere, 8 Wheat. [21 U. S.] 174; Id., 1 Pet. [26 U. S.] 1), and, accordingly, would not enable him to maintain this suit, in the character of owner, to obtain possession of her, even from Thompson, much less from his vendee. Nor did it give him any right of possession or control over the vessel, nor more than the authority to make sale of her to others, whilst she continued the property of his debtor. The libellant, therefore, has not the capacity of maintaining a petitory or possessory action for the recovery of the vessel from her purchaser, nor any action in rem in this court to try the right of ownership of the claimant, under the sale of her to him by her prior owner, the debtor of the libellant.

I do not consider the agreement between the libellant and Thompson as a maritime contract. It is merely personal between the parties. It was entered into in port, and had relation to a transaction entirely on land. Whether the money loaned was applied in purchase of the vessel, or of her cargo, or of any other merchandise, the security of the lender would have been the same. That security was not made dependent upon the manner in which the money was used, and the lender could not, in this court, follow the

money as a thing in which he had a continuing interest. If such an interest might be supposed to subsist, the money, or its avails, could be reclaimed only by the aid of a court of chancery.

Independently of the authority given by the power of attorney, the libellant could not, at law or in chancery, exact his reimbursement out of the subject to which the money was applied. And, under the contract, he can be reimbursed only in the mode provided by its terms (Hunt v. Rousmaniere, 8 Wheat. [21 U. S.] 174; Id., 1 Pet. [26 U. S.] 1), that is, by selling the vessel under his power of attorney. To give effect to the agreement as an incumbrance on the vessel, the creditor must obtain the decree of a competent court, converting the contract into a mortgage or pledge. That relief cannot be had in a court of admiralty, which possesses no power to change a written agreement, or to compel one to be executed conformably to equity and to the understanding of the parties. Andrews v. Essex Fire & Marine Ins. Co [supra]. This court affords its peculiar relief, by holding in pledge the thing which ought to indemnify a party, only when there is a lien, express or implied, upon the thing itself. I cannot perceive that these funds, which were advanced to aid in the purchase of a vessel, acquired a character differing from an ordinary lending of money, so as to be entitled to claim the privilege of a maritime loan. The libel is, accordingly, dismissed, with costs.

Case No. 11,017a.

PERU v. The NORTH AMERICA.

[21 Betts, D. C. MS. 98.]

District Court, S. D. New York. 1853.

ADMIRALTY—WHAT SUFFICIENT TO HOLD RES TO BAIL—AGREEMENT FOR LIQUIDATED DAMAGES—BAIL FOR LESS THAN DOUBLE THE AMOUNT OF LIBELLANT'S DEMAND.

[1. A libel in rem for breach of charter party demanding a stated sum in damages is sufficient to hold the res to bail, although specific breaches showing specific amounts of damage are not alleged.]

[2. An agreement fixing the amount of penalty or liquidated damages is not conclusive upon a court of admiralty as to the amount of bail in a suit in rem.]

[3. Act March 3, 1847 (9 Stat. 181), does not abridge the power of a court of admiralty in a suit in rem to accept bail for less than double the amount of libellant's demand.]

[This was a libel for breach of charter party by the government of Peru against the ship North America (Cornell and others, claimants). Heard on claimants' motion for a discharge upon giving bail for $40,000.]

BETTS, District Judge. The ship North America was chartered to the libellants, by charter party dated New York, August 17, 1853 (Qu. 1852), to transport a cargo of guano from the Chinca Islands to Hampton Roads. The charter party stipulated that the ship should proceed from San Francisco to Callao, and thence, with all convenient dispatch, to the Chinca Islands, and to be at Callao, for the purpose of fulfilling the voyage, in the course of January or February, 1853, or before. The particulars of loading and unloading, and conducting the voyage, were regulated by the charter party, and it then added, "Penalty for nonperformance of this charter party $20,000, which amount is fixed as indemnification of prejudices caused by the party delinquent to the party observant."

The libellants instituted their action in rem in this court, and caused the ship to be attached, on the allegation that "the agreement of the charter party was not fulfilled, nor any way entered upon, on the part of the ship, but, on the contrary, the said vessel openly and wantonly violated the said charter party, by proceeding on another and in a different voyage, under another and a different contract of affreightment from that of the aforesaid charter party," and charge that they "have sustained damage, in consequence of the nonperformance of the aforesaid contract of charter party, to an amount greatly exceeding the sum of $20,000, fixed by the parties in and by the said charter party as indemnification for such damages; that is to say, to the amount of $50,000 and upwards."

The claimants now move the court for an order that the ship be discharged from arrest on giving bail to double the amount stipulated in the charter party, and for such other modification in point of amount.

By the act of congress of March 3, 1847 (9 Stat. 181), the marshal cannot accept bail, and discharge the ship from arrest, unless the bond be in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge. This statute does not assume to interfere with the powers of a court of admiralty to regulate the execution of its process, and the stipulations it is authorized to take, conformable to general principles of procedure in those courts, on the particular equities of each case.

The motion is founded upon two propositions: First, that the stipulation in the charter party amounts in law to a liquidation of the damages which the libellants can demand for any breach of the charter party; and, second, if that stipulation is construed to be a penalty, in its technical sense, the libel has not assigned breaches in a proper form of pleading, so as to put in demand any specific sum of money, which can be the basis of bail, or sufficient to afford authority to the court to decree damages. The latter proposition is properly a point of pleading, and the insufficiencies of the libel, if any, suggested by the counsel for the claimants, are not so flagrant or obvious that the court can decree against it, as a nullity, on a summary

motion. The assignment of breaches or exactness of pleading attended with the formalities enforced by the rules of the common law are not demanded in the admiralty practice; and if, on consideration, the statement of damages in this libel should be held too indefinite or indistinct, it would be almost a matter of course to permit the party to reform it in its details, if he did not depart virtually from the substance of the pleading. I shall therefore assume that the libellants place themselves, by their proceedings, in an attitude to be entitled to all the damages they can prove they have sustained because of the charter party, unless the amount is limited, determined by the agreement itself.

As to the first point, whether the agreement naming an amount of damages is to be construed a penalty or an adjustment and liquidation of the sum to be paid at all events, the question is not so free of doubt as to be disposed of satisfactorily, impromptu. Although the books seem more generally to regard the use of the term "liquidated damages" as less certain, in determining the intent of the contracting parties to fix the quantum of damages, than employing "penalty" is to denote they meant the question of damages should be an open one, yet it may perhaps be assumed that the bearing of the course of modern decisions is to put the interpretation of the stipulation upon the intention of the parties, to be gathered from the whole agreement, and not as absolutely settled by the use of either of those expressions; and courts of high respectability indicate the opinion that the presumption, in case of doubt, will be that the stipulated sum was intended as a penalty, and not to be liquidated damages. Lindsay v. Anesley, 6 Ired. 186; Watt's Ex'rs v. Sheppard, 2 Ala. 425; Brewster v. Edgerly, 13 N. H. 275; Cheddick v. Marsh, 21 N. J. Law, 463; Jackson v. Baker, 2 Edw. Ch. 473; Spear v. Smith, 1 Denio, 464.

A learned and acute commentator seems to consider the disposition of the American courts to favor a construction of these stipulations which takes from them a positive character, and renders them penalties, as not consonant with the soundest judicial prudence. Sedg. Dam. (2d Ed.) 421. See, also, Esmond v. Van Benschoten, 12 Barb. 366. I think, however, the reasoning in support of the opposite view has great legal urgency and weight. I do not think the court is required, on a motion of this character, to declare, in a case of ambiguity, a legal proposition which may bar the rights of the libellants, and particularly against the manifest inclination of the state judicatories, when, by giving the more liberal intendment to the agreement, the point is left open for decision upon the merits, and in a way that the aggrieved party can have redress by appeal to the highest tribunals. A determination on this motion that under the charter party the libellants can recover no more than $20,000 damages, whatever their real amount may be, would be conclusive probably upon the remedy, because, on giving security for that sum, the ship might be effectually put out of the reach of the libellants, although a court of review should, after final decision here, overrule the judgment, and determine that the ship ought to have been retained to answer to the actual damages sustained.

I shall accordingly deny the motion to discharge the ship on giving bail in the sum of $40,000, but I consider the amount claimed by the libel, the extent to which stipulations for the delivery of the vessel ought to be bound, according to the course of admiralty courts. The recovery cannot, in a money demand, be beyond that sum, and security for its payment is all that the libellants are entitled, in equity, to demand. The stipulation is not for the value of the ship, but to cover the amount in contestation. Dist. Ct. Adm. Rules 39, 40.

The ordinary stipulation on intervening is intended to cover such costs as may be awarded. The order will accordingly be that the ship be discharged on a sufficient bond or stipulation executed by the claimants in the sum of $50,000.

PERUVIAN, The (WOOLLY v.). See Case No. 18,031.

Case No. 11,018.

The PESHTIGO.

[2 Flip. 466; 20 Alb. Law J. 378; 9 Cent. Law J. 285; 25 Int. Rev. Rec. 361.] [1]

District Court, E. D. Michigan. June, 1879.

COLLISION—RECOVERY — LIEN UPON INSURANCE—ABANDONMENT NOT NECESSARY.

1. The owner of a vessel injured by a collision can only recover to the extent of the value of the offending ship and her freight immediately subsequent to the collision. He has no lien or claim upon the insurance received by the owner of such other vessel.

[Cited in Gleason v. First Nat. Bank of Lapeer, 13 Fed. 721.]

2. Where actual total loss occurs, there is no need of formal abandonment to entitle the owners to the benefits of the limited liability act.

Libel in personam, by McMorraw and Fitzgerald, owners of the schooner St. Andrew, against one Dunham, owner of the schooner Peshtigo, to recover damages brought about by a collision of those vessels. Besides the usual allegations of ownership and negligence, the libel set forth that, at the time of the collision, the Peshtigo was insured in the Manhattan and Orient Mutual Insurance Companies; that by reason of such collision and the damage thereby occasioned to the Peshtigo, these companies had become, and were liable to pay to the respondent the full

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 20 Alb. Law J. 378, contains only a partial report.]

amount of their policies, and that libellants had a claim against said companies enforceable by garnishment. Writs of garnishment were sued out against the companies, to which they made returns, admitting liability under the policies, and announcing their willingness to pay whomsoever the court should order. Respondent, Dunham, in his answer, set forth a plea to the effect that, from the effects of this collision, the Peshtigo was sunk, and with her cargo became a total loss. Moreover, that the collision and the injury therefrom were occasioned wholly without his privity or knowledge. To this plea exceptions were filed for insufficiency.

F. H. Canfield, for libellant.
J. J. Speed, for respondent.

BROWN, District Judge. The writs of garnishment in this case can only be supported upon the theory of a lien upon the amount of the policies. If the liability of the owner is limited to the value of the vessel and freight, irrespective of the insurance, there is no claim against him, and consequently nothing which will support the garnishment. Therefore, unless the lien of the libellant upon the vessel is transferred to the insurance money, this suit must fail.

At common law, and also by the civil law and the general law maritime, the owner of a vessel is liable for damages occasioned by the negligence of the master and crew to the full extent of the injury sustained. The ordinary rule of responsibility of the principal for the acts of his agent obtains here, as in every other case; but long before the earliest English act upon the subject, a limit to such liability grew up among the maritime nations of Europe. "The ancient laws of Oleron, Wisbury and the Hanse-Towns contain no provisions on this subject; nor is there any alteration of the rule of the civil law noticed by Roccus; but Vinius, an earlier author, states that by the law of Holland the owners are not chargeable beyond the value of the ship and the things that are in it." Macl. Shipp. 110. This limit of liability was first incorporated in the law of England in the reign of George II., and in that of the United States in the year 1851; but the adjudications under it have not been numerous.

After a careful search for precedents, I have not been able to find a single case in England, and but one in America where the precise question here involved has been passed upon. The absence of English authority is probably due to the fact that, by the law of England, the liability of the owner is limited to the value of the offending ship immediately before the collision, that is, in her undamaged state, while by the American and continental law, the measure of liability is determined by the value of the ship immediately after the collision. In the United States the only reported case upon this point is that of In re Norwich & N. Y. Transp. Co. [Case No. 10,360], in which the learned judge for the Eastern district of New York discusses the question at length, and comes to the conclusion that the owner is not liable in respect of the insurance moneys.

The continental authorities are full and explicit to the same effect. Article 216 of the Code of Commerce following the Hanseatic ordinance of 1614, and the French ordinance of 1681, declares that "Every owner of a vessel is civilly responsible for the acts of the master in whatever relates to the vessel and the voyage. This responsibility ceases on the abandonment of the vessel and freight." Caumont discusses the question at length in his Dictionary of Maritime Law, page 31, title "Abandonment." And his remarks are worthy of reproduction. Section 54: "When the owner has not seen fit to insure his vessel, it is sufficient that he abandon her with her freight, in order to free himself from responsibility for the engagements of the master. Nothing further is demanded. Now, if the owner has adjudged it prudent to effect an insurance, in consideration of a premium more or less in amount paid by him, it is evident that the lenders upon bottomry and shippers cannot deprive him of the fruits of a wise foresight, and receive the benefits of a contract to which they are strangers." Section 57: "It has, then, been very properly decided: 1. That the owner who, to free himself from loans contracted by the master in the course of the voyage, abandons the ship and freight, is not compelled to account to the lender beyond that for the proceeds of the insurance underwritten upon the ship. (Aix, Feb. 8, 1832.) 2. That the proprietor of the ship who effects an abandonment to the shipper is not held as including the value of the insurance. (Rennes, Aug. 12, 1822.)" Section 57: "How could the owner of the ship be held to include in his abandonment the amount of insurance he has taken the precaution to put upon the vessel? Is not this insurance the consideration of the premium he has paid? Can this be affected by his guaranty of obligations contracted by the master? Ought not the relations established by law between the owner of the ship and the lender or shipper to be maintained quite independent of the contracts of insurance which each of them may make?" See, also, Bedarride (Code du Commerce, § 295): "In the discussion which the projet de loi of 1841 called forth, certain courts, notably that of Aix, urged that the abandonment should include, besides the ship and freight, the amount of insurance which the owner had bargained for. This claim, which had already been made before the courts, was formally condemned."

So, too, Defresquet, in his pamphlet upon the law of collisions at sea, discussing the right of abandonment, observes: "We remark, in conclusion, that if an abandonment has been made of a ship sunk by collision, the owner is not obliged to abandon at the

same time the amount of his insurance. This was proposed at one time, but rejected."

These authorities seem to me to announce a sound principle of law and to be fortified by unanswerable reasons. The liability of the owner is limited to the value of the ship and freight. That liability ought not to be extended by a contract of indemnity made by him with a third party; in other words, the right of the injured party to reimbursement ought not to be dependent upon the contingency of a contract to which he was not a party, and with which he has no concern. He loses nothing which he would not have lost if the insurance had not existed. The contract of insurance is personal in its nature, and is a mere special agreement with a party seeking to secure himself against apprehended loss on account of his interest in a particular subject matter, and not at all incidental to, or transferable with, the subject matter. May, Ins. § 6.

The shipper has no lien upon it for the non-delivery of his cargo. Clark v. Brown, 7 La. Ann. 342. Nor can even the master or crew have recourse to it in case of the loss of the vessel. Eymar v. Lawrence, 8 La. 42. See, also, Thayer v. Goodale, 4 La. 222; Steele v. Ins. Co., 17 Pa. 290; White v. Browne, 2 Cush. 412; Stillwell v. Staples, 19 N. Y. 401.

Further objection is made to the plea in this case, upon the ground that the owner has not taken the appropriate proceedings under section 4284, and transfered his interest in the vessel and freight for the benefit of the libellants to a trustee as required by section 4285. It is a sufficient answer to this to say that the plea sets forth a total loss of the vessel and cargo from which would also follow a total loss of freight, and that no formal abandonment is necessary in such cases. 2 Pars. Mar. Ins. 107, 111, 120; Brown v. Wilkinson, 15 Mees. & W. 391.

Exceptions to the plea overruled.

PETALUMA, The (MORRISON v.). See Case No. 9,848.

PETER (BANK OF THE UNITED STATES v.). See Case No. 933.

PETER (BRECKENRIDGE v.). See Case No. 1,825.

Case No. 11,019.

PETER et al. v. CURETON et al.

[2 Cranch, C. C. 561.] [1]

Circuit Court, District of Columbia. April Term, 1825.

SLAVERY.

Children of a female slave born while the mother was in the temporary service of a vendee for years, are slaves of the vendor or vendee. Quære, which?

[Cited in Brooks v. Nutt, Case No. 1,958.]

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

Bill in equity [by negroes Peter and Lewis against D. T. Cureton and A. W. Preuss] for an injunction, and for leave to sue for freedom, in forma pauperis.

The cause was set for hearing on bill and answer. The facts of the case appeared to be as follows: Anthony Addison, being the owner of negro Joanna, the mother of the complainants, in the year 1797, sold her to Walter D. Addison for the term of twelve years, without saying any thing of her increase. The bill of sale says, "I sell and deliver the negro Joan to the said Walter as a servant for the term of twelve years," "to hold the said Joan as a servant," and he warrants the said Joan to the said Walter for that term, "as his right and property." Nothing is said in this bill of sale respecting the condition of Joan after the expiration of the term. Walter D. Addison transferred her to Peter Savarie, in whose family the complainants were born, during the term of service, viz., Peter in 1801, and Lewis in 1803. Savarie died. The defendant Preuss married his daughter and sole heiress, and took out letters of administration upon his estate; and took possession of the complainants as slaves, who continued in his service until he sold them to the defendant Cureton, as slaves for life, at the price of $640, who confined them in gaol, to be carried to South Carolina. At the expiration of the twelve years, viz. on the 8th of October, 1809, Anthony Addison executed a deed to manumit the negro immediately, and her children after they should respectively attain the age of thirty-one. This deed was duly executed, acknowledged, and recorded. The bill, which was accompanied by an affidavit of Mr. Hewitt, the complainants' counsel, that he believed the facts stated in it to be true, prayed for an injunction to prevent the removal of the complainants from the jurisdiction of this court, and for leave to sue for their freedom in forma pauperis. The injunction was granted by the court.

Mr. Hewitt, for complainants, contended that at the birth of the complainants, their mother was not a slave of Savarie, but of Anthony Addison, and that if they were slaves at all, they also were his slaves, and not the slaves of Savarie, and that he had a right to manumit them. He also contended that Preuss, by selling them as slaves for life when they had only a few years to serve, had forfeited all right to their services, and that they were now entitled to their freedom. Ellison v. Woody, 6 Munf. 368; Maria v. Surbaugh, 2 Rand. (Va.) 230; Scott v. Dobson, 1 Har. & McH. 160; Somerville v. Johnson, Id. 348, 352; 1 Cruise, Dig. 279; Laws Md. 1796, c. 67, § 15; Laws Va., Dec. 25, 1795 (page 346).

Peyton & Mason, contra, contended that, Savarie having the use of the slave Joan for twelve years, her children born during the term became the absolute property as slaves

for life. Scott v. Dobson, 1 Har. & McH. 160; Somerville v. Johnson, Id. 348, and Dulany's opinion in 352, 557, 559; Sarah v. Taylor [Case No. 12,339], in this court, November, 1818; and Fanny v. Kell [Id. 4,639], in this court at May term, 1824.

THE COURT (THRUSTON, Circuit Judge, contra,) was of opinion that the complainants, being the issue of a slave, were born slaves, either of Savarie, or of Anthony Addison. If of Savarie, they are slaves for life. If of Anthony Addison, they are slaves until they arrive at the age of thirty-one years; and that not being yet entitled to their freedom, this bill must be dismissed.

CRANCH, Chief Judge, was of opinion that they were born the slaves of Savarie.

MORSELL, Circuit Judge, inclined to the opinion that they were the slaves of Anthony Addison, who had a right to manumit them, and that they would be free at the age of thirty-one.

THRUSTON, Circuit Judge, was understood to be of opinion that it was the intention of Anthony Addison, when he sold the negro Joan to W. D. Addison as a servant for twelve years, to manumit her at the expiration of that term, which intention was manifested by his having actually manumitted her. That she was, therefore, not an absolute slave at the time of the birth of the complainants; but was in the condition of a servant, and imparted that condition to them; and that when the mother became free they also became free.

PETER (DUNLOP v.). See Case No. 4,168.

Case No. 11,020.

PETER et al. v. SMITH et al.

[5 Cranch, C. C. 383.] [1]

Circuit Court, District of Columbia. March Term, 1838.

PURCHASE OF FIRST LIEN BY SECOND LIENHOLDER—RIGHTS ACQUIRED.

If a second incumbrancer takes up a prior incumbrance, which was also a lien upon other property than that bound by the second incumbrance, the second incumbrancer may resort to the property bound by the first incumbrance, and enforce the lien upon it.

Bill in equity [by George W. Peter and others against Richard Smith and others] to enable second incumbrancers who had taken up the first incumbrance, to indemnify themselves by enforcing the lien of the first incumbrance upon property not covered by the second.

Certain judgments, obtained by the Union Bank of Georgetown, in 1822, against George W. Peter, bound all his real estate. On the 9th of April, 1824, George W. Peter conveyed all his real estate, except eleven lots in Washington, to Thomas Peter, in trust to pay certain debts due by George W. Peter to the Bank of the United States and others, for which Thomas Peter was liable as indorser. These creditors, seeing that those judgments were an incumbrance upon the property conveyed for their security to Thomas Peter, and not knowing that George W. Peter had any other real estate bound by those judgments, with a view to clear the title, so that the trustee might sell the property to the best advantage, and to save the costs of a marshal's sale under execution, agreed that the trustee should pay the debt due upon those judgments to the Union Bank, out of the proceeds of the sales of the trust fund. With this understanding the property was sold on the 17th and 18th of September, 1829. Between that time and the 1st of October next following, it was discovered that there were eleven lots in Washington belonging to George W. Peter, not included in the deed of trust of the 9th of April, 1824, and which were also bound by the judgments in favor of the Union Bank; and it was agreed by the creditors secured by that deed of trust, among whom was the Bank of the United States, that those eleven lots should be conveyed by George W. Peter to Thomas Peter, in trust to discharge the several judgments against George W. Peter, according to their legal priorities; and they were so conveyed on the 1st of October, 1829. Mr. Thomas Peter, the trustee under the deed of the 9th of April, 1824, appointed the defendant, Mr. Richard Smith, his agent to execute that trust. Mr. Smith, who was also the cashier of the Branch Bank of the United States at Washington, sold the property, and on the 6th of January, 1830, paid the debt due to the Union Bank on those judgments of 1822, and took an assignment of them to the Bank of the United States, who have brought writs of scire facias to revive them; which writs are still pending in this court. The Bank of the United States obtained a judgment against Mr. George W. Peter, for $5,000, on the 17th of May, 1824, and now contends that the eleven lots were relieved from the lien of the judgments in favor of the Union Bank, by the agreement to discharge and satisfy those judgments out of the proceeds of the sales of the property conveyed to Thomas Peter, in trust, on the 9th of April, 1824; and that their judgment of the 17th of May, 1824, bound those eleven lots long before they were conveyed to Thomas Peter by George W. Peter, by the deeds of October, 1829, and May, 1830.

On the contrary, the complainants contend, that as a court of equity would have compelled the Union Bank, who had a lien upon the whole, to resort in the first place to the eleven lots which were not covered by the deed of trust, the trustee in that deed, who was the second incumbrancer, and who has paid off the first incumbrance to the Union

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

Bank, has a right to stand in its place, and use its judgments to indemnify him for the amount thus paid; and that, as the whole of the property has been sold, and the proceeds are within the control of this court, it ought to marshal the assets accordingly; and that the proceeds of the sales of the eleven lots should be applied to reimburse the money taken out of the trust fund, to discharge the debts due to the Union Bank upon the judgments of 1822.

And of that opinion was THE COURT nem. con. Decree accordingly.

Case No. 11,021.

PETER v. SUTER.

[1 Cranch, C. C. 311.] [1]

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

SURRENDER OF DEBTOR UPON CA. SA.

Upon surrender of the debtor upon a ca. sa. the court will not, without motion, order him to be committed in execution.

[This was an action by D. Peter against John Suter.]

Judgment, at December, 1804. Ca. sa. issued and sent to D. Peter, returnable to this term. The principal surrendered in discharge of his bail.

Mr. Mason, for plaintiff, was absent; no notice had been given.

THE COURT received the surrender of the debtor, and refused to order him into commitment, the plaintiff not having prayed it.

Mr. Caldwell then appeared for plaintiff, and prayed him in commitment, and he was committed.

PETER (UNITED STATES v.). See Case No. 16,034.

Case No. 11,022.

The PETERHOFF.

[Blatchf. Pr. Cas. 345.] [2]

District Court, S. D. New York. May 7, 1863.

ADMIRALTY — RE-EXAMINATION OF MASTER ON STANDING INTERROGATORIES — RIGHT OF WITNESS TO MODIFY OR ENLARGE TESTIMONY.

1. Under the special circumstances of this case the master of the vessel, who had been examined as a witness in preparatorio, was allowed, on the application of the claimants, to be re-examined on one of the standing interrogatories, on condition that he should at the same time be examined on certain special interrogatories framed by the court.

2. By the regular course of procedure in a prize suit, a witness cannot claim a right to modify or enlarge his testimony after it has been formally completed and submitted to the court.

In admiralty.

BETTS, District Judge. Messrs. Martin & Smith, of counsel for the claimants in this suit, read and filed, on the 2d inst., an affidavit in this cause, with a notice to the district attorney and the counsel for the captors, advising them of an application to be made to the court, in the cause, that Stephen Jarman, who had been previously examined in preparatorio as a witness in the cause, "be allowed to add to his answer to the twentieth standing interrogatory in the suit" (theretofore made by him), "the statement contained in the foregoing affidavit, or for such other or further order as the court may deem proper in the premises." On hearing counsel on the part of the claimants and of the witness, Jarman, in support of the said application, and for the libellants in objection thereto, and on reading also the affidavits of the prize commissioner in relation to the conference between himself and the witness, after the examination aforesaid had been taken in the cause, and on adverting to the preparatory proofs transmitted to the court by the prize commissioner, and due consideration being had of the premises, and it appearing to the court thereform that the examination of the witness Jarman was completed and reduced to writing by the commissioner and attested to by the oath of the witness, on the 1st day of April, 1863, that the report of the testimony of all the witnesses was transmitted to the court and filed therein on the 21st of the same month, and an order granted in the cause by the court, on motion of the district attorney, that the proofs so transmitted by the commissioner be opened, it is considered by the court that the witness is precluded, by the regular course of procedure in a prize suit, from claiming a right to modify or enlarge the testimony before given by him after the same has been formally completed and submitted to the court; but it not being made to appear affirmatively, in opposition to the aforesaid motion, that the witness before named was actually aware that his testimony in the case, as given before the commissioner, had been formally closed and the evidence of the time and circumstances of his interview with the commissioner leaving room for a fair implication, upon his affidavit and that of the commissioner that he was invited to review his answer theretofore given to the twentieth standing interrogatory and to offer further statements in relation thereto, and also that he might have supposed that his oral representations on that interview would be regarded by the commissioner as a continuous and constituent part of his sworn reply to said interrogatory, it is considered by the court that the witness should rightfully be allowed a re-examination by the commissioner upon the aforesaid interrogatory, and be permitted to embody in his answer thereto the explanatory statement and representations set forth in his affidavit made and filed

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

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

in support of this application, upon the condition that, at the same time, in making such statement, he be examined by the commissioner upon the following special interrogatories, directed by the court, in pursuance of the standing prize rules, viz.:

Special interrogatories to be administered to Stephen Jarman, in addition to the twentieth standing interrogatory before administered to him, and his replies thereto, to be received on the trial of the cause, in connection with and as explanatory of his answers to the aforesaid standing interrogatory: Special interrogatory number one: Did you know, or had you been informed, or had you reason to believe, after your answers to the stated interrogatory aforesaid had been given by you and written down by the prize commissioner, and when did you first acquire such knowledge, information, or belief, that any other witness and who, being one of the ship's company on the voyage in question, had, after your examination, and when, declared before such commissioner that any papers, and what, on board the vessel and on the voyage inquired about, had been burnt, torn, thrown overboard, destroyed or cancelled, or attempted to be destroyed or cancelled, and by whom, and when? Special interrogatory number two: Did you at any time, and when and where, make or offer any statement or explanation to the prize commissioner previous to your examination and testimony in this suit on the 1st of April, 1863, in relation to the destruction or concealment of any paper or papers, and what, on board the vessel, and on the voyage in question? Special interrogatory number three: Did you apply to the prize commissioner for leave to inspect your answer to the twentieth interrogatory of your own accord, after it had been attested to by you, or was your attention called to it by the commissioner; and did he inquire of you, and when and where, whether you understood that interrogatory and your answer thereto, at the time your testimony was given, or make any other inquiry of you to that purport or effect, and when, and where?

Wherefore it is ordered and decreed that the witness named be permitted to put in his proposed re-examination and statement before the prize commissioner upon the twentieth standing interrogatory, within five days after the entry of this order, on submitting to an examination upon the above special interrogatories; that the prize commissioner give the district attorney immediate notice of the time and place of such re-examination; and that, after the close thereof, he forthwith transmit the amended return of the testimony to this court, in order that the cause may be despatched to a speedy hearing.

[NOTE. Subsequently the vessel and cargo were condemned. Case No. 11,023. A final decree of forfeiture was entered against the vessel and cargo. Id. 11,024. Appeal was then taken to the supreme court where this decree was reversed, except as to a portion of the cargo. 5 Wall. (72 U. S.) 28. Pending the appeal in the supreme court, the district court refused to order the costs of the prize commissioner to be paid out of the funds of this case, holding that the appeal removed the cause from that court, and placed the prize property exclusively under the control of the appellate court. Id. 11,025.]

Case No. 11,023.

The PETERHOFF.

[Blatchf. Pr. Cas. 381.] [1]

District Court, S. D. New York. July 30, 1863.

PRIZE—CONDEMNATION—AID AND COMFORT FOR THE ENEMY.

Vessel and cargo condemned on the following grounds: 1. The vessel, knowingly laden, in whole or in part, with articles contraband of war, was transporting them at sea, not to a neutral port, for purposes of trade and commerce within the authority and intendment of public law, but to some other port or place, and in aid and for the use of the enemy, and in violation of the law of nations. 2. The vessel's papers were simulated and false as to her real destination.

[In admiralty. A motion to have the master of the vessel re-examined was allowed on condition that he should be examined at the same time on certain special interrogatories. Case No. 11,022. It is now heard on pleadings and proofs.]

BETTS, District Judge. This cause having been brought to hearing before the court, upon the pleadings and proofs, and the issues of law and fact involved therein, and upon questions affecting the rules and doctrines of public law in relation to the case, and the rights and liabilities of the respective parties assumed thereby, and the admissibility, relevancy and effect of the various classes and items of proof heard in the said cause, relating to acts or declarations of parties on board of the said ship on the voyage in question, and being part of her crew or ship's company, or others having authority to act in her behalf, and whether such evidence be direct and positive, or presumptive and inferential, as, also, in respect to acts of misfeasance on the voyage, in the spoliation, mutilation, or concealment of papers transported in the ship on such voyage, or attempt to disguise the character of the cargo on board and its destination, and the premises aforesaid, with the allegations and arguments of counsel for the respective parties thereupon, having been fully heard and understood, it is considered and found by the court:

First. That the said steamship Peterhoff, in the premises mentioned, was knowingly, on the voyage aforesaid, laden, in whole or in part, with articles contraband of war, and had them in the act of transportation at sea;

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

Second. That her voyage, with the said cargo, was not truly destined to the port of Matamoras, a neutral port, and for purposes of trade and commerce, within the authority and intendment of public law, but, on the contrary, was destined for some other port or place, and in aid and for the use of the enemy, and in violation of the law of nations;

Third. That the ship's papers were simulated and false as to her real destination.

Wherefore, it is considered by the court, that the said vessel and her cargo are subject to condemnation and forfeiture, and it is ordered that a decree therefor be entered accordingly.

[NOTE. A final decree of forfeiture was entered against the vessel and cargo. Case No. 11,024. On appeal to the supreme court this decree was reversed, except as to part of cargo. 5 Wall. (72 U. S.) 28. Pending the appeal in the supreme court, the district court refused to order the costs of the prize commissioner to be paid out of the funds of this case, holding that the appeal removed the cause from that court and placed the property exclusively under the control of the appellate court. Case No. 11,025.]

Case No. 11,024.

The PETERHOFF.

[Blatchf. Pr. Cas. 463; [1] Betts' Pr. Cas.]

District Court, S. D. New York. Aug. 1, 1863.[2]

PRIZE—EXAMINATION OF WITNESSES AND CARGO—EVIDENCE—NEUTRAL VESSEL AND NEUTRAL PORT—CONTRABAND OF WAR—RESISTANCE TO VISITATION AND SEARCH—SPOLIATION OF PAPERS.

1. On motion of the district attorney, acting under instructions from the government, a mail bag, under the official seal of the general post-office of Great Britain, found on board of the prize vessel, was ordered by the court to be delivered to the district attorney, to be by him disposed of conformably to the instructions of the government.

2. The attorney for the United States is, by law, official master of suits prosecuted by the United States in the prize court, and has authority, at his discretion, to offer to or withhold from the consideration of the court any particular of testimony relative to a prize suit in prosecution in court, under his discretion.

[Cited in Confiscation Cases, 7 Wall. (74 U. S.) 457.]

3. In this case the court made an order for the unlading, opening, and examination of the cargo, to ascertain its nature and quality.

4. The court refused to allow a witness, who was a passenger on the prize vessel, and who had been examined in preparatorio, to be re-examined for the purpose of showing his personal loyalty, on the ground that the question of his individual loyalty or disloyalty was of no importance, and that his political status was shown to be that of an enemy.

5. Under the special circumstances of this case the court permitted the master of the prize vessel to be re-examined on the standing interrogatory as to the destruction of papers, and ordered him to be at the same time examined on three special interrogatories framed by the court, although the testimony of all the witnesses had been filed in court and an order made that the proofs be opened. [Case No. 11,022.]

6. The court struck out from the testimony of the master, as irrelevant, a statement made by him as to another witness, which was not responsive to any part of the standing interrogatories.

7. A prize commissioner has no right to put to a witness any interrogatories except the standing ones, or those specially framed by the court for the particular case.

8. The court rejected, as evidence, a statement made on the record by the prize commissioner in regard to the reluctance of a witness to answer.

9. A document produced for the first time at the hearing, and forming no part of the depositions in the case, is not admissible in evidence.

10. Although such document, if properly put in evidence, would be regarded by the court as a very material piece of evidence against the vessel and her cargo, yet the court did not, upon the proofs in the case, entertain any such doubt upon the question of condemning the vessel and cargo, as to make it proper to direct an order for further proof in order to permit the introduction in evidence of the document.

11. In prize cases, the court of that district into which the property is carried and proceeded against, has jurisdiction.

12. The mere carrying of a vessel, or of her cargo, seized on the high seas as prize of war, into any particular district, without the institution there of any proceedings in prize, cannot affect or take away the jurisdiction over the property of the district court of another district, in which the proceedings against the property may be instituted after the property has been carried into such other district.

13. A neutral vessel, laden with a neutral cargo, may lawfully trade between neutral ports, in time of war, in all descriptions of merchandize, contraband or otherwise, without being liable to seizure by a belligerent.

14. But a seizure is justifiable if a vessel be engaged in carrying contraband of war for or to the enemy, or to the port of the enemy; and all contraband goods, even though belonging to neutrals and found in neutral bottoms, are liable to capture and condemnation, if seized by a belligerent while on a destination for the uses of the enemy of such belligerent.

15. The principles announced by this court in the cases of the Stephen Hart [Case No. 13,364] and The Springbok [Id. 13,264], affirmed.

16. A prize court will not shut its eyes to a well known and obvious system of conducting trade with the enemy in contraband articles.

17. Effect of a claim put into prize property by underwriters who had insured it against capture.

18. A person who was a citizen of the United States, residing in Texas at the time of the breaking out of the war, and has never owed any allegiance to any foreign country, is to be regarded as a citizen of the enemy's country, in prize proceedings, and cannot appear as a claimant in them, because he has no persona standi in court.

19. Implements and munitions of war which, in their actual condition, are of immediate use for warlike purposes, are to be deemed contraband whenever they are destined to the enemy's country or to the enemy's use.

20. All military equipments and military clothing are regarded as contraband articles. In England all manufactured articles which, in their natural state, are fitted for military use, or for building and equipping ships-of-war,

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

[2] [Reversed in 5 Wall. (72 U. S.) 28.]

among which articles cordage is included, are contraband in their own nature.

21. The probable use of articles is inferred from their destination; and if articles capable of military use are going to a place where any need of their employment in military use exists, it will be presumed that they are going for military use, although it is possible that they might have been applied to civil consumption.

22. In this case the vessel, although ostensibly on a voyage from London to neutral waters at the mouth of the Rio Grande, was laden with a cargo composed largely of articles contraband of war, which were not designed, on their departure from England, to be sold or disposed of in the neutral market of Matamoras, but were designed to be delivered, either directly, or indirectly by trans-shipment, in the country of the enemy and for the use of the enemy.

23. The refusal of the master of a neutral merchant vessel to permit the papers of his vessel to be taken on board of a belligerent cruiser when demanded, to be there examined by the commander of the cruiser, especially after those papers have been already so far examined on board of the merchant vessel, by a subordinate officer from the cruiser, as to excite suspicion concerning their regularity, is, on the part of the neutral master, a resistance to the right of visitation and search, even though he offers his papers for examination on board of his own vessel, and his vessel for search.

24. Papers on board of the vessel were destroyed at the time of her capture, some by being burned and some by being thrown overboard by order of the master.

25. False evidence by the master as to the destruction of the papers.

26. The spoliation of papers on board of a neutral vessel, when overhauled by a belligerent cruiser, is of itself a strong circumstance of suspicion.

27. In England and in the United States spoliation of papers is not held to furnish of itself sufficient ground for a condemnation, but to be a circumstance open to explanation; yet, if the explanation be not prompt or frank, or be weak and futile, if the case labors under heavy suspicions, or if there be a vehement presumption of bad faith or gross prevarication, it is ground for the denial of further proof, and condemnation ensues from defects in the evidence, which the party is not permitted to supply.

28. Deficiencies in the manifest in respect to the contraband articles on board.

29. The absence of invoices as to some of the contraband articles.

30. Defects in the bills of lading.

31. Character and quantity of the contraband portion of the cargo.

32. Character and status of some of the passengers on the vessel.

33. Notwithstanding the ostensible destination of the vessel to neutral waters at the mouth of the Rio Grande, the evidence establishes the actual hostile destination of the cargo.

34. All the claimants of the vessel and cargo had on board contraband articles, which were destined to be delivered directly, or indirectly by trans-shipment, into the enemy's country, and for the use of the enemy.

35. When contraband articles, destined for the use of the enemy, are found on board of a vessel, all other goods on board of that vessel belonging to the owner of the contraband articles, even those goods which are innocent, must share the fate of the contraband goods.

36. Whether the English doctrine is sound that contraband goods are liable to capture, even though destined to a neutral port, if found entering waters common to both the neutral port and a hostile port. Quere.

37. Where the vessel belongs to the owner of the contraband articles, or where there are circumstances of fraud as to the papers, or the destination of the papers or the cargo, and thus an attempt, under colorable appearances to defeat the rights of a belligerent, the vessel which carries the contraband articles will be condemned, and the penalty on the vessel will not be limited merely to a loss of freight and expenses.

38. So, too, the vessel will be condemned not only where her owner is privy to the carriage of contraband, but where the master of the vessel, as the agent of such owner, interposes so actively in the fraud as to consent to give additional color to it by sailing with false papers.

39. So, also, if the owner of a vessel places it under the control of a master who permits it to carry, under false papers, contraband goods ostensibly destined to a neutral port, but in reality going to the country of the enemy, he must sustain the consequence of such misconduct on the part of his agent.

40. A neutral owner of a vessel is, as a general rule, held responsible for all the acts of the master of his vessel committed in violation of the rights of a belligerent.

41. A master is, in time of war, bound to know the contents of his cargo, and cannot be permitted to aver his ignorance of the contents of contraband packages on board of his vessel.

42. From the moment a vessel, having on board contraband articles, which have a destination to the enemy's country, leaves her port of departure, she may be legally captured, and it is not necessary to wait until the goods are actually endeavoring to enter the enemy's country, the penalty attaching the moment the illegal transportation commences.

[43. Cited in Wood v. Fowler, 26 Kan. 687, to the point that the court will take judicial notice of the situation of a town in a foreign country, and that a bar exists at the mouth of the river at which it lies, which vessels of the draught of the vessel libeled cannot cross.]

In admiralty.

BETTS, District Judge. The steamer Peterhoff was captured, as lawful prize of war, on the 25th of February, 1863, by the United States steamer Vanderbilt, off the island of St. Thomas, about four and one-half miles from the outer road or mouth of the harbor. She was placed in charge of a prize-master, who proceeded with her to Key West. The United States district judge, the marshal, and the district attorney being absent on her arrival at Key West, the prize-master reported to Admiral Bailey, the naval officer in command at Key West, who ordered the prize-master to proceed with the prize to New York. She arrived there on the 28th of March, and the libel in this case was filed on the 30th of March.

On the 21st of April, 1863, Stephen Jarman, the master of the Peterhoff, intervening for the interest of the owners of the vessel and her cargo, filed a claim to the vessel and her cargo, on behalf of such owners, as his principals, not disclosing any names, but averring that he was master of the vessel at the time of her seizure, duly appointed by her owners, and was their lawful agent, and the rightful bailee of the vessel and cargo.

The test oath to this claim was made by Captain Jarman, and averred that the vessel and cargo belonged to British subjects. The claim denied the lawfulness of the seizure, and prayed for a restoration of the vessel and cargo to him or to his principals.

On the same day, Robert Mackie, of New York, the agent of Lloyd's, intervening for the interest of the underwriters of the Peterhoff and her cargo, filed a claim to both, for such underwriters. He averred, in the claim, that the vessel and her cargo were fully insured by his principals, and that the ownership of both was vested in them, and denied the lawfulness of the capture, and prayed the restoration of the vessel and cargo to him or to his principals. The test oath to this claim was made by Mr. Mackie, and averred that the vessel and cargo belonged, at the time they were seized, to subjects of Great Britain.

On the 22d of April, 1863, a claim was filed by Samuel J. Redgate, in which he represented himself as "late of Texas, and lately a political refugee from that state, but more recently sojourning in Great Britain, merchant, intervening for himself, as owner, agent, and consignee of a large portion of the cargo of the said steamer Peterhoff, of the value of three hundred and seventy-five thousand dollars, or thereabouts." He claimed so much of the cargo as stood in his name "as owner or consignee, or under power of attorney to act as consignee or agent, for himself and principals," and stated that he was bona fide owner, consignee or agent of that portion of the cargo, and was employed to attend to and protect the interests in that portion, and to demand restitution thereof, with damages for unlawful detention "in behalf of himself as owner, consignee or agent, and also in behalf of the underwriters," and denied the lawfulness of the capture. The test oath to this claim was made by Redgate, and averred that such portion of the cargo belonged to him as owner, consignee, agent, &c., as set forth in the claim.

On the same day, George W. Almond, who represented himself as a "resident of the city of London, and a subject of the crown of Great Britain, merchant, intervening for himself as owner, and as agent and consignee, of a portion of the cargo of said steamer Peterhoff, of the value of one hundred and fifty thousand dollars, or thereabouts," filed a claim to "that portion of said cargo which stands in his name as owner or consignee, or under power of attorney to act as consignee or agent, for himself and principals," and stated that he was bona fide owner, consignee or agent of that portion of the cargo, and was authorized to attend to and protect the interests in that portion of the cargo, and to demand restitution thereof, with damages for unlawful capture and detention, "in behalf of himself as owner, consignee, or agent, and also in behalf of the underwriters," and denied the lawfulness of the capture. The test oath to this claim was made by Almond, and averred that the abovenamed portion of the cargo belonged to him as owner, consignee, agent, &c., as set forth in the claim.

The depositions in preparatorio, taken in the case, are those of Stephen Jarman, master, Henry Bound, first mate, Walter N. Harris, second mate, Christopher H. Tregidgo, third mate, Robert Bowden, George W. Almond, and Samuel J. Redgate, passengers, John Murphy, chief engineer, John Murphy, first assistant engineer, Thomas Webber, steward, George Duffay, fireman, James Diamond, cook, and John Reed and John J. Campbell, seamen. These depositions were all taken in April, 1863, Jarman, Bowden and Almond having been examined on the 1st, Redgate on the 1st and 20th, Bound on the 2d, Murphy, first assistant engineer, Diamond and Reed on the 4th, Webber on the 6th, Harris and Tregidgo on the 11th, and Murphy, chief engineer, Duffay and Campbell on the 13th.

Among the articles found on board of the Peterhoff at her capture was a mail bag, which was delivered by the prize master to the prize commissioner. This bag was under the official seal of the general postoffice of Great Britain. On the 21st of April, 1863, an affidavit, made by the district attorney, as attorney for the United States and the captors, was presented to the court, in which he set forth that he had carefully examined all the ship's papers and evidence taken in preparatorio in this case, and had inspected the British mail packages found on board of the vessel; that the mail appeared to be bona fide, authenticated, sealed, public government mail of Great Britain, found on board of a commercial vessel, apparently navigated between London, in England, and Matamoras, in Mexico; that the said evidence furnished no proof that the said mail was false or spurious or simulated, or otherwise than genuine; and that he, as attorney for the United States and the captors, under his general authority as district attorney, and under special authority from the government, consented that said mail be given up, to be sent to its destination. Upon this affidavit, an application was made to the court, by the district attorney, that he have leave to withdraw the mail bag from the custody of the court. The special counsel for the captors opposed the application, but the court, on the 22d of April, made an order, which recited that the attorney for the United States was, by law, official master of suits prosecuted by the United States in the prize court, and had thereby authority, at his discretion, to offer to or withhold from the consideration of the court any particular of testimony relative to a prize suit in prosecution in court, under his discretion, and directed that the mail bag be delivered to the attorney for the United States, out of the custody of the court, to be by him disposed of conformably to the instructions of the government of the United States. The counsel for

the claimants were present in court when this application was made, but they made no opposition to the granting of the same.

On the 25th of April, 1863, an affidavit was presented to the court, made by the prize master who brought the Peterhoff to New York, setting forth that she was laden with a large cargo packed in boxes, bales, and cases, the true character of which could not otherwise be ascertained than by the unlading, opening, and inspection thereof; that such papers as were found on board of the vessel very imperfectly disclosed the true contents of the bales, cases, and boxes, and described the same as "merchandise" simply, except in a few instances of artillery boots and army shoes and blankets; and that he had been informed, by persons composing the crew of the captured vessel, that packages of papers of the vessel were burned or thrown overboard as the vessel was about being captured. Upon this affidavit, and on the application of the United States and the captors, an order was made by the court, directing the marshal to cause the cargo of the vessel to be unladen, and stored in a safe warehouse having sufficient accommodations for the unpacking and inspection of the cargo, and appointing three competent persons, Messrs. Edwin Gerard, Henry H. Elliott, and Orison Blunt, to examine and make an inventory of the cargo upon its unlading, and to open the boxes, cases, and bales, and remove their contents, so far as should be necessary to ascertain the nature and quality of the cargo, and to report to the court the particulars, names, descriptions, and assortments of the goods, with their marks and numbers, and the nature, use, quantities, and qualities thereof, and any fact they might discover and deem material in the premises, and that, after such inspection, the contents of the packages should be restored to their original condition, and that the seal of the prize commissioners should be then placed on the place of storage of the cargo.

The report of the three gentlemen appointed to make an inventory of the cargo was filed on the 2d of June, 1863. They annexed to their report an inventory of the whole of the cargo. Two of the commissioners (Messrs. Blunt and Elliott) state, in the report, "that a very large portion of the said cargo will be found, on an examination of the inventory aforesaid, to be particularly adapted to army use; that large numbers of the cases contain Blucher boots, which are known as army shoes; a number of cases contain cavalry boots, and are so labelled, samples of said labels being hereto annexed; that 192 bales of the said cargo consist of gray blankets, adapted to the use of an army, and are believed to be such as are used in the United States army; 95 casks contain horseshoes of a large size; 36 cases of a large size contain artillery harness, in sets for four horses, with two riding saddles attached to each set; there were also on board two hydraulic presses in pieces, adapted for cotton; that a considerable portion of said cargo consists of drugs, directed Burchard & Co., successors, Matamoras, Mex'o, in which, among an assorted lot of drugs, quinine, calomel, morphine, and chloroform an important portion." The report states that the cargo consisted of 1,520 cases, 110 trunks, 287 bales, 169 casks, 209 kegs, and 559 bundles of merchandise, 1,343 bundles of hoop iron, and 280 bundles or bars of steel or iron. Mr. Gerard, one of the commissioners, appended to the report a statement that he concurred in the inventory and description of the cargo, but differed from his colleagues as to that portion of their report which described certain of the cargo as being particularly adapted to the use of an army. The samples of labels referred to as annexed are two in number, and were taken from trunks forming part of the cargo. One of the labels has upon it the words, "100 army Bluchers," and the other the words, "36 cavalry boots." It appears, from the inventory of the cargo annexed to the report, that of the 4,477 cases, trunks, bales, casks, kegs, bundles, and bars which the report states to have been found on board, the commissioners opened and examined 842 cases, 43 bales, 114 kegs, 2,109 bundles, 23 casks, and 11 trunks, being in all 3,142 parcels; that among these were 20 cases of Blucher boots, 5 cases of Bluchers and gentlemen's boots, 66 cases of Wellington, Napoleon, police, cavalry, and army Blucher boots, 15 cases of army Blucher boots, 2 cases of full-length russet army boots, two cases of black and russet Bluchers, 3 packages of shoes and light Blucher boots, 1 bale of gray-mixed blankets, one bale of army or gray blankets, 9 bales of mixed and gray blankets, 1 bale of white blankets, 2 cases of artillery harness and chains, 2 packages of saddles and hardware, 2 packages of saddlery and quinine, 11 cases of drugs, 1 case of quinine, 2 cases of assorted drugs, 5 kegs of nails, 107 iron kegs of nails, 9 bags of horseshoe nails, 1 cask of horseshoes, 3 packages of saddlery hardware, 2 cases of buckles, 4 cases of hinges, screws, stocks, and dies, 3 casks of hardware, 3 cases of cast steel and files, 280 bundles or bars of steel or iron, 5 cases of planes, axes, &c., 6 packages of planes and hardware, 2 packages of saws and files, 6 packages of pickaxes and handles, axes and hatchets, 147 bundles of spades and shovels, 42 anvils, 60 blacksmiths' bellows, 1 cask of vices, 2 cases and 9 bundles of machinery, being an iron bed-plate, and iron piston-rod, and other articles for a press, 1,343 bundles of hoop-iron, 501 boxes of tin, 1 case of horse-brushes, 6 cases of red, white, and blue bunting, and 305 coils of rope.

A large number of papers were found on board of the Peterhoff at the time of her capture, and have been laid before the court. The affidavit of the prize master, taken according to the usual practice, on the delivery of the papers to the prize commissioners, states that the delivery of the papers to him was refused until after the arrival of the ves-

sel at Key West, where, under instructions from Admiral Bailey, he demanded, in writing, of the master and passengers on board, that the papers should be delivered to him, whereupon they were delivered. Those which are of any importance consist of three bills of health; a certificate from the Mexican vice-consul at London, certifying to the manifest of the cargo of the vessel; a certificate from Lloyd's; a clearance certificate from the custom-house at London; a manifest of the cargo; a receipt for light duties at Plymouth; a certificate of the registry of the vessel; a certified copy of such certificate of registry; the shipping articles of the vessel; a receipt for harbor dues at Falmouth; a large number of bills of lading, invoices, certificates made by the Mexican vice-consul in London as to the shipment of merchandise by the vessel, and insurance; bills of goods shipped by the vessel from London to Matamoras; sundry papers relating to a hydraulic press found on board of the vessel; various letters; a copy of a policy of insurance on the vessel; one log-book; and four cargo-books.

The first bill of health was given to the vessel at London, on the 7th of January, 1863, and speaks of her as bound from London to "St. Thomas and other places." The second bill of health was given to her at St. Thomas, on the 24th of February, 1863, by the Danish authorities, and speaks of her voyage as one from London to Matamoras. The third bill of health was given to her at St. Thomas, on the same day, by the Mexican consul there, and speaks of her as bound to Matamoras.

The certificate of the Mexican vice-consul at London, as to the manifest of the cargo, is dated January 16, 1863, and certifies to the number of packages of merchandise composing the cargo as being 4,486, and as being consigned to Captain Jarman, at Matamoras, and speaks of the vessel as bound to Matamoras.

The certificate from Lloyd's is dated London, June 6, 1862, and certifies that the Peterhoff belongs to Hull, England, was launched in July, 1861, and is classed as A 1, for nine years from 1861.

The clearance certificate from the custom-house at London shows that the vessel cleared from London for Matamoras, January 6, 1863, and cleared a second time January 7, 1863.

The manifest of the cargo is signed by James I. Bennett & Wake, as brokers. It speaks of the vessel as clearing from London for Matamoras, January 7, 1863, and states the number of her bills of lading to be 38, and gives the marks and numbers upon all the packages composing her cargo. But under the printed head of "Description of Goods," it specifies only so many boxes, bales, cases, kegs, coils, packages, casks, bundles, chests, and trunks. The only description of any of the items is in the instances of 60 bellows, 120 bundles of spades and shovels, 42 anvils, 2 iron drums, 1,360 bundles of iron hoops, 280 bundles and bars of steel, and 9 bags of nails. The word "rope" has been written, in one instance, after the words "145 coils," and then carefully erased with ink. The items of "50 coils," "45 coils," and "20 coils," also occur in the manifest, with nothing written or erased thereafter. The entire cargo is stated, in the manifest, to be consigned to "order," except in the instance of 49 cases, 2 iron drums and 1 package, which are stated as being "addressed to Burchard & Co., successors, Matamoras," and as being consigned to "Messrs. Burchard & Co." the aggregate of the boxes, bales, cases, kegs, coils, packages, casks, bellows, bundles, anvils, chests, trunks, iron drums, bars, and bags is 4,581.

The receipt for light duties at Plymouth is dated January 19, 1863, and speaks of the voyage of the vessel as from London to Matamoras, via Plymouth.

The certificate of the registry of the vessel shows her to be a British-built vessel, built at Sunderland in the year 1862, and of the register tonnage of $660^{42}/_{100}$ tons, and is dated at the custom house, London, December 20, 1862. It states her to be wholly owned by Joseph Spence, of Cowper's Court, Cornhill, in the city of London, shipbuilder. The certified copy of said certificate of registry is dated at London, January 14, 1863.

The shipping articles of the vessel are dated January 1, 1863, and state her voyage to be "from London to Matamoras, and any port $\overset{\text{and}}{\text{or}}$ ports in the Gulf of Mexico, $\overset{\text{and}}{\text{or}}$ North $\overset{\text{and}}{\text{or}}$ Sh. America, $\overset{\text{and}}{\text{or}}$ West Indies, and back to a final port of discharge in the United Kingdom, voyage not to exceed twelve months." They state her crew to consist of a master, three mates, a carpenter, a steward, a cook, ten able-bodied seamen, two ordinary seamen, three engineers, eight firemen, and four able-bodied seamen as substitutes, those four substitutes being stated as having joined the vessel at Plymouth, three of them on the 13th of January, and one of them on the 15th, and all the others being stated as having joined the vessel at London, some on the 1st and some on the 2d of January, the crew thus consisting in all of thirty-four persons. The articles state that the seamen and firemen are to assist in the general duties of the ship, and to take in and discharge cargo, &c., when required by the master.

The receipt for harbor dues at Falmouth is dated January 19, 1863.

There were 72 bills of lading found on board of the Peterhoff. Of these 39 are originals, and the remainder are duplicates. Of 1 there are four sets, of 30 more there are duplicates, and of 8 there are no duplicates. Of the 39 bills, 9 are indorsed in blank, 9 are not indorsed, (8 of these 9 being the 8 of which there are no duplicates, and the remaining 1 of them being one for articles shipped by Captain Jarman,) 9 are indorsed

to Robert Bowden, 4 to G. W. Almond, 3 to Captain Jarman, 2 to S. J. Redgate, 2 to S. J. Redgate & Co., and 1 to S. J. Redgate and G. W. Almond. G. & W. Almond are named as shippers in 3 of the bills, James I. Bennett & Wake in 1, S. J. Redgate in 2, J. Spence in 2, Captain Jarman in 1, and sundry other persons in the rest. The bills of lading, both originals and duplicates, are all of them signed by Captain Jarman, and all of them specify that the goods are to be delivered to "order," except one covering 52 packages, which specifies that the goods covered by it are to be delivered to "Messrs. Burchard & Co., successors, Matamoras." Each of them speaks of the vessel as being "bound for off the Rio Grande, Gulf of Mexico, for Matamoras;" and each of them contains the following language: "Goods to be taken from alongside of the ship, at the mouth of the Rio Grande, at consignee's risk and expense, within thirty days of arrival, providing lighters can cross the bar, or a penalty will be incurred of ten pounds per day after that period." Each of them states that the goods are to be delivered "at the aforesaid off the Rio Grande, Gulf of Mexico, for Matamoras." In some cases the bill specifies that the freight is to be paid in London, and in other cases "at Matamoras." None of the bills of lading in any way specify what the articles covered by them are, except in the instances of a bill of lading of a shipment by James I. Bennett & Wake, which specifies 9 bundles of bagging, (this being the bill of lading that is not mentioned in the manifest,) and of other bills which specify 145 coils of rope, 50 coils of rope, 280 bundles and bars of wrought steel, 2 cases of seeds, 78 kegs of nails, and 1,360 bundles of iron hoops, 500 boxes of tin, 10 bales of gunny cloth, and 13 bales of cotton wrapping, 1,680 pairs of boots, 2 iron drums, 1,080 pairs of blankets, "11 packages hydraulic press," 45 coils of rope, 60 smiths' bellows, 147 bundles of spades and shovels, and 42 anvils, "3 cases medicines," and 9 bags of nails and 20 coils of rope.

A comparison of the inventory annexed to the commissioner's report of the cargo with the bills of lading, in respect to the marks and numbers upon the various packages, shows the following results: In packages covered by a bill of lading indorsed to S. J. Redgate & Co. were found saddles and hardware, horse brushes, hardware, saddlery, and quinine, and cast steel and files; in packages covered by a bill of lading indorsed to S. J. Redgate were found 145 coils of rope; in packages covered by bills of lading indorsed to Robert Bowden were found Blucher boots, Wellington, Napoleon, cavalry, and army Blucher boots, black and russet Bluchers, gray mixed blankets, and red, white, and blue bunting; in packages covered by bills of lading indorsed to Captain Jarman were found 70 coils of rope, mixed and gray blankets, and assorted drugs; in packages covered by bills of lading indorsed to George W. Almond were found white blankets, light Blucher boots, Blucher boots, saddlery, hardware, bundles and bars of steel to the number of 280, 9 robes of bagging, horseshoes and horseshoe nails; and in packages covered by a bill of lading indorsed to Samuel J. Redgate and George W. Almond were found tin, being 501 boxes. Bills of lading not indorsed, and of which there were no duplicates, cover packages containing Blucher boots, planes, axes, &c., nails, artillery harness, buckles, artillery harness and chains, army Blucher boots, drugs, quinine, and army or gray blankets. Bills of lading indorsed in blank cover packages containing 23 rolls of bagging, (those packages being marked "Peterhoff, owner,") 90 coils of rope, hinges, screws, stocks, and dies, iron kegs of nails, saws and files, pick-axes and handles, axes and hatchets, spades and shovels, 42 anvils, 60 blacksmiths' bellows, vices, planes and hardware, 11 cases of machinery, containing the iron bed-plate, iron piston-rod, and other articles for a press, (J. Spence being the shipper of these 11 cases,) rolls of zinc, iron kegs of nails, and the 1,343 bundles of hoop-iron.

A large number of invoices were found on board of the Peterhoff, covering the entire cargo embraced in the 39 bills of lading, (in which bills 26 shippers are named,) except the articles specified in the inventory before mentioned as artillery harness, buckles, and artillery harness and chains, and the articles contained in packages addressed "Burchard & Co., successors, Matamoras," specified in such inventory as drugs and quinine, and the nine rolls of bagging. An examination of these invoices shows that among the articles covered by the bills of lading indorsed to Almond were 9 tons of horseshoes, 52,000 horseshoe nails, 644 bars of cast steel, 20 coils of Manilla rope, 2,000 pairs of gray blankets, 7,128 pairs of Bluchers, 99 waist belts, 14 ball bags, and a large number of buckles, martingale rings, harness awls, saddlers' knives, saddlers' punches, straps, and horse brushes; that among the articles covered by the bills of lading indorsed to Bowden were 379 yards of blue military cloth and blue military serge, 500 pairs of brown-gray blankets, 700 pairs of Blucher boots, 650 pairs of men's Bluchers, 472 pairs of Bluchers, 144 pairs of Wellington boots, 76 pairs of riding boots, 200 pairs of negro brogans, and 307 pieces of scarlet, white, and blue bunting; that among the articles covered by the bills of lading indorsed to Redgate & Co. were 200 ounces of quinine, 1,813 pounds of cast steel, 14 riding saddles, 22 bridles, 4 saddle cloths, and a large quantity of halter chains, harness buckles, martingale rings, buckles, trace chains, files, and axes; that among the articles covered by the bills of lading indorsed to Redgate were 145 coils of Manilla rope, weighing 5 tons; that among the articles covered by the bill of lading indorsed to Redgate and Almond were 500 boxes of tin plates;

that among the articles covered by the bills of lading indorsed to Captain Jarman were 2,000 pairs of "government regulation gray blankets," 50 coils of Manilla rope, weighing 11,411 pounds, 140 ounces of quinine, 20 pounds of chloroform, and a quantity of morphine, James's powders, Dover's powders, opium, and ipecac; that among the articles covered by the bills of lading indorsed in blank were 14 tons of sheet zinc, 72 iron kegs of nails, containing 7,728 pounds, 1,360 bundles of hoop iron, weighing 34 tons, 1,559 yards of gunny cloth, and 1,988 yards of stout cotton wrapping, the packages containing the last two articles being marked "Peterhoff, owner," and the invoice of them being headed "Adventure to Matamoras, per S. S. Peterhoff, to Pile, Spence & Co., Dr.;" that among the articles shipped by J. Spence and covered by bills of lading indorsed in blank were a large quantity of hatchets, axes, hammers, spades, shovels, planes, augers, gimlets, sledge-hammers, drawing-knives, saws, smiths' bellows, anvils, vices, pickaxes, files, and chisels, 90 coils of tarred hemp rope, weighing 11,384 pounds, and a cotton press, the invoice covering the last two articles being headed "Adventure to Matamoras, per S. S. Peterhoff, to Pile, Spence & Co., Dr.;" that among the articles covered by the bills of lading which are not indorsed, and of which there are no duplicates, were 1,000 pairs of "men's army Bluchers," 1,840 pairs of men's Bluchers, 1,160 pairs of other Bluchers, 1,500 pairs of Blucher boots, 180 pairs of long artillery boots, 1,080 pairs of brown-gray blankets, and 100 kegs of nails, weighing 10,000 pounds. The articles specified in the inventory of the commissioners before mentioned as artillery harness, buckles, and artillery harness and chains, and the articles contained in the packages addressed "Burchard & Co., successors, Matamoras," and specified in such inventory as drugs and quinine, (of all of which articles there are no invoices,) were covered by bills of lading which are not indorsed, and of which there are no duplicates. The nine rolls of bagging (of which there is no invoice) were covered by the bill of lading in which James I. Bennett & Wake are the shippers, and which is indorsed to Almond. The invoices also show that the other goods covered by the bills of lading indorsed to Almond consisted of hose, shirts, pantaloons, collars, braces, pins, needles, shoes, boots, sheepskins, chamois skins, buttons, felt hats, prints, flannels, blankets, dry goods, drills, shirting, sewing cotton, lace, spool cotton, tape, braid, sewing thread, awls, shoe pegs, linen thread, combs, and padding; that the other goods covered by the bills of lading indorsed to Bowden consisted of shoes, boots, leather, hose, vests, woolen gloves, skirts, sleeves, jackets, woolen shirts, cotton shirts, scarfs, neck-ties, pantaloons, frocks, cravats, mittens, cuffs, cloths, coats, sacks, cassimeres, dress goods, silks, and shawls; that the other goods covered by the bills of lading indorsed to Redgate & Co. consisted of curry-combs, carriage bolts, padlocks, hinges, plane-irons, brushes, compasses, saws, locks, gimlets, chisels, dress goods, shirts, hose, felt hats, tea cloths, knives, and forks; that the other goods covered by the bills of lading indorsed to Redgate consisted of preserved meats and soups; that the other goods covered by the bills of lading indorsed to Captain Jarman, consisted of flannels; that there were on board goods covered by a bill of lading not indorsed, and in which Captain Jarman was named as the shipper, consisting of shoes, boots, writing paper, pencils, pens, combs, brushes, perfumery, soap, hose, shirts, worsted, spool cotton, pins, needles, buttons, gloves, headdresses, collars, handkerchiefs, and umbrellas; that the other goods covered by the bills of lading indorsed in blank, and in which J. Spence was the shipper, consisted of screws, locks, padlocks, hinges, butts, nails, rivets, spikes, and bits; that there were on board goods covered by bills of lading indorsed in blank, and in which Redgate was the shipper, consisting of vests, scarfs, shirting, shoes, ties, braces, collars, shirts, drawers, belts, hats, flannel, muslin, cloths, prints, boots and shoes; that the other goods covered by the bills of lading indorsed in blank consisted of garden seeds, cloths, and hats; and that the other goods covered by the bills of lading not indorsed, and of which there were no duplicates, consisted of planes, ploughs, axes, cloths, dress goods, shoes, hose, writing paper, and envelopes.

In announcing my decision in this case, at the time the decree was entered, I stated that I should prepare an opinion in the case at a future day. I now find that, on the 19th of November, 1863, a report of the prize commissioners was filed setting forth, in pursuance of the final decree of the 1st of August, 1863, a detailed inventory of the contents and value of the cargo of the Peterhoff, made under their direction. It appears from that report of November 19, 1863, that the articles specified in the report of June 2, 1863, as artillery harness, consisted of ten complete sets of russet artillery harness for four horses; that the articles specified in the report of June 2, 1863, as buckles, consisted of 553 gross of rings and 705 gross of buckles for harness; that the articles specified in the report of June 2, 1863, as artillery harness and chains, consisted of 20 complete sets of russet artillery harness for four horses, and 258 heavy russet artillery halters and 600 galvanized halter chains; that the articles specified in the report of June 2, 1863, as marked "Burchard & Co., successors, Matamoras," and as consisting of drugs and quinine, were 2,300 ounces of quinine, 245 pounds of chloroform, 1,000 pounds of calomel, and a quantity of opium, morphine, ether, and other drugs; and that the 9 rolls of bagging, specified in the report of June 2, 1863, consisted of 1,145 yards of bagging. The report of November 19, 1863, also shows that the packages on board,

marked "Burchard & Co., successors," contained, besides the said drugs, tea, garden seeds, dry goods, and blankets. Only one invoice was found on board of any of the articles contained in the packages marked "Burchard & Co., successors." That invoice is annexed to the report of June 2, 1863.

An examination of the report of November 19, 1863, shows that the articles covered by the bills of lading indorsed to Almond, were valued by the prize commissioners at $55,238.98; those covered by the bills of lading indorsed to Redgate & Co., at $7,082.53; those covered by the bills of lading indorsed to Redgate, at $1,875.30; those covered by the bill of lading indorsed to Redgate and Almond, at $5,010; those covered by the bills of lading indorsed to Bowden, at $113,130.77; those covered by the bills of lading indorsed to Captain Jarman, at $12,380.65; those covered by the bills of lading indorsed in blank, at $29,729.61, (of which $8,725.84 was the value of the shipments by Redgate, and $10,568.06 the value of the shipments by J. Spence;) those covered by the bills of lading not indorsed, and of which there were no duplicates, at $29,945.72; and those shipped by Captain Jarman, and covered by a bill of lading not indorsed, at $2,551.81.

Among the documents found on board of the Peterhoff was a copy of a letter, dated London, October 27, 1863, signed "James I. Bennett & Wake," and addressed to Messrs. Pile, Spence & Co.; and a copy of a reply to that letter, dated the same day, signed "Pile, Spence & Co.," and addressed to Messrs. James I. Bennett & Wake; and a copy of a letter dated London, January 17, 1863, signed "James I. Bennett & Wake," and addressed to Messrs. Pile, Spence & Co. These three letters relate to the voyage of the Peterhoff, and the respective interests of the writers of the letters in the freight to be earned by her, and show that she was to bring home a cargo of cotton from the Rio Grande. I shall have occasion hereafter to refer particularly to the contents of these letters. They constitute the only agreement, in the nature of a charter-party of the vessel, that was found on board.

There was also found on board a printed form of a policy of insurance, in which the names of "Robinson & Fleming, No. 21 Austin Friars, London," are printed as insurers. The blanks for writing in the form, are filled in as insuring the Peterhoff for £10,000 on her hull, and for $5,000 on her machinery, average payable on each valuation, as if separately insured, or on the whole, and general average, as per foreign statement, if required by the assured," "from London to Matamoras, while there, and thence to Liverpool, including collision clause, as per printed slip annexed," at the rate of five guineas per cent. On the margin of the form are printed the words, "Warranted free from capture, seizure, detention, and all consequences of hostilities." There is no signature to the instrument, although it contains the following in print: "In witness whereof, we the assurers, have subscribed our names, and sums assured, in London." The printed form of a bill at the foot of the copy of the policy, intended to be filled up with items of the charges for the premium and the policy, is not filled up.

There was also found on board a letter, dated "Royal Mail Steam Packet Company, No. 55 Moorgate street, London, January 8, 1863," signed "Rd. T. Reep, Sec'y," and addressed to "Capt'n Cooper, R. N., Jamaica," which says: "This letter will be shown to you by Capt'n S. Jarman, of the screw steamship Peterhoff, who, in the event of his not being able to procure a supply of coal necessary for his ship from merchants in your port, is to be accommodated from the company's stock under your charge, of, say, not exceeding 250 tons at 34s. 4d. per ton, either on his out or home voyage, both or either. You will be good enough in such case, to take the captain's drafts, at three days' sight, payable in London, on his owners, Messrs. Pile, Spence & Co., and forward the same to 55 Moorgate street, at your earliest convenience."

One of the papers found on board was a bill or invoice, reading thus: "London, 30 Dec., 1862. Messrs. Pile, Spence & Co., per Peterhoff, bot. of Ford, Curtis & Curtis, 10 bales gunny cloth, 1,559 yards; 13 bales stout cotton wrapping, 1,998 yds.; freight, £47 4s. 6d., marked 'Peterhoff, owner.'" On the same page with that bill is another, reading thus: "Manchester, Dec. 24, 1862. Messrs. Pile, Spence & Co., bot. of J. Bowes, 1 hydraulic cotton press, with ram to lift 4 feet, and set of pumps complete; 2 birch railway boxes, bound with iron, and fitted up with wheels, stillages, rails, &c." There was also found on board sundry correspondence in reference to this cotton press, and some drawings of cotton presses, to which I shall refer hereafter more particularly.

The cargo-books, four in number, give, under different headings, the dates of putting the packages on board, their marks and numbers, and solid contents and positions in the vessel. They are generally stated to be merely cases, bales, casks, and trunks, the contents not being specified, except in the instances of bellows, coils of rope, machinery, round bars in a bundle, bars of iron, machinery bars, packages of leather, medical comforts, samples, shovels, box for cotton press, iron hoops, anvils, casks of nails, bars and bundles of wrought steel, kegs of nails, and bags of nails. The log-book purports, on its title page, to be for a voyage from London to Matamoras, and to have been kept by H. Bound. It commences on the 30th of November, 1862, and details a voyage of the vessel from Liverpool to London, she having left Liverpool on that day, and arrived at London on the 6th of December following. The log shows that she remained lying at

London from the 6th of December until the 7th of January following, and that during that time, she was scraped, cleaned, and painted, and her decks caulked; that she commenced taking in cargo on the 24th of December, and finished taking it in on the 7th of January following; that she left London on the 7th of January, and arrived in Plymouth Sound on the 9th of January, in the evening; that on the 10th of January she proceeded further up the Sound, and took in fuel; that she left Plymouth harbor on the 18th of January, in the morning, and came to anchor in Falmouth harbor on the 19th of January, in the morning; that she left Falmouth harbor and proceeded on her voyage on the 27th of January, in the afternoon; that on the 20th of February, at 3 a. m., she sighted the Virgin Islands, and at 8 a. m. was brought to by the "Federal war steamer Alabama" firing two shots across her bows, and at 8:15 a. m. was boarded by a "Federal officer," and had her papers overhauled, and at 8:45 a. m. proceeded towards St. Thomas, and at 9:45 a. m. came to anchor in the harbor of St. Thomas; that she remained at St. Thomas, where she took in coal, until the 25th of February, three-quarters of an hour after noon, when she proceeded out of the harbor; that at 2:20 p. m. she was brought to by the United States steamer Vanderbilt; that at 2:30 p. m. an officer came on board; that at 2:55 p. m. the officer, having overhauled her papers, left and returned on board the Vanderbilt, demanding that the Peterhoff should remain stationary; that at 3:30 p. m. the officer returned on board and demanded that Captain Jarman should take his papers on board of the Vanderbilt, which he refused to do, being in charge of her majesty's mails; that the officer then left, threatening to send an armed crew on board; that at 4 p. m. she was boarded by a lieutenant, a master's mate, an engineer, and 21 armed men from the Vanderbilt, who took charge of her against the protests of the captain and passengers; that at 8:50 p. m. she was boarded again by another officer, who demanded her papers to take on board the Vanderbilt, "which was refused, at the same time full liberty being given by Captain Jarman for the papers to be overhauled on board, or the ship searched"; that at 9 p. m. a lieutenant, a master's mate, two engineers, and an extra file of marines, &c., "took charge of the Peterhoff, telling Captain Jarman that he was not to consider himself any longer in charge"; that all the crew of the Peterhoff were then taken on board of the Vanderbilt, with the exception of the master, chief officer, second engineer, steward, cook, one boy, and the passengers; that on the next day, the 26th of February, the Peterhoff proceeded to the westward, and, passing within sight of St. Domingo and Jamaica, came to anchor in the harbor of Key West on the 7th of March, in the afternoon. The log-book ends on the 9th of March, while the vessel was lying at Key West.

I will now refer to the most material portions of the depositions taken in preparatorio: Captain Jarman says that the Peterhoff was seized on the 25th of February, 1863, off the harbor of St. Thomas, and taken thence to Key West, and from thence to New York, and that he does not know why she was seized. Bound, the first officer, testifies to the same effect. Harris, the second mate, says that the capture was made off the island of St. Thomas, three or four miles from the shore, and that he believes the vessel was seized on suspicion. Tregidgo, the third officer, says that the capture was made about four miles off St. Thomas, and that the vessel was taken on suspicion of an intention to run the blockade. Bowden, one of the passengers, says that Matamoras, Mexico, was to have been his home, and that he heard that the vessel was captured because they said she was going to run the blockade. Almond, one of the passengers, says that the capture was made about two or three miles outside of the harbor of St. Thomas, and that no reason was given for the seizure, unless on account of some alleged informality in the papers of the vessel. Redgate, one of the passengers, says that he was born in London, and resides in Matamoras, Mexico, and has resided there a year and a half or two years, and believes that his family are in Matamoras; that they were there with him a part of the time while he resided there, and, when not with him, were in the state of Texas. He also says: "I am a citizen of the United States. I now owe allegiance to the United States. I owe obedience to the laws of Mexico, but I owe allegiance at present to the United States government." The testimony of Redgate on this subject read originally thus: "I was once a citizen of the United States, and I suppose I am now. I now owe allegiance to Mexico, as a resident of Mexico. I think I do not owe allegiance at present to the United States." This testimony, as the record shows, was corrected by Mr. Redgate, on its being read over to him, by erasure and interlineation, so as to read as first above stated. He says that he understood that the reason the capture was made was, that the master of the Peterhoff refused to be taken out of his ship with his papers. Murphy, chief engineer, says that the Peterhoff was taken on suspicion of running the blockade. Murphy, first assistant engineer, says that the vessel was seized about seven miles outside of the harbor of St. Thomas, and that he does not know the reason of her seizure, except the pretence that she was intending to run the blockade. Webber, the steward, Duffay, a fireman, Diamond, the cook, and Campbell, a seaman, all say that they do not know why the vessel was seized. Reed, a seaman, says that he should think the capture was made five or six miles off the mouth of the harbor of St. Thom-

as; that he does not know why the vessel was seized; that he supposes it was on suspicion that she had contraband goods for the "Confederate government." Captain Jarman says that the Peterhoff sailed under British colors, and had no other national colors on board. The testimony of all witnesses is to the same effect. Captain Jarman says that the vessel was owned by J. Spence, of London, and that he was appointed to the command by Mr. Joseph Spence, the owner, in London; that he has known the Peterhoff since about the 10th of December, 1862; and that she was delivered to him by Mr. Spence, in London. Tregidgo says that he has known the Peterhoff since the 18th of October, 1862, when he first saw her coming into Liverpool on her last voyage from Nassau. Reed says that there was no resistance made to the capture, "only the captain would not allow his papers to go out of the ship."

Captain Jarman says that he had a small speculation of his own on board the Peterhoff, "a few stores and other property, as captains usually have"; that he had no interest in the vessel; that he had no other interest in the cargo; that his property paid no freight, and had nothing to do with the ship's cargo; that none of the ship's company had any interest in the vessel or the ship's cargo; and that the value of his property on board was about £1,000, at what it cost in London and St. Thomas. Bowden says that he was a passenger on board at the time of the capture, and held bills of lading for a part of the cargo; that he does not know who owned the remainder thereof; and that the value of his share of the shipment was between twenty and twenty-five thousand pounds sterling at London. Almond says that he owned in his own right a portion of the cargo on board the vessel, which, at cost prices, was valued at about twelve thousand pounds sterling; that this portion of the cargo consisted of men's and women's boots and shoes, calicoes, cotton, prints, shirts, flannels, woolen hose, horseshoes, and nails, felt hats, "not military, but civilian's hats," pins, and needles, one case of saddlers' tools and some shoemakers' tools; that he does not remember the names of any other articles; that what he had was a general assortment; that he had no arms, powder, shot, or any military arms or clothing on board the vessel, except one rifle and five revolvers, and some two or three hundred rounds of ammunition, which was all contained in a small tin box; that two of the revolvers were intended for the use of Redgate, and the rest for his own use; that he had also a small case of quinine, containing one hundred ounces, and a small portmanteau, also containing medicines and drugs in small quantities; that he intended to sell the same; that the portion of the cargo that he owned was entirely distinct and separate from the other cargo on board, and that the only other persons in any way interested therein were his father, his uncle, and himself; that his father, William Almond, and his uncle, George Almond, both reside in London, and are partners together in the shipping business there, under the firm name of George & William Almond; that he is not interested in the firm, but shares with them equally in the profits resulting from the sale of the portion of the cargo owned by all of them; that he furnished no money to purchase the goods in question, but they were purchased by his uncle and father; and that no other person on board of the vessel has any control or power over the goods in question but himself. Redgate says that he was on board as a passenger; that he had an interest in some of the cargo, and that a large portion of the cargo was also consigned to him; that he supposes he had an interest in the cargo to the amount of from fifteen to twenty thousand pounds sterling; and that this includes what was consigned to him. Reed says that the captain took on board some of the cargo at St. Thomas. Captain Jarman says that the vessel was bound to the port of Matamoras; that the voyage began at London, and was to have ended in England, at Liverpool or London; that she carried a general cargo of merchandise, which was put on board in December, 1862, and January, 1863; and that she had no goods which he considers contraband of war. Bound says that the vessel was bound to Matamoras when captured; that the cargo consisted of assorted goods, partly of nails, iron, drugs, tin, and general cases of merchandise; and that he knows of no contraband goods on board. Harris says that they were bound to Matamoras; that the cargo was a largely assorted cargo of merchandise, in cases, bales, and trunks; and that he does not know of what it consisted. Tregidgo says that the vessel was bound to Matamoras; that she carried a general assorted cargo, and took in about ninety or one hundred cases of spirits at St. Thomas; and that there were some contraband goods on board, such as boots and shoes, and army cloth and medicines. Bowden says that the voyage commenced at London, in January, 1863; thence to Plymouth, for passengers, thence to Falmouth, under stress of weather; that the vessel sailed from Falmouth, on the 27th of January, for Matamoras, with liberty to call at St. Thomas or Jamaica for coal or other purposes connected with the voyage; that she stopped at St. Thomas from the 20th to the 25th of February; that, on the morning of the 25th of February, previous to entering St. Thomas, she was overhauled by the United States Steamer Alabama, and her papers were examined and passed; that she was bound for Matamoras, and was to return from that place to England; that when she left England, she had a cargo of general merchandise, consisting of boots and shoes, blankets and hosiery; and that he has heard there were also printed calicoes, nails, and other articles of that kind on board; that there were no goods contraband of war or

prohibited by law, to the best of his knowledge and belief; and that some articles, which he thinks were ships' stores, were taken on at St. Thomas. Almond says that the vessel left London, bound for Matamoras, to stop at St. Thomas, for coals; that she had nothing on board contraband of war or prohibited by law, to his knowledge; that, after leaving London, she stopped at Plymouth, and he went on board there; that she lay there some seven or eight days; and left Plymouth on or about January 20, and had to put back to Falmouth on account of contrary winds, where she remained until the 27th of January, when she proceeded to St. Thomas, arriving there about February 20, and there coaled; and that she remained there till the 25th of February, and left there about twelve and a half o'clock p. m. of that day, and was followed out by the Vanderbilt and captured about two p. m., although possession by the prize crew was not taken until about nine and a half p. m. Redgate says that the vessel was bound to Matamoras, and was cleared for that port, and that he obtained certificates from the Mexican consul to his bills of lading; that she had on board a cargo of general merchandise, consisting of woolen goods, fancy goods, boots and shoes, nails, tin, and cordage; that these are all he recollects; that he was there when she was taking in cargo and that she had no goods on board which were contraband of war, or otherwise prohibited by law. All the other witnesses, except Reed, say that the vessel was bound for Matamoras, and all except Duffay and Campbell, say that they know of no goods on board contraband of war. Murphy, chief engineer, says that there were some blacksmiths' tools and nails. Murphy, assistant engineer, says that the cargo was general merchandise. Webber says that there were some kegs of nails. Duffay says that he saw some smiths' anvils and bellows on board. Diamond says that she had an assorted cargo. Reed says that they were bound for Matamoras, or any port of North or South America; that the shipping master told this to him and to the greater part of the crew when they shipped in London; and that the cargo consisted of assorted goods.

Captain Jarman says that the vessel had the ordinary ship's papers only; that she sailed from London and touched at Plymouth and Falmouth in stress of weather, and at St. Thomas for coal; that her previous voyage, so far as he knows, was from England to Nassau and back to Liverpool; that on that voyage she must have had some cotton; and that she cleared from London on the 6th or 7th of January, and left Falmouth on the 27th of January. Harris says that they stopped at Plymouth to take on passengers. Trigidgo says that her previous voyage was to Nassau; that he does not know what she took out; and that she brought back cotton. Bowden says that he has heard that the vessel had made one voyage to Nassau. Almond says that the vessel had only carried one cargo before the present one; that that was a cargo of coals, which she delivered at Nassau, and returned to Liverpool with a cargo of cotton, which was put on board at Nassau; and that he heard this from Captain Jarman. Diamond says that the last voyage of the vessel was to Nassau and direct back to Liverpool, calling for coal at Halifax; that the last cargo was general, consisting of tea, coffee, liquors, &c., and was all sold and landed at Nassau; and that it was put on board at Liverpool, England, partly by a man named Dobson, in August, 1862. Captain Jarman says that the present cargo of the vessel is assorted, and consists of general merchandise; that he knows it consists of some kegs of nails, a little iron, cases and bales, which he supposes are dry goods, some large bellows, and a few anvils; and that he cannot specify any further. Bound says that the cargo was of general merchandise, but that he does not know particular quantities and qualities. Harris says that the cargo was a largely assorted general cargo, in cases, bales, trunks, &c., and that he does not know what was in them, nor anything about the different species or quantities of cargo. Tregidgo says that the cargo consisted of medicines, about five hundred boxes of tin plates, blacksmith's bellows and anvils, cotton presses, boots and shoes, bar iron, army clothing, kegs of nails, spades and shovels, carpenters' tools, spirits, some heavy casks, iron work, and bales and cases. Almond says that the portion of the cargo other than that in which he is interested consisted, as he understood, of a general assorted cargo of merchandise, of a kind and character similar to the portion in which he is interested. Redgate says that he cannot set forth the quantity or different species of the cargo more fully than he has done in his answers to previous interrogatories. The other witnesses, all of them, say either that the cargo was assorted merchandise or that they do not know of what it consisted. Captain Jarman says that the vessel was owned by Joseph Spence of London; that the cargo is owned by merchants in London, represented by three passengers who were on board; that he represents the owner's share of the cargo, that is, the share of Spence & Co.; that they have a share of not above one-eighth, he supposes; that he knows, by the bills of lading, who the owners are; that he thinks it is all represented by his three passengers and himself, except a few parcels or cases on board, which are covered by a bill of lading indorsed to Burchard & Co., of Matamoras; that they are all English owners, except the last named, and he does not know what countrymen they are; and that the English owners, he thinks, all reside in London, and he supposes they are all English subjects. Bowden says that he believes the entire cargo

was owned by the shippers, as they appear upon the bills of lading, or the parties in Matamoras, to whom they were consigned; that he held bills of lading for boots and shoes, hosiery, shirts, blankets, cloths, bunting, and other articles, from parties whose names he gives, and who, he says, were the owners of the goods, and are, as he believes, all British subjects, doing business in England; that he intended to do business in Matamoras as a commission merchant; and that these goods were consigned to him for sale. Almond says that Bennett and Wake were agents for the vessel. Redgate says that the goods on board were owned by a great many persons, the names of some of whom he gives; and that they all live in England. Captain Jarman says that there was a bill of sale of the vessel to J. Spence, which he saw the day he took charge of her; that he does not know who sold her; that he took a new register of her on or about the 10th or 12th of December, 1862; that this sale was made in London on or about that date; and that he thinks the sale was made by Mr. Pearson or Parsons. Tregidgo says that the vessel was bought by her present owners at a mortgagee's sale, which owners he states to be Messrs. Pile, Spence & Co.

Captain Jarman says that he thinks the names of the laders and owners of the cargo are all contained in the bills of lading which were found on board; that, so far as he knows, all the cargo is for the real account, risk, and benefit of those who appear in the bills of lading to be the owners. Bowden says that the goods were to be delivered at Matamoras, for the account, risk, and benefit of the shippers of the same. Almond says that the laders of the cargo in which he is interested were his father and uncle; that he and they had no consignees, as he was authorized to select his own consignee, on arriving at Matamoras; that this authority was verbal and not in writing; that these goods were to be delivered at Matamoras for the real account, risk, or benefit of his father, his uncle, and himself; that they all owned the same in equal shares; that it was his intention to settle in Matamoras and sell the goods in question himself; and that he had never been there. Redgate says that part of the cargo was consigned to him as a merchant in Matamoras for some eighteen months then past. Webber says that some cases were taken on board for the captain, at St. Thomas, some of which contained liquors. Captain Jarman says that he thinks there are five and twenty or thirty bills of lading; and that none were false or colorable, and none were different from those found on board at the time of the capture, to his knowledge. Almond says that three sets of bills of lading, consisting of four in each set, were signed for the cargo owned by himself and partners; that he gave up four bills of lading to the prize officer. Redgate says that he does not know exactly how many bills of lading were signed for the goods belonging to, or consigned to him, but he thinks seven or eight. Captain Jarman says that he has no other papers, and had none relating to the vessel and cargo, except what he delivered up at the time of the capture. Captain Jarman says that there was a charter-party, or a copy, on board with the papers at the time of the capture, signed by Spence, and Bennett & Wake. Bound says that the capture took place about three miles from St. Thomas, and that he thinks there was a charter-party signed. Harris says that the capture took place in sight of St. Thomas Island. Tregidgo says that the vessel was captured about four miles to the southward of St. Thomas. Almond says that the capture was made a few miles off the coast of St. Thomas. Murphy, first assistant engineer, says that the capture was made just outside the harbor of St. Thomas. Webber says that the vessel was captured near the harbor of St. Thomas. Captain Jarman says that the prize commissioners have all the papers that were on board the vessel at her last clearing port; that none connected with the voyage, the ship or the cargo were destroyed; that he tore up some letters from his wife and father at the time of the capture; that none others were destroyed, to his knowledge, by any person; and that none were concealed, or in any way disposed of, to his knowledge. Bound says that the ship had her usual papers, clearance, register, &c., all of which were on board when captured, and that none were destroyed or concealed in any way. Harris says that he does not know what papers were on board the vessel when she left London; and that he threw overboard, by order of the captain, a square paper package, the contents of which he does not know, about the time of the capture, after the first boarding by the officers of the Vanderbilt, and before the prize crew took possession, he thinks, but he cannot say precisely at what time. He says: "This paper package was handed me by the captain, or he told me to get it out of the cabin, which I did. While I had it in my possession, I handed it to Campbell, or some other seaman, and told him to hold it while I was busy, and he did. He afterwards gave it back to me, and I then threw it overboard. I told the seaman who held it that in case a boat from the Vanderbilt came alongside, not to let it be seen. The captain told me not to let any one see it. The captain had given me this same paper parcel once before, at the time the Alabama stopped us, before we were boarded by the Alabama. He told me, at that time, to keep this parcel, and throw it overboard if he told me to, or, if he made a sign to me, then to throw it over. As I did not throw it overboard then, I gave it back to the captain. The Alabama was a United States war steamer of some

kind, which boarded us before we went into St. Thomas, on the same day that we went into St. Thomas. I think this was four or five days before we were captured."

Tregidgo says: "I don't know what papers were on board of the steamer when she sailed, except the English mail for Matamoras. When we were first boarded by the Alabama, going into St. Thomas, the captain sent for the second officer, and gave him a packet, with instructions to keep it in the fore part of the ship, and if he, the captain, made him a sign, he was to throw the package overboard, and if the boarding officer was between the captain and the second officer, so that a sign could not be made, he was to use his own discretion. On the boarding officer returning to the Alabama, the packet was taken aft to the captain. On being first boarded from the Vanderbilt, exactly the same proceedings were carried out, and the packet was again returned to the captain. On the captain perceiving the officer again coming from the Vanderbilt, he gave me the packet, and told me to keep out of the way with it. He then said: 'Never mind. Fetch the second officer;' and the packet was again given to him—the second officer, Mr. Harris. On the captain observing a prize crew coming from the Vanderbilt, he called the second officer aft, and, after sending for Mr. Mohl, one of the passengers, to witness the necessity of throwing the packet overboard, he then ordered the second officer to throw it overboard from a part of the ship where it would not be observed from the Vanderbilt, which he did. While the packet was in the fore part of the vessel, a man named Campbell had it, concealing it. I do not know what the packet contained. I heard the captain speak of it as containing dispatches. He called it dispatches. There were some written papers sent to the stoker to be burned. They were burned by George Duffy, fireman. The packet was sewed up in canvas, and weighted with lead, so that it would sink. Mr. Mohl appeared very much depressed at the necessity of throwing over the packet." Bowden says that no papers of any kind were burned, thrown overboard, destroyed, cancelled, or attempted to be concealed, to the best of his knowledge, information or belief.

Almond says: "I don't know what papers were on board the vessel when she left St. Thomas. The same day we arrived at St. Thomas, Captain Jarman ordered a package to be destroyed. It was in charge of Mr. Mohl, passenger. He gave it up, at the captain's request, to be destroyed. I suppose it was destroyed. I don't know for what reason it was so destroyed. I don't know what the package contained. We were in sight of St. Thomas at the time. I don't remember whether or not it was destroyed before or after we were hailed by the United States steamer Alabama. We were hailed by that vessel the morning of the day we reached St. Thomas. We entered about half past ten o'clock in the morning. The package was very small. I never saw it but once, and then it was in Mr. Mohl's possession. I never knew what it contained. It was destroyed because Mr. Mohl objected to its being opened. At Falmouth, Captain Jarman said we must deliver up any and all sealed packages, as he should not carry any. Mr. Mohl had the one in question, but did not give it up at the time, and it was not given up until the morning of the day of our arrival at St. Thomas, when it was destroyed, as I have above stated. Nothing else was destroyed or concealed, to my knowledge."

Redgate says that he had no letters, and no instructions, as to the mode of disposing of the cargo; that he does not know that any person burned, tore, threw overboard, destroyed, or cancelled, or attempted to conceal, any papers on board. Murphy, assistant engineer, says that he was told by the second steward that there were some papers destroyed by one of the stokers, named George Duffy; that some were thrown overboard by the second mate; and that the first steward, Webber, knew of the fact. Webber says: "I heard several of the crew say that some papers had been thrown overboard by Mr. Harris, the second mate, just before the Alabama boarded us. I saw some newspapers burned by Duffy, a fireman. They belonged to a passenger, named Mohl, who gave them to me to be burned, and I gave them to Duffy and told him to burn them. I don't know why he wanted them burned. I saw the packet that Mr. Harris was said to have thrown overboard. It looked like a brown paper parcel. I did not see him throw it over." Duffy says: "The steward of the ship gave me a package of papers, or something that was printed. It looked like a book that had been 'tossed from a great many hands.' He told me to burn it, which I did. I don't know the steward's name, nor the contents of the package or book which I burned, nor anything about it, except what I have stated. This was about the time the Vanderbilt captured us. I cannot say exactly whether it was before or after the capture. We were outside of the harbor of St. Thomas, after we had been in. I was down in the engine room, and as I came up on deck the steward gave me this package, and told me to burn it. He did not say why, nor who it belonged to, nor anything more than to burn it." Reed says: "When we first saw the United States gunboat, the Alabama, which boarded us on the 20th day of February, before we went into St. Thomas, the captain sent Mr. Harris, the second officer, forward with a box of papers, which papers I saw the captain put into the box, and he told Mr. Harris to put something into the box to sink it, and, on the raising of his finger, to let it go overboard (the

box and papers, I mean); but, as the officer did not search the ship, he took the box back again and gave it to the captain. When we sighted the Vanderbilt, the captain again told Mr. Harris, the second officer, to take the box forward again, and be sure to put something in it to sink it; and, after the first boat which boarded us from the Vanderbilt was returning to the Vanderbilt, the captain told Mr. Harris that if the boat from the Vanderbilt returned again to our ship, then to throw the box overboard, which Mr. Harris did. I saw it go overboard myself. He then sent the steward, Thomas Webber, with another bundle of papers, to George Duffay, the fireman, to be put into the furnace, which was done; and, when the steward returned, the captain gave him two papers to hide, and, in case the captain was taken out of the ship, then the steward was told to destroy them, and he made a motion with his fingers as if to tear them. This was in the pantry, and I was alongside of the steward at the time, and the captain was opposite to both of us. I do not know whether the steward did destroy them or not." Campbell says: "The second mate gave me a sealed parcel, wrapped in brown paper. He told me to take care of it, and, if I was signalled by either himself or the captain, I was to let them drop overboard. I was in the forward part of the ship. The boarding officer was at that time on board from the United States steamer Alabama. After the officer left I gave the parcel back to the second mate. Afterwards, when the prize crew came off from the Vanderbilt, I saw the second mate give the same parcel to the captain of the Peterhoff, and I saw the captain drop them overboard from the starboard gangway. The package was heavy, but I do not know what was in it."

Captain Jarman says that he knew of the blockade of the principal ports of Charleston, the Mississippi, &c., before he left England, and knew about the war in America. The testimony of all the witnesses is, that the officers, crew, and passengers knew of the war and of the blockade of the enemy's ports before leaving England. Captain Jarman says: "I was spoken and boarded by the United States ship Alabama on this voyage. My papers were examined, but my papers were not indorsed. I was allowed to proceed. I was spoken by the Alabama about two miles from St. John's Island, and seven from the harbor of St. Thomas, on the 20th of February last." Harris says that, on her previous voyage, the vessel was under another owner, Mr. Pearson, of Hull. Duffy says: "When I shipped, I refused to go if the vessel was to run the blockade. This question arose between the captain and me at the Sailor's Home, where I shipped. I told him I did not wish him to take me to run the blockade. He said it was more than he dare do, to run a blockade, as he belonged to the naval reserve."

Captain Jarman says that he has sustained considerable loss by the seizure; and that, in case his property should not be restored, he will sustain considerable loss. Bowden says that he has sustained a serious loss by the capture, in time and business, and in other respects. Almond says that he has sustained great loss by the capture. Redgate says: "I have sustained an injury by the seizure of this vessel. I compute my loss in this way—imprisonment on board of the vessel, loss of time, loss sustained in business, loss by being deprived of performing my duty as agent of Lloyd's at Matamoras, and for other wrongs and privations." Captain Jarman says that the vessel was insured, and he believes the cargo was. Bound says that the vessel was insured partly in London and Paris. Bowden says that the part of the cargo which he represented was insured or partially insured. Almond says that his portion of the cargo was insured for £11,500 in Lloyd's for the voyage from London to Matamoras, with liberty to stop at St. Thomas, or Jamaica; that the premium was under £5, and he thinks about 97s.; and that it was insured by his father and uncle with Bennett & Wake, brokers. Redgate says that the goods, as far as he was concerned, were insured; that he understands that the vessel was insured also; that the insurance was from London to Matamoras, touching at St. Thomas for coal; that he does not recollect at what premium; and that some of the insurances were effected in London and some in Paris. Captain Jarman says that if he had arrived at his destined port, the property would have become the property of the consignees—that is, for the time being; and that the property was represented by the passengers who were on board. He says that there was a small quantity of tea on board. Tregidgo says: "I heard Mr. Eyck, one of the passengers, say that the cargo was to go across the river, from Matamoras into Texas. I am very confident of this." Bowden says that, if they had arrived at Matamoras, the part of the cargo which he represented would have taken the chance of the market for its sale; and that the proceeds were to be returned. Almond says that, on arriving at Matamoras, he was to hold the cargo, and take his chance in the market for its sale. Redgate says that, if the vessel had arrived at Matamoras, the cargo would have belonged or would have been at the disposal of the persons holding the bills of lading, and that the laders or owners were to take the chance of the market. Captain Jarman says that he knows of no papers of any kind relating to the vessel and cargo in any country, except those delivered to the captain; and that no papers were delivered out of the vessel in any way whatever, to his knowledge. Bowden says that the prize master, at the time of the capture, took away all the papers relating to the vessel and cargo. Almond says that he does not know of any

other papers than those received by the prize officer. He says: "All the vessel's papers, and all the papers relating to the cargo, were delivered by Captain Jarman and by ourselves to the prize officer, Acting Master Lewis, of the Vanderbilt, on the day of capture. I delivered four bills of lading, set of invoices for the entire lot of my goods, and the Mexican consul's certificate of proper shipment of goods, to the officer. These were all the papers I had relating to the cargo." Redgate says: "There are not in any country besides the United States, nor on board of any vessel, any bills of lading, invoices, letters, instruments, papers, or documents relative to the vessel or cargo, that I am aware of; none that I know or heard of." He says: "There were no papers delivered out of, or carried away in any manner whatever from the vessel that I know of. I never heard that any had been, except those that were taken by the prize officer."

Captain Jarman says: "There were eight passengers on board when I left London or Plymouth. Their names are as follows: Samuel or S. Redgate, Robert Bowden, Wellesly Almond, Mr. Mohl, Mr. Edwards, Mr. Heyck, Mr. Ellsworth. The last four left me while I was at Key West, having no interest in the cargo. One other left at Falmouth, he having joined the ship at Plymouth. The three first named are in charge of a large portion of the cargo, and are now here. They were taken on board in London or Plymouth, and were destined to Matamoras. None of the eight passengers were citizens of the United States, to my knowledge. Possibly Mr. Edwards may have been." Bound says: "Bowden, Almond, Redgate, Edwards, H. Heyck, Ellsworth, Moyles, were passengers on the vessel at the capture. Redgate, Edwards, Heyck, and Moyles are from Mexico; the others from England. All are merchants. They came on board at London and Plymouth. Bowden, Redgate, and Almond were, I think, interested in the cargo; the owners not, I believe. They were all going to Matamoras. No citizen of the United States was on board nor any citizen of any of the states at war with the United States." Tregidgo says: "There were seven passengers on board. Their names were Bowden, Almond, Ellsworth, Eyck, Mohl, Edwards, Redgate. Mohl and Redgate told me they were residents of Texas. Eyck also belongs to Texas. He told me so. There was a Mr. Bisbie, who came on board in Plymouth, and left the ship at Falmouth. I think he was an army officer, as he had his sword with him. I think he was an American. The passengers were going to Matamoras. Edwards told me he must be back into the Southern states by the first of March." Bowden says: "There were seven passengers on board. All were bound from England to Matamoras. They were myself, Messrs. Redgate, Ellsworth, Mohl, Edwards, Heyck, and Almond." Almond says that there were seven passengers on board, S. J. Redgate, R. Bowden, Mr. Ellsworth, Mr. Mohl, Mr. Edwards, Mr. Heyck, and himself; that Mr. Mohl and Mr. Heyck were Germans, as he believes; that the remainder were Englishmen, with the exception of Mr. Edwards, who told him he was an American; and that they were all bound to Matamoras. Redgate says that there were seven passengers on board, including himself, Bowden and Almond; that the others were Mr. Edwards, Mr. Heyck, Mr. Mowl, and Mr. Ellsworth; that he thinks Mr. Edwards was an American; that Mr. Mowl and Mr. Heyck were Germans, and Mr. Ellsworth a Scotchman, who was bound to Matamoras, as his (Redgate's) clerk; that they were young men; and that he does not know that they had any families. Webber says that there were seven or eight passengers on board when they left Plymouth: that one by the name of Bisby or Bigbee, left at Falmouth; that three or four left at Key West; that their names were Mr. Ellsworth, Mr. Heyck, Mr. Edwards, Mr. Mole. Reed says that there were seven passengers on board, and that one joined at Plymouth and left at Falmouth; that his name was Colonel Bigsby; that he was an officer in the Confederate army; that one of the passengers was Mr. Redgate, and the others Mr. Almond, Mr. Mole, Mr. Heyck, Mr. Edwards, Mr. Ellsworth, Mr. Bowden; that they were all taken on board at Plymouth, except Mr. Heyck and Mr. Ellsworth, who were taken on board at London; that they were going to Matamoras; that they said that from there they were going home; that they did not say where their home was, but that he heard them say that they could not get home because their place was blockaded; that Mr. Mole burned some papers when the Alabama boarded them; and that it was note paper, with the "Confederate flag" upon it.

Captain Jarman says that all the papers found on board are true and fair to the best of his knowledge and belief; that none are false or colorable, to the best of his knowledge; that there were no other papers of any kind, except as he has already stated; and that he has signed no papers concerning the vessel or cargo since her capture. Bowden says that all the papers found on board are true and fair, to the best of his belief; and that he had a passport for Matamoras, Mexico, through Earl Russell. Almond says that all the papers found on board are true and fair to the best of his knowledge; that he had a passport from the English government, viséd by the Mexican consul at London, to go to Mexico, and travel there, and has it now in his possession. Redgate says: "As far as concerns myself, all the papers which I had were entirely true and fair, and, as far as I know or believe, all of the other papers were so, and none of them were false or colorable, nor do I know of any matter or circumstance to affect their credit. I have not made any oath or affirmation in order to

obtain any passport or other clearance. I had no passport or letter of safe conduct. I do not know whether the others had or not. I have written letters to the British consul at Key West, and also to Lloyd's, giving an account of the capture. I have no copies of such letters." Captain Jarman says that he was steering, when captured, towards Matamoras; that his course was not altered upon the appearance of the capturing vessel; that the course of the Peterhoff was at all times directed towards her port of destination, as shown on her papers; and that her course was not altered at any time to any port or place, except to such ports as he had already stated. The testimony of all the other witnesses is to the same purport. Captain Jarman says that there were no arms or parts of arms, or warlike instruments of any kind on board, and no cargo of any kind, to his knowledge, except such as he had described, to the best of his knowledge, but the private arms of the officers and passengers, which were taken and kept by the captors. He also says that he has already stated all that he knows and believes relative to the true character and destination of the vessel and cargo. Bound says that there was a cotton-press on board, not put together. Bowden says that nothing was thrown overboard to prevent suspicion. Murphy, assistant engineer, says that the Peterhoff was sold to Pile, Spence & Co. by, he believes, Mr. Pearson, of Hull.

At the close of the deposition of Captain Jarman, as taken on the 1st of April, 1863, after the signature of the witness and the jurat of the prize commissioner, is a certificate signed by the commissioner, stating "that subsequent to the examination of the above deponent, circumstances having occurred which led him to suppose that deponent had not fully answered the 20th interrogatory, as to the destruction of papers in this case, and deponent having been voluntarily present before the commissioner, the 20th interrogatory was again read to deponent, and his answer thereto read to him, as herein recorded, and deponent was asked if he desired to add to or alter his answer to the above interrogatory, when deponent replied that he did not desire to change or add to his answer herein."

In the deposition of Tregidgo, after his answer to the 43d interrogatory, and before his signature to the deposition, and also before the jurat thereto, is the following statement: "The witness adds to his reply to the 20th interrogatory as follows: I have been a midshipman in the British navy, and am accustomed to seeing the form in which dispatches are made up. The packet thrown overboard was put up in the same manner. There was no mark upon it. The ends were loaded with a heavy weight of lead at each end. The first time that I ever saw it, or knew it was on board the ship, was when the Alabama boarded us. I then saw it, and saw at once that it was a package of dispatches. This addition to my reply to the 20th interrogatory was made at my request. I was born in the year 1843, and am nearly 20 years of age." The deposition of Redgate was taken on the 1st of April, 1863. On the 20th of April, 1863, he was reproduced by the United States district attorney, and, at his request, re-examined. On such re-examination he testified as follows, in answer to the 1st interrogatory: "I resided in the state of Texas until the breaking out of the war between the Northern and Southern states. I had resided there about thirty years—twenty-five or thirty—and battled against secession as far as my humble means would allow, until I was driven out of the state. My family resided there with me, and, when I left Texas, I left my family there. They afterwards followed me into Matamoras. I never took the oath of allegiance to the republic of Texas, nor, since its admission, to the government of the United States. I never had any papers of citizenship, nor did I ever obtain a passport at any time." On such re-examination, he also testified as follows, in answer to the 9th interrogatory: "There was a small portion of the cargo on board which I owned absolutely. The bills of lading in these cases, which are among the papers, will show the portion which belonged to me absolutely, and so will the invoices which are with the papers. They are made out in my name. Other portions of the cargo were consigned to me, and the bills of lading in these cases are indorsed to me, and the invoices in these cases are made in the name of the consignors. My only interest in these cases was to arise from the commission on the sales, when made, of five per cent. I was not an owner, in any way, of the portion of the cargo which I now speak of as having been consigned to me. The portion of the cargo which I absolutely owned was very small, and cost me something like one hundred to one hundred and fifty pounds. Since the vessel arrived in this port, Mr. Bowden, another passenger with me, who was the agent or superintendent of a considerable portion of the cargo, has empowered me, by a power of attorney, to take care of and manage his interests in the cargo. I think the cargo in question, in which Mr. Bowden is interested, is shown by the bills of lading among the ship's papers, they being indorsed to him. Of this I am not positive, although I have very little doubt they are so indorsed, and that the names of the owners in this case, as in that portion consigned to me, appear in the invoices found on board. In all these cases in which I am interested as consignee, the names of the absolute owners appear in the invoices, to the best of my knowledge, and they all reside in London, Glasgow, and Nottingham, and are all English subjects."

At the close of the deposition of Thomas Webber, as taken on the 6th of April, 1863, after his signature and the jurat, is the following statement: "On reading the deposi-

tion over to deponent, he adds, in reply to the 20th interrogatory, that, after the Peterhoff had been boarded by either the Alabama or the Vanderbilt, the captain gave me a small package of papers on blue foolscap sheets, about two sheets, and told me that, if the ship was captured, I was to tear up and destroy these papers, but I handed the papers back to the captain several hours after, and did not destroy them." This statement is signed by the witness, and has to it a jurat, showing that it was sworn to on the 6th of April, 1863, the same day that his main deposition was sworn to.

On the 2d of May, 1863, an application was made to the court, on the part of Samuel J. Redgate, to allow special interrogatories to be settled by the court, to be propounded to him in preparatorio, so as to enable him "fully to explain his political status and loyalty to the government of the United States, and his conduct, motives, and intentions in relation thereto, and further to explain fully his connection with the cargo of the Peterhoff, and his motives and objects in connection with the voyage on which the said vessel was captured as prize." This application was founded upon an affidavit made by Redgate; but it was opposed by the district attorney and the counsel for the captors, and was refused by the court, on the ground that the question of the individual loyalty or disloyalty of Redgate was of no importance, and that his political status, upon the testimony given by him in his depositions in preparatorio, and upon the facts stated by him in his affidavit on the application, was that of an enemy, according to the decisions of the supreme court in Jecker v. Montgomery, 18 How. [59 U. S.] 110, and in the Prize Cases, 2 Black [67 U. S.] 635. Subsequently Mr. Redgate renewed his application to be examined on special interrogatories, protesting against his being regarded in any respect as a citizen of "the so-called Confederate government," averring that he was an alien enemy to it, and claiming a right "to so place himself before the court, by proofs in preparatorio," as to put himself in the attitude of a neutral, for the purposes of a just protection to his rights. On the 11th of May, 1863, on this application, with the consent of the district attorney and of the counsel for the claimants, the court made an order that Redgate be forthwith examined orally before the prize commissioners; that the interrogatories and his answers be reduced to writing by them, and submitted to the court; and that the district attorney and the proctors for the claimants be allowed to be present, and to put direct and cross interrogatories to him. No examination of Mr. Redgate, under this order, appears ever to have taken place. The court has been informally advised that the examination of Mr. Redgate under this order was waived by consent of the district attorney and of the counsel for the claimants. No prejudice, therefore, can attach to Mr. Redgate, because be was not examined under this order.

On the 27th of April, 1863, Captain Jarman made an affidavit, containing a statement in respect to the package which the passenger Mohl had in his possession, and which was thrown overboard by Harris, by direction of Captain Jarman, after the Peterhoff was boarded by a boat from the Vanderbilt. That statement was, in substance, the same as the one subsequently made by Captain Jarman on his further examination, which will be alluded to hereafter, and the general purport of it was that the package in question was a package which Mohl told Captain Jarman contained "white powder," but of the contents of which Captain Jarman was ignorant, and which he ordered to be thrown overboard, because he thought it would "endanger or compromise" his vessel; and that he did not believe that it contained anything other than powder of some kind. He further stated in his affidavit: That the twentieth standing interrogatory was, on his examination, put to him as follows: "What papers, bills of lading, letters, or other writings relating to the vessel or cargo were on board the vessel at the time she took her departure from her last clearing port before she was taken as a prize? Were any of them burned, torn, thrown overboard, destroyed, or cancelled, or attempted to be concealed, and when and by whom, and who was then present?" That, believing that the contents of the package were only powder, he made answer as follows: "You have all the papers which were on board at her last clearing port; none connected with the voyage, the ship, or the cargo were destroyed. I tore up some letters from my wife and father at the time of capture. None others were destroyed, to my knowledge, by any person. None were concealed or in any way disposed of, to my knowledge." That Mr. Elliott, the commissioner, asked to call in a day or two, as he might wish to see him again. That, in pursuance of such invitation, he called a few days afterwards at the office of the commissioner. That the commissioner called his attention to the foregoing interrogatory, and the answer thereto, and asked him if he clearly understood the interrogatory. That he then told the commissioner about the said package in terms substantially the same as contained in the affidavit, and inquired of the commissioner if it would not be a proper matter to explain in connection with his answer to the interrogatory; and that the commissioner informed him that he did not think that it was at all pertinent to the interrogatory, and that his answer to the interrogatory was in every way sufficient. On this affidavit an application was made to the court, on the part of the claimants, that Captain Jarman be allowed to add to his answer to the twentieth interrogatory the statement contained in his affidavit. On the hearing of the application, an affidavit made by Mr. Elliott, the prize commissioner, was

presented to the court, stating that the request made by him to Captain Jarman, at the close of his examination, to call, was designed as a civility merely, and was an invitation rather than a request; that he subsequently sent for Captain Jarman, and with the purpose of allowing him to explain his answer to the twentieth interrogatory; that, at the interview which followed, Captain Jarman told him the history of the package, substantially as detailed in his affidavit, though perhaps not so much in detail, but that Captain Jarman thought that, as the twentieth interrogatory asked only in respect to papers, there was no occasion to change the answer, and said that he thought his answer was sufficient; and that he, the commissioner, did not express any opinion on the subject, but simply acquiesced in the opinion of Captain Jarman. It appeared that the original examination of Captain Jarman had been completed and reduced to writing, and sworn to by the witness on the 1st of April, 1863, and that the report of the testimony of Captain Jarman and of all the other witnesses had been filed on the 21st of April, 1863, and an order granted on that day by the court that all the proofs be opened. The application thus made on the part of the claimants was opposed on the part of the libellants. In deciding upon that application I came to the conclusion that it did not appear that Captain Jarman was aware, at the time of his interview with the commissioner subsequently to his examination, that his testimony had been formally closed; that there was room for a fair implication, that he was invited by the commissioner at that interview to review his answer to the 20th interrogatory, and offer further statements in reply to it; and that he might have supposed that his oral statements to the commissioner at that interview would be regarded by the commissioner as a continuous and constituent part of his sworn reply to that interrogatory. I therefore, on the 13th of May, 1863, made an order that Captain Jarman be re-examined by the prize commissioners on the twentieth interrogatory, and be allowed to add to his answer the explanatory statement contained in his affidavit before named, and that he be examined at the same time by the prize commissioners upon three special interrogatories which were framed by me, and were set forth in the order.

On the 16th of May, 1863, Captain Jarman was examined under this order, and his answer then made to the twentieth interrogatory was as follows: "When the passengers engaged their passage, they were distinctly told that they would not be allowed to carry any letters, papers, or dispatches in the ship. This was clearly understood. Before leaving Falmouth I received a telegram from J. Spence, Esq., the owner of the ship, instructing me to question the passengers as to whether they had any documents in their possession. I immediately called them together, and advised them as to my owner's instructions, and they, one and all, in the presence of each other, and in the presence of Mr. Mole, a passenger, and another passenger who left the ship at Falmouth, then declared that they had nothing in their possession of such description. The next day the last-named passenger came to me, and said he had made up his mind to return to London, intending to go out to Mexico by the West India mail packet. This passenger's name was Besbie or Besby, and he left me the same day, and went on shore at Falmouth. After the ship left Falmouth, Mr. Mole, the passenger above named, came to me and stated that he had a small packet of white powder—patent white powder, he called it—in which he and some of his friends were interested. I said, 'You had better deliver it up to me, for it is a dangerous article to have on board.' He gave it to me and I locked it up in my state-room. Nothing more was thought of this until we approached St. Thomas, excepting that I asked of him why he had not mentioned this before leaving Falmouth. He replied, as it was neither papers nor writings of any kind, he did not think it requisite. When the United States steamship Alabama approached us, I called Mr. Mole and told him I did not like having this packet of powder on board, and that, if the ship was likely to be searched, it must either be opened or destroyed, and then gave it in charge of one of my officers—the second officer, Mr. Harris—with orders to destroy this packet if I instructed him. I told him in that case to throw it overboard. Not being examined by the Alabama, it was not then destroyed. After leaving St. Thomas, we were boarded by a boat from the Vanderbilt. This boat left the ship, ordering me to remain until they returned. I then called Mr. Mole again, and requested him to let me see the contents of the package. To this he objected, saying it was a patent, and could not be seen by any one but himself and friends. So I ordered it to be thrown overboard, fearing it might jeopardize the ship in some way, and it was accordingly thrown overboard. I believe it to have been white powder, as stated by Mr. Mole, and had no reason to believe otherwise, and do not think anyone knew the contents of this packet but this same Mr. Mole. I do not now believe it was anything but white powder, as above stated. I told Mr. Harris, above named, that when I instructed him to throw it overboard, I expected to instruct him in case it was requisite for me to make myself positive on the point as to the contents. After the Vanderbilt's boat left the ship, I ordered Mr. Harris to throw this package overboard from the gangway. This was after the first boarding boat of the Vanderbilt left us, and before her boat came the second time, and after Mr. Mole refused

to let me see the contents." The following question was then put to Captain Jarman by the commissioner: "When you instructed Mr. Harris to throw this package overboard, did you instruct him to throw it over on the side of the ship away from the Vanderbilt's boat, so that the package could not be seen when it went over?" He replied: "I gave Mr. Harris an order to throw it overboard from the starboard gangway, that being the nearest to my cabin door. It might have been the side away from the Vanderbilt. The Vanderbilt certainly approached me on the starboard quarter. I do not know whether the Vanderbilt's boat was at that time on the port or starboard quarter. I do not recollect having instructed Mr. Harris in any other way than I have stated." Then follows this memorandum, signed by the commissioner: "The witness repeatedly refused to answer this question by a direct negative or affirmative, and, in all cases herein, was unwilling to answer without verbose explanations." The special interrogatories framed by the court were put to and answered by Captain Jarman, as follows: "1. Did you know, or had you ever been informed, or had you reason to believe, after your answers to the stated interrogatory aforesaid had been given by you and written down by the prize commissioner, and when did you first acquire such knowledge, information, or belief, that any other witness, and who, being one of the ship's company on the voyage in question, had, after your examination, and when, declared before such commissioner, that any papers, and what, on board the vessel, and on the voyage inquired about, had been burned, torn, thrown overboard, destroyed or cancelled, or attempted to be destroyed or cancelled, and by whom and when?" Answer: "After my examination had been finished and written down by the commissioner, and while awaiting my second interview with 'you, as suggested by you,' I did hear that the cabin boy had stated that I had put some papers in a tin box and thrown them overboard. I cannot say how many days it was after my examination. It might have been two or it might have been three days. I cannot be positive. The cabin boy's name was John Reed. I cannot say positively who told me. I think it was the cook. It was either the cook or steward." "2. Did you, at any time, and when and where, make or offer any statement or explanation to the prize commissioner previous to your examination and testimony in this suit on the 1st of April, 1863, in relation to the construction or concealment of any paper or papers, and what, on board the vessel, and on the voyage in question?" Answer: "I did not make or offer any statement or explanation to the prize commissioner previous to my examination and testimony in this suit, having been a prisoner, and in jail, up to the day when I was first examined by the commissioner. I therefore had no opportunity; nor at my first examination, as no question seemed to call for this explanation." "3. Did you apply to the prize commissioner for leave to inspect your answer to the twentieth interrogatory, of your own accord, after it had been attested to by you, or was your attention called to it by the commissioner, and did he inquire of you, and when and where, whether you understood that interrogatory, and your answer thereto, at the time your testimony was given, or make any other inquiry of you to that purport or effect, and when and where?" Answer: "I did not apply of my own accord for leave to inspect my answer to the twentieth interrogatory, but I was sent for by the commissioner, and then I made an explanation. At my first interrogation, I considered the twentieth interrogatory to apply to letters, bills of lading, or papers connected with the ship or cargo. When the interrogatory was read to me by the commissioner, at this second interview, I then made the explanation relative to the package which was thrown overboard. The commissioner, at this interview, did ask me whether I understood the twentieth interrogatory, and my answer thereto, and he read the same to me. I then explained as above stated. This interview took place at the office of the prize commissioner the same day after getting a note from the commissioner requesting an interview. I should think this was within three or four days after my first examination. That examination was made and completed on the same day, viz., on the first day of April, 1863." The following statement is added to the deposition, before the signature and jurat: "The witness desires permission to state that the cabin boy, John Reed, named herein, threatened, while on board ship, and before he reached this port, to do all he could to injure the witness, because he chastised him for neglect of duty." This was stated in the presence of many witnesses.

On the hearing of the case, the counsel for the claimants objected to the question put by the commissioner to Captain Jarman on re-examination, on the ground that the commissioner had no right to put any question that was not specified in the order for re-examination; and to the statement by the commissioner as to the witness refusing to answer, as being improper evidence. The court did not pass upon these objections at the time. On an objection taken by the district attorney, the court struck out as irrelevant the statement added by Captain Jarman as to the cabin-boy, Reed. I think that it was not proper for the commissioner to put to the witness, on his re-examination, any question except the 20th standing interrogatory, and the three special interrogatories. I also reject the statement of the commissioner as to the witness's refusal to answer; for, although, on the examination of a witness, his demeanor,

and his reluctance or readiness to answer, are very often material circumstances in affecting the credit to be given to his testimony, and although, in the case of written depositions, the court is deprived of the benefit of seeing the witness face to face, it is manifest that the practice of permitting prize commissioners to lay before the court, for its information and guidance, statements of the character of the one in question here, would lead to such abuse that it could not be safely tolerated in any well-regulated system of jurisprudence.

At the hearing of the case, the district attorney presented to the court the following copy of a letter, accompanied by a certificate from the department of state of the United States, under date of April 29, 1863, certifying that it was a true copy of the original on file in that department: "No. 77. Cornhill, E. C., London, Nov. 24, 1862. ——— ———, Esq. Dear Sir: We may state, for the guidance of any friends who may be desirous of shipping to America, that arrangements have been made for the dispatch of a vessel by us to the Rio Grande, about the first week in December; that cost of freight and insurance on goods can be paid at the port of delivery. The services of the highly respectable firm of Messrs. Brown, Fleming & Co., at Matamoras, have been secured; also those of Mr. Redgate, Lloyd's agent, an expert in cotton, and who has been resident nearly 40 years in Texas and Mexico. That gentleman's services will be of great value to shippers in respect to his local knowledge and influence, as also as regards agency of the inland transit, and landing and shipping of goods and cotton. Mr. Harding, of the firm of Messrs. Harding, Pullien & Co., of this city, has been named, and consented to act as factor for the receiving of the proceeds in cotton, and the equal distribution of same to the shippers, according to value of respective shipments, and who will effect the necessary insurance. Further, a Mr. Besbie, of the Confederate States of America, holds a contract from that government, whereby he is to receive 100 per cent. on invoice cost, payable in cotton at specie value, clear of all charges of freight, &c., for any goods he may deliver into the Confederate States. Said contract has been authenticated by Mr. Mason and others. He is willing to share same, say to the extent of 50 per cent., with any houses who may feel inclined to ship. Moreover, said parties are at liberty to send out their own supercargoes, and, if the goods can meet with a better market, shippers by our vessel may avail themselves of said contract or not; but, in the latter case, there will be no certainty of getting cotton back, as the wagon traffic cannot be properly carried out without the aid of government support, in the shape of teamsters to attend to cattle, and which the Confederate government will supply from the army, to facilitate the inland transport of goods and the bringing back of cotton for the contract. In the event of peace or cessation of hostilities, the Confederate government, by the contract, binds itself to receive goods that are shipped but not delivered, and, for any orders not shipped, but in course of same, 10 per cent. profit upon invoice cost and charges. Any further information you may require we shall be happy to give our best efforts to obtain from the respective parties interested. We remain, dear sir, yours truly, Jas. I. Bennett & Wake." The district attorney also presented to the court an affidavit, made on the 24th of April, 1863, by Joshua Nunn, chief clerk in the United States consulate at London, appended to a copy of the foregoing letter, and deposing that the original letter was signed by the usual signatures of James I. Bennett & Wake, and that the copy was a true copy. This affidavit was verified by a certificate, as to its authenticity, by the United States consul at London, and by a certificate from the department of state of the United States, under date of May 7, 1863. This letter was offered, on the part of the government, as legitimate evidence in the cause. It was urged that the letter might have been produced by any of the witnesses, in answer to the 21st standing interrogatory; that, if so produced, it would have been competent evidence; that it clearly referred to the Peterhoff and her voyage, and was signed by the persons whose names appear in the papers of that vessel as the brokers of her cargo; that the letter was admissible on the authority of the case of The Romeo, 6 C. Rob. Adm. 351; and that, at all events, the letter, if not admissible at the hearing in the first instance, ought, being material evidence, to be admitted on an order for further proof. I do not think that on the authority of the case referred to, or according to the settled practice in prize cases, the letter is admissible in evidence when offered for the first time at the hearing. I accordingly rejected it. But while, if it were properly put in evidence in the case, I should regard it as a very material piece of evidence against the Peterhoff and her cargo, yet, upon the proofs in the case, I do not entertain any such doubt upon the question of condemning the vessel and cargo as to make it proper that I should direct an order for further proof, in order to permit the introduction in evidence of the letter.

An objection was taken at the hearing, by the claimants, to the jurisdiction of this court in the present case, on the ground that the Peterhoff was first taken to the port of Key West, and afterwards brought to the port of New York, it being insisted that the district court at Key West could alone take jurisdiction of the case. There is no force in this objection. In prize cases, the court of that district into which the property is carried and proceeded against has jurisdiction. The Merino, 9 Wheat. [22 U. S.] 391. The mere carrying of a vessel or of her cargo, seized on the high seas, as prize of war, into any par-

ticular district of the United States, without the institution there of any proceedings in prize, cannot affect or take away the jurisdiction over the property of the district court of another district, in which the proceedings against the property may be instituted, after the property has been carried into such other district.

In the opinion delivered by me in the Stephen Hart [Case No. 13,364] I stated that many of the principal questions involved in that case, and in the cases of The Springbok [Id. 13,264] and The Peterhoff were alike, and I announced, in that opinion, the leading principles of public law which lead to a condemnation in all the cases. In my opinion in the case of the Springbok I restated those principles. As the present opinion is necessarily of great length in consequence of the mass of documents and evidence in the case, I must content myself with referring to my opinions in the cases of The Stephen Hart [supra] and The Springbok [supra] for a full exposition of the authorities and the reasoning which support those principles.

A neutral vessel, laden with a neutral cargo, may lawfully trade between neutral ports in time of war, in all descriptions of merchandise, contraband or otherwise, without being liable to seizure by a belligerent. But a seizure is justifiable if a vessel be engaged in carrying contraband of war for or to the enemy, or to the port of the enemy. (Instructions of the Navy Department, of August 18, 1862, to the naval commanders of the United States.) And all contraband goods, even though belonging to neutrals, and found in neutral bottoms, are liable to capture and condemnation, if seized by a belligerent while on a destination for the use of the enemy of such belligerent. Ordinance of the Congress of the Confederation, of February 1, 1782, 5 Wheat. [18 U. S.] Append. p. 120; Halleck, Int. Law, c. 24, § 11, p. 576; 1 Duer, Ins. 630; The Commercen, 1 Wheat. [14 U. S.] 388, 389.

The doctrine of all the authorities, so far as it is applicable to the case of the Peterhoff, is, that if her voyage was an honest one, from one neutral port to another neutral port, and she was carrying neutral goods between those two ports only, she was not liable to capture; but that, if her voyage was a simulated voyage, and she was carrying articles contraband of war, really destined for the use of the enemy, and to be introduced into the enemy's country by transshipment from her, at the mouth of the Rio Grande, into other vessels, she and her cargo were liable to seizure and condemnation. These principles were very fully discussed by the late district judge for the Southern district of Florida in the case of The Dolphin and The Pearl [Case No. 3,975], and I refer to his opinions in those cases as being fully concurred in by me. According to these principles, the question as to whether or not the cargo of the Peterhoff was being transported in the business of lawful commerce is not decided by merely deciding the question as to whether she was documented for and sailing upon a voyage from London to the mouth of the Rio Grande. The commerce which the law regards is that which is dependent upon the destination and intended use of the cargo on board of the vessel, and not on the incidental voyage of a vessel which may be but one of many carriers through which the property is to reach its originally intended destination. The proper inquiry, in testing the lawfulness of the transportation of contraband goods, is whether they are intended for sale or consumption in the neutral market, or whether the direct or intended object of their transportation is to supply the enemy with them. If the immediate object of the voyage of the Peterhoff was to supply the enemy with contraband goods laden on board of her, she and her cargo were liable to capture, even though such goods were neutral property, and even though they were to be delivered in the first instance at a neutral port, provided they were destined for the direct use of the enemy. If the Peterhoff had on board goods contraband of war, which were destined, when they left England, for the use of the enemy, in the country of the enemy, and not for sale or consumption in Mexico, the mere destination of the vessel to Mexican waters, and even the mere intended landing of the goods at Matamoras, on their way to the enemy's country, would not exempt the vessel or her contraband cargo from lawful capture as prize of war. If it was the intention of those having control of the movements of the Peterhoff and of her cargo that she should merely lie in Mexican waters, at the mouth of the Rio Grande, and that her cargo, composed in large part of contraband articles, should be transported, after being unladen, into the enemy's country, either directly or by the way of Matamoras, then her voyage was not a voyage, in good faith, from one neutral port to another neutral port, but was, so far as respected the commerce in which her cargo was employed at the time of her seizure, a voyage in the course of prosecution to the country of the enemy, although she had not, as yet, reached the mouth of the Rio Grande, and although her regular papers documented her for a voyage from London to Matamoras, or to the mouth of the Rio Grande. If the intention that the contraband goods should reach the country of the enemy existed when they left England, that intention cannot be destroyed or rendered of no effect by the avowed, additional, and apparently innocent intention that the terminus of the transit of the vessel herself should be in Mexican waters. In such case, the sole purpose of the guise given to the transaction would be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If the object of sending the Peterhoff into Mexican waters at the mouth of the

Rio Grande was merely to trans-ship the contraband articles carried by her into lighters, to be transported to the country of the enemy, the only commerce carried on in such case would be the transportation of the contraband articles from England to the country of the enemy, as was intended when they left England. It is equally well settled that the ulterior destination of contraband goods determines the character of the trade, no matter how circuitous the route by which they are to reach that destination; that, even though the Peterhoff was destined to Mexican waters, and the goods were there to be unladen, yet if they were to be transported thence, by any mode of conveyance, to the enemy's country, the trade was unlawful; that the trade in contraband goods with the enemy's country, through neutral territory, is likewise unlawful; that the goods so shipped through neutral territory, even though they may be unladen and trans-shipped, are liable to condemnation; that, if the voyage of the Peterhoff was of such a character, it was an attempt to carry on trade with the enemy by the circuitous route of Mexican waters or a Mexican port, which the law will not countenance; that, under such circumstances, her voyage was illegal at its inception; and that she and the goods were liable to seizure at the instant it commenced. Halleck, Int. Law, c. 21, § 11, p. 504; 1 Kent, Comm. (8th Ed.) p. 85, note a; 1 Duer, Ins. p. 568, § 13; Jecker v. Montgomery, 18 How. [59 U. S.] 110, 115; 2 Wildm. Int. Law, 20; The Jonge Pieter, 4 C. Rob. Adm. 79; The Richmond, 5 C. Rob. Adm. 325; The Maria, Id. 365; The William, Id. 385; The Nancy, 3 C. Rob. Adm. 122; The United States, Stew. Vice Adm. 116; The Thomyris, Edw. Adm. 17; The Joseph, 8 Cranch [12 U. S.] 451.

In reference to this very case of the Peterhoff, the foreign office of Great Britain, in a letter to her owner, on the 3d of April, 1863, announced at its conclusion, after having communicated with the law officers of the crown, that the government of the United States has no right to seize a British vessel bona fide bound from a British port to another neutral port, unless such vessel attempts to touch at or has an intermediate or contingent destination to some blocked port or place, or is a carrier of contraband of war, destined for the enemy of the United States; that her majesty's government, however, cannot, without violation of the rules of international law, claim for British vessels, navigating between Great Britain and such neutral ports, any general exemption from the belligerent right of visitation by the cruisers of the United States, or proceed upon any general assumption that such vessels may not so act as to render their capture lawful and justifiable; that nothing is more common than for those who contemplate a breach of blockade, or the carriage of contraband, to disguise their purpose by a simulated destination and by deceptive papers; and that it has already happened, in many cases, that British vessels have been seized while engaged in voyages apparently lawful, and have been afterwards proved, in the prize courts, to have been really guilty of endeavoring to break the blockade, or of carrying contraband to the enemy of the United States. So, also, the inception of the voyage completes the offence; and, from the moment that the vessel, with the contraband articles on board, quits her port for the hostile destination, she may be legally captured. It is not necessary to wait until the goods are actually entering the enemy's country; but, the voyage being illegal at its commencement, the penalty immediately attaches, and continues so long as the illegality exists. Halleck, Int. Law, c. 24, § 7, p. 573; 2 Wildm. Int. Law, 218; 1 Duer, Ins. 626, § 7; The Imina, 3 C. Rob. Adm. 167; The Trende Sostre, 6 C. Rob. Adm. 390, note; The Columbia, 1 C. Rob. Adm. 154; The Neptunus, 2 C. Rob. Adm. 110.

The new course of trade to which the present war has given rise is notorious; and this court has abundant evidence in regard to it upon its own records. Neutral vessels, almost always under the British flag, are cleared from England, with papers giving an ostensible destination, for both vessel and cargo, to Cordenos, in Cuba, or Nassau, N. P., or Matamoras, on the Rio Grande, in Mexico, all in neutral waters. Those destinations are used merely for call or trans-shipment, either as a new point of departure for a further voyage of the same vessel to a port of the enemy, or as a place of trans-shipment of the cargo to another vessel, in which it may enter the country of the enemy, the cargo being composed, in almost every instance, more or less, of articles contraband of war. Numerous cases have been before this court in which this course of trade has been developed, and it has been a subject of comment in the British parliament. Earl Russell, in the house of lords, on the 18th of May, 1863, alluded to it as a well-known fact, that vessels had been sent from England to Nassau, "in order to break the blockade at Charleston, Wilmington, and other places, and carry contraband of war into some of the ports of the Southern states;" and he remarked that, in a case of simulated destination,—that is, a vessel pretending that she is going to Nassau, when she is in reality bound to a port of the enemy,—the right of seizure exists. So, too, in the house of commons, on the 29th of June, 1863, the then solicitor general of England, Sir Roundell Palmer, referred to the case of The Dolphin [Case No. 3,975], and remarked that the principles of the judgment in the case of The Dolphin were to be found in every volume of Lord Stowell's decisions; that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and

the trade with Nassau and Matamoras had become what it was in consequence of the war. A prize court will not shut its eyes to a well-known and obvious system of conducting trade with the enemy in contraband articles. Nor, in a case like the present, where the demand of the enemy of the United States, for articles contraband of war, was so largely increased by the sealing up, by means of the blockade, of the enemy's ports on the Atlantic coast, and where so great a need of cotton existed in England, which could not be supplied to any great extent from the country of the enemy, except from the cotton fields of Texas, through the Rio Grande, can the court fail to recognize the existence of special reasons for the adoption of such a course of trade as appears, by the evidence, to have been adopted in the case of the Peterhoff. The Rosalie and Betty, 2 C. Rob. Adm. 343.

The representations upon the papers of the Peterhoff of the neutrality of her voyage, are, of course, not conclusive; and it is claimed on the part of the government that the evidence shows that her voyage was being prosecuted in bad faith, and under illusive semblances, and that the intent and purpose of her owner were that her cargo should be taken from her at the mouth of the Rio Grande by lighters, and be landed in the country of the enemy; that she drew too much water to cross the bar at the mouth of the river, and could never reach the port of Matamoras; that her cargo was composed very largely of articles contraband of war; that it was intended, on her departure from England, that these articles, and all the rest of her cargo, should be landed from her in the country of the enemy; and that the evidence in the case is such as to require the condemnation, not merely of the contraband articles, but of the rest of the cargo, and of the vessel herself.

I have already very fully analyzed the documents found on board of the Peterhoff, the contents of her cargo, and the testimony of the witnesses. I shall, therefore, content myself with stating the conclusions on the various questions of fact to which my mind has been brought by the entire evidence. In the examination which I have made of the case, I have derived valuable assistance from the printed arguments furnished me by the learned district attorney and by the special counsel for the captors.

The Peterhoff, a steamer of the burden of 669 tons, laden with a cargo of assorted merchandise at London, left that port early in January, 1863, documented for a voyage to Matamoras, upon the Rio Grande, in Mexico. She was built in Great Britain, and her registered owner is Joseph Spence, of London, ship-builder. Prior to her present voyage, she was owned by a person named Pearson, of Hull, England, whose name is familiar to this court, from its records, as a person heretofore largely engaged in supplying contraband goods to the enemy of the United States, and in sending out vessels to run the blockade. On the voyage immediately preceding the present one, she carried a cargo of cotton from Nassau to Liverpool. Under the agency of James I. Bennett & Wake, as brokers, acting in behalf of Joseph Spence, or his firm of Pile, Spence & Co., her cargo, on her present voyage, was laden by a large number of shippers, all of them British subjects, with the exception of Samuel J. Redgate, who is a citizen of the United States, and was a resident of Texas at the time of the breaking out of the war. The shippers of the cargo were, according to the bills of lading, twenty-six in number, the bills of lading being thirty-nine in number. Of the bills of lading, nine were indorsed to Robert Bowden, a passenger, four to George W. Almond, a passenger, three to Captain Jarman, the master of the Peterhoff, two to Samuel J. Redgate, a passenger, two to Samuel J. Redgate & Co., and one to Samuel J. Redgate and George W. Almond. Of the remaining eighteen bills of lading, nine were indorsed in blank, and were found in the possession of the master or of some of the passengers, two of these nine being shipments by Samuel J. Redgate, and two of them being shipments by J. Spence. There were, in addition, one bill of lading, not indorsed, of goods shipped by Captain Jarman, and eight bills of lading, not indorsed, of which no duplicates were found on board, and which were also found in the possession of the master or of some of the passengers. Duplicates were found of thirty of the bills of lading, and of one of them (being one of a shipment by Samuel J. Redgate, indorsed in blank) there were four sets found. The entire number of packages found on board, excluding five cases of samples, was 4,472. Of these, 533 were covered by the bills of lading indorsed to Bowden, 772 by those indorsed to Almond, 143 by those indorsed to Captain Jarman, 155 by those indorsed to Redgate, 72 by those indorsed to Redgate & Co., 501 by the one indorsed to Redgate and Almond, 1,878 by those indorsed in blank, (of which latter the number of packages shipped by Redgate was 379, and the number shipped by J. Spence was 1,432), 403 by those not indorsed, and of which there were no duplicates, and 15 by the one not indorsed, and in which Captain Jarman was the shipper. While proceeding on her voyage, and going towards St. Thomas for a supply of coal, the Peterhoff was, on the 20th of February, 1863, overhauled by the United States steamer Alabama, and, after her papers had been examined, allowed to proceed to St. Thomas. On the 25th of February she left St. Thomas, and was overhauled by the Vanderbilt. Her papers were examined by the boarding officer, who immediately returned to the Vanderbilt, leaving directions that the Peterhoff should remain stationary while he communicated with his commander. Shortly afterwards the boarding officer returned to the Peterhoff, and gave to Captain Jarman a

message from the commander of the Vanderbilt, to the effect that the captain should proceed, with the papers of his vessel, on board of the Vanderbilt. Captain Jarman refused to do so. The officer again returned to the Vanderbilt, and shortly afterwards a sufficient force from that vessel was sent on board of the Peterhoff to take possession of her. Shortly afterwards another officer from the Vanderbilt demanded the papers of the Peterhoff, to take on board the Vanderbilt, and the demand was refused. The Peterhoff was immediately sent to Key West as a lawful prize, and thence to New York.

A claim to the vessel and cargo was put in by Captain Jarman, on behalf of their owners, but that claim disclosed no name of any owner. The claim of Mr. Mackie, the agent at New York of the English underwriters, in averring the ownership of the steamer and her cargo by the underwriters, necessarily implies that the vessel and her cargo were insured from loss by capture, and that the ownership of the vessel and cargo was vested in the underwriters by virtue of an accepted abandonment after a loss by capture. The copy of the policy of insurance, found on board of the vessel, (if it be entitled to be regarded as a copy of a complete policy,) purports to be a policy on the hull and machinery of the vessel, and contains the clause, "warranted free from capture, seizure, detention, and all consequences of hostilities." This, as far as it goes, is consistent with the claim put in by Mr. Mackie, as the underwriters could have no claim to the vessel and cargo, in consequence of their capture, unless they had been insured by the underwriters against loss by capture, and unless the title to them had vested in the underwriters, by reason of an abandonment after a loss by capture. So, too, the claim by the underwriters admits the lawfulness of the capture; for without a lawful capture there could be no condemnation and no loss; and the averment of the ownership by the underwriters, which ownership could only arise in consequence of an accepted abandonment, admits a lawful capture of the insured steamer and cargo, and they were subject to lawful condemnation.

The claim of Redgate is, as owner, agent, and assignee, to $175,000 in value of the cargo. According to the appraisement of the prize commissioners, which was about $257,000 for the whole cargo, the value of the goods on board, covered by the bills of lading indorsed to Redgate, Redgate & Co., and Redgate and Almond, and by the bills indorsed in blank, in which Redgate was the shipper, was less than $23,000. Almond, in his claim, claims, as owner, agent, and consignee, cargo to the value of $150,000, while, according to the valuation by the prize commissioners, that part covered by the bills of lading indorsed to him was valued at only a little over $55,000. According to the valuation by the prize commissioners, that part covered by the bills of lading indorsed to Bowden was valued at over $113,000. As no claim was interposed by Bowden to any part of the cargo; and as Captain Jarman only claims the cargo for its owners generally; and as no claims to any portions of the cargo were put in, except those by Redgate and Almond; and as there was cargo of the value of over $50,000, according to the valuation of the prize commissioners, covered by bills of lading indorsed in blank, (exclusive of what was shipped by Redgate,) and by bills of lading not indorsed, it would seem to follow, necessarily, that Redgate must have had control over large portions of the cargo which were not covered by bills of lading in which he was the shipper, or by bills indorsed to him. Indeed, he says, in his answer to the 9th interrogatory, on his re-examination, that he acts as agent for the portion of the cargo represented by the bills indorsed to Bowden; and, in his claim, he claims as owner, agent, and consignee. At the valuation by the prize commissioners, the value of the cargo covered by the bills indorsed to Bowden, and those indorsed to Redgate, Redgate & Co., and Redgate and Almond, and those indorsed in blank, in which Redgate was the shipper, and thus the value of what is confessedly represented by Redgate, is nearly $136,000, or more than one-half of the entire valuation by the prize commissioners. Redgate does not state in his claim what specific portions of the cargo he claims as owner, nor what as agent, nor what as consignee. There can be no doubt whatever that Redgate must be regarded as a citizen of the enemy's country, within the decisions of the supreme court in Jecken v. Montgomery, 18 How. [59 U. S.] 110, and in the Prize Cases, 2 Black [67 U. S.] 635, although he calls himself a citizen of the United States, and says that he resides in Matamoras. He was a citizen of the United States, residing in Texas, at the time of the breaking out of the war, and he never has owed any allegiance either to Mexico or to Great Britain. Upon this principle, all the cargo on board of the Peterhoff which was owned by Redgate, or was in his custody and charge for the time being, is confiscable as enemy's property. It is, also, a well-established principle, that a citizen of the enemy's country, as Redgate was, cannot appear as a claimant, because he has no persona standi in court. Halleck, Int. Law, c. 31, § 23, p. 772; 3 Phillim. Int. Law, § 461; The Falcon, 6 C. Rob. Adm. 199.

Almond's claim is on behalf of himself, as owner, agent, and consignee, to cargo of the value of $150,000. It is to be noted, that while Captain Jarman, in his test oath to his general claim to the vessel and her cargo, on behalf of their owners, says that the vessel and cargo will belong, if restored, to subjects of Great Britain, yet neither Redgate nor Almond, in their claims or test oaths, make any averment that any of the

cargo represented by them as agents or consignees will belong, when restored, to subjects of Great Britain, although great pains is taken in the testimony, to show that the shippers named in the bills of lading were British subjects.

The witnesses, all of them, admit their knowledge of the war, and of the blockade, by the naval forces of the United States, of the ports of the enemy. Captain Jarman and the passengers, Bowden, Almond, and Redgate, all of them declare that the Peterhoff had no goods on board contraband of war. All of these four witnesses, except Bowden, were interested personally, as owners, in portions of the cargo, and large portions of the cargo were in the charge of them and of Bowden, by indorsements to them of bills of lading. But Tregidgo, the third officer, specifies, as contraband, boots and shoes, army clothing, and medicines; and Duffay specifies smiths' anvils and bellows. Captain Jarman swore, on his first examination, that no papers connected with the voyage, the ship, or the cargo, were destroyed; that all the papers that were on board of the vessel at her last clearing port were in the hands of the prize commissioners; that he tore up some letters from his wife and father at the time of the capture; but that, with that exception, none were destroyed, concealed, or in any way disposed of, to his knowledge, by any person. Redgate and Bowden testified that they knew nothing of any papers being burned, torn, thrown overboard, destroyed, canceled, or attempted to be concealed. Almond mentioned the destruction, by order of Captain Jarman, of a package which was in charge of Mr. Mohl, a passenger, but he said he was ignorant of its contents, and he fixed the time of its destruction as being the morning of the day the Peterhoff arrived at St. Thomas, but could not say whether it was before or after she was overhauled by the Alabama. The officers and crew of the vessel, on their examination, disclosed a very different state of facts in regard to this package, and in regard to the destruction of papers, which testimony I shall particularly refer to, hereafter. It showed clearly that papers were thrown overboard by order of Captain Jarman, after the Peterhoff had been boarded by the Vanderbilt, and while the boarding officer was absent to procure a prize crew from the Vanderbilt. Thereupon, Captain Jarman had his attention directed, by the prize commissioner, to the 20th interrogatory, it being again read to him, with his answer to it. He then stated to the prize commissioner the circumstance of the throwing overboard of the package received from Mohl, and said that it contained white powder, and that Mohl was unwilling that it should be opened, because of it being patented. Captain Jarman gives as an excuse for not mentioning, at his first examination, the circumstance of the throwing overboard of this package, that he considered the 20th interrogatory to apply to letters, bills of lading, or papers connected with the ship or cargo; and it is claimed on his behalf, that his reply to the prize commissioner, when asked, at the interview subsequent to his first examination, if he desired to add to or alter his answer to the 20th interrogatory, that he did not desire to change or add to it, was a proper one, for the reason that, as the package contained only the patent white powder, and not papers, it was not at all relevant to the interrogatory to place on the record anything in reference to the package. It must be borne in mind, that when Captain Jarman was thus called before the commissioner, he had not read the testimony given by the other witnesses in respect to the destruction of the papers. That testimony was, all of it, subsequently filed in court, on the 21st of April, 1863. On the same day, an order was made by the court that the proofs be opened. On the 27th of April, 1863, Captain Jarman, having obviously been made acquainted with the whole testimony, made his affidavit, setting forth his statement in respect to the package of white powder, for the purpose of the motion which was made by the claimants, that he be allowed to add that statement to his answer to the 20th interrogatory. He was, by order of the court, re-examined on the 16th of May on the 20th interrogatory, and on three special interrogatories. On that examination he gives his version of the destruction of the package which he was told was white powder. What he says has been already recited at length.

There are many things about this statement of Captain Jarman which are utterly incredible, and his whole statement is full of inconsistencies. He says that he told all the passengers, before leaving Falmouth, that they would not be allowed to carry any documents, and that they all declared that they had none; that, after they left Falmouth, Mohl, a passenger, came to him and said that he had a small packet of patent white powder; that he, Captain Jarman, said to Mohl that he had better deliver it up to him, for it was a dangerous article to have on board; and that Mohl then gave it to him, and he locked it up in his state-room. Why it was thought to be a dangerous article is not stated. If it was really thought by Captain Jarman to be a dangerous article to have on board, he certainly would have thrown it overboard immediately, instead of locking it up in his state-room. He then says that nothing more was thought of it until they approached St. Thomas; that, when the Alabama approached them, he called Mohl, and told him that he did not like having the packet of powder on board, and that, if the shop was likely to be searched, it must either be opened or destroyed; that he then gave it in charge of Harris, the second officer, with orders to throw it overboard,

if instructed by him; and that it was not then destroyed, because the vessel was not examined by the Alabama. He gives no reason for the obvious connection between the approach of the Alabama and his disinclination to having the package on board; or between a search of his vessel by the Alabama and his desire to throw overboard the package; or between the departure of the Alabama without examining the Peterhoff and his resolution not to destroy the package. If it was dangerous to have the package on board for any other reason, except that it contained what could not be submitted to the inspection of the officers of the Alabama, it would have been dangerous to have it on board during the entire voyage to St. Thomas, and as well after the departure of the Alabama as before her approach. The whole transaction clearly shows that the only danger connected with the package was the danger of having it examined by the officers of a United States vessel. And what possible danger could there be in having it so examined, unless it contained evidence of some unlawful transactions? Captain Jarman then says, that after a boat from the Vanderbilt had boarded the Peterhoff, and had left her again, ordering her to remain stationary, he called Mr. Mohl, and requested him to let him see the contents of the package; that Mohl objected to this, saying that it was a patent, and could not be seen by any one but himself and friends; and that so he, the captain, ordered it to be thrown overboard, fearing that it might jeopardize the ship in some way, and it was accordingly thrown overboard. The approach or presence of a cruiser of the United States seems to have been the only cause sufficiently powerful to draw attention to the danger of having this package on board, and it seems to have been an adequate cause to that end. Captain Jarman does not state how, according to his fear, the package might jeopardize the ship. How could it jeopardize the ship at the moment when the boat was expected back from the Vanderbilt with a prize crew, unless it was that a search of the vessel and an examination of the contents of the package would have disclosed evidence to justify the seizure and condemnation of the ship? Captain Jarman says that he believes the contents of the package to have been white powder, as stated by Mohl; and that he does not think that any one knew the contents of the package but Mohl. But Captain Jarman has no warrant manifestly for any belief as to what were the contents of the package, except what Mohl told him. Tregidgo says that Mohl told him he resided in Texas, and Reed says that when they were boarded by the Alabama, Mohl burned some note-paper with a "Confederate flag" upon it. Under these circumstances it would hardly be safe to rely upon hearsay evidence, derived only from Mr. Mohl, as to the contents of the package. This entire story, as to the contents of the package being white powder, is unworthy of belief.

The fact that a package, which was given to Captain Jarman by Mohl, was destroyed, is abundantly proved. Almond testifies to the fact, although he makes it to have occurred on the day they arrived at St. Thomas. But, that there was a destruction of papers, both by burning and throwing overboard, the witnesses (other than Captain Jarman and the three passengers) all agree. There is no substantial difference in their testimony. Harris, the second mate, who threw overboard the package, by the orders of the captain, says that it was a square paper package, and that it was thrown overboard after the first boarding by the officers of the Vanderbilt, and before the prize crew took possession. He says that Captain Jarman told him not to let any one see it; that Captain Jarman had given him that same paper parcel once before, at the time the Alabama stopped the Peterhoff, and before she was boarded by the Alabama, and had told him, at that time, to keep the parcel, and throw it overboard, if told by him, Captain Jarman, or if he, Captain Jarman, made a sign to him; and that, as he did not then throw it overboard, he gave it back to the captain. Tregidgo, the third officer, confirms this testimony of Harris, in all particulars, and adds, that Captain Jarman ordered Harris to throw it overboard from a part of the ship where it would not be observed from the Vanderbilt; that Harris did so; that he heard Captain Jarman call the packet "dispatches"; and the packet was sewed up in canvas, and weighted with lead, so that it would sink; and that Mohl appeared very much distressed at the necessity of throwing it over. Tregidgo says that he has been a midshipman in the British navy, and is accustomed to seeing the form in which dispatches are made up; that the package so thrown overboard was put up in the same way; that there was no mark upon it, and that there was a heavy weight of lead at each end; that the first time he saw it or knew of it was when the Alabama boarded them; and that he then saw it, and saw at once that it was a packet of dispatches. Campbell confirms the testimony of Harris, and says that the parcel was a sealed parcel, wrapped in brown paper, and was heavy. He also relates the arrangement for throwing the package overboard at the time of the visit of the Alabama, and says that when the prize crew came off from the Vanderbilt he saw Captain Jarman drop the parcel overboard from the starboard gangway. Murphy, assistant engineer, shows that it was understood on board that some papers were thrown overboard by Harris, and he speaks of Webber as being aware of that fact. Webber also shows that it was understood on board, among the crew, that some papers

had been thrown overboard by Harris just before the Alabama boarded them. He also says that he saw the packet that Harris was said to have thrown overboard, although he did not see him throw it over, and that it looked like a brown paper parcel. Reed confirms the testimony of Harris as to the arrangement for throwing overboard the package at the time of the visit of the Alabama, and as to its being thrown overboard, by order of Captain Jarman, while the boat from the Vanderbilt was coming a second time to the Peterhoff. Reed says that it was a box of papers, and that he saw the captain put the papers into the box, and that the captain told Harris to put something into the box to sink it, and to throw it overboard, on a signal, this being at the time of the visit of the Alabama; and that, after they were boarded by the Vanderbilt, he saw Harris throw the box overboard. Whatever discrepancies there may be in this testimony, the substantial fact remains, that a package, which was understood and believed, by the disinterested officers and crew on board, to be papers, was thrown overboard by the second mate, by order of the captain, when it was manifest that a prize crew was coming on board from the Vanderbilt, to take possession of and search the Peterhoff. The story of the white powder only adds to the conviction of the court, from all the evidence, that this package contained papers which it was important to destroy, for the reason that they would have shown that the Peterhoff and her cargo were liable to seizure and to condemnation.

But there is testimony as to the destruction of other papers. Duffay says that Webber, the steward, gave him a package of papers, or something that was printed, which looked like a book "that had been tossed from a great many hands," and told him to burn it; that he did so; that he does not know its contents; and that this was about the time the Vanderbilt captured them, and while they were outside of the harbor of St. Thomas, after having been in. Webber says that he gave Duffay, to burn, some newspapers belonging to Mohl, who gave them to him, Webber, to be burned, and that he, Webber, gave them to Duffay, and told Duffay to burn them. Murphy, the assistant engineer, says that he heard on board that some papers had been destroyed by Duffay. Tregidgo says that some written papers were burned by Duffay. Reed says that Webber was sent by the captain with a bundle of papers to Duffay to burn. Whatever it was that was burned by Duffay, the burning seems to have been caused by the visit of the Vanderbilt. And, unless it clearly appears exactly what the writings were that were burned, the presumption as to what was burned by Duffay, as well as to what was thrown overboard by Harris, must be taken most strongly against the claimants. Duffay calls it "a package of papers or something that was printed," and says "it looked like a book." He had it in his possession, apparently, longer than any other of the witnesses. Reed calls it a "bundle of papers." Tregidgo calls it "written papers." Webber calls it "newspapers." It is quite apparent, also, that what was thrown overboard by Harris, and what was burned by Duffay, came from the possession of Mohl. There is further evidence showing that Captain Jarman recognized the necessity, in view of a search of his vessel of destroying certain papers. Webber, the steward, says that after the Peterhoff had been boarded by the Alabama or the Vanderbilt, the captain gave him a small package of papers, on blue foolscap sheets, about two sheets, and told him that if he, the captain, was taken out of the ship, he, Webber, must tear up and destroy those papers; but that he handed the papers back to the captain several hours afterwards, and did not destroy them. In this testimony Webber is confirmed by Reed, who says that, when Webber returned from giving to Duffay the papers to be burned, the captain gave Webber two papers to hide, and that in case the captain was taken out of the ship, then Webber was told to destroy them, and the captain made a motion with his fingers as if to tear them; and that this occurred in the pantry. It is very clear, therefore, that Captain Jarman felt the necessity of destroying papers. Under these circumstances, the presumption would be, not only that he destroyed the papers which he thus handed to Webber, but that the package which was thrown overboard, under such a pressing exigency, contained papers. The only testimony contained in the evidence of the witnesses, as to the destination of the cargo other than what results by implication from their averments that the vessel was bound to Matamoras, is in the evidence of Tregidgo, who says that he heard Heyck, one of the passengers, say that the cargo was to go across the river from Matamoras into Texas; and that he is very confident of this.

I have already particularly referred to the various papers found on board of the vessel. The register, the shipping articles, the invoices, the bills of lading, and the clearance, all of them appear fair on their faces. I have also alluded to the fact that there were no invoices of the thirty sets of artillery harness, the buckles, or the bagging, or the drugs consigned to Burchard & Co., of Matamoras. What may have been contained in the mail which was on board has not been made known, for the reason that the mail was delivered up unopened. No letter of instructions to Captain Jarman was found on board, nor any letters to any consignees, nor were there found on board any letters giving any instructions to any person in regard to any disposition of the cargo of the vessel, unless such letters may have been in the mail bag. Almond says that he had no consignees, but was to select his own, and that he had no written instructions; and Redgate says that

he had no letters and no instructions as to the mode of disposing of the cargo. By the manifest, all the goods are specified as consigned "to order," except the packages addressed to Burchard & Co.; and, by reference to the bills of lading, it appears that in all cases where they were indorsed specially to the order of any person, the indorsee was a passenger on board the vessel, having the care of that portion of the cargo. The manifest, although it contains a printed heading, "Description of Goods," has, under that head, no designation whatever of any article of merchandise, whether contraband or otherwise, but only specifies, under that head, so many boxes, bales, cases, kegs, coils, packages, casks, bundles, chests, and trunks, except in some unimportant instances. In one instance, in the thirteenth item in the manifest, which now reads, under the head of "Description of Goods," "145 coils," the word "rope" was at first written after the words "145 coils," and it can still be read, under a very heavy erasure with ink. And although afterwards, in the manifest, there are found specified in different places, 50 coils, 45 coils, and 20 coils, yet the word "rope" does not appear now after any one of those entries, nor does it appear ever to have been written there. Rope and cordage are well settled to be contraband articles, as much so as arms; and the invoices of these 260 coils of rope show 215 of them to have been Manilla rope, and the rest tarred hemp rope. The bills of lading contain, every one of them, carefully written in it, a statement that the Peterhoff is bound for "off the Rio Grande, Gulf of Mexico, for Matamoras;" and also, in writing, the following: "Goods to be taken from alongside the ship, at the mouth of the Rio Grande, at consignees' risk and expense, within 30 days of arrival, providing lighters can cross the bar, or a penalty will be incurred of ten pounds per day after that period;" also, in writing, a provision that the goods are to be delivered "off the Rio Grande, Gulf of Mexico, for Matamoras;" also, in each case, except the bill of lading for the 52 packages addressed to Burchard & Co., that the goods are to be delivered "unto order," and, in that excepted instance, that they are to be delivered "unto Messrs. Burchard & Co., successors, Matamoras." The court will take judicial cognizance of the well-known facts, that Matamoras lies on the right bank of the Rio Grande, the river which forms the boundary line between Mexico and the United States at that point, several miles up from the mouth of the river, and nearly opposite the town of Brownsville, in Texas; that the river is very narrow at that place; and that, at the mouth of the river, is a bar, which at all times prevents the entrance into the river of a vessel drawing as much water as the Peterhoff; she drawing, as was admitted by the counsel for the claimants at the hearing about sixteen feet. In this view, the provision in the bills of lading, that the goods are to be taken from alongside of the ship, by means of lighters, at the mouth of the Rio Grande, becomes intelligible, making it apparent that the vessel was not to go herself to Matamoras, but was to go no further than the mouth of the Rio Grande. And, from the language of the provision in the bills of lading, it would seem that there were times when even lighters could not cross the bar at the mouth of the river.

There are some things, in respect to the log-book of the Peterhoff, which are quite open to observation. It commences on the 30th of November, 1862, and the entries from that time to the 5th of December, 1862, covering three pages, are filled with a voyage from Liverpool to London; and the heading across the top of those pages describes the log as one of a voyage from Liverpool towards London. The heading of the next two pages describes the log as being a log of the steamer while lying in London harbor. The next six pages have no headings whatever. They embrace the period from December 16, 1862, to January 7, 1863, both inclusive. The entries during that time show that the vessel was lying at London, taking in cargo. The next two pages, covering the entries of January 8 and 9, 1863, have this heading: "Log of the S. S. Peterhoff, from London towards Plymouth," some word having been erased over which the first half of the word "Plymouth" is written. The next page, embracing the entries of January 10 and 11, has the heading: "Log of the S. S. Peterhoff, lying in Plymouth." The next page, embracing the entries of January 13, 14, and 15, has no heading. The next page, embracing the entries of January 16 and 17, has the heading: "Log of the S. S. Peterhoff, lying in Plymouth." The next two pages embracing the entries of January 18, and 19, have, each of them, the heading: "Log of the S. S. Peterhoff, from Plymouth." The latter one of these two pages being a left-hand page, and there being no heading to the next right-hand page. And there is no further heading whatever in the book, over any of the entries in it, which extend from January 20 to March 9. Upon the title-page of the log-book there appear printed the words, "A log-book containing the proceedings on board the;" then written, the words "S. S. Peterhoff;" then printed the words "from the port of;" then written, the word "London;" then printed, the word "to;" then written, the word "Matamoras;" then printed, the words "Commanded by;" then written, the words "Capt'n S. Jarman, R. N. R.;" then printed, the word "Commencing," the blank after which is not filled; then printed, the word "Ending," the blank after which is not filled; then printed, the words "Kept by;" then written, the words "H. Bound." Notwithstanding this title-page, the voyage with which the log-book commences is one from Liverpool to London, occupying from November 30, 1862, to December 6, 1862, at which date she arrived at London. She remained at London until the 7th of January. All the entries in the

log-book, from its commencement to and including the 18th of December, 1862, covering five pages and a half, are signed "Hugh Ewing," who, it is presumed, was her mate at that time. The entries in the handwriting of Bound do not commence till the 19th of December, and all the rest of the entries in the book are in his handwriting, and at the close of the last entry, on the 9th of March, is his signature. It results, then, that there is no indication or suggestion, anywhere in the log-book, as to any destination of the vessel after she left Plymouth, except what may be gathered from the entry on the title-page, and that is the title-page of a log-book, the first voyage in which is one from Liverpool to London. There is no evidence as to when the entry on the title-page was made. It is manifestly in the handwriting of Bound, and, of course, was made after he joined the vessel at London. But whether it was made before or after the capture of the Peterhoff by the Vanderbilt cannot be known, because Bound continued his entries in the log-book until and including the 9th of March, which was two days after the Peterhoff came to anchor at Key West, she having been captured on the 25th of February. Aside from the title-page, there is not a word in the log-book, either in the heading of any page or in the body of the entries, to indicate to the officers of any cruiser examining it whether she was bound on the voyage on which she was captured; nor is Matamoras or the Rio Grande anywhere mentioned in the entries in the log.

The utter absence, from the manifest and bills of lading, of any satisfactory information as to the true contents of the packages on board of the Peterhoff, composing her cargo, induced the making of the order for the discharge and inspection of her cargo. The court has, in the official report of the commissioners, filed June 2, 1863, an inventory of the contents of the cargo, being the result of the opening and examination of a sufficient number of packages to show what was on board. The commissioners reported that there were 4,472 packages of cargo, exclusive of five cases of samples. They also reported that a large portion of the cargo was "particularly adapted to army use;" that large numbers of cases contained "Blucher boots," known as "army shoes;" that a number of cases contained "cavalry boots," so labelled—a label annexed to the report, from one of the trunks of boots, specifying its contents as "100 army Bluchers," and one annexed, from another trunk, specifying its contents as "36 cavalry boots;" that 192 bales of the cargo consisted of "gray blankets," "adapted to the use of an army," and believed to be such as are used in the United States army; that 95 cases contained horseshoes of a "large size;" that 36 cases of a large size, contained "artillery harness," in sets for four horses, with two riding-saddles attached to each set; that there were also on board "two hydraulic presses," in pieces, adapted for "cotton;" and that a considerable portion of the cargo consisted of drugs, directed, "Burchard & Co., successors, Matamoras, Mex'o," in which, among an assorted lot of drugs, quinine, calomel, morphine, and chloroform formed an important portion. The inventory annexed to the report filed June 2, 1863, shows that, in addition to the articles thus particularly referred to by the commissioners, there were found 305 coils of rope, (45 of the coils mentioned in the manifest consisting each of two coils of rope,) 501 boxes of tin, 29 casks of sheet zinc, 1,343 bundles of hoop iron, 280 bundles and bars of steel or iron, 42 anvils, 60 blacksmiths' bellows, and some quinine and assorted drugs. An examination of the invoices found on board of the Peterhoff shows that the number of pairs of Bluchers and Blucher boots found on board was 14,450, of which 1,000 pairs are called, in the invoices of them, "men's army Bluchers;" that the number of pairs of long artillery boots was 180; that there were 5,580 pairs of the gray blankets, of which 2,000 pairs are called, in the invoices of them, "government regulation gray blankets;" that the quantity of horseshoes contained in the 95 casks was 9 tons; that of the 305 coils of rope, 90, weighing over 5 tons, were tarred hemp rope, and 215, weighing about 11 tons, were Manilla rope, the weight of the 305 coils being about 16 tons; that the 29 casks of sheet zinc weighed about 14 tons; and that the 1,343 bundles of hoop iron were of the weight of 34 tons. No invoices were found of the 36 cases of artillery harness, but the appraisement report of the prize commissioners, of November 19, 1863, shows that there were 30 complete sets of russet artillery harness for four horses, contained in 30 cases, and that the 6 other cases contained 258 heavy russet artillery halters, and 600 galvanized halter chains. Nor were there any invoices of the drugs consigned to Burchard & Co., but the appraisement report of November 29, 1863, shows that those drugs consisted of 2,300 ounces of quinine, 1,000 pounds of calomel, 245 pounds of chloroform, and sundry other drugs. The invoices on board also show that, including the quinine and assorted drugs mentioned in the report filed June 2, 1863, there were, in addition to the drugs consigned to Burchard & Co., the following drugs: 340 ounces of quinine, 20 pounds of chloroform, 16 pounds of opium, 38 ounces of morphine, and various other drugs; that there were, also, 200 pairs of shoes, which the invoice of them calls "negro brogans;" and, also, 379 yards of blue military cloth and blue military serge, 307 pieces of scarlet, white, and blue bunting, several saddles, bridles, and saddle-cloths, a quantity of harness-rings, harness-buckles, bridle-buckles, martingale-rings, and trace-chains, 1,559 yards of gunny cloth, 1,988 yards of

stout cotton wrapping, 52,000 horseshoe nails, 3½ tons of nails, 42 anvils, weighing 4½ tons, 644 bars of cast steel, and some waiste-belts and ball bags.

The remark of the commissioners, in their report filed June 2, 1863, is, that a very large portion of the cargo was particularly adapted to army use; and this observation is fully warranted, in view of the quantities of Bluchers and Blucher boots, cavalry and artillery boots, gray blankets, horseshoes, military cloth, sets of artillery harness and saddles and bridles, to say nothing of the coils of rope, tin, sheet zinc, hoop iron, steel, anvils, and blacksmiths' bellows, and quinine, chloroform, morphine, opium, and other drugs, all of which were not only useful for army purposes, but were, many of them, articles of which there was great need in the army of the enemy, by reason of the stringency of the blockade of their ports. It is laid down by all writers on international law, that implements and munitions of war, which, in their actual condition, are of immediate use for warlike purposes, are to be deemed contraband whenever they are destined to the enemy's country, or to the enemy's use. Halleck, Int. Law, c. 24, § 13, p. 577; 3 Phillim. Int. Law, § 229. By the treaty of commerce between France and Denmark, in 1742, cordage was declared to be contraband; and, by the treaty of 1801, between Great Britain and Russia, to which Denmark and Sweden subsequently acceded, saddles and bridles were enumerated as contraband, the list being further augmented, by the convention of July 25, 1803, by the addition of equipments for cavalry. Halleck, Int. Law, c. 24, § 16, p. 580. The 18th article of the treaty of November 19, 1794, between the United States and Great Britain, (which treaty is no longer in force,) enumerated the articles which, in future, should be esteemed contraband of war, and specified, among those articles, horse furniture, holsters, belts, and generally all implements of war, as also cordage, and generally whatever might serve for the equipment of vessels, excepting, however, wrought iron; and declared that those articles should be just objects of confiscation whenever they were attempted to be carried to the enemy. 8 Stat. 125. The law of prize, as universally established by the prize courts of Europe and the United States, declares that all instruments and munitions of war are to be deemed contraband, and that rule is held to embrace, by its terms and by fair construction, among other articles, all military equipments and military clothing. Halleck, Int. Law, c. 24, § 20, p. 583, and authorities there cited. It is, also, an established doctrine of the English admiralty, that all manufactured articles, which, in their natural state, are fitted for military use, or for building and equipping ships-of-war, among which articles cordage is included, are contraband in their own nature, to the same extent as instruments and munitions of war, and no exception is admitted in their favor, except by express provisions of treaty. Halleck, Int. Law, c. 24, § 21, p. 584, and authorities there cited; The Charlotte, 5 C. Rob. Adm. 305; The Neptunus, 3 C. Rob. Adm. 108; 2 Wildm. Int. Law, 212. These principles assign, without any question, to the list of contraband articles found on board of the Peterhoff, as being instruments of war, if they were destined to the use of the enemy or to the enemy's country, the following articles, being either military equipments, military clothing, manufactured articles fitted, in their natural state, for military use, or cordage, namely: the 14,450 pairs of Bluchers and Blucher boots, the 180 pairs of long artillery boots, the 5,580 pairs of gray blankets, the 30 sets of artillery harness, and their accompaniments of halters and halter-chains, the saddles, bridles, saddle-cloths, waiste-belts, and ball-bags, and the 305 coils of rope. It is also claimed, on the part of the libellants, that the horseshoes contained in the 95 casks, and which the report of the commissioners describes as horseshoes of a large size, were designed for the cavalry service of the enemy, and were wholly unsuitable for any such existing service in Mexico; that the anvils and blacksmiths' bellows were such as accompany army forges; and that those articles, together with the tin, sheet zinc, hoop iron, and cast steel, the 2,640 ounces of quinine, 265 pounds of chloroform, 1,000 pounds of calomel, 16 pounds of opium, 38 ounces of morphine, and other drugs, and the blue military cloth, if not necessarily contraband in themselves, under all circumstances, must, in view of the quantities of them found on board of the Peterhoff, and the demand existing for some, if not all of them, for the use of the army and navy of the enemy, be considered as contraband in the present case, if they were going to the country of the enemy. I do not intend to hold that any of these articles are contraband, other than such as come under the head of military equipments, military clothing, manufactured articles fitted, in their natural state, for military use, and cordage, although strong reasons might be urged for including many of the other articles named within the list of contraband; under the circumstances surrounding this case. It is said, in Moseley, Contr. War, p. 9: "The tendency of all the recent authorities, both in works written on the subject and in judicial decisions, especially the decisions of Sir William Scott, goes to show that contraband or not contraband of war is a question of evidence, to be determined in each case by reference, not to one particular rule of law, but many; not to any one fact, however strong that may be, but to all the circumstances connected with the goods in question. It is not only, or not so much, whether the goods are, in themselves, or as belonging to a class, capable of being applied to military or naval use, but wheth-

er, from all the circumstances connected with them, those very goods are or are not destined for such use."

It is also laid down by high authority, that the probable use of articles is inferred from their destination; and that, if articles capable of military use are going to a place where any need of their employment in military use exists, it will be presumed that they were going for military use, although it is possible that they might have been applied to civil consumption. Halleck, Int. Law, c. 24, §§ 23, 24, pp. 586, 587; 1 Kent, Comm. 140; 3 Phillim. Int. Law, § 254. The large quantities of the articles found on board of the Peterhoff which are claimed to be contraband, and which are not strictly military equipments, or military clothing, or manufactured articles which, in their natural state, are fitted for military use, is a circumstance worthy of consideration, on the question as to whether those articles were probably intended for the ordinary uses of life, or were destined for military use. This remark applies with great force to the horseshoes, of which there were 95 casks, containing 9 tons, and to the drugs, among which there were 2,640 ounces of quinine, 265 pounds of chloroform, and 1,000 pounds of calomel. As none of the articles alleged to be contraband can be so, unless they were going to the country of the enemy, the question of their destination is vital. If a hostile destination can be certainly assigned to one portion of this cargo, and that a portion which was under the charge of Captain Jarman, and of the passengers, Redgate, Almond, and Bowden, a like destination can properly be assigned to all the articles composing the cargo, as they were all of them under the charge of Captain Jarman and those passengers. For I am led to the conclusion, upon the whole evidence, that there was a concert of action between Captain Jarman and those three passengers, in respect to the cargo. Bowden has put in no claim to any part of the cargo, but has made Redgate his agent, by power of attorney, in reference to the part of the cargo represented by the bills of lading indorsed to him, Bowden; and Captain Jarman put in a claim to the vessel and the entire cargo, "for the interests of his principals, the owners of the steamer Peterhoff, her tackle, &c., and cargo." The same kinds of articles are found to have been covered by the bills of lading indorsed to Captain Jarman and to the three passengers. Thus, by the bills indorsed to Bowden, are covered 500 pairs of brown-gray blankets, 700 pairs of Blucher boots, and 1,122 pairs of Bluchers; by the bills indorsed to Almond, 2,000 pairs of gray blankets, 7,128 pairs of Bluchers, 20 coils of Manilla rope, and a quantity of martingale-rings, bridle-buckles, straps, waiste-belts, and ball-bags; by the bills indorsed to Redgate & Co., a quantity of halter-chains, harness-buckles, martingale-rings, bridle-buckles, trace-chains, riding saddles, bridles, and saddle-cloths; by the bills indorsed to Redgate, 145 coils of Manilla rope; by the bills indorsed to Captain Jarman, 2,000 pairs of government regulation gray blankets, 50 coils of Manilla rope, 140 ounces of quinine, 20 pounds of chloroform, and a quantity of morphine, opium, and other drugs; and by the bills indorsed in blank, in which J. Spence is named as the shipper, (he being the owner of the Peterhoff,) 90 coils of tarred hemp rope, and a cotton press. The invoices of that rope and cotton press, and of the 10 bales of gunny cloth and the 13 bales of cotton wrapping, marked "Peterhoff, owner," are all on the same sheet, and are each headed thus: "Adventure to Matamoras, per S. S. Peterhoff, to Pile, Spence & Co., Dr."

Joseph Spence, the owner of the Peterhoff, was one of the firm of Pile, Spence & Co. That firm is spoken of by several of the witnesses as the owners of the Peterhoff, and it is that firm that is named in the papers found on board as the owners of the cotton press or presses, and of the gunny cloth and cotton wrapping, and of 90 of the coils of rope. J. Spence is named as shipper in the bill of lading covering the cotton press, the packages containing which were marked "P. S. & C.," and are specified in the bill of lading as "11 packages hydraulic press." Under another bill of lading, Mr. Spence was the shipper of 362 packages of merchandise, which contained 90 coils of tarred hemp rope, and large quantities of hardware, and the smiths' bellows and anvils. The cotton press is described by the prize commissioners, in their appraisement report of November 19, 1863, as one hydraulic press, 8-inch cylinder, with bed-plate and braces, 2 heavy iron-bound boxes for pressing cotton, 4 bars of railroad iron, and 8 car wheels, all in 11 packages, with 4 other packages containing iron implements, in bagging, supposed to be the same mark. The commissioners, in their report filed June 2, 1863, speak of there having been on board two hydraulic presses, in pieces, adapted for cotton. There was an invoice found on board, showing that Pile, Spence & Co. bought of J. Bowes, of Manchester, December 24, 1862, "1 hydraulic press, with ram to lift 4 feet, and set of pumps complete," for £170, and "2 birch railway boxes, bound with iron, and fitted up with wheels, stillages, rails, &c.," for £75, being a total, less 1½ per cent. discount, of £241. 6s. 6d. The bill of the cotton press above referred to, headed, "Adventure to Matamoras, per S. S. Peterhoff, to Pile, Spence & Co., Dr.," reads thus: "Marks, P. S. & Co., 1 to 11, cotton press, £250." There is also a letter from J. Bowes to Pile, Spence & Co., dated Manchester, December 26, 1862, saying: "I herewith enclose a tracing of the cotton press, erected. This shows it erected for cotton goods, but the only difference, when

put up for pressing cotton, is, that the table is put level with the ground, so that the boxes can run on the table. This tracing may be useful to the parties putting it up. You see, from the enclosed letter, how necessary it was to have some cash ready. I have had some trouble in having to get the work done at different places, but got all made right and sent off on the 24th inst., and hope it is safe at the ship by this time." The tracing accompanying that letter has three figures upon it, drawn by hand on rice paper, one a side elevation, one an end elevation, and one a view of the pumps. It is headed "8-inch hydraulic press and pumps, rise of ram 4 feet, scale ½ inch to a foot." Upon the tracing this is written at the bottom: "For pressing cotton the rollers at side are not required, and the table is fixed level with the floor. This tracing is only for a ram, with short lift, for Manchester goods." There is also some writing on the tracing, carefully erased with ink. A lithographed circular was also found on board, the heading of which is, "Bellhouse's wool or cotton press, by hydraulic power," and which contains a cut of the press, and the following lithographed text: "The inside dimensions of the box are 40x2.6x7.0. The rise of ram is 5 feet 6 inches. The box is stationary, and the upper portion is hinged, so that, when the wool or cotton is pressed, the doors can be opened, and the bales canvassed and corded." The following is written in ink upon the circular: "All the parts marked thus, X, become separated for packing, and require about 84½ cubic feet of space;" and there are ten parts marked X on the cut. There was also found on board a press copy, on tissue paper, of a letter, dated January 31, 1863, signed "J. Spence." and addressed, "Capt. Jarman, S. S. Peterhoff," which says: "This will probably be handed to you by Mr. Bennett. I have arranged with him that the cotton press and gunny cloth are to be considered on joint account of the ship and the charterers. I have handed him the bills of lading. You will have to receive the freight on them for the ship's ac., viz., £71. 18s. 10d. for the cotton press; £47. 4s. 6d. for the gunny cloth. Both these amounts are indorsed on the bills of lading which Mr. Bennett has with him. Should you call at St. Thomas you will find a press copy of this letter. The news from America has rather a peaceful prospect." There was also found on board a press copy of a letter, dated Manchester, January 20, 1863, signed "J. Bowes," and addressed to J. Spence, Esq., which says: "The putting together of the cotton press is a very simple matter, and will not, I think, require any particular instructions, especially if Captain Jarman has a drawing of the press, which shows it erected complete, and which I sent to Mr. Pile some time ago. To save time, I will write Mr. Pile this post, and request him to send you the drawing."

In this connection, some correspondence found on board is of importance. There is a letter from James I. Bennett & Wake to Pile, Spence & Co., dated London, October 27, 1862, as follows: "Referring to our negotiation relative to the matter of the laying on of a first-class screw-boat, of about 700 to 800 tons gross register, to proceed to the Rio Grande, it is understood and agreed between us, that half the difference between the freight earned out and home, after deduction of the hire, at the rate of 30s. per ton per month, together with the cost of coals, pilotage, port charges, extra labor, and all the expenses usually borne by charterers of a government time-charter, be credited to and paid to us, as agents, by way of commission; that half the freight for the cotton brought home in the cabins, houses, and bunkers, (if any free,) and space on deck, is to be credited to and paid us, and that, as such agents, and by way of further comm'n, we are to have an additional comm'n of five per cent. on gross amount of freight, as a consideration for our services in procuring this freight or employment. We shall esteem it a favor your confirming the within." To this letter Pile, Spence & Co. replied on the same day, by a letter to James I. Bennett & Wake, as follows: "We have your favor of this date, respecting the freight out and home of a first-class steamer for Rio Grande, which we beg to accept, confirm, and agree to." Then there is a further letter from James I. Bennett & Wake to Pile, Spence & Co., dated London, January 17, 1863, as follows: "The following are the conditions we understand to be agreed between us as to the cargo home for the S. S. Peterhoff. If a cargo is found at Matamoras producing £4,000 freight, the capt. is to accept same, and return as quickly as possible. In the event of the captain having £2,500 offered, and accepting better and other employment, then we are to be credited £250 for £2,500, and, in proportion, up to £4,000. If the Peterhoff does take a cargo from Matamoras, the results are to be matter of ac. between us, as originally arranged by letter, dated 27th October." It is quite apparent, from this correspondence, which clearly relates to the Peterhoff and the voyage on which she was captured, that it was intended by Pile, Spence & Co., and James I. Bennett & Wake, that she should bring home a cargo of cotton from the Rio Grande. She carried out, as part of her cargo, a cotton press, the property of Pile, Spence & Co., or of Joseph Spence, her owner. The destination of the cotton press, which the documents referred to show to have been intended for the pressing of cotton, was undoubtedly the state of Texas, within the country of the enemy. It is well known that cotton is raised in Texas very largely, and that it is not raised in Mexico. It was in Texas that the cotton press would be useful, and would

find a market, and unquestionably its destination was to Texas, the country of the enemy. The same documents show that the avowed intention was, that the Peterhoff should bring back a cargo of cotton, which could come only from Texas, and the cotton press was needed there to compress the cotton, so that when stowed on board of the vessel it would occupy as little space as possible. It is also shown by the invoices that, among the articles covered by one of the bills of lading indorsed to Bowden, were 200 pairs of what are called in the invoice which covers them, "negro brogans." The destination of these is indicated by the fact that negro slavery and a negro population exists in Texas, and does not exist in Mexico. Their destination was undoubtedly to Texas. The unmistakable destination of the cotton press and the negro brogans to the country of the enemy must, on all the evidence in the case, be regarded as affixing the same destination to the rest of the cargo, as well to that not contraband as to the contraband. As to the latter, there was no army or navy in Mexico, at or near Matamoras, to be supplied by the military equipments, the military clothing, the manufactured articles fitted, in their natural state, for military use, and the cordage. Nor could there have been any demand in Mexico for the large quantities of the other articles found on board of the vessel. The evidence is entirely satisfactory that the whole of the cargo had the same destination to the country of the enemy which the cotton press and the negro brogans must have had.

I have alluded to the fact that the mail bag found on board of the Peterhoff was, on the application of the district attorney, ordered by the court to be given up to the British authorities, it having been a public mail put up in London by the post-office authorities there, and directed to the postmaster at Matamoras. The contents of this mail were not inspected before its delivery. The state department, charged with the foreign relations of the government, deemed it most proper to direct the district attorney to make application to the court for the surrender of the mail bag, unopened, to the British authorities. The court, regarding the district attorney as entitled to control the proceedings in the suit, and as entitled to dispense, on his part, with the contents of the mail bag as evidence in the case, if he desired to do so, granted the application. It was urged, on the hearing, by the special counsel for the captors, that the natural presumption must be, that there were in that mail bag letters relating to the cargo of the Peterhoff, as no letters to any consignee were found on board, nor were any letters found in the possession of any of the passengers respecting the disposition of the cargo; that, if the cargo was in truth intended for delivery in Mexico, the letters relating to it would have shown that fact, and would have been evidence to show the lawfulness of the voyage and the unlawfulness of the capture; that if, on the other hand, those letters contained evidence that the cargo was intended for delivery in the enemy's country, for the use of the enemy, an examination of them would have disclosed such evidence; that the effect of the surrender of the mail bag and its contents, under these circumstances, was merely to preclude the libellants and the captors from any reliance on such proof as might have been drawn from the contents of the letters in it; that the claimants in this case had a right to insist, in vindication of the lawfulness of the voyage of the Peterhoff, and of the lawfulness of the commerce in which she was engaged at the time of her capture, and with a view of showing the neutral destination of the cargo, if it, in fact, had such neutral destination, that the mail bag should be opened and its contents examined; that if it contained no letters on the subject of the voyage or of the cargo, no harm would have ensued to any one; that if it contained letters showing the lawfulness of the voyage, and the neutrality of the destination of the cargo, this would have been evidence in favor of the claimants; that the claimants asserted no such right, but quietly acquiesced in the surrender of the mail bag and its contents, and made no opposition thereto, although represented in court by their counsel when the application was heard by the court; and that this conduct on the part of the claimants, under all the circumstances surrounding this case, affords the strongest possible evidence of their knowledge that the surrendered mail bag contains proofs which would inculpate the vessel and her cargo, and their owners. But I cannot regard this position as a sound one. It cannot be presumed that the mail bag contained any letters relating to the cargo. There is no evidence that it did, or that any of the claimants knew that it did. And, moreover, after the surrender of the mail bag, unopened, on the application of the prosecuting officer of the government, I do not think that any speculation as to its contents can properly be indulged in, conducing to support the prosecution.

I am led to the conclusion, upon all the evidence, that the Peterhoff, when captured, although ostensibly upon a voyage from London to neutral waters at the mouth of the Rio Grande, was laden with a cargo composed largely of articles contraband of war, which were not designed, on their departure from England, to be sold or disposed of in the neutral market of Matamoras, but were designed to be delivered, either directly, or indirectly by transshipment, in the country of the enemy, and for the use of the enemy. The character and quantity of the articles composing the cargo were such as to show that the cargo had very little adaptation to the Mexican market, or to the small port of Matamoras, so far as any legitimate use or sale, or consumption of it in Mexico was concerned. It was admirably adapted, in every particular, to the market of the enemy; and

large quantities of the articles composing it were those for which there was a very urgent demand to supply the pressing wants of the enemy. The gain which was looked for by the shippers of the cargo only could have resulted from the sale of it to the enemy, and in the enemy's country, and could not have resulted from any sale of it in Mexico for consumption there. The conduct of Captain Jarman, when visited by the officers from the Vanderbilt, as shown by the entries in the log-book of the Peterhoff, was inconsistent with an innocent destination of the vessel and cargo. He twice refused to comply with the demand of the commander of the Vanderbilt to go, with his papers, on board of that vessel. That is the ordinary method of exercising the belligerent right of visitation and search. In The Maria, 1 C. Rob. Adm. 340, 360, Sir William Scott says: "The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation." In that case, the commander of a British cruiser fell in with several Swedish merchantmen, under convoy of a Swedish frigate, and sent an officer on board of the frigate to inquire about the cargoes and destination of the merchantmen, and was answered that they were Swedes, bound to different ports in the Mediterranean, laden with hemp, iron, pitch, and tar. In reference to this state of things, Sir William Scott says (page 371): "The question, then, comes, what rights accrued upon the receipt of his answer? I say, first, that a right accrued of sending on board each particular ship for their several papers; for each particular ship, without doubt, had its own papers; the frigate could not have them; and the captors had a right to send on board them to demand those papers, as well under the treaty as under the general law. A second right that accrued upon the receiving of this answer was a right of detaining such vessels as were carrying cargoes so composed, either wholly or in part, to any ports of the enemies of this country; for that tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted, under the modern law of nations. Thirdly" (page 373), "another right accrued, that of bringing in, for a more deliberate inquiry than could possibly be conducted at sea upon such a number of vessels, even those which professed to carry cargoes with a neutral destination." In referring to the judgment of Sir William Scott in the case of The Maria, Historicus, a recent English writer of public reputation, in a letter on the right of search, being one of a series of letters by Historicus on "Some Questions of International Law" (London, 1863; p. 178), says: "The rights of the belligerent against the neutral are laid down by Lord Stowell with great precision, under three distinct heads: (1) The right to send on board for the ship's papers. (2) The right to detain such vessels as are carrying cargoes of a contraband character, either wholly or in part, to an enemy's port. (3) The right to bring in, for a more deliberate inquiry than could possibly be conducted at sea, even those which profess to carry cargoes to a neutral destination." The refusal, by the master of a neutral merchant vessel, to permit the papers of his vessel to be taken on board of a belligerent cruiser, when demanded, to be there examined by the commander of the cruiser, especially after those papers have been already so far examined on board of the merchant vessel, by a subordinate officer from the cruiser, so as to excite suspicion concerning their regularity, is, on the part of the neutral master, a resistance to the right of visitation and search, even though he offers his papers for examination on board of his own vessel, and his vessel for search. After the refusal by the master of the Peterhoff to permit his papers to be taken on board of the Vanderbilt for examination there, the commander of the Vanderbilt would not have been justified if he had not sent in the Peterhoff for adjudication. The log-book states, under date of February 25, 1862, that an officer from the Vanderbilt came on board of the Peterhoff, overhauled her papers, and then returned on board of the Vanderbilt, demanding that the Peterhoff should remain stationary; that the officer then came again on board of the Peterhoff, and demanded that Captain Jarman should take his papers on board of the Vanderbilt; that Captain Jarman refused to do so, "being in charge of her majesty's mails"; that the officer then left, threatening to send an armed crew on board; that a prize crew then came from the Vanderbilt and took charge of the Peterhoff; that, a short time afterwards, another officer came from the Vanderbilt, and demanded that the Peterhoff's papers should be taken on board of the Vanderbilt; that this was refused, at the same time full liberty being given by Captain Jarman for the papers to be overhauled on board, or the ship searched; and that then the prize crew took charge of the Peterhoff, and told Captain Jarman that he was not to consider himself any longer in charge.

The evidence is entirely satisfactory that papers on board the Peterhoff were destroyed at the time of her capture, some by being burned and some by being thrown overboard. Those that were thrown overboard were so disposed of by the direct orders of Captain Jarman at the time, and all the circumstances of the case are such as to warrant the conclusion that the papers so thrown overboard must have contained matter in relation to the Peterhoff and her cargo which it was important should be concealed from the knowledge of the officers of the United States cruiser. To the destruction of those papers Captain Jarman added, in the first place, the false assertion, in his first an-

swer to the 20th interrogatory, that no papers were destroyed or disposed of at the time of the capture, except some letters from his wife and father which he tore up. Then, after he had heard, as he himself says, in his answer to the first special interrogatory on his re-examination, that it had been testified that some papers had been thrown overboard, he came forward with the story that the package thrown overboard contained white powder. It is sufficient to say that this story cannot be believed. Captain Jarman does not pretend that any one but Mohl knew anything about the contents of this package, and the story as to the white powder is not supported by a particle of testimony from any of the other witnesses. Almond speaks of the package, and says that Mohl gave it up to be destroyed, at Captain Jarman's request, and that Captain Jarman ordered it to be destroyed, because Mohl objected to its being opened, and that he himself never knew what it contained. Although Almond was made aware of all these facts at the time, yet he does not pretend to have heard from Mohl, or from Captain Jarman, the story that the package contained a patented white powder. The entire conduct of Captain Jarman in throwing overboard this package, and in denying the destruction of any papers, and in then inventing this absurd tale, is open to the most severe criticism. The rule of law on this subject is well settled. The spoliation of papers on board of a neutral vessel, when overhauled by a belligerent cruiser, is, of itself, a strong circumstance of suspicion. 1 Kent, Comm. 157. "It is certain," says Sir William Scott in The Hunter, 1 Dod. 480, 486, "that, by the law of every maritime court of Europe, spoliation of papers not only excludes further proof, but does, per se, infer condemnation, founding a presumption, juris et de jure, that it was done for the purpose of fraudulently suppressing evidence which, if produced, would lead to the same result; and this surely not without reason, although the lenity of our Code has not adopted the rule in its full rigor, but has modified it to this extent, that, if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act was done by a person who has interests of his own that might be benefited by the commission of this injurious act. But, though it does not found an absolute presumption, juris et de jure, it only stops short of that, for it certainly generates a most unfavorable presumption. A case that escapes with such a brand upon it is only saved so as by fire. There must be that overwhelming proof, arising from the concurrence of every other circumstance in its favor, that forces conviction of its truth, in spite of the powerful impression which such an act makes to its entire reprobation." But although, both in England and in the United States, spoliation of papers is not held to furnish of itself sufficient ground for condemnation, but to be a circumstance open to explanation (The Hunter, 1 Dod. 480; The Pizarro, 2 Wheat. [15 U. S.] 227), yet, if the explanation be not prompt or frank, or be weak and futile, if the case labors under heavy suspicions, or if there be a vehement presumption of bad faith, or gross prevarication, it is ground for the denial of further proof, and condemnation ensues from defects in the evidence, which the party is not permitted to supply (1 Kent, Comm. 158; The Pizarro, 2 Wheat. [15 U. S.] 227; Bernardi v. Motteux, Doug. 574, 579, 580). In Moseley, Contr. War (page 99), it is laid down that, however regular the papers of a vessel, and however well documented the ownership of the property, if, from the examination of the master, his prevarication and suppression of evidence, and manifest falsehood as to some points, and if, from the known character of the owners and agents of the vessel, as connected with contraband trade, there be fair reason to doubt them, they will be disregarded. In the case of The Two Brothers, 1 C. Rob. Adm. 131, the master had burned some letters before capture, which he said were only private letters. Sir William Scott, in commenting upon that circumstance (page 133), says: "No rule can be better known than that neutral masters are not at liberty to destroy papers; or, if they do, that they will not be permitted to explain away such a suppression, by saying 'they were only private letters.' In all cases it must be considered as proof of mala fides; and, where that appears, it is an universal rule to presume the worst against those who are convicted of it. It will always be supposed that such letters relate to the ship or cargo, and it was of material consequence to some interests that they should be destroyed." Sir William Scott also commented in that case upon the circumstance that the fact that the destruction of the letters did not come out on the master's deposition with frankness, but was added afterwards, when the circumstance had been disclosed by another witness; and he based his decision in the case very much upon his conclusion that the master was in a great measure discredited, from the whole complexion of the case. In the case of The Rosalie and Betty, 2 C. Rob. Adm. 343, 353, Sir William Scott says: "What has been the conduct of the master? It is said, and truly said, that in various parts of his evidence he is a gross falsifier, so as effectually to discredit his own testimony. But will this stop here? I apprehend not. It goes much farther, and extends to the character of his employer; for, where a master prevaricates so grossly as this man does, I cannot suppose that he would be a voluntary falsifier, or that, without an interest, or without instruction or subornation, he would lead himself into such a labyrinth of fraud. I cannot help thinking that the conduct of this master has been such as will reasonably affect the credit and the property of his employers." In the case of The Rising Sun, 2 C. Rob. Adm. 104,

106, Sir William Scott says: "Spoliation is not alone, in our courts of admiralty, a cause of condemnation; but, if then circumstances occur to raise suspicion, it is not too much to say of a spoliation of papers, that the person guilty of that act shall not have the aid of the court, or be permitted to give further proof, if further proof is necessary." The proof being satisfactory that papers on board of the Peterhoff were destroyed by the orders of Captain Jarman, and such destruction not having been satisfactorily explained, but having been attempted to be explained by a resort to an absurd and manifestly fabricated story, the inference which the court must draw from the destruction of the papers is that, if produced, they would have furnished proof of the unlawful character of the voyage of the Peterhoff, and that she was carrying contraband articles, destined to be delivered in the enemy's country, by transshipment from her at the mouth of the Rio Grande.

There are many other concurring circumstances, which are inconsistent with an honest neutral commerce, and only consistent with a design to introduce contraband articles into the country of the enemy. The manifest of the cargo does not disclose the articles on board, but only mentions the cargo as consisting of boxes, bales, cases, kegs, coils, packages, casks, bundles, chests, and trunks, except in a few unimportant instances; and, in one instance, in the manifest, the word "rope," which had been written after the word "coils," has been carefully erased. If the cargo was in good faith designed for sale in the neutral market of Matamoras, a disclosure, in the manifest, of the contraband articles on board would have done no harm, because the commerce would have been lawful, and the merchandise not contraband, even though the entire cargo had consisted of munitions of war. The suppression in the manifest, which is a most important paper to be carried by a vessel in time of war, in reference to her cargo, especially when she is near the country of a belligerent, of all facts tending to show what articles were on board designed and adapted for army and navy purposes, cannot be looked upon in any other light than as a confession that those articles were destined to be delivered in the enemy's country, and for the enemy's use, and were, therefore, contraband. It is true that invoices of nearly all of the cargo were on board, but those invoices were almost all of them in the possession, not of the master, but of the passengers, and formed no part of the ship's papers. The proper paper of a vessel, to show the particulars of her cargo, is her manifest; and, when the boarding officer of a cruiser demands of the master of a merchant vessel the papers of his vessel, he obtains, as the paper showing the particulars of the cargo, the manifest, and not the invoices. In some of the treaties of the United States with foreign countries, it has been provided that, when the two nations are at war, the vessels of both of them, being laden, must be provided, among other papers, "with certificates containing the several particulars of the cargo, that so it may be known whether any forbidden or contraband articles be on board of the same." The Amiable Isabella, 6 Wheat. [19 U. S.] 1; Treaty of 1795 with Spain, art. 17 (8 Stat. 148); Convention of 1800 with France, art. 17 (8 Stat. 186). This rule exists and is to be administered, whether embodied in treaty stipulations or not, and the foundation of it is that in time of war, the documents properly constituting the documents of a merchant vessel should show the particulars of her cargo, especially where, as in the present case, she was documented for neutral waters just outside the limits of the country of one of the belligerents, those neutral waters being extensively used as a mere convenience for the transshipment of cargoes bound to that country. Moreover, there were no invoices whatever found on board for the sets of artillery harness, and the halters and halter chains accompanying the same, or for a large quantity of the harness rings and buckles, or for any of the quinine, chloroform, calomel, and other drugs addressed to Burchard & Co., Matamoras. So, too, the bills of lading found on board are of such a character as to indicate that the cargo was not intended, in good faith, to be delivered at Matamoras, for sale or use there, but was to be delivered in the enemy's country. No one of the thirty-nine bills of lading covering the cargo contains the name of any consignee, with the exception of the one for the fifty-two packages addressed to Burchard & Co., Matamoras. All the other bills, which embrace all the rest of the cargo, declare the merchandise to be deliverable to the order of the shippers. Of the thirty-nine bills, twenty-one are indorsed to four persons who were on board of the vessel at the time of her capture (three of them being passengers, and one being her master), nine are indorsed in blank (of which nine, two are for shipments made by Redgate, and two for shipments made by Spence, the owner of the vessel), and nine are not indorsed (of which nine, one is for goods of which Captain Jarman was the shipper). All the bills of lading, as well those indorsed specially to the passengers and master, as those indorsed in blank, and those not indorsed, and originals as well as duplicates, were found in the possession of the passengers or the master. Captain Jarman says that all the cargo, except what was consigned to Burchard & Co., was represented by himself and the three passengers, Redgate, Almond, and Bowden; and Redgate says that the cargo would have been at the disposal of the persons holding the bills of lading. These bills of lading entirely fail to disclose the truth as to the contraband articles on board of the vessel. In the bill of lading for the cotton press, it is called a "hydraulic press," and the only other articles mentioned in the bills of lading in such a manner

as to enable any one, on an inspection of them, to tell what articles were to be found among the cargo, are the following: bagging, rope, wrought steel, seeds, nails, iron hoops, tin, gunny cloth, cotton wrapping, boots, iron drums, blankets, smiths' bellows, spades, shovels, anvils, and medicines.

Under all the circumstances surrounding this case, and in view of all the departures from the ordinary course of commercial transactions, it is not credible that there was a design, in good faith, to sell and dispose of the cargo in the market of Matamoras. Of this nature is the inference to be derived from the character and quantity of the contraband portion of the cargo, if it had a hostile destination. The gray blankets, the Bluchers and Blucher boots, the cavalry and artillery boots, the artillery harness, and the coils of rope, were especially adapted to the use of the enemy, as were also the cotton press, the smiths' bellows and anvils, the quinine, chloroform, opium, morphine, and other drugs, and the horseshoes, which the commissioners report to be horseshoes of a large size, it being understood that mules and small horses are used in Mexico, as a general thing, while cavalry horses are used by the enemy. Another fact of marked significance is that among the passengers on board of the vessel were two residents of Texas, who, for the purposes of this case, must, under the adjudications of the supreme court in Jecker v. Montgomery, 18 How. [59 U. S.] 110, and in The Prize Cases, 2 Black [67 U. S.] 635, be considered as public enemies. One of them, Redgate, was, at the commencement of the war, a citizen of Texas, and admits, now, that he is a citizen of the United States. This admission he took great pains to make on the record of his testimony, having caused it to be corrected, by erasure and interlineation, from his testimony as first given, which was that he was once a citizen of the United States, and now owed allegiance to Mexico, and thought he did not owe allegiance at present to the United States. He is the claimant, as owner, either alone or jointly with others, or as agent or consignee, of a considerable portion of the cargo, which portion must be condemned as being enemy's property, irrespective of all other considerations. The other passenger, Mohl, told the witness Tregidgo that he was a resident of Texas. He, with three other passengers—Edwards, Heyck, and Ellsworth—left the Peterhoff at Key West, because, as Captain Jarman testifies, they had no interest in the cargo. Mohl's persistence in refusing to permit the contents of the packages in question to be examined by any person, for the reason assigned by him, as stated by Captain Jarman, that the contents were a white powder, which was patented, and could not be seen by any one but himself and friends, taken in connection with the circumstances under which the package was thrown overboard, and with the particular time selected for throwing it overboard, and with the fact that it had been previously arranged to throw the same package overboard, in case of the search of the Peterhoff by officers from the Alabama, besides leading to the conclusion that documents were contained in the package of a character so dangerous that they were thrown overboard when it was manifest that the officers from the Vanderbilt were about to search the Peterhoff, and, at the same time, so important to be preserved that they were not sacrificed by Mohl save at the last extremity, and with the greatest reluctance, producing in Mohl, as testified to by Tregidgo, an appearance of great depression at the necessity of destroying the package, might perhaps warrant the presumption that Mohl was an agent of the enemy.

The witness Tregidgo, who was formerly a midshipman in the British navy, and who stands entirely uncontradicted and unimpeached, testifies that he heard Mr. Heyck, one of the passengers, say that the cargo was to go across the river from Matamoras into Texas. Although this is hearsay evidence, yet, in a prize case, such evidence is sometimes the most reliable to prove the destination of the vessel and cargo. Tregidgo says that Heyck told him that he belonged to Texas. Heyck left the vessel at Key West, with Mohl and two other passengers. If it was intended that the cargo should be carried across the river from Matamoras into Texas, it was to be delivered directly into the enemy's country, and for the enemy's use, and its transit through Matamoras, for that purpose, would not be for any purpose of lawful commerce at Matamoras, nor would it impress upon the cargo a neutral destination.

Upon all the proofs in the case, therefore, notwithstanding the ostensible destination of the Peterhoff to neutral waters at the mouth of the Rio Grande, the actual hostile destination of the cargo must be considered as established. In arriving at this conclusion, I have, as heretofore stated, not given any weight to the circular letter of James I. Bennett & Wake, of November 24, 1862, produced upon the hearing, nor do I regard it as necessary, in consequence of any doubt I have as to the proper disposition to be made of this case, to open the case for further proof, in order to allow the introduction of that letter in evidence. It is apparent, from a mere reading of the letter, that every circumstance proved in evidence, in respect to the Peterhoff and her cargo, is entirely consistent with the course of trade, marked out so specifically in the letter, in respect to carrying goods into the country of the enemy and bringing back cotton in return, and it is entirely inconsistent with any honest destination of the cargo to a Mexican market, for use or sale there. In addition, we have the facts, brought to light in the correspondence of October 27, 1862, between Pile, Spence & Co.

and their brokers, that the Peterhoff was to bring home a cargo of cotton from the Rio Grande; the recommendation, in the circular letter, of Redgate, as being an "expert in cotton," "resident nearly forty years in Texas and Mexico," and a gentleman whose services would be "of great value to shippers, in respect to his local knowledge and influence, as also as regards agency of the inland transit, and landing and shipping of goods and cotton;" the fact, stated in the circular letter, that it was written for the guidance of those who might be "desirous of shipping to America," not to Mexico; the facts, stated in that letter, that "a Mr. Besbie, of the Confederate States of America, holds a contract from that government, whereby he is to receive 100 per cent. on invoice cost, payable in cotton, at specie value, clear of all charges of freight, &c., for any goods he may deliver into the Confederate States"; that such contract "has been authenticated by Mr. Mason and others," and that Besbie is willing to share the same, "say to the extent of 50 per cent., with any houses who may feel inclined to ship;" the facts, that Besbie, as testified to by several witnesses, came on board of the Peterhoff at Plymouth, and left her again at Falmouth, that he was an American, and an officer in the "Confederate" army, and had his sword with him, and that, when he left the vessel, he announced his intention of going out to Mexico by another conveyance; the fact, that the circular letter announces that shippers may send out their own supercargoes, that they need not avail themselves of Besbie's contract, but that, if they do not, they will not be sure of getting cotton, "as the wagon traffic cannot be properly carried on without the aid of government support in the shape of teamsters to attend to cattle, and which the Confederate government will supply from the army, to facilitate the inland transport of goods, and the bringing back of cotton for the contract;" and that, "in the event of peace, the Confederate government, by the contract, binds itself to receive goods that are shipped but not delivered, and, for any orders not shipped, but in course of same, 10 per cent. profit upon invoice cost and charges." The contents of the circular letter, when viewed in the light of the evidence in the case, would, therefore, entirely warrant the court in holding that that letter, if necessary to be proved, and if proved in a proper manner, would be very material evidence to show the real character of the voyage of the Peterhoff, and the true destination of her cargo.

Contraband articles, destined for the use of the enemy, were found on board of the Peterhoff, covered by bills of lading indorsed to each of the claimants on the record, namely, Captain Jarman, Redgate and Almond, and Bowden, who is represented by Redgate. Contraband articles were also found, destined for the use of the enemy, shipped by Spence, the owner of the vessel. Therefore, all the claimants of the vessel and cargo had on board contraband articles, which were destined to be delivered, directly, or indirectly by transshipments, into the enemy's country, and for the use of the enemy, and not for a sale or disposition in the neutral market of Mexico. The evidence is clear, that all the cargo on board was really represented by, and under the control of, Captain Jarman, Redgate, Almond, and Bowden. Consequently, not only were the contraband articles subject to lawful capture by a vessel of the United States, but the other articles on board, belonging to or represented by Captain Jarman, Redgate, Almond, Bowden, and Spence, embracing the entire cargo of the vessel, were subject to like lawful capture, notwithstanding the vessel was, at the time of her capture, on an ostensible voyage from England to neutral waters at the mouth of the Rio Grande.

The settled rule of law is that where contraband articles, destined for the use of the enemy, are found on board of a vessel, all other goods on board of that vessel belonging to the owner of the contraband articles, even those goods which are innocent, must share the fate of the contraband goods. Halleck, Int. Law, c. 24, § 6, p. 573; 3 Phillim. Int. Law, § 277; 2 Wildm. Int. Law, 217; The Sarah Christina, 1 C. Rob. Adm. 237. I have already, in this opinion, referred to the authorities which establish the principles of prize law which lead to the condemnation of this cargo. I discussed those principles very fully in the cases of The Stephen Hart [supra] and The Springbok [supra], but there are some features in the present case which demand special remark. The Stephen Hart was bound, on her papers, to Cardenas, in Cuba, and The Springbok to Nassau, N. P. Those parts, though sufficiently near the country of the enemy to induce their use for the trade in which those vessels were engaged, were yet sufficiently distant to expose their cargoes to great hazard of capture in their transit, after transshipment from those ports, to the enemy's ports. But the transit of the cargo of the Peterhoff from the neutral waters at the mouth of the Rio Grande into the enemy's country would have been attended with no danger whatever, those neutral waters being on the very border of the enemy's country. Every bill of lading of the cargo of the Peterhoff (and the thirty-nine bills of lading found on board covered the entire cargo) contains a provision that the goods are to be taken from alongside of the ship at the mouth of the Rio Grande, within thirty days, in lighters, provided such lighters can cross the bar; and the stipulation on the part of the vessel, in every bill of lading, is, to deliver the goods on the Rio Grande, in the Gulf of Mexico. After the lighters had crossed the bar, and ascended the Rio Grande, which is the dividing line between the country of the enemy and Mexico, their freight might as well and as se-

curely be delivered in the enemy's country, on the left bank, as in the Mexican territory, on the right bank; and any transit of the goods through Matamoras, on their way to Texas, could not deprive the goods of the destination to the enemy's country, originally intended for and impressed upon them. If a pretended neutral commerce of this character, enjoying such facilities for the introduction of contraband goods into the enemy's country, can be carried on without interference, and if the ostensible destination of a vessel, on her papers, to neutral waters at the mouth of the Rio Grande, be sufficient, even when attended by all the circumstances which appear in evidence in this case, in respect to the vessel and her cargo, to exempt both from seizure and condemnation, a very wide door will have been opened for the practice of fraud upon the belligerent rights of the United States; and the commerce of neutrals with the enemy, in supplying them with contraband articles, can go on in safety to an unlimited extent. The naked doctrine upon which this immunity is sought to be upheld is, that whatever the character of the cargo, and whatever its ulterior destination, it is protected from lawful capture, so long as the vessel on board of which it is laden is pursuing a voyage between neutral ports. The unsoundness of this doctrine has been fully demonstrated.

There is another principle of law, which has been applied by the court of admiralty in England to cases like the present one, and which has been pressed upon the court in this case by the special counsel for the captors. He maintains that, where the neutral port or neutral territory lies in such immediate proximity to a port or territory of the enemy as to render it impossible to prevent contraband articles from going immediately from one port or territory to the other, it is as much a violation of neutral obligations, to be followed by confiscation of the property when seized, to introduce contraband articles into the port or territory of the neutral in time of war, as it is to carry them directly to the enemy's port or territory; that such was the position of the neutral waters at the mouth of the Rio Grande, and of the neutral port of Matamoras, in respect to the state of Texas and the port of Brownsville; that lighters, laden with contraband articles, leaving a vessel at the mouth of the Rio Grande, and ascending that river to deliver their freight at Matamoras, might as well deliver it at Brownsville, directly opposite, so far as regards the possibility of preventing such contraband articles from reaching the enemy; and that it is not a sound proposition, that the proximity of a neutral port to the country of the enemy cannot in any manner affect or impair neutral rights, in respect to commerce with such neutral port. We have, indeed, the high authority of Sir William Scott for saying that the enforcement of belligerent rights demands and justifies a restriction upon the commerce of neutrals with a neutral port thus situated; and he enforced such restriction. In The Zelden Rust, 6 C. Rob. Adm. 93, a quantity of Dutch cheese, a contraband article, was on board of a vessel destined to Corunna, in Spain. It was contended by the king's advocate that a destination to Corunna, a lawful port, was, in fact, a destination to Ferrol, an unlawful port, since those ports were both in the same bay, and so situated as to render it impossible to prevent supplies from going immediately to Ferrol, for the use of the Spanish navy, if they were permitted to enter the bay unmolested, under an asserted destination to Corunna. Sir William Scott, after holding cheese to be a contraband article, says: "Corunna is, I believe, itself a place of naval equipment in some degree; and if not so exclusively, and in its prominent character, yet, from its vicinity to Ferrol, it is almost identified with that port. These ports are situated in the same bay, and, if the supply is permitted to be imported into the bay, it would, I conceive, be impossible to prevent it from going on immediately, and in the same conveyance, to Ferrol. There is, in this respect, a material difference between the present case and the case which happened yesterday," (The Frau Margaretha, 6 C. Rob. Adm. 92,) "of similar articles going to Quimper. That port, though in the vicinity of Brest, is situated on the opposite side of a projecting headland or promontory, so as not to admit of an immediate communication, except by land carriage. Without meaning to interfere with the principles of that decision, I think myself warranted to consider this cargo, on the present destination, as contraband, and, as such, subject to condemnation." On the principle of this decision, the cargo of the Peterhoff was lawfully captured, and liable to condemnation, even though it was honestly destined to the port of Matamoras, to be there used or sold.

The principle thus maintained in the case of The Zelden Rust, is recognized in the decision of the same judge in the case of The Maria, 6 C. Rob. Adm. 201. In that case, the French then enemies of Great Britain, were in possession of one bank of the river Weser, the neutral port of Bremen being on the other bank; and a blockade of the river had been instituted by Great Britain. The cargo of the vessel was sent from Bremen, in lighters, to the Jade, to be shipped to America, while the vessel herself went in ballast from the Weser to the Jade, and there took on board her cargo. In delivering his opinion, in that case, Sir William Scott says (page 203): "A blockade imposed on the Weser must, in its nature, be held to affect the commerce of Bremen; because, if the commerce of all the towns situated on that river is allowed, it would be only to say, in more indirect language, that the blockade itself did not exist. It cannot be doubted, then, on general principles, that these goods would be subject to condemnation, as hav-

ing been conveyed through the Weser; and whether that was affected in large vessels or in small, would be perfectly insignificant. That they were brought through the mouth of the blockaded river, for the purpose of being shipped for exportation, would subject them to being considered as taken on a continued voyage, and as liable to all the same principles that are applied to a direct voyage, of which the terminus a quo and the terminus ad quem are precisely the same as those of the more circuitous destination." Thus, the court of admiralty of Great Britain condemned contraband goods going to the neutral port of Corunna, where there was no suspicion of there being destined to the hostile port of Ferrol, upon the sole ground that it would be impossible to prevent those articles, when they reached Corunna, from going immediately to Ferrol, if they were permitted to enter, unmolested, waters that were common to both of those ports. And the same court condemned goods which were carried from the neutral port of Bremen, through the mouth of the blockaded river, on which it is situated, upon the ground that the blockade could not exist for any practical purpose, unless the commerce of Bremen, although neutral, was to be affected by it; and it held the doctrine that, if goods could not reach the sea from Bremen without going through the blockaded waters, they could not depart from Bremen at all. The necessity of the case was held, under the law of nations, to justify, in the one case, the stoppage of commerce in contraband articles to Corunna; and, in the other case, the stoppage of all commerce from Bremen. The justification for the rule urged in the one case was, that the articles, if permitted to go to Corunna, could not be prevented from going to Ferrol; and, in the other case, that the blockade could not exist without affecting the commerce of Bremen. These principles, if applied by this court to the case of the Peterhoff, as being necessary for the maintenance of the belligerent rights of the United States, with respect to the neutral waters off the mouth of the Rio Grande, and to commerce with the port of Matamoras, would justify the condemnation of the cargo, not only the contraband portion, but that which was not contraband. I am not prepared, however, to apply those principles to this case, or to express an approval or disapproval of their soundness. The necessities of the case do not, in my opinion, demand a decision upon those points.

It is apparent, from the terms of the correspondence of October 27, 1862, between James I. Bennett & Wake, and Pile, Spence & Co., that the adventure of the Peterhoff, in taking out a cargo to the Rio Grande, with the intention of bringing home, in return, a cargo of cotton, was an adventure in which James I. Bennett & Wake, as brokers, and Pile, Spence & Co., as representing Joseph Spence, a member of that firm, and the owner of the Peterhoff, were to be interested jointly. No charter of the vessel from Spence to any person has been produced, unless the correspondence referred to is to be considered as a charter. James I. Bennett & Wake were employed as brokers by Pile, Spence & Co., on behalf of Spence, to obtain the outward cargo for the vessel, and, as such brokers, their names appear on the manifest. Captain Jarman says that he was appointed to the command of the vessel by Spence, and that she was delivered to him by Spence. According to the well settled rule of law, therefore, Spence must be held responsible for all that was done by his agent, Captain Jarman, and for the employment of the vessel by Captain Jarman, knowingly, in carrying contraband articles to the country of the enemy, irrespective of the fact that Spence himself shipped on board of her, as an adventure, 90 coils of tarred hemp rope, which are found to have been contraband articles going to the country of the enemy, and also the cotton press, and the smiths' bellows and anvils, and various other articles. Where the vessel belongs to the owner of the contraband articles, or where there are circumstances of fraud as to the papers or the destination of the vessel or the cargo, and thus an attempt, under colorable appearances, to defeat the rights of a belligerent, the vessel which carries the contraband articles will be condemned, and the penalty on the vessel will not be limited merely to a loss of freight and expenses. The Ringende Jacob, 1 C. Rob. Adm. 89; The Jonge Tobias, Id. 329; The Franklin, 3 C. Rob. Adm. 217. So, too, the vessel will be condemned, not only where her owner is privy to the carriage of contraband, but where the master of the vessel, as the agent of such owner, interposes so actively in the fraud as to consent to give additional color to it by sailing with false papers. The Franklin, 3 C. Rob. Adm. 217, 221, note; The Mercurius, 1 C. Rob. Adm. 288, note; The Edward, 4 C. Rob. Adm. 68; The Neutralitel, 3 C. Rob. Adm. 295; Carrington v. Merchants' Insurance Co., 8 Pet. [33 U. S.] 495, 520, 521. So, also, if the owner of a vessel places it under the control of a master, who permits it to carry, under false papers, contraband goods, ostensibly destined to a neutral port, but in reality going to the country of the enemy, he must sustain the consequence of such misconduct on the part of his agent. The Ranger, 6 C. Rob. Adm. 125; Jecker v. Montgomery, 18 How. [59 U. S.] 116, 119; The Mercurius, 1 C. Rob. Adm. 80. A neutral owner of a vessel is, as a general rule, held responsible for all the acts of the master of his vessel, committed in violation of the rights of a belligerent. The Vrouw Judith, 1 C. Rob. Adm. 150; The Columbia, Id. 154; The Hiawatha, 2 Black [67 U. S.] 635, 678. I can come to no other conclusion in this case than that the acts of

Captain Jarman, in signing bills of lading of the character of those in the present case, and in sailing with a manifest giving no adequate information as to the contraband goods on board, and in causing the destruction of papers, and in fabricating the absurd story about the white powder, and, in addition, in testifying that the vessel, the whole of whose cargo, except the cases directed to Burchard & Co., was, as he says, represented by Almond, Redgate, Bowden and himself, had no goods on board which he considers contraband of war, and in averring his inability to specify the contents of his cargo, when he himself was the indorsee of bills of lading covering contraband articles, must be regarded as evidence that he entered upon a systematic course of concealment of the real character of the contraband articles on board, so as to subject the vessel to condemnation as the result of such fraud, when, under other circumstances, she might go free, even though her cargo was confiscated. Moseley, Contr. War, 97, 98. A master is, in time of war, bound to know the contents of his cargo, and cannot be permitted to aver his ignorance of the contents of contraband packages on board of his vessel. The Oster Risoer, 4 C. Rob. Adm. 199.

The capture of the Peterhoff on the high seas, at the place of her capture, was lawful. From the moment a vessel, having on board contraband articles, which have a destination to the enemy's country, leaves her port of departure, she may be legally captured; and it is not necessary to wait until the goods are actually endeavoring to enter the enemy's country, the penalty attaching the moment the illegal transportation commences. Halleck, Int. Law, c. 24, § 7, p. 573; 2 Wildm. Int. Law, 218; 1 Duer, Ins. 626, § 7; The Imina, 3 C. Rob. Adm. 167; The Trende Sostre, 6 C. Rob. Adm. 390, note; The Columbia, 1 C. Rob. Adm. 154; The Neptunas, 2 C. Rob. Adm. 110.

An appeal to the supreme court was taken in this case within ten days after the decree was made, and the vessel was taken by the navy department, for the use of the government, at an appraised valuation of $80,000. No application was made to the court, on the part of the claimants, for leave to put in further proof, and most clearly this is not a case where the privilege of further proof would be tendered to the claimants.

The vessel and cargo are, both of them, condemned.

[NOTE. On appeal to the supreme court the decree of this court was reversed, except as to a part of the cargo, and as to that affirmed. 5 Wall. (72 U. S.) 28. Pending the appeal in the supreme court, the district court refused to order the costs of the prize commissioner to be paid out of the funds of this case, holding that the appeal removed the cause from that court, and placed the prize property exclusively under the control of the appellate court. Case No. 11,025.]

Case No. 11,025.

The PETERHOFF.

[Blatchf. Pr. Cas. 620.] [1]

District Court, S. D. New York. Jan., 1865.

APPEAL IN PRIZE CASES—EFFECT UPON THE PROPERTY—CASES PENDING APPEAL—CAPTURE ON LAND—TITLE.

1. An appeal to the supreme court from the decree of this court in a prize cause removes the cause from this court, and places the prize property exclusively under the control of the appellate tribunal.

2. Pending such an appeal, this court refuses to order the costs of the prize commissioner to be paid out of the funds in this case.

3. The distinction stated between the effects of a capture of property on land by a belligerent and of a capture of prize property at sea.

4. In the former case the title passes as soon as the capture is complete. In the latter the right of property remains unchanged until a final decree of condemnation by the courts of the country of the captors.

In admiralty.

BETTS, District Judge. This suit was terminated in the district court on the last day of July term, 1863, by the condemnation as prize of the steamship and cargo. [Case No. 11,023.] A final decree of forfeiture was entered against the vessel and cargo on the 1st of August thereafter [Id. 11,024], and on the 8th day of the same month the cause was removed, by appeal, to the supreme court of the United States, pursuant to the provisions of the act of congress "to regulate proceedings in prize cases," approved March 3, 1863 (12 Stat. 759, §§ 7, 8). The cause was thereupon removed, by such appeal, to the supreme court, where it is now pending, awaiting, on the docket of the court, its regular course of hearing and final determination.

The removal of the cause from the district court necessarily takes from that court all authority over the subject-matters involved in the suit, and places them exclusively under the control of the paramount tribunal. The latter body alone has capacity to change the position or use of the res, while it is under contestation. In matters of prizes held for adjudication, the tenure of the property seized is eminently qualified, provisional, and destitute of absolute ownership. The captors, by the universal rule of the modern law of civilized nations, became only keepers of the arrested property, for the purpose of submitting it to judicial inquiry and judgment; the question of its confiscability for violation of the laws of war preceding and overriding all other questions of title or possession by the captors. It would constitute an undeniable outrage on those laws for the government of the United States, through any of its departments, executive, judicial or military,

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

to appropriate this prize or its proceeds, mero motu, without the preliminary of a legal scrutiny and condemnation, prosecuted in due form of legal procedure. The distinction between the capture of property by a belligerent during war waged on land, and a prize seizure, is as definitely marked in consequence and effect, as if the two had no common foundation of authority. 1 Kent, Comm. 101, 102, note 6; Halleck, Int. Law, c. 30, §§ 1, 4. When property is captured on land by a belligerent, the title passes and is vested so soon as the capture is complete, and the property then belongs absolutely to the sovereign. In regard to a prize taken at sea, the right of property is not changed by the seizure alone. The prize remains in the hands of the captor, lawfully sequestrated, under a species of trusteeship, awaiting a trial at law in the courts of the nation seizing it. While undergoing the processes of law necessary to ascertain its character, it is exempt from all power of the captors other than that of safe-keeping for the purposes of trial, and of determining its culpability. Until the decree of the prize court has transferred the title of the prize to the capturing power, the lawful proprietorship continues with the original possessor, subject to no other use or appropriation by its occupant than that of safe-keeping under arrest, pending judicial proceedings seeking its forfeiture.

Manifestly, in that status of the property, it cannot be lawfully divested of its condition of pledge, so long as the question of its lawful ownership is undetermined and rests under judicial advisement. These considerations are irrefragable, in respect to the functions of a court of dernier resort within whose cognizance the property may be placed; and more especially there is no shadow of authority existing in a tribunal from whose jurisdiction a subject of litigation is carried by appeal to a superior one, to recur to and exercise a renewed power over the subject-matter, after it has been transferred and submitted to the exclusive judgment of the ultimate tribunal.

It is within the competency of the supreme court, on the appeal in this cause, to decree the suit null and void; to order a new trial; to deny the recovery of costs, or to adjudge, at its discretion, any modification of the forfeiture pronounced against the prize by the district court, which the court of last resort may regard as equitable and just. The inferior court cannot lawfully intercept that corrective authority of the superior court, and prevent, by otherwise disposing of the res itself, while the appellate court may be in the act of rectifying the injury inflicted on the appealing party, that order of remedy which is most appropriate and desirable to the aggrieved suitor.

There is no effective judgment against the prize property or its proceeds remaining on the records of the district court. In principle, its orders to devote the proceeds of the captured property to the payment of the costs and expenses of the suit, while the cause remains within the control of the supreme court, for final decision, can be no more appropriate and available than directions from it to make full distribution of the proceeds of the prize among the captors, together with costs.

It seems to me a misapprehension of the case of The Collector, 6 Wheat. [19 U. S.] 194, to regard it as laying down the doctrine, that after an appeal to the supreme court, the funds connected with the cause still remain subject to the order and disposal of the inferior court. On the contrary, the opposite conclusion appears to be plainly stated. The inferior court remains the custodian of the proceeds in the cause under litigation while it is pending in the supreme court, but the inferior court is expressly inhibited from making any order respecting the property whether it has been sold and the proceeds paid into court, or whether it remains specifically, or its proceeds remain in the hands of the marshal. The property or fund in this suit is undoubtedly in the keeping or charge of the district court, or of the sub-treasury, as its actual depository, but the lawful control of it belongs to the supreme court, in all particulars.

These principles will preclude my granting the motion of the counsel on the part of the prize commissioner, for an order directing the payment of the costs taxed in his favor in this case out of the funds deposited in charge of this court, and it is, accordingly, not necessary to discuss the further question presented, and much urged, respecting the right of the commissioner to have those costs declared to be payable out of the proceeds of the cause in court, or, in case of the deficiency of that fund, out of the judiciary fund in the treasury. It is understood that that question is to come before the court, in other cases, now on appeal from this court to the supreme court, in which a decision upon the point may become practically important. and not be merely speculative and inactive. The consideration of the question may, I think, more appropriately abide an occasion which shall demand its determination.

I am by no means prepared to accept the qualified provision in the 13th section of the prize act of June 30, 1864 (13 Stat. 311), that the district court notwithstanding the appeal to the supreme court "may still proceed to make a decree of distribution, so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein," as giving authority to the district court to pay out of its registry or charge the moneys or fund under appeal in the supreme court. I am inclined rather to regard it as a strongly implied inhibition to the district court against intermeddling in any way with the actual dis-

posal of the funds left in its charge, except in execution of positive directions of the supreme court.

Case No. 11,026.

PETERKIN v. NEW ORLEANS.

[2 Woods, 100;[1] 22 Int. Rev. Rec. 11; 23 Pittsb. Leg. J. 90.]

Circuit Court, D. Louisiana. Nov. Term, 1875.

MUNICIPAL CORPORATIONS—SEIZURE OF TAXES AND REVENUES ON EXECUTION—BANK DEPOSITS.

1. The taxes and public revenues of a municipal corporation cannot be seized on execution by its creditors, although the corporation is in debt and has no means of payment except the taxes which it is authorized to collect.

2. Neither the place nor manner in which the revenues of a municipal corporation are kept divests them of their public character or subjects them to be diverted, at the suit of creditors, from the purposes for which the law authorized them to be collected.

3. Such revenues are protected from seizure or attachment by creditors, although they may have been deposited in a bank for safe keeping, and the bank has thereby become the debtor of the corporation for the amount so deposited.

[Cited in New Orleans v. Morris, Case No. 10,182.]

4. An act of the legislature required a municipal corporation to levy each year a special tax sufficient to pay the annual interest on certain of its designated bonds: *Held*, that the act authorized and required the levy of a tax to pay interest after the maturity of the bonds as well as before.

Heard on motion to dissolve attachment. The plaintiff [W. S. Peterkin] being the holder of certain bonds issued by the city of New Orleans in aid of the Opelousas Railroad and of the Jackson Railroad, and the bonds having become due and remaining unpaid, had reduced the same to judgment in this court. In pursuance, as it is claimed, of the original act which authorized the issue of the bonds, the city had levied a tax to pay the interest thereon, and a fund for this purpose, amounting to $105,000, had been deposited by the city in the Louisiana National Bank. It was deposited in the bank to the credit of the fund for the payment of the interest on the bonds, but was not sufficient to pay the interest on all the bonds. The plaintiff having, as stated, recovered a judgment both for the principal and interest due on his bonds, had attached this fund and served notice of garnishment upon the Louisiana National Bank. The motion was to dissolve this attachment.

B. F. Jonas, City Atty., for the motion.

T. J. Semmes, contra.

WOODS, Circuit Judge. It is claimed in behalf of the city that the taxes and public revenues of a municipal corporation cannot be seized under execution against it, and that the doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt and has no means of payment but the taxes which it is authorized to collect. Dill. Mun. Corp. § 64; Egerton v. Third Municipality, 1 La. Ann. 435; Third Municipality v. Hart, 6 La. Ann. 571. This, as a general rule, is conceded; but it is claimed that the circumstances of this case make it an exception.

1. It is said that the city having deposited this money in a bank, the bank has thereby become the debtor of the city, and the fund has lost its distinctive character as public revenue and become simply a debt due the city from the bank, and subject to garnishment by any creditor of the city. In support of this view the cases of Stetson v. Gurney, 17 La. 162, and Norris v. Hero, 22 La. Ann. 605, are cited, where it is held that money deposited in a bank by an agent in his own name cannot be identified, and becomes a debt due the depositor from the bank, and is not a debt due the principal.

This argument applies to all the funds of the city raised by taxation for all purposes. So that if we give this theory full force, it follows that whenever a municipal corporation, either from necessity or as a matter of convenience, deposits its revenues in a bank to be drawn upon for public uses, no matter to what purpose appropriated, they are liable to be seized by its creditors; that funds for feeding prisoners, sustaining hospitals, lighting the streets, keeping a supply of water for the extinguishment of fires, paying the police, etc., are all subject to be appropriated by any enterprising creditor who chooses to make the necessary effort. If funds raised for the payment of interest can be seized because the city has deposited them in a bank, it follows that funds raised for any of the other purposes named may also be seized. I do not think the manner or place in which the public revenues of a municipal corporation are kept divests them of their public character, or subjects them to be diverted from the purposes for which, and for which only, the law authorized them to be collected. In my judgment, a municipal corporation stands in a different plight from an individual in such a case. The officers of a city charged with the execution of a great public trust, on which depend the comfort, safety, lives and property of the inhabitants, cannot, by the manner in which they keep the public revenues, subject them to seizure by the public creditors, and thus defeat the very purposes for which the municipal body was created. The fact, therefore, that the city made the Louisiana National Bank the depository of its public revenues, does not subject them to seizure and garnishment.

2. It is claimed that the law authorizing the city to issue the bonds held by plaintiff, only authorized the city to levy a tax to pay the interest thereon until their maturity; that

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

the fund attached was for interest on the bonds after maturity, and is therefore a property of the city which is not applicable by law to any specified purpose, and is therefore subject to seizure by any creditor who has a judgment against the city. But the law does not so read. It provides that "a special tax on real estate and slaves shall be levied in January of each year sufficient to pay the annual interest on said bonds, * * provided that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of 6 per cent. per annum on the stock of the company held by the city." Under this act, the authority to levy a tax for the payment of the interest upon the bonds is just as clear, and the duty just as imperative, after the maturity of the bonds as before, unless the stock for which the bonds were issued pays dividends of 6 per cent., which is not and never has been the case. If the city refused to levy a tax for interest after the maturity of the bonds, I think a bondholder who had reduced his bonds to judgment might have the writ of mandamus to compel the city to levy and collect the tax. The collection of the money seized was, therefore, authorized by law. It was collected for a special purpose, and it cannot be diverted from that purpose by the vigilance and enterprise of the city's creditors. The officers of the city could be compelled by mandamus, at the instance of creditors having judgments on their bonds, to apply the funds so raised to the payment of interest pro rata on all the bonds of this class. It therefore follows that no single creditor has the right to seize the whole fund for his sole benefit and apply it to the payment of the principal as well as the interest of his debt. This fund must be applied to the purpose for which the law authorizes its collection, and no other. The attachment must therefore be dissolved.

Case No. 11,027.

Ex parte PETERS.

[4 Dill. 169; 4 Law & Eq. Rep. 232.] [1]

Circuit Court, W. D. Missouri. Aug., 1877.

HABEAS CORPUS—REV. ST. § 1024, CONSTRUED—CUMULATIVE JUDGMENTS.

1. The petitioner for the writ of habeas corpus entered a general plea of guilty, in the district court, to an indictment containing four counts, and setting forth at least two distinct offences of a similar character, and was sentenced to two years imprisonment upon each count, each term commencing at the expiration of the preceding term; after two years, but before the expiration of four years, he applied to be discharged on habeas corpus, on the ground that the court had no authority to render cumulative judgments: *Held*, that the judgment of the court, when collaterally assailed, was not wholly void, and was good to the extent of four years imprisonment at least.

[Cited in Ex parte Peters, 12 Fed. 462.]

2. Section 1024 of the Revised Statutes construed and applied.

[Cited in Ex parte Hibbs, 26 Fed. 427.]

This is a petition by F. W. Peters for a writ of habeas corpus. The indictment on which petitioner was convicted in the district court of the United States, contains four counts. The first count charges that Peters, on the 28th day of October, 1874, did forcibly break into the post-office at Bucklin, Linn county, Missouri, with the intent to commit larceny therein. The second count charges that the defendant, Peters, on the same day, did steal a certain letter, containing $750, out of the same post-office. The third count charges that Peters, on the 12th day of November, 1874, did forcibly break into the post-office and the building used in part as the post-office at Unionville, Putnam county, Missouri, with the intent to commit a larceny therein. The fourth count charges the stealing, at the same place, and on the same day, and out of the last mentioned post-office, by defendant Peters, of two letters, containing $157 in money.

The defendant pleaded guilty, and was sentenced as shown by the return to the writ of habeas corpus, which return is as follows:

"Now, at this day, comes the warden of the penitentiary of the state of Missouri, and makes return of the writ of habeas corpus issued by order of this court upon the application of said F. W. Peters therefor, and states and certifies to this honorable court, that said F. W. Peters is now held and detained within said penitentiary, and under the custody of the undersigned as the warden thereof, under and by virtue of a commitment issued out of the district court of the United States for the Western district of Missouri, in pursuance of the conviction and sentence of said Peters by said court, which said commitment is as follows:

" 'United States of America, Western District of Missouri. In the District Court of the United States for the Western District of Missouri. Be it remembered: That, at a regular term of the district court of the United States for the Western district of Missouri, begun and holden in the city of Jefferson, in said district, on the first Monday, the 1st day of March, A. D. 1875, and on Monday, March 8th, the following proceedings were had: "Monday, March 8th, 1875. The United States v. F. W. Peters, alias John G. Crawford. Indictment for breaking into post-office and stealing letters therefrom. On this day comes the district attorney, on behalf of the United States; and also comes the defendant, F. W. Peters, alias John G. Crawford, in his own proper person, and by his attorney, N. C. Kouns, and, with leave of court, withdrew his plea of not guilty, heretofore recorded herein, and for plea says he is guilty as char-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 4 Law & Eq. Rep. 232, contains only a partial report.]

ged in the indictment preferred against him; and it being forthwith demanded of the defendant if he has anything further to say why the court here should not proceed to pronounce judgment against him, says he has nothing further to say than he hath said. And thereupon, all and singular the premises being seen and fully understood, it is adjudged that the said F. W. Peters, alias John G. Crawford, be imprisoned and confined to hard labor for the term of two years in the Missouri penitentiary, under each count, of four counts of the indictment; the first term to commence on the 8th of March, 1875; the second term to commence on the expiration of the first term of two years; the third term of two years to commence on the expiration of the second term of two years; and the fourth term of two years to commence on the expiration of the third term of two years; and said four terms to constitute a continuous imprisonment of eight years. And it is further adjudged that defendant pay a fine of one dollar." Whereupon the prisoner, F. W. Peters, alias John G. Crawford, is remanded into the custody of the marshal, who is commanded forthwith to deliver the said F. W. Peters, alias John G. Crawford, at the penitentiary of the state of Missouri, into the custody of the warden thereof, together with a copy of this judgment. In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at my office, in the city of Jefferson, in said district, this 8th day of March, A. D. 1875. [Signed] Alfred S. Krekel, Clerk United States District Court, Western District of Missouri. [Seal.]

" 'A true copy: George Smith, U. S. Marshal. By S. O. Tenny, Deputy.'

"He further states that said F. W. Peters, alias John G. Crawford, under and by virtue of said commitment, was delivered into the custody of the warden of said penitentiary by the United States marshal, on the 9th day of March, 1875, and that he has since that time been imprisoned and confined at hard labor in said penitentiary; and that his term of imprisonment, according to said commitment, and the judgment, and the sentence therein recited, will not expire until the 8th day of March, 1883. All of which I hereby certify. J. R. Willis, Warden of the Missouri Penitentiary."

The facts set forth in the return of the warden were not contested. Section 1024 of the Revised Statutes, referred to in the opinion, is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

N. C. Kouns, for petitioner.

A. W. Mullins, Dist. Atty., and M. T. C. Williams, for the United States.

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

DILLON, Circuit Judge. The case was submitted at the term, and as it involved an important question, time was taken to consider it.

I have given it considerable reflection, and have submitted the record and the arguments to Mr. Justice Miller. He was strongly inclined to the opinion that the most favorable view to the petitioner is that at least two distinct offences were charged, one in the first and one in the third count; that after conviction, by force of section 1024 of the Revised Statutes, these two offences must be treated, in this proceeding, as having been "properly joined," the defendant having taken no exception to the joinder at or before the trial, but having pleaded guilty to the whole indictment, and that, as a consequence, the judgment of the court is good to the extent of four years imprisonment at least; and that since that period has not elapsed, the petitioner is not entitled to his discharge on habeas corpus at this time.

Without going into the learning as to the power to render cumulative judgments in criminal cases, either in felonies or misdemeanors, or whether the offences charged against the petitioner are felonies or misdemeanors, nor what is the effect, logical or legal, of section 1024 of the Revised Statutes upon the rule or doctrine of the common law in this behalf, I concur in the view which impressed Justice Miller as the sound one, and which is above indicated; and I hold that the petitioner is not entitled to his discharge at this time. Whether he can successfully apply to be discharged on habeas corpus at the end of four years, we do not determine.

This case coming before us on habeas corpus, is distinguishable from U. S. v. Maguire [Case No. 15,708], and, besides, the whole question as to the power of the federal court to render cumulative judgments was in that case expressly left open for further consideration. In this collateral proceeding it must be taken, for the reasons above suggested, that at least two offences were properly joined; and that, although the judgment of the court may have been erroneous, it was not void. The petitioner must be remanded. Ordered accordingly.

[NOTE. The two terms of two years each having expired, the petitioner renewed his application for discharge, alleging that the other sentence of four years was illegal, owing to the fact that distinct offences were improperly joined. The court held, however, that separate offences, growing out of the same transactions, may be joined, and the prayer of the petitioner was denied. 12 Fed. 461.]

See Ex parte Shaffenburg [Case No. 12,696]; Ex parte Parks, 93 U. S. 18.

Case No. 11,028.

PETERS et al. v. BOWMAN et al.[1]

District Court, N. D. Mississippi. June, 1874.

ADMINISTRATORS C. T. A.—POWER TO SELL LANDS —EQUITY—CROSS BILL.

[1. Where land is directed by will to be sold and the executor appointed to execute the trust fails to qualify, the sale may be made, under the Mississippi statute (Code 1871, § 1194), by the administrator with the will annexed, and a good title conveyed.]

[2. One who purchases land with knowledge that the title is defective, relying upon his vendor's warranty and promise to have the defect cured, cannot, when suit is brought to enforce a vendor's lien in favor of his vendor's grantor, maintain a cross-bill, setting up the defect in his vendor's title and praying a rescission of the sale under which his vendor acquired the land.]

[This was a bill in equity by W. Y. Elliott, administrator with the will annexed of Jonathan Bostick, and D. W. Bowman, against J. R. Chalmers and wife, George B. Peters and others, to enforce a vendor's lien upon real estate. The defendants Chalmers and wife and Peters filed a cross bill, praying rescission of contract of sale, and for the declaration of a lien in their favor on account of certain money paid by them, and for improvements made by them. Complainants demurred to the cross-bill and a hearing has been had thereon.]

H. T. Ellett, for complainants.

H. Craft and Lamar & Mays, for defendants.

HILL, District Judge. The questions now presented arise from the complainants' demurrer to the cross-bill, filed by J. R. Chalmers and wife, and George B. Peters, a portion of the defendants, to the original bill. The cross-bill contains the following allegations: Jonathan Bostick and D. W. Bowman were the joint owners of the lands described in the pleadings. Bostick made and published his last will and testament, which has been proven and admitted of record, in which he nominated and appointed said Elliott as executor of his will, so far as the same related to his estate and business to be transacted in the state of Tennessee, and A. B. Guinn as executor of his estate in Mississippi. The testator had his residence in Mississippi, but died in Tennessee. The will, among other things, provided that the lands mentioned, and other joint property, consisting of stock, &c., belonging to testator and Bowman, should remain on the place, and be managed by Bowman and Guinn, the executor, until Bowman should desire a sale, when Guinn should unite with Bowman in making a sale and conveyance. That, on the 25th Jan., 1869, Bowman and W. Y. Elliott, the Tennessee executor, did make a sale and conveyance of the land to defendants, Jaquess Brothers, receiving therefor $4,000 cash, and the notes of the vendees for $24,000, in equal annual payments, with six per cent. interest from date, the one first falling due having been paid; and that on the 26th Jan., 1870, Jaquess Brothers sold the land to George B. Peters, for the sum of $11,925 cash, and an agreement upon the part of Peters to pay the three outstanding notes so given by Jaquess Brothers to Elliott and Bowman, which assumption upon the part of Peters it is alleged was not in writing, and therefore void. Chalmers and wife were put in possession of the land, under an agreement with Peters to occupy and cultivate it, and to pay off the balance due and so assumed, and then to have one-half the land. When the sale was made by Elliott and Bowman to Jaquess, a deed of conveyance, with warranty of title, was enacted, retaining in the deed a lien for the payment of the purchase money. When the sale was made by Jaquess Brothers to Peters, a deed of conveyance with warranty of title was made by them to and accepted by Peters, who knew the true condition of the title, and defects, if any, and relied upon the warranty and the promise of the vendors that the necessary proceedings would be had to perfect the title. The cross-bill alleges that Elliott, being the executor of the estate in Tennessee only, had no power to sell and convey the interest of Bostick in the lands; that the Jaquesses have become insolvent; that Chalmers and wife have made large and valuable improvements upon the land, greatly exceeding the rents and profits, and prays that the contract be rescinded, and that the amount so paid by Peters to Jaquess Brothers, with interest, be declared a lien upon the land, together with the value of the improvements so made by Chalmers and wife. To all of which Elliott and Bowman demur, and assign for causes of demurrer: 1st. That this court has no jurisdiction of subject matter or parties to grant the relief prayed for. 2nd. That said cross-bill does not contain any matter of equity or other thing upon which this court can grant any relief against the defendants thereto or either of them. 3rd. That said cross-bill is manifestly brought merely for the purpose of delaying the trial of the original cause without disclosing any substantial merits.

The main ground relied upon for the relief prayed in the cross-bill is that Elliott had no authority under the will to make the sale and conveyance of the Bostick interest in the land. There is no charge of fraud, mistake, or other cause usually held sufficient for the rescission of contracts of sale of real or other estate. On the contrary, it is stated that Peters, or Chalmers his agent, knew of the defects complained of and relied upon the promise of the vendors, the Jaquesses, to make the title good. It is unnecessary to enquire whether or not Peters is entitled under the facts stated in the bill to a rescis-

[1] [Not previously reported.]

sion of the contract, as against his vendors, the Jaquesses. Were the cross-bill filed by the Jaquesses, it is doubtful whether it could be maintained as a bill for rescission of the contract. Whilst, as already stated, a specific performance might not be decreed until any defect in the title should be supplied, Elliott, as executor in Tennessee, is not authorized to make the sale and conveyance of the lands in Mississippi, or to do any other act in relation to the estate here. But on the failure of Guinn, the executor, nominated for the estate here, to qualify and act as such, Elliott might as well as any other person obtain from the proper court here letters of administration with the will annexed, and as such, under the laws of this state, execute any of the powers under the will not intended as a special personal trust. When land is directed to be sold by will, and the executor or person appointed to execute the trust shall fail, the sale shall be made by the administrator with the will annexed, or, in other words, the administrator with the will annexed, in such case, succeeds to the powers of the executor. See Code 1857, p. 458, art. 136; Code 1871, p. 236, § 1194. Whilst it may be true that the court would refuse to decree a specific performance only upon condition of the conveyance of a perfect title, and which the vendor would have an opportunity to procure. But the original bill is not filed to enforce the contract made between Jaquess and Peters, but that between Elliott and Bowman and the Jaquesses. There is no allegation that they accepted, and rely upon the assumption made by Peters to the Jaquesses. It is a mere statement of the subsequent contract made between the Jaquesses and Peters, and that Chalmers and wife, under same agreement with Peters, are in possession of the land. Peters and Chalmers and wife are proper parties, only that they may be subject to such decree and order of the court as may be necessary to place the purchasers, should the land be sold, in possession and no farther, so far as enforcing the original contract is concerned. They are further necessary parties to enable them to protect any interest they may have received under the purchase from the Jaquesses; and as such might show any facts reducing the sum due, &c., but all of which is matter of defence to the original bill, and not properly relief under cross-bill. Whenever the direction of the will is that the lands shall be sold, the administrator with the will annexed may make the sale, has been uniformly held by the supreme court of this state. If, therefore, Elliott has properly qualified as administrator with the will annexed in this state, he had the power to make the sale and conveyance, and if the conveyance made is defective, it may be corrected by a proper deed. The will directed the sale to be made when Bowman so desired, which it is manifest he did do by the sale made. The result is that the demurrer must be sustained and the cross-bill dismissed.

[NOTE. Subsequently the cause was submitted for final hearing upon the bill, amended bill, answer, exhibits, and proofs. It was decreed that complainants were entitled to the payment of the unpaid purchase money, with interest, and, in default of such payment by defendants, to have the land sold for that purpose. A reference was had to a master to ascertain the amount of unpaid purchase money, with interest. Case No. 11,029. An appeal was then taken to the supreme court, where it is reported under the title of Peters v. Bowman, and where the decree of this court was affirmed. 98 U. S. 56.]

Case No. 11,029.

PETERS v. BOWMAN et al.[1]

District Court, N. D. Mississippi. June, 1875.[2]

ADMINISTRATORS C. T. A.—EXECUTION OF POWER OF SALE—RIGHTS OF VENDEE—WILLS—DEVISES TO CHARITABLE USES.

[1. Where land is directed to be sold by will, and the executor appointed to execute the trust fails to qualify, the sale may be made, under the Mississippi statute (Code 1871, § 1194), by an administrator with the will annexed.]

[2. One who purchases land with knowledge of defects in his vendor's title stands in his vendor's shoes, with reference to any right to have the title made good by his vendor's grantor.]

[3. The Mississippi statute prohibiting devises to religious or ecclesiastical corporations or for their use, or for the purpose of being given or appropriated to charitable uses (Code 1857, art. 55, p. 302), does not apply to a devise for the purpose of establishing a female school not subject to denominational control.]

[4. Where a will directs the executor to sell lands and, after paying debts, expenses, etc., to pay over the remaining cash assets to trustees for the purpose of establishing a charitable institution, the fact that the devise is invalid under the laws of the state, so far as the charitable purpose is concerned, does not operate to invalidate the sale made by the executor.]

[This was a bill in equity by W. Y. Elliott, administrator with the will annexed of Jonathan Bostick, and D. W. Bowman, against J. R. Chalmers and wife, George B. Peters, and others, to enforce a vendor's lien upon real estate. A cross-bill was filed by some of the defendants, and a demurrer thereto was sustained at the June term, 1864. See Case No. 11,028. The cause is now submitted for final hearing upon the bill, amended bill, answers, exhibits, and proofs.]

H. Ellett, for complainants.

J. R. Chalmers, H. Craft, and E. Mays, for defendants.

HILL, District Judge. This cause is now submitted upon final hearing upon the bill, amended bill, pro confesso answers, exhibits, and proofs, and from which it appears that D. W. Bowman, being the owner of the lands

[1] [Not previously reported.]

[2] [Affirmed in 98 U. S. 56.]

described in the bill, sold an undivided half interest therein to Jonathan Bostick, evidenced by a memorandum thereof in writing signed by Bowman and himself, and by which Bostick became vested with an equitable title to the one-half interest in said lands. Bowman and Bostick were also joint owners of a considerable amount of personal property which it was agreed was to be employed in cultivating said lands for their joint benefit, and which was so employed. Bostick, being the owner of a considerable estate, real and personal, a portion of which was situated in Tennessee and a portion in this state, on the 22d Nov., 1869, made and published his last will and testament, which has been duly established and admitted of record in the proper courts of both states, and in which complainant Elliott was nominated as the sole executor of the estate in Tennessee, and A. B. Guinn sole executor of the estate situated in this state. Guinn died before the testator. Elliott qualified as executor in Tennessee, and obtained from the probate court of Tunica county, in which the will was admitted to record, letters testamentary, and afterwards letters of administration with the will annexed, and proceeded to administer the estate here. That portion of the will which relates to the lands in controversy directs that his executor in Mississippi shall co-operate with said Bowman in the management of his interest in the Bowman lands, in leasing, renting, or cultivating said lands, jointly with said Bowman, until Bowman should wish to make sale, and then to join Bowman in making sale and title to the same, and all property jointly owned by them on said plantation, said sale to be made on such terms as to said executor might seem best, and that in making said sale, as to the time and manner, the same should be done according to the then existing contract and understanding between the testator and Bowman; and further that, if deemed practicable, that the plantation and property should be operated jointly with Bowman until the testator's income from it and his other estate and cash assets should be sufficient to pay off his debts, but which indebtedness he did not charge upon any particular portion of his estate. The testator further directed that the cash assets which remained after the payment of his debts and expenses of administration, including the sale of the Bowman lands, should be paid over to certain trustees named, and be by them applied to the purchase of grounds and the erection of buildings for a female school at or near Triune, Williamson county, Tennessee.

Complainant Elliott, acting under what he supposed to be the power conferred under said will with said Bowman, on the 25th Jan., 1869, sold lands to the defendants, Jaquess Bro's, for the sum of $4,000, cash, and the further sum of $24,000 in four payments of $6,000 each, payable 1st Jan., 1870, '71, '72, and '73, with six per cent. interest from date. Bowman and complainant then executed their joint deed of conveyance to the purchasers to these lands, retaining a lien for the payment of the purchase money and interest. The note falling due Jan. 1st, 1870, was paid; the other three, with interest, remain due and unpaid. On the 25th Jan., 1870, Jaquess Bro's sold and conveyed the lands to the defendant, George B. Peters, for the sum of $11,920, paid in cash, and an obligation upon the part of Peters to pay the three unpaid notes for $6,000 each, executed by them to Bowman and complainant, and to enforce which the bill is filed. Peters entered into an agreement with Chalmers and wife to put them in possession, and who were to cultivate the lands and from the income pay off the notes, and then receive a title to the one-half interest therein. Chalmers and wife immediately went into possession and have continued since to occupy and cultivate these lands. This bill as stated is filed for the purpose of enforcing the payment of the residue of the purchase money under the lien retained. Peters and Chalmers and wife alone resist the payment of the purchase money for the alleged reason that complainant had no power to sell the interest of Bostick, the deed executed by him being as executor and not as administrator with the will annexed, and which, since the hearing upon the demurrer, has been corrected by the execution of a deed, styling himself as administrator with the will annexed, but which, it is insisted, could not be done after the commencement of the suit; and if it had been done before, that the right to sell and convey was a personal trust, and could only be executed by the executor named, and did not survive to the administrator with the will annexed. That the appropriation directed to be made of the proceeds of the sale of these lands being for charitable use, the devise is void under the statutes of this state. That Jaquess Bro's, their vendor and grantor, are insolvent, and unable to respond to their breach of warranty. These positions have been forcibly and ably presented by the distinguished counsel for the defendants, the correctness of which it is the duty of the court to examine and determine, by reason and authority.

The authority read and commented upon by counsel for the defence established the general rule that where an executor is clothed with discretionary power to sell lands devised to be sold or otherwise disposed thereof, the power is a personal trust, which can only be executed by the person or persons named in the will, and does not survive to the administrator with the will annexed. Indeed, without an enabling statute the power conferred by an executor to sell land does not pass the power to the administrator with the will annexed. But by article 136, p. 458, Code 1857, continued in Code 1871, p. 236, § 1194, it is provided, that when land is directed by will to be sold and the executor or person appointed to execute the trust shall fail, the sale shall be made by the administrator

with the will annexed; in other words, the administrator with the will annexed in such case succeeds to the powers conferred upon the executor or person appointed to make the sale, and such power has uniformly been held by the supreme court of this state under the statute. The will of Bostick directed the land to be sold; the time when it should take place was mainly to be determined by Bowman. The direction is to join Bowman in the sale and conveyance. The proceeds of this sale, together with the income of his estate and cash assets, were first to be applied for the expenses of the administration of his estate, and the debts against it, and the remainder to be applied in the purchase of the necessary grounds and the erection of a proper building for a female institute of learning at or near Triune, in Williamson county, Tennessee, so that this land was directed to be sold, the time to be fixed by Bowman, and the terms by the executor, but evidently intended to be in conjunction with Bowman, who held the legal title to all the lands described. Without further comment or reference to authority, I am satisfied the administrator with the will annexed was authorized to sell and convey the equitable interest in these lands, held by Bostick at the time of his death. Letters of administration with the will annexed of Jonathan Bostick were granted to complainant Elliott on the 8th day of November, 1869, prior to the purchase by Peters from Jaquess Bro's, and when the purchase of Peters was made it was known to him that when the conveyance was made to Jacquess Bro's that Elliott was not duly appointed and qualified as administrator with the will annexed, but, as he supposed, as executor, and therefore his power to make the sale and conveyance was then defective, and relied upon the promise of Jaquess Bro's to take such proceedings as would perfect the title; the only thing necessary to be done was the executing of a new deed. Peters relied upon the warranty of his vendors, Jaquess Bro's. The contract, so far as Bowman was concerned, was executed, and, at the time Elliott executed the conveyance, was supposed to be executed upon his part. Had Jaquess Bro's filed a bill for the rescission of the contract after the qualification of Elliott as administrator, and Elliott had then tendered them his deed before final decree, they would have been compelled to accept it; Peters, their vendee, who purchased with a full knowledge of the defect, and as it is admitted, relied upon their promise to have the defect cured, standing in their shoes, and can claim nothing which they could not have claimed. Elliott having, since the commencement of this suit, executed and delivered a proper deed, has placed his vendees and those claiming under them in the same condition as they would have been had the conveyance been made jointly with Bowman upon the original sale and purchase. No other rights having intervened, Jaquess Bro's and their vendee, and Peters, with Chalmers and wife, have been in possession of the land, enjoying its profits, ever since the original purchase, and now have all the title, legal and equitable, to the lands, subject only to the lien for the unpaid purchase money. The numerous authorities referred to by defendant's counsel have no application to the facts in this case. They apply only to executory contracts, where title is to be made upon payment of the purchase money, and a bill is filed for specific performance. Reference might be had to authority to sustain the conclusion, but it is not deemed necessary, as the distinction referred to will be found in the text-books, and adjudicated cases, with little if any dissent. But it is insisted that there is still a more radical defect in the purpose for which the sale was directed to be made, and which it is assigned is found in article 55, p. 302, Code 1857, which prohibits devises to religious or ecclesiastical corporations, or for their use, or for the purpose of being given or appropriated to charitable uses or purposes, which it is insisted is the purpose of this devise, and renders it void. But I am of opinion that, plausible as this position may at first seem to be, a proper construction of this provision of the Code is that some religious or ecclesiastical denominations or some person for them must be intended to control the bequest either for their own benefit or for such charitable purpose as they may elect; the reason for the provision, the evil to be prevented, was the improper influence which might be brought to be bear upon those who might be overcome in sickness, or when apprehending speedy dissolution to overlook the natural objects of their bounty, and dispose of their estate for the benefit of other objects than those upon whom they would confer their property if left unbiased or uninfluenced.

The school intended to be provided for is not shown to have been intended to promote the interest of any denomination, but only for the promotion of the education of the female youth of the country, irrespective of denominational or sectional interests; certainly a public and praiseworthy object, which cannot be presumed to have been obtained by any undue influence, or intended by the law-makers to be prohibited. But admitting that this bequest could not have been carried out, the directions were that the lands should be sold and the proceeds become a part of the testator's monied estate, and be first applied to the expenses of administration and payment of debts. If the residue of the fund could not, under the law, be applied to this trust, then it would pass under the other clauses of the will, if embraced by any of them; if not, then would go to those entitled to it, as in case of intestacy. After a careful consideration of the questions presented, I am satisfied the complainants are entitled to the payment of the unpaid purchase money with interest, and in default of

such payment by the defendants to have the land sold for that purpose. There being no contract between complainant and Peters, or Chalmers and wife, no personal decree can be rendered against them for the amount due. A reference must be had to the master to ascertain the amount of unpaid purchase money with interest.

[On appeal to the supreme court, the decree of this court was affirmed. Peters v. Bowman, 98 U. S. 56.]

Case No. 11,030.

PETERS v. BRECKENRIDGE.

[2 Cranch, C. C. 518.] [1]

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

EXECUTORS AND ADMINISTRATORS—EXECUTOR DE SON TORT—ISSUE OF "NEVER EXECUTOR."

1. The possession of property by the defendant, under a disposition of it by deed in the lifetime of the deceased, is not such a possession as will, in law, constitute the possessor executor de son tort.

2. If the issue of "never executor" be found against the defendant, the judgment will be de bonis testatoris si, &c.; et si non, de bonis propriis.

Debt upon the bond of James White, Senior, charging the defendant [John Breckenridge] as executor. The defendant pleaded ne unques executor. Upon the issues joined on these pleas, the plaintiffs [Robert Peters' executors] in order to charge the defendant as executor de son tort, proved that James White died in possession of considerable personal property, which came to the hands of the defendant. The defendant, to show that the property was given to his wife, in the lifetime of White, offered in evidence, with the assent of the plaintiffs, a certain paper, under seal, executed by White and his two grandchildren, one of whom was the defendant's wife, which stated that it was the will and desire of the said White to give a certain tract of land and fifteen negroes, to be equally divided between his said two grandchildren; and he thereby appointed certain persons to make the division; and the two grandchildren were to throw into hotch-pot two tracts of land, and then the whole three tracts were to be equally divided between them. The two grandchildren bound themselves, in a penalty, to abide by the division to be made by the persons so to be appointed. The instrument is under the hands and seals of the said James White, Senior, and the two grandchildren, and of the defendant, who had married the granddaughter, and was dated in February, 1800. White died in March, 1801. The defendant and his wife resided with White until his death; and the slaves continued on the place, and were employed as usual, until his death. The division was not made until after his death.

Mr. Key and Mr. Dunlop, for plaintiffs.

Mr. Jones, for defendant.

Mr. Jones, for defendant, prayed the court to instruct the jury in effect, that the possession of the property, by the defendant, under that deed and the circumstances stated, was not such a possession as, in law, makes the defendant executor de son tort.

Which instruction THE COURT gave. (MORSELL, Circuit Judge, not sitting, having been formerly the counsel of the defendant in the case.)

The jury, however, found a verdict for the plaintiffs, which, with the judgment thereon, was ordered to be entered in the following manner, namely:—

"The jurors, &c., on their oath, say, as to the issue joined upon the plea of ne unques executor, that the within named John Breckenridge, as executor of the last will and testament of the said James White, Senior, did administer divers goods and chattels, which were of the said James, at the time of his death, in manner and form as the said (plaintiffs) have, within, in replying, alleged. And the said jurors, on their oath aforesaid, do further say, as to the issue joined upon the plea of payment, that the said James did not pay, &c., as in his said plea the said defendant hath alleged. And they find that the sum of $897.07, current money, with interest thereon, from the 1st day of January, 1803, till paid, is justly due to the said plaintiffs on the writing obligatory aforesaid.

"Therefore it is considered by the court here that the said plaintiffs recover against the said John Breckenridge, as such executor as aforesaid, as well the sum of £1,218. 10s. sterling, equal to $5,415.56 current money, their debt aforesaid, as the sum of $10,000 damages; the said debt and damages to be released on the payment of $897.07, with interest thereon from the 1st day of January, 1803, till paid, and the sum of —— by the court here, unto the said plaintiffs, on their assent adjudged for their costs and charges by them about their suit in this behalf expended; to be levied of the goods and chattels which were of the said James White at the time of his death in the hands of the said John Breckenridge to be administered, if he hath so much thereof in his hands to be administered, and if he hath not so much thereof in his hands to be administered, then to be levied of the proper goods and chattels of the said John Breckenridge; and that the said plaintiffs have thereof their execution, &c.; and the said John Breckenridge, in mercy, &c."

[Subsequently the defendant filed a bill in equity to stay proceedings upon the judgment recovered in the above case on the ground of usury. The bill was dismissed. Case No. 1,825.]

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

Case No. 11,031.

PETERS v. MARTENS.

[2 Wkly Notes Cas. 603.]

District Court, E. D. Pennsylvania. July 16, 1875.

SEAMEN—EXCESSIVE PUNISHMENT—INSUBORDINATION BY STEWARD.

1. Excessive punishment of a seaman by a master not excused because erroneously authorized by consul.

2. Insubordination by a steward, an educated man, is a greater offence than by an ordinary mariner.

This was the complaint of Captain Henry Peters, of the ship Limerick Lass, an American vessel, against J. G. Martens, steward of said vessel, setting forth charges of insubordination against the latter. The defendant was brought to this port in irons, from Bremerhaven, under consular orders. The testimony on the part of the captain showed that the steward was drunk several times, had used offensive language, and had struck the captain. In the testimony of the steward, it was admitted that he was drunk once, that he had asked permission to go to Hamberg while in Bremerhaven, that the captain granted him permission, but warned him that he would consider him a deserter if he went, and that he chose to remain aboard. The consul at Bremerhaven ordered the steward to be brought to the United States for trial. He was in irons during the voyage home, which lasted 45 days.

Criminal proceedings were begun, and the defendant was bound over by a United States commissioner for trial. Immediately thereafter the United States district attorney, under the act of congress of June 11, 1864,—Rev. St. p. 830, § 4300 [13 Stat. 124],—investigated the case, and, being of opinion that it should be summarily tried, reported the same to Cadwalader, J. When the case was called for trial a complaint was filed by the United States district attorney, to which the defendant pleaded not guilty.

It was then agreed, by counsel on both sides, that the case should be heard on the testimony taken before the commissioners with the same effect as if a libel and answer had been filed in personam in admiralty for personal damages. It was also agreed to refer all questions of wages to the court. Either party to be at liberty to file such libel in rem or in personam as may be necessary to give retrospective effect to said judge's opinion as a decree.

Mr. Coulston, for complainant, argued that the master had acted under the instructions of the counsel in all that he did, and that under the act of 1872,—Rev. St. p. 892, § 4600 [17 Stat. 274],[1]—enlarged and extensive powers were given to consuls.

[1] The section authorizes consular officers to reclaim deserters and discountenance insubordination by every means within their power, and in all cases of apprehension of deserters to inquire into the facts.

Mr. Neal, contra, replied on the testimony presented.

THE COURT (CADWALADER, District Judge) said that no citizen of this or any other country, of the intelligence required to command a vessel, could be excused for the ignorance implied in the defence of the master of this vessel, supposing him to have acquiesced in the flagrant error of the consul. The whole offence here was the occasional insubordination of the steward, while more or less intoxicated, at a time when the vessel was in port. No crime has been shown that in any manner imperilled the discipline of the ship. The master could have lawfully put him in irons for a day or two. But that a consul should confine a man for two months in irons for such an offence is too gross a violation of natural right to be excusable on the supposed authority of a consul or master. If the injured party were of the grade of mariners of the lower and uneducated class, I should give larger damages; but the steward is an educated man, and, therefore, I think his want of subordination exceeds what would be palliated from the ignorance of a man less educated.

Decree for libellant for the full amount of wages due him, to wit, $153.68, and $120 damages, with costs.

Case No. 11,032.

PETERS et al. v. PREVOST et al.

[1 Paine, 64.] [1]

Circuit Court. D. New York. April Term, 1813.

INJUNCTION—MULTIPLICITY OF SUITS—REMEDY AT LAW—CONSOLIDATION.

1. An injunction to stay proceedings in ninety-two suits in ejectment, where the parties, pleadings, title, and testimony, were the same in each suit, until one or more could be tried, the remainder to abide the event, refused.

[Cited in Lapeer Co. Com'rs v. Hart, Har. (Mich.) 160.]

2. A court of law can afford the necessary relief in such a case, if it be proper, by a consolidation rule.

3. Whether in such a case a perpetual injunction would be granted against proceeding in the remaining actions after the defendants had obtained successive verdicts in several of the suits? Quere.

4. The court, having full power to issue commissions to take testimony abroad, when sitting as a court of common law, will not entertain any proceedings for such a purpose, on its equity side.

This was a bill filed to obtain an injunction against proceeding in certain actions of ejectment commenced in this court. The bill stated that the defendants had commenced ninety-two suits in ejectment against the complainants, and that the plaintiff, the lessors of the plaintiff, the defendants, and the declarations filed, were the same in each

[1] [Reported by Elijah Paine, Jr., Esq.]

cause. That the title of the plaintiffs and of the defendants in each cause was the same. That one of the causes being at issue, an application had been made to the common law side of the court to consolidate them, and that the whole should abide the event of one or more suits, such as the defendants might choose to try; but that the court were of opinion that such an order could not, according to the strict rules of the common law, be made. The bill further stated, that the complainant had been unable to make the regular application at the last term for a commission to examine a foreign witness, in consequence of not knowing his name, and that the defendants had since refused to consent to the issuing of such commission. The prayer was for an injunction to stay all proceedings until the further order of the court.

D. B. Ogden and N. Pendleton, for complainants.

T. A. Emmet and E. Williams, for defendants.

LIVINGSTON, Circuit Justice. This is a bill to enjoin the defendants from proceeding in certain actions of ejectment, on the ground that the parties litigating are the same; that the title of the plaintiffs and of the defendants in each cause is the same, and that the same testimony in each will be relied on. The prayer for an injunction is general, to stay all the actions until the further order of the court; but the real object of the complainants appears to be to have the proceedings enjoined in some of them only, and to permit the plaintiffs at law to go on in so many as may be deemed necessary fairly to try and decide the right of the parties claiming title to the lands in question, and that all the other actions abide the event of those which may be directed to be tried.

This is neither a bill of peace, which generally lies where a right has been repeatedly tried and decided at law, to restrain further litigation, nor is it an application to have the rights of the parties determined upon issues directed by the court to save the trouble and expense of suing a number of persons separately; but it is a prayer to consolidate actions, which it is not denied that the plaintiffs have a clear right to prosecute and have decided at law, merely on a suggestion that a multiplicity of trials will thereby be avoided, and much expense saved. The attempt to obtain the interposition of a court of equity in this way is novel, and of the first impression; although instances of the same nature must very frequently have occurred in this state in prosecuting actions of ejectment. The cases which have been decided on bills in the nature of bills of peace, bear but little analogy to the present application. If this be a proper case for consolidation, a court of law is competent to afford relief as well in this as in other cases, and the objections which lie to its interference in this way, must apply here as well as there. What right, it may be asked, has this court to say, that one verdict in ejectment shall be final, when either party has a right to bring another action for the same land; and that it shall be final, not only in a particular action, but that nearly one hundred other actions shall be governed by it? and if two, three, or any other certain number, are permitted to be tried, who can say but that the verdicts may be so variant or contradictory as to leave the title as doubtful as before? In one point of view the present application is quite unnecessary. If the complainants mean to be satisfied with one verdict, and it should be against them, they can easily prevent the expense of further trials by confessing judgments in the other suits; but this must be left optional with them, as it must be with the plaintiffs at law, whether they will submit to one verdict against them, this court not having a right to impose such terms on either of them.

These actions of ejectment must originally have been prosecuted against the different occupants of different parcels of land, and although the landlords may have made themselves defendants in all of them, it cannot deprive the plaintiffs of the right of proceeding, as they might have done against the original tenants. If the prevention of costs were of itself a reason for a court of equity's interposing in this way, it might encourage tenants who had no right but possession, to put the owner to the trouble and expense of asserting his title in a court of justice, in hopes of discovering some defect in it, if they could force him to consolidate his actions, and thus divide the costs of only one suit among them.

Upon the whole, I think it improper to allow an injunction.

1. Because the only relief which is sought by the bill, if it be proper at all, can be afforded as well at law as in this court.

2. Because the parties are much too early in making the present application. If the defendants obtain verdicts at law in four or five successive trials, I will not say that the plaintiffs might not then be perpetually enjoined from proceeding in the other actions; but, until then, each party must be left to conduct the suits in such way as they think proper, under such rules as the court, where they are pending, may prescribe.

The application for a commission to take depositions in Canada must be made in open court, a judge at chambers having no power to award one; nor is it necessary or proper to come into equity for it, the circuit court, sitting as a court of law, having full power to grant it. I perceive, however, no objection arising out of the war, to taking out such a commission. If it be not executed in a reasonable time, the court may discharge the rule, and permit the plaintiffs at law to proceed.

Case No. 11,033.

PETERS et al. v. ROGERS et al.

[5 Mason, 555.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1830.

TRUSTEE PROCESS—CITIZEN OF ANOTHER STATE.

A person, who is a citizen of Maine, having his home and inhabitancy there, is not liable to be sued as trustee of a citizen of Maine, in the courts of Massachusetts under the trustee attachment process (Act 1794, c. 65), notwithstanding his business in the coasting trade compels him to pass about half his time in Massachusetts.

[This was an action of indebitatus assumpsit by John Peters and others against Zebediah Rogers and trustee.] The only question was, whether the trustee was, upon his disclosure, answerable.

Bartlett and Peabody, for trustee.

The marginal note in the case of Ray v. Underwood, 3 Pick. 302, is, "A person who has never been an inhabitant or resident within this commonwealth, but who only comes here occasionally in the day time, is not liable to the trustee process." And such is understood to have been the construction uniformly held by the supreme judicial court; that it is a local statute, and not applicable to foreigners, or citizens of other states. The case of Tingley v. Bateman, 10 Mass. 343, holds the same doctrine. There can be in the United States court no such difficulty as sometimes occurs in the state court, respecting the suit being brought in the wrong county; for the circuit court in Suffolk is the court for every county in the state. The objection to charging the trustee is, that the statute is local; and, by a just construction equally binding on all courts, it cannot apply to transactions and trusts originating out of the state, or to persons domiciled in another state and casually here. It is like the garnishee process in London, where a debt arising out of the jurisdiction, is not attachable within the city. 1 Rolle, Abr. 554; 3 Lev. 23; Show. 10. The same doctrine is held in Kidder v. Packard, 13 Mass. 80; and in Picquet v. Swan [Case No. 11,133], the circuit court held, that they were not inclined to give a larger operation to the statute than its words clearly import.

Kinsman, for plaintiff, argued as follows:

It will be perceived by the answer of the trustee, that the contract, by virtue of which he had possession of the vessel, was made in Boston, that the vessel was in Boston at the time the trustee was summoned, and that Pierce himself, although his family resided in Maine, transacted his most important business in Boston, and that "the course of that business led him to spend about the same period of time in both places." We think the above mentioned facts are sufficient to give the court jurisdiction, and to render the trustee chargeable. The statute providing the trustee process, was intended to remedy the inconvenience precisely, which existed in this case. It provides, "that the creditor may cause the goods, &c., of his debtor to be attached, in whose hands or possession soever they may be found," where such goods, &c., "cannot be attached by the ordinary process of law;" if the property in this case had not been pledged to Pierce, being within the jurisdiction of the court, it might certainly have been attached in the ordinary way; but being in Pierce's possession, and not liable to attachment by the ordinary process, the plaintiff ought to have his remedy by the statute providing for foreign attachment.

As to the cases cited by the other side, the opinion of the court in Ray v. Underwood, 3 Pick. 302, is given with great caution, the circumstances being all stated, as, "that the person summoned was not an inhabitant of, or resident within, any town in this commonwealth, but that he only came within it occasionally in the day time," making clearly a distinction between an inhabitant and a resident, and leaving us to infer, that a slight variation in the circumstances might have made a material difference in the result of the case. The present case is different from that, inasmuch, as, in the first place, Pierce, the trustee, was a resident in Boston for purposes of business, and it so appears by his answer. Again, it differs from the case in Pickering; in this, that the property itself, as to which Pierce is supposed to be trustee, was also here, and, in this last respect, there is, too, a wide difference between the present case, and the case of Kidder v. Packard, 13 Mass. 80, as will appear by an examination of that case. The cases cited from the English books seem to differ from the present, in the same particulars as the American cases, and the remark of the judge in the case in Picquet v. Swan [supra], alluded to, that "he is not inclined to give a larger operation to the statute than its words clearly import," will not, we apprehend, prevent the court from giving it its full operation, where the words and intention are both clear, as we think they are in the present instance.

It is further objected, that "the statute" (the statute regulating foreign attachment) "is local, and cannot apply to transactions and trusts originating out of the state, or to persons domiciled in another state and casually here." The ground stated in the first clause of the above named objection is entirely assumed, because the transaction in the case in question, did, in fact, originate in this state. According to our view of the operation of a local law, it is binding upon all persons and property within the limits and protection of the government where such law exists. The attachment law of Massachusetts, for instance, as respects other governments, is local, and yet

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

property belonging to citizens of other states, and passing through Massachusetts, is liable, while within her limits, to be attached by her laws. What, then, should exempt this case from the ordinary operation of the law, where both the property and the holder of it are actually in the limits of the jurisdiction of the court, and within the precinct of its officer? But, however the law might have been before the passing of the late statute (St. 1829, c. 124, approved March 12, 1830 [Laws Mass. p. 477]) respecting mortgages of personal property, to which the court is respectfully referred, we think by that statute it is now settled. By section 2 of that act, it is clear, that the vessel in this case might have been specifically attached, the plaintiff complying with certain conditions therein mentioned; and surely, if the property were so much within the jurisdiction as to enable the creditor to attach it by the 2d section of that act, it must also be so far within the jurisdiction, as to enable the creditor to pursue the other mode pointed out in the 1st section, if more convenient or more agreeable. As it respects the jurisdiction of the United States courts, it is believed to be every day's practise to sue defendants in states where they are only transient visitors, and not citizens or inhabitants; otherwise, from the very constitution of the federal courts, a plaintiff could never sue in the circuit court of his own state, unless in some cases specially provided for by law, such as those arising under patents.

STORY, Circuit Justice. In the present case, the plaintiffs are described in the writ as of Boston, and citizens of Massachusetts, and the principal defendant as of Bangor, in Maine, and a citizen of Maine, and the trustee, as "of said Boston, mariner," without any description of citizenship whatsoever. The trustee in his disclosure avers, that at the time of the service of the plaintiff's writ upon him, his family resided at Orrington, in the state of Maine, and that said Orrington was the residence of this respondent when at home; that for many years before the service of said writ and since that period, this respondent has been engaged in the coasting trade between the state of Maine and Boston, purchasing, transporting, and selling cargoes, and that the course of business led him to spend about the same period of time in each place. The answer then proceeds farther to state, that the principal defendant, Rogers, had conveyed to him five eighths of a certain schooner, the Chancellor, as security to indemnify him against a promissory note, which he had signed as surety for Rogers; that he (the trustee) was part owner of the schooner, and had employed her in the business aforesaid ever since the transfer, and from Rogers's share of the profits had in part paid the note; and that the vessel is now in Boston, and the five eighths of Rogers are worth more than the debt due on the note, &c. The service was made upon both principal and trustee in this district.

The question under these circumstances is, whether the party can be holden as trustee under the trustee attachment act of 1794, (chapter 65). In the construction of local statutes the courts of the United States have always been in the habit of respecting and following the decisions of the local courts; and, it has been already intimated in this court, that we are not disposed to enlarge by implication, in cases not controlled by authority, the influence of such a summary remedy. Picquet v. Swan [Case No. 11,134]. It is well known, that by the provisions of this process no person can be summoned as trustee out of the county, in which he lives, if he be the sole trustee; and if he is so summoned, he is entitled to be discharged upon the matter appearing by plea, or otherwise, to the court. See Wilcox v. Mills, 4 Mass. 218; Davis v. Marston, 5 Mass. 199; Jacobs v. Mellen, 14 Mass. 132. In Tingley v. Bateman, 10 Mass. 343, it was held, that where the plaintiff and defendant and trustee all lived out of the state, the process was not maintainable, although service was made upon the trustee within the state. The court on that occasion said, "there is a plain implication in another provision of the statute, that a person, liable as trustee, must be one, who at the time of the service of the writ, or within three years next preceding, has, or has had, his residence and home within the state;" and again, "a resident and inhabitant of another state is not in legal contemplation within the process of this court, to be summoned as a trustee." In Ray v. Underwood, 3 Pick. 302, it was held, in conformity with a former decision, that a person, who has never been an inhabitant or resident within any town of the state, but only came within it occasionally in the day time to look after some of his property, he living in an adjoining town of a neighbouring state, was not liable to be summoned as a trustee. These authorities appear to me directly in point, and close the question now before this court. They are founded in good sense and convenience. Upon any other construction, if an inhabitant of another state should be sued here as trustee for personal property locally situate in the state, to which he belonged, he could be obliged, in order to discharge himself, to bring the property at his own risk into the state, that it might be taken in execution, whatever might be its bulk or character, a ship or a cargo of lumber. This would be an intolerable grievance, and has never yet been claimed as a rightful exercise of jurisdiction on the part of this commonwealth. It is clear, upon the disclosure of the trustee, that he is a citizen of Maine, and has his family and home there; and he has, in a legal sense, no residence or inhabitancy in Massachusetts. Without stopping, therefore, to consider, whether, as a citizen of Maine, he is liable to be sued in this court

as trustee by the plaintiffs, who are citizens of the same state, it is the opinion of the court, that by the local law he is entitled to be discharged, and he is accordingly discharged.

PETERS (UNITED STATES v.). See Case No. 16,035.

Case No. 11,034.

PETERS et al. v. WARREN INS. CO.

[1 Story, 463.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1840.

COLLISION WITH FOREIGN VESSEL — INEVITABLE CASUALTY—GENERAL AVERAGE—APPORTIONMENT —SALVAGE — INSURANCE — PARTIAL LOSS UNDER FIVE PER CENTUM—BOTTOMRY.

1. Where a loss occurs by an accidental collision with a foreign vessel, which by the law of the country, where it takes place, is to be borne and apportioned between the vessels, as being by inevitable casualty, it is not by our law deemed a general average.

[Cited in Emery v. Huntington, 109 Mass. 437.]

2. The mere fact, that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act done, or sacrifice or expense voluntarily incurred for the common benefit, does not necessarily make it a case of general average by our law.

[Cited in Annan v. The Star of Hope, Case No. 405; The Queen of the Pacific, 18 Fed. 701.]

3. Although salvage is often in the nature of a general average, it is not universally true, that, in the sense of our law, all salvage charges are to be deemed a general average; they are only so, when incurred for the benefit of all concerned.

[Cited in The Queen of the Pacific, 18 Fed. 701.]

4. The items included and the sums apportioned and paid, according to the law of a foreign country, as a general average in an adjustment thereof, made there, (and a fortiori, if enforced by the tribunals there) are quoad the items and the rule of apportionment conclusive upon and payable by the underwriters here, as a general average, although not apportioned in the same manner, and not deemed items of general average by our law.

5. By the Boston policies of insurance no partial loss on a ship under five per cent. is to be borne by the underwriters. Assuming, that a loss by such an accidental collision, sustained by the ship insured, is a partial loss, and less than five per cent.; yet if the sum apportioned on her, on account of the injury to the other vessel, together with her own loss, exceeds five per cent., the underwriters are liable for the whole loss borne and apportioned on her.

6. Under the circumstances of the present case, it was *held*, that the loss by the collision was an entirety, and the whole damage assessed upon, and payable by the Paragon, was a direct damage or partial loss, occasioned by the collision, and the items were not to be separated.

7. Where a bottomry bond, executed at Hamburg, was given at a premium of twelve and a half per cent., and the bottomry holder agreed to give it up, if the sum advanced and common interest were promptly paid, and the agent of the bottomry holder received a draft from the owners on Hamburg for the amount, and common interest, and charged a commission for indorsing the draft, and the bond was thus taken up; it was *held*, that the underwriters were liable for the interest and commission, and bound to pay them as a part of the loss, since they thereby obtained the benefit of the surrender of the twelve and a half per cent. premium; and they were not entitled to the benefit without partaking of the burthen.

8. One of the owners, who transacted the business, and gave the draft, and took up the bottomry bond, as agent for all the owners, was not entitled to claim against the underwriters any commission on his disbursements, or for his services.

This cause was formerly before this court, and the report thereof will be found in Peters v. Warren Ins. Co. [Case No. 11,035]. It now came again before the court at this term, upon exceptions filed to the report of the auditor, to whom it had been referred to ascertain and adjust the loss, which the plaintiffs were entitled to recover. The exceptions were as follows: The defendants object to the report of the insurance broker, William Hales, Esq., to whom the case was referred. (1) We object to the amount of partial loss, and the proportion thereunto belonging, of the general expenses at Hamburg, on the ground, that by itself it would not amount to five per cent. (2) We object to Hechscher's charge for indorsing Mr. Peters' draft, $46.44. (3) We object to the charge of the interest included in Parish's account with Peters, which runs to the 26th of May, 1837; when the loss occurred November, 1836, and was demanded January 31st, 1837, and payable March 31st, 1837. The plaintiffs filed the following exception: The plaintiff excepts to so much of the report as disallows the charge for a commission.

F. C. Loring, for plaintiff.

The argument for the plaintiffs was as follows: The first objection is, to what is called the partial loss, not amounting to five per cent. The answer is, that there was no partial loss; that, by the laws of Hamburg, the whole damage in cases of collision is a general average loss; and that in the present case the damage to the Paragon was as much general average, as that to the Franca Anna. This appears conclusively by the statement of facts, which embodies a part of the despacheur's adjustment in the following words: "That is, the Paragon, her cargo and freight was to bear one half of the expense of her own repairs, and to pay one half of the value of the Galliot, &c." And the adjustment concludes as follows; "which sum" (meaning one half of the expenses of repairs and loss of the Galliot,) "is to be borne by ship, cargo, and freight, as general average." The answer to the second objection, and in part to the third, is drawn from what appears in the auditor's report, and a letter therein referred to, and is as follows. The owners having no funds at Hamburg, the master was necessitated to raise the funds to pay the amount of the gen-

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

eral average, payable by the ship on bottomry. Parish & Co. furnished the funds at the premium of twelve and a half per centum. They, however, wrote to their correspondents in New York, Hechsher & Co., that they did not intend to exact the premium, if the amount advanced, with all charges, was promptly paid, and the owners should secure it by effecting a policy of insurance on ship or freight, and assigning it to Hechsher & Co. for that purpose. The plaintiff, on receiving this intelligence, requested the defendants to furnish funds to pay the bond; they declined to do so; and he then made arrangements to, and did furnish the funds, by which the bond was paid, and the premium of twelve and a half per cent. saved to the insurers. The expenses incurred in so doing seem to be equitably, if not legally, a charge on the insurers, as they derive the sole benefit therefrom; and in fact, they seem to come within the provision in the policy, that the insurers will contribute towards all expenses incurred in and about the recovery of the property. The items excepted to are actual cash payments made by the plaintiff for this purpose. The payment was made in the usual course, by remitting bills of exchange. The charge for indorsing is a usual and customary one, which the plaintiff was obliged to pay, because Hechsher & Co. were instructed to claim the whole premium if any delay or objection occurred. The interest, objected to, was actually paid by the plaintiff; and he does not, as it would appear, receive, nor does the office pay double interest. The usual sight of bills remitted is sixty days. Parish & Co. would, therefore, charge interest, till the bills matured and were collected; and the plaintiff was obliged to remit enough to cover the amount due, when the bills should mature; which he did. If he had purchased bills, payable at sight, this charge of interest would not appear, but the same amount would be charged in another shape, because the bills would have cost more. If, on the refusal of the defendants to furnish funds, the plaintiff had elected to pay the bond and premium, he certainly could have recovered it. By taking the course he did, a considerable saving was effected, of which the defendants have the entire benefit, and should therefore pay all the expenses actually and necessarily incurred for that purpose. The same remarks will apply to the charge for the insurance to secure the bond, which the auditor has left "in the mud," but which the defendants have not excepted to. And for the same reasons, the plaintiff considers himself entitled to charge a commission for his services, time, and trouble in effecting the arrangement, as for a service rendered to the defendants; in which light it is hoped the court will consider it.

T. Parsons, for insurance company.

The argument for the defendants was as follows: The exception to the "partial loss" rests on this ground. The vessel lost a cable and anchor, &c. This loss was certainly a partial loss by our law, and did not amount to five per cent. We understand the law of the case to be, not that a foreign adjustment determines for us, what is a general average; but that a foreign adjustment of what is truly, and by our law a general average, is binding on us. By the opinion of the court in this case, it will be seen, that it stands on a very different footing from general average. As to the bottomry bond, Peters was permitted to take this up for less than its face, and whatever sum he actually was obliged to pay in so doing, we acknowledge ourselves liable for, but no farther. Now, we, the defendants, had at that time (by the case) a policy on the ship, which we should of course have readily transferred to Hechsher & Co., and thus the premium on the new policy would have been saved. Similar remarks apply to the charge for insurance, made by the plaintiffs, which the auditor has not allowed, and which the plaintiff now claims. The auditor states the facts fully in his report, and it seems to us clear, that he was right in not allowing it.

STORY, Circuit Justice. The first exception is founded upon the clause in the policy (which is the common clause in the Boston policies), that the underwriters shall not be liable "for any partial loss on other goods on the vessel, or on freight, unless it amount to five per cent., exclusive in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average." The argument in support of the exception seems to rest on the ground, that the damage done the Paragon itself was a partial loss only, less than 5 per cent.; and that it is not of the nature of a general average. In the opinion already expressed in this case, when it was formerly in judgment, I strongly inclined to think, that the loss by the collision was not to be deemed a general average in the sense of our law, although it was apportioned upon both the vessels. Peters v. Warren Ins. Co. [Case No. 11,035]. General average is commonly understood to arise from some voluntary act done, or sacrifice, or expense incurred, for the benefit of all concerned in the voyage, or adventure; and then it is apportioned upon all the interests, which partake of the benefit. But the mere fact, that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act done, or sacrifice or expense voluntarily incurred, for the common benefit, does not make it necessarily a case of general average by our law. Salvage is properly a charge, apportionable upon all the interests and property at risk in the voyage, which derive any benefit therefrom. But, although it is often in the nature of a general average, it is far from being universally true, that, in the sense of our law, all salvage charges are

to be deemed a general average. On the contrary, these charges are sometimes a simple average, or partial loss. We must, therefore, look to the particular circumstances of the case to ascertain, whether it be the one, or the other. So, expenses incurred on capture are sometimes a general average, and sometimes not. Thus, if the expenses are incurred for the benefit of all concerned, they are a general average. But, if there should be a capture of a neutral ship, solely on account of the cargo, which is owned by different persons, who are shippers, if no proceedings are had against the ship, but are against the cargo only, the expenses occasioned thereby will be apportioned upon the owners of the cargo, and are but a partial loss thereof, and not a general average; for such expenses are not for the benefit of the ship or freight, which, therefore, do not contribute thereto. See 2 Phil. Ins. (2d Ed., 1840) pp. 71–74, c. 15, § 1; Id. p. 125, § 5; Id. p. 225, c. 16, § 3; Benecke & S. Average (by Phillips, Ed. 1833) pp. 101, 102, 139–141.

It has been said, in the argument for the plaintiff, that, whether this claim be a general average, or not, by our law, it is clearly a general average by the law of Hamburg; and that the foreign law must furnish the rule for the case under such circumstances. And in support of the argument reliance is placed upon the language of the adjustment of the despacheur, who states, that the Paragon, her cargo, and freight, are to bear one half of the expense of her own repairs, and to pay one half of the value of the Galliot; and the adjustment concludes by saying, that this sum (the one half) is to be borne by the ship, cargo, and freight, as "general average." The argument certainly has considerable apparent weight. It is met, on the other side, by the suggestion, that what constitutes general average must be decided by our law, since the contract and its language must be interpreted by the laws of the place of the contract; and that when a case of general average under our law has arisen, then the foreign adjustment thereof may be conclusive of the amount of such general average; but it is not otherwise. But this argument does not solve the whole difficulty. The real question is, whether the underwriters, by the terms of the policy respecting general average, mean such losses and expenses only, as are deemed general average by our law, or such losses and expenses, as arise in the course of the voyage, from any of the perils insured against, and are assessed upon and payable by the insured, as a general average under and in virtue of any foreign law. Now, the contract of insurance is a contract of indemnity against risks and losses by the perils insured against, not only in the home port, and on the ocean, but also in foreign ports. It naturally, therefore, looks to general averages, which may be incurred and enforced abroad, as well as at home. If by a peril, insured against, the insured is compelled in a foreign port, by the local law, to pay a sum as general average, which, by the law of his own country would not be so, why may not such a loss or charge be properly deemed a general average in the sense of the policy? What difference in principle is there between deciding, that items or apportionments included in a foreign adjustment of a general average, although not belonging to a general average, or a proper apportionment, by the law of our own country, are, nevertheless, to be here paid for as a general average, and deciding that a loss, not a general average by our law, but a general average by the foreign law, and enforced there, is to be deemed and paid for here as a general average? In each case the loss, sought to be recovered, is, pro tanto, not a general average according to our law; and the principle, which is to govern, must be the same, whether the loss be greater or less, whether it apply to the totality of the claims, or to any item thereof. Now, certainly the weight of authority, both in England and America is, that the items included and the sums apportioned and paid according to the law of a foreign country, as a general average, in an adjustment thereof, made there, (and, a fortiori, if enforced by the public tribunals there,) are, quoad the items and the rule of apportionment, conclusive upon and payable by the underwriters here, as a general average, although not apportioned in the same manner, and not deemed items of general average by our law. This is certainly the doctrine in Simonds v. White, 2 Barn & C. 805; Loring v. Neptune Ins. Co., 20 Pick. 411; Strong v. New York Fireman Ins. Co., 11 Johns. 323; and Depau v. Ocean Ins. Co., 5 Cow. 63. The most important case the other way is Shiff v. Louisiana State Ins. Co., 6 Mart. [N. S.] 629. But there is great difficulty in holding, that this case ought to overcome the rule established in Simonds v. White, 2 Barn. & C. 805, which puts the doctrine upon grounds of public convenience and policy, and the apparent intention of the parties. There is nothing unreasonable in construing the engagement of the underwriters in a policy to be, that they will pay, whatever the insured is compelled to pay as a general average, arising from the risks insured against. But I wish to be understood as not absolutely deciding this point, and it is the less necessary to consider it, because, assuming the sum claimed not to be a general average, it is nevertheless, as a partial loss, to be borne by the underwriters. The infirmity of the argument for the exception consists in separating the loss, incurred by the damage done to the Paragon itself, from the damage done to the other vessel, which was apportioned on the Paragon, and in considering them as independent losses Now, they are not so separable. The loss by the collision was an entirety; and the whole damage assessed upon, and payable by the Paragon, was a direct damage or partial loss, occasioned by the col-

lision, and the items are not to be separated. The whole loss was a charge in rem upon the Paragon; and the collision was the proximate cause thereof. This was the doctrine entertained by the supreme court, upon the hearing of this cause upon the writ of error. Peters v. Warren Ins. Co., 14 Pet. [39 U. S.] 99. We must treat the loss, then, as an aggregate partial loss, composed of two items, the one the direct damage done to the Paragon, the other the direct damage done to the other vessel, and assessed and charged upon the Paragon. These items, when united, far exceed 5 per cent. This exception is, therefore, overruled.

The next exception turns upon a very different consideration. It seems, that a bottomry bond was given to defray the amount of the sum awarded against the Paragon and charges; and that the bottomry holder was willing to waive the 12½ per cent. interest payable upon the bond, if he was promptly paid the amount, and certain other conditions were complied with. The agent of the bottomry holder at New York received from Mr. Peters, (one of the plaintiffs,) a draft on Hamburg for the amount, and charged a commission for indorsing that draft to his principal, and thereby becoming a guarantor of the draft. The bottomry bond was thus taken up; and a less sum than the 12½ per cent. was actually paid to the agent. The charge of this commission is now objected to. But I think it is without any just ground. If the underwriters seek to avail themselves of a diminished payment of interest upon the bottomry bond, they must take it cum onere. Mr. Peters acted with entire good faith in this part of the transaction; and it has been for the benefit of the underwriters. The charge seems to me entirely reasonable and proper in itself; and the underwriters have no just cause to complain, that a less sum has been paid upon the bond, than might have been required under its terms. If they adopt Mr. Peter's agency in taking up the bond, they must adopt it throughout. If they do not adopt it, they ought to pay the whole 12½ per cent. bottomry interest due on the bond. I therefore overrule this exception also.

The same considerations will apply to the third exception. The interest, therein objected to, was a part of the agreement, upon which the payment of the 12½ per cent. was surrendered by the bondholder. And besides; it is in itself most reasonable, that the bondholder should be paid the interest upon his advances, not merely up to the time, when the draft was received, but up to the time, when it would arrive at maturity, and be paid.

As to the exception by the plaintiff of the disallowance by the auditor of the claim of Mr. Peters for a commission, for settling and paying the bottomry bond; it appears to me, that it was rightly rejected by the auditor for the reason stated by him. It was the primary duty of the plaintiffs to pay the bottomry bond, in order to entitle themselves to recover the amount thereof from the underwriters. If the owner pays money to repair damages to his ship, he is not entitled to claim from the underwriters any commission on his disbursements; and the present case is not distinguishable from that in principle.

On the whole, my judgment is, that the report ought to be confirmed.

Case No. 11,035.

PETERS et al. v. WARREN INS. CO.

[3 Sumn. 389;[1] 1 Law Rep. 281; 1 Hunt, Mer. Mag. 67.]

Circuit Court, D. Massachusetts. Oct. Term, 1838.

MARINE INSURANCE — PERIL OF THE SEA—COLLISION IN FOREIGN WATERS—APPORTIONMENT —SENTENCE OF FOREIGN COURT.

1. Where a collision between two ships accidentally took place within the dominions of a foreign power, and by the laws of that foreign power, all damages occasioned thereby were to be borne equally by the two vessels; *held*, that such a collision was a peril of the seas, within the meaning of the common policy of insurance; and that the underwriters were liable, not only for the direct damage done to the ship insured by them, but also for the charge apportioned on such ship as her contributory share towards the common loss, not as a general average, but as properly a part of the partial loss occasioned by the collision.

[Cited in Emery v. Huntington, 109 Mass. 437; Indianapolis Ins. Co. v. Mason, 11 Ind. 179, 180. Cited in brief in Forbes v. Manufacturers' Ins. Co., 1 Gray, 372.]

2. Such a charge is a part of the loss within the maxim, "Causa proxima, non remota, spectatur." General average can be only, where there is some voluntary sacrifice or voluntary expense incurred for the common benefit.

3. The maxim, "Causa proxima, non remota, spectatur," is not of universal application in the law; and does not exclude incidental losses, flowing as a legal or natural consequence from the direct injury or loss to the thing insured.

[Cited in McDonald v. Snelling, 14 Allen, 296; Marble v. City of Worcester, 4 Gray, 409.]

4. Semble, that a loss by an accidental collision of two vessels, without fault on either side, is not a case of general average according to our law; but of particular average.

[Cited in Broadwell v. Swigert, 7 B. Mon. 39.]

5. The sentence of a foreign court, of competent jurisdiction, acting in rem, is conclusive in respect to the matter, on which it directly decides.

This was a case on a policy of insurance, dated the first day of April, 1836, whereby the defendants insured the plaintiffs, for whom it may concern, payable to them, eight thousand dollars on the ship Paragon, for the term of one year, commencing the risk on the 15th day of March, 1836, at noon, at a premium of five per cent. The declaration alleged a loss by collision with another vessel, without any fault of the master or crew of the Paragon; and also insisted on a general average and contribution. At the

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

trial, the parties agreed to a statement of facts, as follows: "The plaintiffs are owners of the ship Paragon, insured by the defendants in part. On the 10th of November, 1836, said vessel sailed from Hamburg in ballast, for Gottenburg, to procure a cargo of iron for the United States. Whilst proceeding down the Elbe, with a pilot on board, she came in contract with a galiot, called the Franc Anna, and sunk her. The Paragon lost her bowsprit, jib-boom, and anchor, and sustained other damages, which obliged her to go into Cuxhaven, a port at the mouth of the Elbe, and subject to the jurisdiction of Hamburg, for repairs. Whilst lying there, the captain of the galiot libelled the Paragon in the marine court; alleging that the loss of the vessel was caused by the carelessness or fault of those on board the Paragon. The ship was arrested, but subsequently released on security being given by the agents of the owners to respond to such damages as should be awarded by the court. The captain of the Paragon, in his answer, denied the charges of carelessness or fault on the part of those on board of his ship; and the court, after hearing the parties and their proofs, decided that the collision was not the result of fault or carelessness on either side; and that, therefore, according to article 1, tit. 8, of the marine law of Hamburg, the loss was a general average loss, and to be borne equally by each party; that is, the Paragon was to bear one half of the expense of her own repairs, and to pay one half of the value of the galiot; and the galiot was to bear the loss of one half of her own value, and to pay one half of the expense of the repairs of the Paragon. In conformity with this decision, a general average statement was drawn up by Mr. Oldermann, the despacheur of Hamburg, an officer appointed by law, and by whom alone such statements can be prepared. In this statement are charged, first, the expenses of repairing the Paragon, after making the deduction of one third, new for old—saving one of her anchors and chains, which was lost at the time of the collision; wages and provisions of the captain and crew during the detention, and the expenses of surveys, protest, defending the suit, &c., amounting in all to about eight hundred dollars; and one half of which is charged to the Paragon, and one half to the galiot. Secondly, are charged the value of the galiot, as by appraisal, under an order of court; of her freight and cargo; the expenses of surveys, protest, prosecuting the suit, &c.—amounting, in all, to about six thousand dollars; one half of which is to be charged to the Paragon." The statement concludes thus; "Which, according to the before-mentioned ordinance, relating to insurance and average, is to be borne by ship, cargo, and freight, as general average. The ship Paragon has to claim from the Franc Anna for half the damages, say $400; and the Franc Anna from the Paragon, one half the damages, say $3000; so that the Paragon must pay $2600,—which amount the tribunal of commerce decreed should be paid instanter. The owners of the Paragon having no funds in Hamburg, the captain was obliged to raise the money on bottomry. There being no cargo on board of the Paragon, and no freight earned, the ship had to bear the whole of the general average loss."

F. C. Loring, for plaintiffs.
Mr. Parsons, for defendants.

STORY, Circuit Justice. There is no doubt, in this case, that the actual injury sustained by the Paragon, is a loss for which the underwriters would be liable, if it amounted to five per cent. There is as little doubt, as the Paragon was obliged to go into the port of Cuxhaven for repairs, that, according to the established principles of our law, differing on this point from that of England, the wages and provisions of the crew during the detention for the repairs is a general average. The only real question in controversy between the parties is, whether the underwriters are in this case liable for the sum decreed by the tribunal at Hamburg, to be paid by the Paragon, as her contributory share of the loss occasioned by the collision, either as a general average, or as a direct consequence of the collision, and a loss occasioned thereby. Some things are now well settled, which were formerly subject to some controversy among jurists. In the first place, the sentence or decree of the marine tribunal of Hamburg, being a court of competent jurisdiction in the premises, must be taken to be conclusive, as to the cause and amount of the loss, and of the contribution to be made by the parties. The collision happened within the territorial jurisdiction of Hamburg, and therefore the case was one within the competency of its judicial tribunals, and to be rightfully governed by its laws. However true it may be, that the city of Hamburg has no authority to prescribe to the rest of the world, what shall be deemed, in the maritime law, a general average; yet it cannot well be doubted, that it has full authority to make laws on the subject of collisions within its own territorial domains, which shall be obligatory on all vessels which choose to come within those domains. The ordinance of Hamburg (title 8, arts. 1, 2), has prescribed the rules on this subject; and has declared that in cases of collision of vessels, occurring accidentally, the damage shall be apportioned upon both the vessels, their freights and cargoes, as in other cases of general average ("communen avarien"), and shall be borne one half by each vessel. See Stev. & B. Av. by Phillips, 146, 367, 383. The sentence of the marine court of Hamburg has decided, that the collision in the present case was accidental, and not by the fault of either party; and has apportioned the damage accordingly between the two vessels. And that sentence

I take to be conclusive in both respects, upon the general principle now universally established, that the sentence of a foreign court of competent jurisdiction, acting in rem, is conclusive in respect to the matters, on which it directly decides. The original proceeding was here in rem, and precisely the same as our own courts of admiralty would have exercised in rem, in a case of collision within our own jurisdiction.

In the next place, it is now well settled, that when a case of general average occurs, if it is settled in the foreign port of destination, or in any other foreign port, where it rightfully ought to be settled, the adjustment there made will be conclusive as to the items, as well as the apportionment thereof upon the various interests, although it may be different from what our own law would have made, in case the adjustment had been made on a like collision in our own ports. The cases, cited at the bar on this point, are entirely satisfactory and conclusive. See especially Simmonds v. White, 2 Barn. & C. 805; Dalglish v. Davidson, 5 Dowl. & R. 6; Loring v. Neptune Ins. Co., 20 Pick. 411; Thornton v. U. S. Ins. Co., 3 Fairf. [12 Me.] 153; Strong v. New York Fireman's Ins. Co., 11 Johns. 322; Depau v. Ocean Ins. Co., 5 Cow. 63; 3 Kent, Comm. lect. 47, p. 244; 2 Phil. Ins. (1st Ed.) p. 255, 260; Id. (2d Ed., 1840) pp. 140, 141.

But the question still remains, whether, in the sense of the general maritime law, or, at all events, in the sense of our law, the present is a case of general average, to which the doctrine is properly applicable, so far as to make the underwriters liable therefor. It certainly cannot be considered as strictly falling under the ordinary definition of general average, where a sacrifice is voluntarily made for the benefit of all concerned; such as in cases of jettison, and ransom, and expenses by capture. By the law of England it seems clear that a loss of this sort, that is, by an accidental collision, without fault on either side, is a particular average, to be borne by the injured parties themselves; and it is not the subject of apportionment, or contribution, or of general average in any form. Lord Stowell so lays down the doctrine in the case of The Woodrop Sims, 2 Dod. 85, and so does Lord Tenterden, in his work on Shipping (part 3, c. 8, § 12). In this respect the law of England follows the Roman law. "Si navis tua, impacta in meam scapham, damnum mihi dedit, quæsitum est quæ actio mihi competeret? Et ait Proculus, si in potestate nautarum fuit, ne id accideret, et culpa eorum factum sit, lege Aquilia, cum nautis agendum." Dig. lib. 9, tit. 2, l. 29, § 2. "Sed si tanta vis navi facta sit, quæ temperari non potuit; nullam in dominum dandam actionem." But in many if not in most of the maritime nations of continental Europe, the rule prevails, that the damage shall be equally apportioned between the vessels. A summary of many of the ordinances will be found in Jac. Sea Laws, bk. 4, pp. 324, 342, c. 1; in 1 Emerig. Ins. c. 12, § 14; in 2 Valin, Comm. lib. 3, tit. 7, art. 10; in Abb. Shipp. pt. 3, c. 8, § 12; and in 1 Bell, Comm. (4th Ed.) pp. 489, 490, §§ 518–520. In the ordinance of Louis XIV., in 1681, it is expressly declared, that, in cases of collision of ships, the damage shall be equally borne by the ships which have done it, and suffered it, whether on the voyage, or in the roads, or in port. Valin speaks of it, indeed, as a common average between the two vessels ("Le dommage causé par l'abordage est jugé avarie commune pour les deux navires"); but I do not know, that he is to be interpreted to mean a general average in the sense of the maritime law, as his words rather refer to an apportionment of the damage. If I were compelled to decide this question by the lights, which are now before me, I must confess, that the inclination of my opinion would be, that it is not a case of general average according to our law, but that it is a case merely of particular average. Emerigon considers all losses by collision to be merely a simple average. Dig. lib. 9, tit. 2, l. 29, § 4; 1 Emerig. Assur. (Ed. 1827) pp. 409, 414, c. 12, § 14, notes 1, 4. See, also, 1 Bell, Comm. (4th Ed.) p. 492, § 520.

The real question, however, upon which this case turns, is, whether the underwriters are liable for this apportionment or contribution of the Paragon towards the common damage. Now, that collision of ships by accident is a peril of the sea, and that underwriters are liable for the direct injury to the ship insured, which is occasioned thereby, admits of no doubt. The point of difficulty is, whether the amount of the damage apportioned on the Paragon is a direct injury, occasioned by the collision. If it can and ought to be so treated, then the underwriters are liable for the loss. If, on the other hand, it is to be considered as a mere consequential injury, then the maxim, "Causa proxima, non remota, spectatur," applies, and the underwriters are exonerated. This question has not, to my knowledge, ever before come under the consideration of the American courts. It has, however, been recently decided in England, in a case, to which I shall presently refer.

But let us see, how it stands in the foreign maritime law; and in the opinion of eminent continental jurists. The French ordinance of 1681 (liv. 3, tit. 6, art. 26), among other things expressly declares, that the insurers shall bear all losses and damages occasioned by collision (abordage). Pothier holds, that, under this clause, the underwriters are liable for all losses occasioned by accident, without the fault of the injured party. Pothier des Assur. note 50. Emerigon holds the same doctrine. 1 Emerig. Assur. c. 12, § 14. And no doubt seems to have been entertained by either of them, that the loss, for which the insurers were liable, included the damages apportioned upon the vessel, arising from the collision, whether done di-

rectly to itself, or to the other vessel. Emerigon expressly says: "In the case of a rustic judgment (judicio rustico), where the damage is divided between the two vessels, I believe that the insurers are liable for the part which belongs to the ship insured by them." Id., sub finem (Ed. by Boulay-Paty, 1827), p. 417. In the modern Code of Commerce of France (article 50) the insurer is declared liable for all losses and damages which may happen from fortuitous collision (abordage fortuit). Code Com. liv. 2, tit. 10, art. 350, § 2. In another article (art. 407), it is declared; "In case of collision, if the occurrence was purely accidental, the damage is borne without remedy by the suffering vessel. If the collision proceeded from the fault of one of the masters, the damage is paid by the one who occasioned it. If there be a doubt, which of the two vessels were in fault, the damage is to be repaired at their common expense, in equal portions between them." Id. art. 407. This last case has given rise to a doubt among the French jurists, whether, as the Code is silent as to the liability of the insurers, except in cases of fortuitous collision, the insurers are now liable for the damages apportioned, when there is a doubt as to which vessel is in fault. Boulay-Paty and Estrangin both hold, that, under such circumstances, the loss is to be treated as a fortuitous collision, and the damages are to be paid by the insurers. See 1 Emerig. Assur. pp. 416, 417, c. 13, § 14; note by Boulay-Paty (Ed. 1827); 4 Boul. P. Dr. Com. 14–16; Poth. Assur. par. Estrangin (Marseilles, Ed. 1810) pp. 72, 15, 76, note 50. Now it is not necessary to settle, whether these learned jurists are right or not in their interpretations of the modern French Code. What I desire to state is, that they perfectly concur in the opinions of Pothier and Emerigon, and hold, that the damage to the ship insured not only is to be paid by the insurers, but that the damages assessed upon the ship are to be paid, whether she be the injured ship or not. And certainly it must be admitted, that there is no hardship upon the insurers in adopting such a rule; for it may as often work in their favor as against them; since, if the ship insured be the most injured, they will have the full benefit of the rule.

But there is a late case in England directly on the point. It is De Vaux v. Salvador, 4 Adol. & E. 420. That case, in many respects, resembles the present. The facts were, that the ship, insured by the policy, on which the action was brought, came in collision with a steam vessel, in the river Hoogly, in Bengal, by which each was injured; but the steamer most. The owner of the steamer threatened to proceed in the court of admiralty, at Calcutta, against the vessel injured; and the claim was referred to an arbitration; and it was awarded, that each ship should bear half the joint expenses of the two. The ship insured was detained at Calcutta for some time to repair the damages sustained by the collision. The insured claimed from the underwriters the amount of the wages and provisions expended during the detention to repair, as a general average; and also the sum paid to the steamer by the ship insured. Lord Denman, at the trial, rejected both items, holding the underwriters not liable therefor; and upon a motion for a new trial, his opinion was supported by the court of king's bench. His lordship, in delivering the opinion of the court, first stated, that the wages and provisions in such a case were not a general average by the law of England (in which respect it differs from our law); and then he proceeded to say; "The second point appears to be entirely new, which circumstance is not so strong an argument against it as against the former claim, because the event is likely to have been of much less frequent occurrence." And then, after referring to the case of Fletcher v. Poole [1 Park, Ins. (7th Ed.) p. 89, c. 2.] [2] and the maxim on which he thought the case must rest, "In jure, non remota causa, sed proxima, spectatur," he added; "Such must be understood to be the mutual intentions of the parties to such contracts. Then how stands the fact? The ship insured is driven against another by stress of weather. The injury she sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel. And whenever this effect is produced, both vessels being in fault, a positive rule of the court of admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out, that the ship insured had done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the court of admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea. It grows out of the arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor possibly as consistent with it; and can no more be charged on the underwriters, than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by the perils insured against."

This is the whole of his lordship's judgment; and I have cited it at large, from a desire to present the argument in the very words, in which it was pronounced, so that there should be no danger of its true force being misrepresented or misunderstood. Now, I own, that it is not quite satisfactory to my mind. I admit, in the fullest manner, the force and propriety of the maxim, in cases of insurance (for there are many other

[2] [From 4 Adol. & E. 427.]

cases of contract, to which it does not apply[3]) "Causa proxima, non remota, spectatur," in ascertaining, whether there is a loss within the policy. My difficulty is in admitting, that the case before the court was within the true scope of the maxim. It seems to me, that there is an over-refinement in this attempt to apply the maxim; and I cannot but think, that there is much danger, too, in so applying it to mercantile transactions. Suppose the case of a capture of a neutral vessel, and she should be carried in for adjudication, and acquitted upon payment of costs and expenses to the captors; would not the insurers be liable for these costs and expenses? There is no doubt, that they would, if the capture was one of the perils insured against; and yet it might be said, and truly said, that the capture was not the necessary or immediate cause of these costs and expenses. They were the act of the court, founded upon an arbitrary rule, or an exercise of judicial discretion. Suppose the case of the insurance of a neutral ship against capture only, and after a capture, she were lost by a peril of the sea; would not the case be a total loss by capture, notwithstanding the proximate cause was a peril of the sea? Suppose a steam ship insured against all perils but fire; and having caught fire, the fire was extinguished only by the sinking of the ship at sea; would it not be deemed a loss by fire, within the policy? Suppose a vessel is shipwrecked upon a barbarous coast, and is there set fire to by the natives, and thus destroyed; to what cause would the loss be attributed, to the perils of the sea, or to fire? The former would be a peril acting directly on the subject-matter, from which the ship was not delivered when the other proximate peril was superinduced. Hahn v. Corbett, 2 Bing. 205. Take a case still nearer to the present, of a contribution for a general average, or salvage. Neither of these losses is expressly within the words of the common policy. Yet the underwriters are liable therefor, although not directly stated among the enumerated perils. The contribution of other interests (such as the ship, the freight, and the other cargo) to a jettison, occasioned by the perils of the sea, cannot be said to be a necessary or proximate effect of these perils. It is a charge resulting from the perils insured against, and attaching to these interests, as a burden, by reason of these perils. But then the contribution is the result of a rule of the maritime law, which imposes the charge; and independently of that rule, there is no necessary or natural connection between the perils, which induced the jettison, and the contribution made by the other property. In a metaphysical sense, the proximate cause of the contribution is the rule of the maritime law, and the more remote cause is the perils of the seas. So, in cases of salvage. The expenses and charges of salvage, in cases of shipwreck or of other calamities and injuries to the ship by the perils of the seas, have, as their proximate cause, the labors and services performed by the salvors; and have no necessary or natural connection with those perils, although they are properly results or incidents, which may be subsequently attached thereto.

We all know, that when a ship is obliged to put away to a port of necessity by losses or injuries in a storm, which constitute a general average, the wages and provisions and other expenses of the crew, to and at the port of necessity, constitute a part of the general average. Why? Not because they are the proximate effects of those losses or injuries; for the storm, which occasioned the general average, has ceased; but because they are charges, which follow, as a legal result, from the original perils. When the thing insured becomes, by law, directly chargeable with an expense, or contribution, or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss. Pothier lays it down, as in his opinion a clear result of the contract of insurance, that the underwriters are bound to pay, not only the direct loss occasioned by a peril insured against, but all the expenses, which follow as a consequence therefrom. Poth. de Assur. note 49. Estrangin (a very excellent commentator on Pothier) asserts, that there is not the slightest doubt on the subject. "L'usage et la loi ont toujours soumis les assureurs à supporter les frais, qui sont la suite d'une fortune de mer, comme les pertes directes occasionées par l'evenement." Id. Estrangin, note. And this is the unequivocal opinion of Emerigon, as we have already seen. 1 Emerig. Assur. pp. 414–417, c. 12, § 14, and Boul.-P. Comm. (Ed. 1827). And it is to be observed, that these learned foreign jurists found themselves, not so much upon any peculiarities of their own Ordinances, as upon general principles, applicable to the contract. Their reasoning turns upon this proposition, that the insurers are not only to pay the loss from a peril insured against, but must also pay the expenses and charges incident to, and flowing from the direct loss, as a part thereof. "Ces frais extraordinaires," says Pothier, "sont, pour le marchand, qui a fait assurer, une perte, qui lui est causée par une fortune de mer." I confess, that I have always hitherto supposed this to be also the doctrine of our law. Whatever expense, charge, or contribution flows as a natural or a legal consequence from a peril insured against, I have supposed to be a loss within the policy, as being, within the meaning of the maxim, a proximate effect. I am aware of the bearing of the cases of Fletcher v. Poole [supra],

[3] Suppose a factor should deposit the goods of his principal in an improper place, where they were destroyed by an accidental fire, he would be liable for the loss; and yet the fire was the proximate cause of the loss.

and Eden v. Poole [1 Term. R. 132, note]; 2 Marsh. Ins. bk. 1, p. 721, c. 16, § 5; and Robertson v. Ewer, 1 Term R. 127. But taking the provisions of the ship to be, as they are generally valued, as a part of the ship and her outfit, I find it difficult (as indeed Mr. Marshall did), to reconcile these cases with Brough v. Whitmore, 4 Term R. 206, and if I were obliged to follow the rule laid down in one or the other of these decisions, I should follow that in Brough v. Whitmore. In America, it has not been necessary to decide the point, on which these cases turned, as the wages and provisions in such cases are a general average. The case put by his lordship, that the underwriters would not be liable for a penalty, incurred by a contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against, does not strike me with the same force as it did his lordship, unless he meant a penalty in personam, and not a forfeiture operating upon the thing insured. In this latter view, I should say, "Nil agit exemplum, litem quod lite resolvit." Suppose by the laws of a country shipwrecked vessels were declared to be forfeited to the government, either directly, or as a consequence of the utter impossibility of complying with the revenue laws, arising from the shipwreck, it would, as I think, be difficult to maintain, if the perils of the seas were insured against, that the underwriters would not be bound to pay the whole loss, and not merely the direct injury done by the shipwreck. The case of Hahn v. Corbett, 2 Bing. 205, appears to me fully to support this opinion.

The difficulties which met the court in the case of De Vaux v. Salvador [4 Adol. & E. 420], and were not overcome, appear to me to be these: First, the loss, or charge, or contribution (call it which you may) occasioned by the collision, was, by the mere operation of law, a direct, positive, and proximate loss, or charge, or contribution, attached to the ship, eo instanti, that the collision took place. It was, in no just sense, a remote consequence of the collision; but a part of the injury done to the Paragon herself. Secondly, it was not a mere personal charge, but a charge in rem. The Paragon was directly liable therefor; and the charge thus attached to her, constituted, to that extent, a direct diminution of her value, pro tanto. It was, debitum in præsenti, solvendum in futuro. Suppose, by the laws of Hamburg, in case of a fortuitous collision, both vessels had (upon a principle of territorial policy), been declared forfeited to the government; and the forfeiture had been enforced against the Paragon; would there not have been a total loss arising from the collision? Hahn v. Corbett certainly goes to that extent. In every way, in which I can contemplate the case of De Vaux v. Salvador, with the greatest respect and deference for the learned judges, who decided it, I confess myself unable to yield to its authority. It is confessedly a novel application of the maxim, "In jure, non remota causa, sed proxima, spectatur." Lord Bacon has indeed stated the reason of the maxim to be, that "it were infinite for the law to consider the causes of causes, and their impulsion, one of another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." But that great man, conscious of the difficulties attendant upon metaphysical refinements on the subject, qualified this observation with another. "Also, you may not confound the act with the execution of the act; nor the entire act with the last part of the consummation of the act." And of this he puts divers examples, one of which I will cite: "If a lease for years be made, rendering rent, and the lessee make a feoffment of part, and the lessor enter, the immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party. But that is but the pursuance and putting in execution of the title, which the law giveth, and therefore the rent or condition shall be apportioned." What greatly strengthens my doubts is, that such jurists as Emerigon, and Boulay-Paty, and Pothier, and Valin, and Estrangin, treat this as a clear case of liability of the insurers, under the terms of the policy, not, as I have before remarked, upon any peculiarity of the French law, but upon the general principles of the maritime law, acting on the contract of insurance. They treat the whole loss, in a case of this sort, to be a loss suffered by the ship, for which she is liable by a proceeding in rem, and to that extent damnified by the perils insured against. Suppose, in the present case, proceedings had been instituted in rem for the contribution for the collision (as they might well have been), and in the course of the proceedings the Paragon had been sold to satisfy the charge, I confess that I am unable to see how the insurers could escape the payment for a total loss, any more than they could in the case of a sale of the ship to pay salvage, arising from a peril insured against. There is one circumstance in the case before the court, in which it differs from that of De Vaux v. Salvador. It is that the amount or contribution was fixed by a judicial decree against the ship, not directly, indeed, but indirectly; for a stipulation was given, to prevent actual proceedings in rem against her. But I do not know that this circumstance ought to make any difference in the principle which ought to govern us. I certainly attach no weight to it. Upon the whole, my judgment is, that the defendants are liable upon this policy for the contributory amount paid by the Paragon on account of the collision, as a direct, positive, and proximate effect from the accident.

[NOTE. Upon the question whether in this case the contributory amount paid by the Paragon on account of the collision was a direct, posi-

tive, and proximate effect from the accident, in such sense as to render the defendants liable therefor, the judges were opposed. It was therefore certified to the supreme court for a final decision. The supreme court decided that the contributory amount paid by the Paragon was a direct, positive, and proximate effect from the accident, in such sense as to render the defendants liable therefor upon the policy. 14 Pet. (39 U. S.) 99.

[Pursuant to the order of this court, a reference was had to an auditor to ascertain and adjust the loss. On the coming in of the report, exceptions were filed, which were overruled by the court, and the report confirmed. Case No. 11,034.]

PETERS (WHEATON v.). See Case No. 17,486.

PETERSBURG JUDGES OF ELECTION (UNITED STATES v.). See Case No. 16,036.

PETERSBURG R. CO. (ATKINS v.). See Case No. 604.

PETERSBURG R. CO. (KEPPEL v.). See Case No. 7,722.

PETERSON (BAKER v.). See Case No. 776.

PETERSON v. The JAVA. See Cases Nos. 7,232–7,234.

PETERSON (MILLICK v.). See Case No. 9,601.

Case No. 11,036.

PETERSON v. UNITED STATES.

[2 Wash. C. C. 36.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.

SHIPPING REGULATIONS—REGISTRATION OF VESSELS—EVIDENCE OF SALE AND TRANSFER—SPECIAL VERDICT—PROVINCE OF COURT.

1. Information for a breach of the act of congress [1 Stat. 287] for registering and recording ships and vessels of the United States.

2. Upon a special verdict, the court has only to decide the law upon the facts stated, where a difficulty is expressed by the jury upon the facts. But if the jury express a doubt as to a particular point of law, the court can only decide the law upon that point.

[Cited in Garland v. Davis, 4 How. (45 U. S.) 154; U. S. v. Page, Case No. 15,986a.]

3. The mere settlement of an account between parties, one of them being represented by an agent, does not make a contract between the parties, although it may be evidence of a contract.

4. If, in an account settled between parties, an interest in a vessel is debited to one of them, the charge might be evidence to satisfy a jury of the fact of a sale and transfer of the vessel; but it is not in itself a transfer; and the court, if the fact of such account and debit are proved, cannot say there was a transfer of a vessel.

This was an information in the district court, for a violation of the fourth section of the act for registering and recording ships or vessels, &c., passed in 1792, in which the oath stated in the section is set forth; and it is asserted that an alien, viz. Don Bass. Roderigues, a subject of Spain, was, at the time the vessel was registered, interested in her.

The jury found a verdict to the following effect: That Bass. Roderigues, a subject of Spain, held an interest in the ship Phœnix, connected with Peterson, at the time of her purchase, and sailing from New York, in February, 1803. They find a settlement of money concerns, which took place between W. Weissman, the agent of Peterson, and J. S. Spinosa, agent by power of attorney, of Roderigues, on the 20th of January, 1804; when the balance was paid by Weissman to Spinosa (alias Spence.) But the jury doubt respecting the powers of Spinosa, by settlement of an account, to vest the property or right of Roderigues in the Phœnix, in Peterson solely. If, in law, the contracts and powers of attorney enabled Spinosa legally to part with the right of Roderigues in the ship, then the jury find for the defendant; but if they did not so enable Spence, by settlement of an account, legally so to do, then they find for the United States the sum of 7,000 dollars. The two powers are dated on the 23d of June, 1802. One of them grants full power to Spinosa, or Spence, to undertake any contract or negotiation on behalf of Roderigues; he, the said Roderigues, binding himself to make good the appointments at the times and manner stipulated. That whatever contracts may be entered into by the said Spence, he, Roderigues, in like manner will adopt, establish, and ratify; and he engages to fulfil them in the manner stipulated, granting him all necessary power; with an unrestrained and general liberty to act, exempt from the expenses. The other power is more special, and is confined to two objects: First, the collecting all moneys due in the United States to Roderigues; second, to buy a vessel of 300 tons, and make Roderigues responsible for the purchase thereof, or of negroes. On the 6th of July there was a contract entered into between Roderigues and Spence, in which the latter agrees to go to the United States, and to recover all debts there owing to Roderigues, "which are proved by the acknowledgment of bills which he delivers to me, with the respective powers for the recovery of the same, amounting to 11,877 dollars." When said recovery is had, Spence agrees to buy a ship of 300 tons, properly equipped; then to go to the nearest Spanish port, and have her made a Spanish vessel; then to the African coast, and to buy a cargo of negroes, to be purchased with the money received in the United States; then to go to Callao, and dispose of vessel and slaves. One-third of the proceeds to be allowed to Spence for his trouble. If the vessel cannot be bought for want of money, so as that the expedition for negroes shall fail; then said Spence has full power to act in the manner best suited for his return to Lima.

The case was argued by Mr. Dallas for the United States. The jury find that in Febru-

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

ary, 1803, an alien was interested in this vessel, together with the plaintiff; that a settlement of a money account took place between Peterson and Roderigues; and they doubt only as to the power of Spence in this settlement to transfer the vessel. The contract and power must be considered together, and we find the objects were, to collect debts, buy a vessel, and to carry on the slave trade; but there was no power to sell the vessel, which was in derogation of the whole scheme proposed. The general expressions of one of the powers must be confined by the contract to the slave business. The only mention of a sale of the vessel is at Callao. But independent of the want of power, Spence could not legally transfer, because immediately on the purchase made for an alien, the vessel was forfeited, and the property devested. The transfer even to a citizen, for the purpose of obtaining a register, could only be by bill of sale reciting the old register; and the whole transaction was tinctured with fraud. He cited 3 C. Rob. Adm. 114, 115: 6 East, 144, 145; Id. 427; 4 East, 110; 1 Pow. Cont. 183, 196, 201; 3 Term R. 454; 1 Bos. & P. 297, 554; 6 Term R. 61; Maybin v. Coulon, 4 Dall. [4 U. S.] 298, 308, 269; 3 Caines, 1, 4; 3 Bac. Abr. 295, 97, 98; 7 Bac. Abr. 7, 30.

Ted & Peters, Jr., for plaintiff. The jury find that if the powers and contracts enabled Spence legally to transfer, then they find for Peterson, which is of course finding that the transfer was made. The contract does not appear to have been communicated to Peterson, and therefore is not to be regarded; for a secret power or instructions, will not affect third persons acting under the open power. Poth. Obl. p. 54, a 4, s 79, to Mod. 10, 11. Spence had a power to settle accounts. If Peterson was a trustee for Roderigues for a part of this vessel, and Spence withdrew the funds from Peterson in the settlement on which the purchase had been made, this operation of course revested the property in Peterson. 2 Term R. 666; Wils. 117; Hardr. 115; 1 Wils. 55,—were cited, to show that the court can infer nothing in a special verdict, not found by jury; consequently no part of the charges in the information can be inferred to exist, but those stated in the verdict.

WASHINGTON, Circuit Justice, informed the counsel for the plaintiff in error, that he must confine himself to the question, whether any judgment could be rendered on the verdict; if he should think it worth while to say anything after hearing the observations which would be made by the court.

Upon a special verdict, the court was only to decide the law upon the facts stated. The jury, in such a case, by their general conclusion, express their doubts arising upon all the facts which they state. If instead of making a general conclusion, the jury express a doubt only as to particular points of law, the court has nothing to do but to decide the law upon those points; and the judgment will be rendered for that party in whose favour the jury find, in case the law be with him. Now in this case, the jury declare that the point they doubt is, whether Spence, by settlement of an account, had a power to vest the property or right of Roderigues in the vessel in Peterson; and though in propounding the point of law to be decided by the court, they seem to place it upon the powers of Spence, under the letters of attorney and contract, to retransfer; yet it is obvious, from the whole finding taken together, that the point they meant to submit, referred to the power to transfer by a settlement of accounts.

Now this is a question which it is impossible for the court to answer. The mere settlement of an account does not in itself constitute an agreement, or amount to a contract; though it may be evidence of a contract. If the value of Roderigues' interest in this vessel was debited in that account to Peterson, this might have been evidence to authorize the jury to find the fact of a sale or transfer of the vessel; but it is not a transfer, and therefore the court, who cannot decide except upon facts found, cannot say that there was a transfer in this case. If the jury had, from the evidence, found that fact, then the questions of law might arise which have been debated. This objection to the verdict appearing on the face of it, a venire de novo ought to be awarded.

[For an action against Peterson to recover a premium of insurance effected upon the Phœnix and paid for his benefit, see Case No. 9,601.]

PETERSON (UNITED STATES v.). See Case No. 16,037.

Case No. 11,037.

PETERSON v. WATSON.

[Blatchf. & H. 487.] [1]

District Court, S. D. New York. Dec. 3, 1835.

ADMIRALTY — SUITS BY SEAMEN FOR PERSONAL TORTS—COMMON-LAW REMEDY—COMPROMISE—COSTS.

1. In an action for a personal tort, where the right of action is in dispute, the respondent may compromise with the libellant before decree, without regarding the libellant's costs, and such compromise will be a bar to a further prosecution of the suit by the libellant's proctor, to obtain the costs.

2. In actions for personal torts, courts of admiralty afford to seamen no remedies and no privileges to which they would not be entitled in courts of common law.

[Cited in The Guiding Star, 1 Fed. 349; The Max Morris, 28 Fed. 884.]

3. A notice by the proctor for the libellant, to the respondent personally, in an action for a personal tort, that, in case of a compromise out of court, he will be held liable for the costs, does not vary the relative rights of the parties, and need not be regarded.

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[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

4. Semble, that the proper notice in such case would be, that the respondent pay to the proctor for the libellant the amount of the compromise money.

5. Where a suit is compromised without satisfying a proctor's costs, and he desires to prosecute it to recover his costs, the regular practice is to notice the cause for trial, and give notice to the opposite party that the suit is continued to recover costs and nothing more.

This was an action in personam, by [John Peterson,] a seaman against [George Watson,] the master of a vessel, for an assault and battery at sea. The respondent appeared, and, by his answer, denied the allegations of the libel imputing to him tortious conduct, and justified his acts as a legal exercise of authority. Proofs were taken on both sides. Subsequently, at the instance of the libellant, the respondent compromised the cause by paying the libellant $20, and took his release and discharge from all causes of action accruing on the voyage. The proctor for the libellant, apprehending that a clandestine settlement of the cause might be made between the parties, gave the respondent notice, that if he settled the cause without satisfying the costs, he would be held answerable for them to the proctor. The release being set up by the respondent in an answer, by way of plea puis darrein continuance, the proctor for the libellant replied specially, that the release was obtained by covin and collusion, to defraud him and the officers of court of their costs, and noticed the cause for hearing upon that issue. The libellant now moved for a decree that the respondent pay the taxed costs of the libellant, notwithstanding the settlement of the cause. The respondent opposed the motion, upon the ground that he had a right to purchase his peace, in an action for tort, before the recovery of damages, without regarding the libellant's claim for costs, and distinguished this case from cases where the right of action of the plaintiff is admitted, or costs or damages are adjudged after trial.

Erastus C. Benedict, for libellant, cited Toms v. Powell, 6 Esp. 40, 7 East, 536, and 3 J. P. Smith (Eng.) 554; Cole v. Bennett, 6 Price, 15; Read v. Dupper, 6 Term R. 361; Randle v. Fuller, Id. 456; Welsh v. Hole, 1 Doug. 238.

Theodore Sedgwick, for respondent.

BETTS, District Judge. The application now made by the libellant's proctor is not strictly regular, because he noticed the cause for hearing upon the issue of a covinous and fraudulent settlement of the action, without apprising the respondent specifically, as required by the course of practice in this court, that he was proceeding for costs and nothing more; but, as that objection is not insisted on by the respondent, I shall consider the general question, whether a party can settle with his adversary under circumstances like the present, without being responsible for the costs which have already accrued. This court has had occasion heretofore to examine this subject in other aspects, and has held a respondent liable for costs, after the settlement of a suit for wages, out of court, with the sailor personally, and in the absence of his counsel, where, under the circumstances of the case, the court would not have advised or approved such settlement, if the costs were to be thrown on the sailor. The Victory [Case No. 16,937]. So, also, where the respondent and his attorney settled a claim for wages without the presence or knowledge of the libellant's proctor, by paying a sum less than the proofs taken in the cause showed to be then due, a decree was rendered against the respondent for the taxable costs. The Sarah Jane [Id. 12,348]. This case is distinguishable from those, in being a suit for a personal tort, and differs from the cases of tort in the books where the attorney's costs were secured to him notwithstanding the release of his client, in being yet only in suit, no damages or costs having been adjudged against the respondent. This court affords a party no peculiar remedy in actions of this character, nor is a seaman under any peculiar protection, nor does he enjoy any special privilege, in suits for torts. Therefore, no equity arises in behalf of the libellant here, which he could not claim if his suit had been prosecuted in a court of common law. The question, then, rests upon precisely the same principles as if it were to be decided in a court of common law, and as if the suit had been there settled between the parties, whilst in a course of prosecution, leaving the attorney to look to his client alone for the costs incurred. No case was cited on the argument, nor has any been seen by the court, which allows the mere institution of a suit for damages in tort to carry with it a lien upon or equitable claim to the costs created in bringing or pursuing the action, or which recognises the right of the attorney, in such case, to hold the defendant responsible for his costs in the suit, before the rendition of judgment therefor. The English courts have allowed the cause to proceed for the mere recovery of the costs, in suits for debts; but there is a diversity between the practice of the common pleas and that of the king's bench, in this respect. The king's bench recognises the lien of the attorney as extending to his client's funds in the hands of the defendant (Mitchell v. Oldfield, 4 Term R. 123; Toms v. Powell, 6 Esp. 40), from the time the suit is brought or notice of it is received by the defendant; but the common pleas regards the lien as only attaching to the interests of the client in the hands of his attorney, and that subject to the equitable claims of the opposite party (Hall v. Ody, 2 Bos. & P. 28; Schoole v. Noble, 1 H. Bl. 23; Swain v. Senate, 2 Bos. & P. [N. R.] 99). The court of chancery upholds com-

promises between parties, when anything is paid, though the solicitor's costs are not provided for. See Oldham v. Hand, 2 Ves. Sr. 259. If, then, this case is to be adjudged in conformity to the principles adopted by courts of common law or by the court of chancery, it would seem to follow that the libellant had the absolute control of the cause, and that his settlement, upon a valuable consideration, would be an acquittance of the respondent from all further responsibilities. The court assumes no authority over the consciences of the litigants, to enforce an adequate compensation on such mutual adjustments, nor will it interfere to trammel the right of both to enter into them. The power to arrest or rescind the effect of a compromise is cautiously exercised in respect to suits for debts actually owing; and the caution would be more fitly applied to prosecutions for mere torts, where it would be impracticable for the court, upon the opposing representations of the parties, and without hearing the proofs, to ascertain whether there was a just cause of action, or whether there was ground to distrust the justness of the settlement. The whole case would have to be tried, before the court could pronounce that the suit was properly instituted, and that it afforded prima facie ground for the award of costs to the libellant. That manifestly could never be done, without serious inconvenience and expense; and the better practical rule will doubtless be, to leave the proctor to look to the responsibility of his client alone. Ordinarily, he will take the precaution to secure himself against the mischances of suits of this character; and, if he does not, no urgent equity is thereby created for an extraordinary interference on his behalf by the court. Parties have, no doubt, a free right of election between tribunals of concurrent jurisdiction. Yet, it ought not to escape attention that suits are conducted in this court with greater expense than in many of the inferior local tribunals, and, where the remedies are the same, practitioners ought not to have a bounty to encourage their selection of that court which must be most onerous to the opposite party. In other actions in personam than those by seamen for wages, which merit the most favoring indulgences, I shall be unwilling to give proctors privileges here, in respect to costs, which they could not enjoy in any other court. In cases of collusion and fraud, the court might be induced to avail itself of the control afforded it by the stipulations of suitors, to shield its officers from inequitable and covert practices, set on foot and consummated to their wrong by the parties litigant. But the mere adjustment, by mutual agreement between the parties, of an action of tort, ought not, of itself, to be regarded as a fraud on the promovent, although a mariner, or as calling upon the court to administer for his proctor a relief which might not, on the same facts, be claimed by the proctor of any other suitor.

The notice given to the respondent does not, in my opinion, vary the relation of the parties. I will not say what the effect of such notice might have been, if it had gone no further than to require the amount of compromise money to be paid to the proctor, and not to the libellant personally; or whether, under such premonition, the respondent might have been compelled to pay to the proctor a sum not larger than the amount of the taxable costs. But, in this case, the notice forbade any settlement of the cause, without satisfying the proctor's costs. It accordingly assumed a direction in the matter beyond the right of the proctor, and one which the respondent was not bound to observe. The respondent was not bound to regard the costs of the libellant's proctor in the light of a lien on him or on any funds under his control; because no costs could exist until damages had been decreed against the respondent, and because even a recovery in such a suit does not necessarily carry costs as an incident, in admiralty. A mere proffer to buy peace, in vindictive actions, is never deemed an admission of a right to any recovery in them; nor should the fact of the payment of $20 by the respondent, to free himself from the detention and expenses of a contested suit in this court, be regarded as an acknowledgment by him that he was in fault, and that a decree must, in the end, have passed against him. There is, then, no equity shown by the libellant's proctor in demanding the payment into his hands, in the first instance, of even the sum received by his client, or any part of it; and, unless that equity manifestly appears, there would, in my opinion, be no justifiable cause for continuing the suit and charging costs on the respondent. I shall, therefore, decree the settlement to be a full bar to the further prosecution of the suit. Decree accordingly.

PETERSON (WONSON v.). See Case No. 17,934.

Case No. 11,038.

PETERSON et al. v. WOODEN et al.

[3 McLean, 248;[1] 2 Robb, Pat. Cas. 116.]

Circuit Court, D. Ohio. July Term, 1843.

PATENTS — CLAIM EXCEEDING THE INVENTION — FAILURE TO SET FORTH IMPROVEMENT IN DECLARATION — DEMURRER.

1. If the patentee claims more than he has invented, his patent is not void, as under the former law; but, so far as his invention goes, he is protected.

[Cited in brief in Rheem v. Holliday, 16 Pa. St. 350.]

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

2. But where the claim is for an improvement of a machine, the patentee must show in what the improvement consists.

3. In a declaration, the improvement must be stated as an essential part of the plaintiff's right; and if this be not done the declaration is demurrable.

At law.

Mr. Storer, for plaintiffs.

Mr. Fox, for defendants.

OPINION OF THE COURT. This is an action for the violation of a patent right. In their declaration, the plaintiffs [Peterson & Peterson] state, that they have invented a "new and useful improvement in the cooking stove," which improvement, they state, has not been known or used. The schedule which is set out in the declaration, describes the structure of the stove in all its parts, but no where describes in what the improvement consists. And on that ground the defendants demurred to the declaration. Prior to the act of the 4th of July, 1836 [5 Stat. 117], if the patentee claimed more than he had invented, his patent was void. But, under the decision of the supreme court, he was permitted to surrender his patent and take out a corrected one. The 13th section of the above act provides, that "where a patent is invalid by a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had invented, if done through inadvertence, on surrendering the patent, the patentee may obtain a new patent for the residue of the period unexpired of the original patent." And in all cases of infringement subsequent to the date of the amended patent, it is declared to be valid. The fifteenth section of the same act provides, that, under the general issue and notice, the defendant may controvert the truth of the specifications.

The ninth section of the act of 3d March, 1837 [5 Stat. 191], provides, that, where the patentee has claimed more than he has invented, "the patent shall still be deemed good and valid for so much of the invention as shall be truly and bona fide his own, provided it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right as aforesaid." Now although the patent is not void when the patentee claims more than he has invented, yet, in his specification, he must state in what his improvement consists. He does not claim, in this case, the invention of a cooking stove, but an improvement on such stove; but in no part of the declaration is it stated what this improvement is. Had he claimed the invention of the stove, under the above statute of 1837, the invention would have been good, so far as it extended. This is an essential part of the plaintiffs' case, and should be set out in the declaration. And as this has not been done, the declaration is demurrable. Leave is given to the plaintiffs to amend their declaration.

PETILLON v. NOBLE. See Case No. 11,044.

PETITION OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the petitioners.]

Case No. 11,039.

The PETREL.

[The case reported under above title in 18 Law Rep. 185, and Brunner, Col. Cas. 589, is the same as Case No. 2,261.]

Case No. 11,040.

In re PETRIE et al.

[5 Ben. 110;[1] 7 N. B. R. 332.]

District Court, S. D. New York. May, 1871.

BANKRUPTCY—RIGHT OF BANK TO APPLY BALANCE ON MATURED PAPER OF BANKRUPT.

P. & Co. had an account with a bank, on which there was due to P. & Co. a balance of $395 41, deposited by P. & Co. without any knowledge on the part of the bank of their insolvency, when a draft on P. & Co. for $3,500, owned by the bank, fell due and was protested for non-payment, P. & Co. having failed five days before. The bank applied the balance towards the payment of the draft. Bankruptcy proceedings were commenced against P & Co. nearly a month afterwards. The assignee and the bank submitted to the court the question of their respective rights to the balance: *Held*, that the bank had a right to retain the balance, as against the assignee.

[We, William H. Guion, assignee of the estate of the bankrupts above named, and the Central National Bank of the city of New York, creditors of said bankrupts, being parties concerned in the above-entitled bankruptcy proceedings, hereby consent and agree to submit and state the questions contained in the special case hereto annexed for the opinion of the court thereon. And we agree that upon the questions raised by such special case being finally decided, that the amount in dispute, namely, $395 41, shall be paid by said bank to said assignee, or shall be returned by said bank on account of their debt, as the court shall direct, without costs. And we agree that the judgment of the court on said questions shall be final.][2]

Wm. A. Guion,
Assignee of Petrie & Co.
Wm. A. Wheelock,
President Central Nat. Bank.

This was a case submitted to the court by the assignee in bankruptcy of George H. Petrie & Co., and the Central National Bank, as follows:

On February 14th, 1870, the Central National Bank were the owners of a draft for $3,500, drawn by the Beaver Brook Manu-

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

[2] [From 7 N. B. R. 332.]

facturing Company, on, and accepted by, Petrie & Co., the bankrupts herein, and which matured on the last mentioned day, and was protested for non-payment.

At and previously to the time of such protest, the firm of Petrie & Co., the bankrupts, had an account with said bank, in which said firm had been in the habit of depositing moneys, from time to time, and drawing against the same. At the date of maturity of said draft there remained a balance due to said firm of Petrie & Co., on said deposit account, of $395 41, which was so deposited on or previously to February 5th, 1870, in the regular course of business, and without said bank having knowledge or notice of the insolvency of said Petrie & Co. Petrie & Co. failed four days afterwards, namely, on February 9th, 1870.

At the maturity and protest of the draft, the bank applied the amount of the deposit towards the payment of the draft.

Nearly a month afterwards, and on March 12th, 1870, bankruptcy proceedings were commenced against Petrie & Co.

The bank claimed that, under section 20 of the bankruptcy act, the draft and deposit were mutual debts, and that they had a right to set off one against the other, thereby reducing the amount of the draft to $3,104 59.

The assignee claimed that the funds, deposited as aforesaid, belonged to the estate of the bankrupts; that, in respect to the same, the bank were acting as trustees; that they had no right to set off any part of their debt against the same; and that he, as such assignee, acquired an absolute title to the same, under section 14 of said act. He also claimed that, to allow said bank to hold said funds, would be a violation of the second clause of section 35 of said act, and would be giving them a preference over other creditors.

The questions to be determined were as follows:

First—Had the bank a right to set off the amount of said draft of $3,500, against the said deposit of $395 41, thereby reducing the amount of said draft to $3,104 59?

Second—Should the bank pay over to said assignee the amount of said deposit?

BLATCHFORD, District Judge. As the opinion and judgment of the court on the questions stated in the foregoing special case, the first question above stated is answered in the affirmative, and the second question above stated is answered in the negative.

Case No. 11,040a.

PETRIE v. PENNSYLVANIA R. CO.

[3 N. J. Law J. 204.]

ELECTION OF ISSUES—REMOVAL.

On petition to remove cause from New Jersey supreme court. Before August 6, 1879, plaintiff had filed three replications to three pleas. August 6, before issue, plaintiff gave notice of trial at September term in Hudson county. August 29 the supreme court judge ordered that plaintiff make election as to issues. The case was noticed for December term. December 2, a petition for removal was presented by defendant; the judge declined to make the order and tried the cause. This petition, verifying these facts, asks advice as to course to be pursued.

NIXON, District Judge, said no advice or order is necessary; the case will go on if properly removed. He remarked upon the general inattention of counsel to the provisions of the act of 1875. [18 Stat. 470.] This act, he said, goes to the full length. Since that act the orderly way is to find out whether a cause is removable; file the papers and go on, leaving the other party to apply to remand. The case comes itself—no order is necessary. If the state judge feels that it is not removable he goes on; but an application may be made to the federal court and then, if the cause is removable, it will be removed.

Case No. 11,041.

PETROCOKINO v. STUART.

[37 Leg. Int. 30; 14 Phila. 412; 9 Reporter, 167; 26 Int. Rev. Rec. 30; 1 Wkly. Jur. 701; 9 N. Y. Wkly. Dig. 371.] [1]

Circuit Court, E. D. Pennsylvania. Dec. 29, 1879.

JURISDICTION—SUITS BETWEEN ALIENS—CITIZENSHIP OF CORPORATIONS.

1. The act of congress of 1798 [1 Stat. 570], read, as it must be, in connection with section 2, art. 3, of the constitution, does not confer jurisdiction to the United States circuit court over controversies between aliens, but between a state, or the citizens thereof, and foreign states, citizens or subjects. Montalet v. Murray, 4 Cranch [8 U. S.] 46, recognized.

2. As respects rights of action and liability to suit, a corporation will be regarded as a citizen of the state by which it was created. That the defendant corporation has an office and is transacting business here is unimportant. A corporation cannot migrate.

3. The defendants' offices in Philadelphia render them liable to suit here in any court having jurisdiction of the parties and the controversy; but, as this court has not, the writs must be quashed.

[Motion to quash writs of summons. The plaintiffs, aliens, brought suit against "Stuart & Brother, Limited," a corporation under an English company's act, which had an office and transacted business in Philadelphia.

[J. Warren Coulston, for the motion. This court has no jurisdiction in an action where both the parties are aliens. Const. U. S. art. 3, § 2; Montalet v. Murray, 4 Cranch [8 U. S.] 46.

[1] [Reprinted from 37 Leg. Int. 30, and 9 Reporter, 167, by permission. 9 N. Y. Wkly. Dig. 371, contains only a partial report.]

[Samuel Wagner, contra. Where a foreign corporation is permitted to do business in a state on condition that it may be sued in the United States court for the circuit in which such state is. Ex parte Schollenberger, 96 U. S. 369. See, also, Railroad Co. v. Whitton, 13 Wall. [80 U. S.] 285.] [2]

BUTLER, District Judge. The plaintiffs and defendants, in each of the above cases, are aliens,—the defendants being incorporated, and having offices and transacting business in Philadelphia, where the processes were served. The court is asked to quash the writs, for want of jurisdiction. The jurisdiction of this court is limited to the classes of cases enumerated in the acts of congress, relating to the subject. Among these are "suits of a civil nature where * * * an alien is a party;" and this is the only class here involved.

What is the meaning of this provision of the act of 1793? Certainly, that when one, and only one, of the parties to a suit, is an alien. For the provision must be read in connection with section 2 of article 3 of the constitution, which confers jurisdiction on the federal courts. Jurisdiction is not conferred over controversies between aliens, but between a state or the citizens thereof, and foreign states, citizens, or subjects. In other words, (as respects the question involved,) between the citizens of a state, and the citizens or subjects of a foreign state. Even if congress had intended otherwise, the statute must be construed in conformity with this provision. The limit of jurisdiction prescribed by the constitution, cannot of course, be transcended. The statute was so construed in Montalet v. Murray, 4 Cranch [8 U. S.] 46. Although a corporation is not a citizen, within the meaning of the several clauses of the constitution, relating to citizens, as is said in Railroad Co. v. Whitton, 13 Wall. [80 U. S.] 270, yet as respects rights of action, and liability to suit, it will be regarded as a citizen, of the state by which it was created.

That the defendant has an office, and is transacting business here, is unimportant. A corporation cannot migrate. The cases of Ex parte Schollenberger, 96 U. S. 369, and Railroad Co. v. Whitton, 13 Wall. [80 U. S.] 285, are inapplicable to the facts here involved. Ex parte Schollenberger, principally relied upon, decided simply that the presence of an office and agent here, made the defendant liable to the service of process under the statute of 1873 [Laws Pa. 1873, p. 27] of Pennsylvania,—an "inhabitant of the state" for the purposes of suit. No other question was involved. The plaintiff being a citizen of Pennsylvania, and the defendant treated as a citizen of another state, the court had jurisdiction of the controversy, and the question before us could not arise. If having an office and transacting business here, had been regarded as transferring the corporation, or its home, to this state, the court, clearly, would not have had jurisdiction. The acceptance of service of the writ, is immaterial. It waived nothing but the official act of serving. The most unequivocal consent would not confer jurisdiction. Collins v. Collins, 37 Pa. St. 387; Funk v. Ely, 52 Pa. St. 442; Mills v. Brown, 16 Pet. [41 U. S.] 525. The defendants' offices in Philadelphia render them liable to suit here in any court having jurisdiction of the parties, and the controversy. But this court has not. The writs must be quashed.

[2] [From 9 Reporter, 167.]

PETRY (FRINK v.). See Case No. 5,128.

Case No. 11,042.

PETTERSON v. CHAPMAN et al.

BROWNSON et al. v. SAME.

[13 Blatchf. 395.] [1]

Circuit Court, N. D. New York. June 7, 1876.

REMOVAL OF CAUSES—ACT OF MARCH 3, 1875—CITIZENSHIP OF PARTIES.

1. Citizens of New York brought an action of trover in a state court against a citizen of New York and citizens of Connecticut. All the defendants took proceedings to remove the suit into this court, under the second section of the act of March 3, 1875 (18 Stat. 470), as being a suit in which there was "a controversy between citizens of different states." *Held*, that the controversy in the suit was not one between citizens of different states, and that the cause must be remanded to the state court.

[Cited in Sawyer v. Switzerland Marine Ins. Co., Case No. 12,408. Followed in Van Brunt v. Corbin, Id. 16,832. Approved in Boyd v. Gill, 19 Fed. 147, 149.]

[Cited in Simmons v. Taylor, 83 N. C. 148.]

2. The only changes introduced by this part of the second section of the act of 1875 are, that either party, plaintiff or defendant, may remove the cause, and that it is no longer necessary that either party shall be a citizen of the state in which the suit is brought; but it still remains necessary that the state citizenship of each individual plaintiff shall be different from the state citizenship of each individual defendant, to authorize a removal under this part of said section.

[Cited in Donohoe v. Mariposa L. & M. Co., Case No. 3,989. Followed in Van Brunt v. Corbin, Id. 16,832. Cited in Eureka Consolidated Min. Co. v. Richmond Consolidated Min. Co., 2 Fed. 830; Edwards v. Connecticut Mut. Life Ins. Co., 20 Fed. 453.]

[These were actions at law by Peter G. Petterson against William P. Chapman, Henry P. Chapman, and Alfred Woodbridge, and by Morton Brownson and Charles Ennis, executors, etc., against the same defendants, for the conversion of certain securities belonging to the plaintiffs. Heard on motion to remand the causes to the state court.]

Clark Mason, for plaintiffs.

James S. Stearns, for defendants.

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

JOHNSON, Circuit Judge. These motions to remand to the supreme court of New York the causes above entitled are made upon the ground that the second section of the act of March 3, 1875 (18 Stat. 470), does not authorize their removal into this court. The plaintiffs and the defendant Woodbridge are citizens of New York, while the defendants Chapman are, or are alleged to be, citizens of Connecticut. Each action is for the conversion by the defendants, who were doing business as brokers, and were in partnership, of certain securities belonging to the respective plaintiffs. The application for removal was made, in each action, by all the defendants.

The second section of the act referred to consists of two branches, the latter of which relates to cases in which the application to remove the cause into the circuit court is made by less than the whole number of plaintiffs or of defendants. It provides for cases in which more than one controversy, or a principal and subordinate controversies, are involved in one suit. This was also the case in the act of July 27, 1866 (14 Stat. 306), which enacted, that, in a suit by a citizen of a state against a citizen of another state, and also a citizen of the same state as the plaintiff, if the controversy might finally be determined between the plaintiff and the citizen of the other state, without the presence of the other defendant, it might be removed. Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604]. The state of facts does not exist, in the case under consideration, to which the latter part of the section can be applied, and it is, therefore, not immediately involved.

The first part of the section provides, that any suit of a civil nature, involving a certain amount, then pending, or thereafter brought, in a state court, "in which there shall be a controversy between citizens of different states," may be removed by either party into the circuit court of the United States. The precise question presented is whether the controversy in this suit is one between citizens of different states; for that is the case in which alone the power of removal exists.

The judicial power of the United States extends, by force of the constitution, among other subjects, to controversies between citizens of different states. On the other hand, it does not, in express words, at least, extend to controversies between citizens of the same state, when the power rests on citizenship alone. By the first section of the act before cited, the original jurisdiction of the circuit courts of the United States extends to suits "in which there shall be a controversy between citizens of different states;" and, as we have seen, in the second section, the power of removal is, in this respect, conferred in the same terms. Under sections 11 and 12 of the judiciary act of September 24, 1789 (1 Stat. 78, 79), the jurisdiction of the circuit courts extended to suits between a citizen of the state where the suit is brought and a citizen of another state, and the power of removal of cases begun in the state courts was expressed in the same terms. Upon the words thus employed, the construction was early settled, that the designation was intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons all of whom are entitled to sue, or are liable to be sued, in the courts of the United States. This doctrine was reaffirmed in Susquehanna & W. V. Railroad & Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 172, and is unquestioned law. In the act of March 2, 1867 (14 Stat. 558), a power of removal was given in a suit in a state court "in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state," in favor of the latter, whether he was plaintiff or defendant, upon certain conditions. It was held in Case v. Douglas [Case No. 2,491] that the settled construction of the former acts was applicable to and governed this; and, in the case of Sewing Machine Cos., 18 Wall. [85 U. S.] 553, the supreme court held the same view. Mr. Justice Clifford, in giving the opinion of the court, says: " 'A suit by a plaintiff against a defendant,' must mean substantially the same thing, in the practical sense, as 'a suit in which there is controversy between the parties.' " The change of expression introduced in the act of 1875 does not, as it seems to me, affect this principle of construction. "A controversy between citizens of different states" must mean substantially the same thing, as to the diversity of citizenship extending to every person who is a party on the other side. The new phrase merely omits one qualification expressed in the other phrase It is no longer necessary that one party should be a citizen of the state in which the suit is brought. He may be a citizen of any state, if the other party be not a citizen of that state, but of another. But this leaves untouched the principle established by the cases, that the party on each side, though consisting of several individuals, is, for that purpose, to be regarded as one, and that each individual must possess the requisite citizenship. The changes introduced, by this part of the section of the act in question, are, that either party, plaintiff or defendant, may remove the cause, and that it is no longer necessary that either party shall be a citizen of the state in which the suit is brought. It still remains necessary that each individual plaintiff shall be of different state citizenship from that of each individual defendant, to authorize a removal under this part of the act.

The principle running through all the cases which have been referred to is, that the requisite jurisdictional citizenship must exist as to each individual plaintiff or defendant; and that what would be necessary if there were but one individual on each side remains necessary, as to each individual,

when there are more than one. This construction does not appear to rest so much upon the particular words employed in the several statutes, as upon the acceptance of the general idea, that, when jurisdiction depends alone upon citizenship, the fact that it exists as to one person does not in the least afford a foundation for asserting it over another. The fact of citizenship is entirely personal, and so is the grant of jurisdiction, founded upon the fact. This view appears to me to be disclosed in, and to have been acted upon in, all the cases from Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267, the earliest, down to Sewing Machine Cos., 18 Wall. [85 U. S.] 553.

The phrase of the judiciary act, "a suit commenced by a citizen of a state in which the suit is brought, against a citizen of another state," and that of the act of 1867, "a suit in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state," have been held alike to require the jurisdictional citizenship in each individual. In the last phrase, if we say, "a controversy between a citizen of one state and a citizen of another state," we drop out the requirement of citizenship in the state where the suit is brought, but make no other change, and certainly none in the necessity of the construction so long established, as to the requisite citizenship of each individual. On that point there is no room for discrimination. The present act embodies precisely this idea, neither more nor less, conveying it in fewer words—"a controversy between citizens of different states." When there is such a controversy, either party may remove it. Either party to the controversy includes each individual on the one or the other side; and, on the principles of the adjudged cases, the jurisdictional requirement must exist in respect to each individual. The difference of citizenship must exist between the plaintiffs, on the one hand, and the defendants, on the other. Diversity of citizenship, as to those between whom the controversy exists, is alone regarded. Nothing is affirmed as to diversity of citizenship between the plaintiffs, on the one hand, alone, and between the defendants alone, on the other; for, between them there would be no controversy. Yet, upon the construction claimed by the defendants, such a diversity necessarily carries the right of jurisdiction to the circuit court; for, upon that construction, if one plaintiff is of different state citizenship from the others, then, whatever may be the citizenship of the defendants, whether of one or more states, there will be a controversy between citizens of different states. Thus, the word "controversy" will be eliminated from the case of jurisdiction, and that will attach, whenever the individuals engaged in a suit include citizens of more than one state. Unless the construction is adopted which requires the jurisdictional fact to exist as to each individual among the parties, every litigation may be originally commenced in, or may be drawn to, the courts of the United States, in which any individual among the plaintiffs or defendants is of a different state citizenship from a single individual of the other party. If all the individuals who are plaintiffs, except one, are citizens of New York, and they bring their suit, in the courts of New York, against defendants all of whom are citizens of New York, upon the construction which I think should be rejected, the defendants could remove the cause into the circuit court of the United States, and it might originally have been brought in that court. Such a case does not, in my opinion, present a controversy between citizens of different states, within the meaning of either the constitution or the laws.

It is suggested, that the nature of the claim, being for a conversion of personal property, and, therefore, maintainable against either defendant alone, is material. But, to this it must be answered, that the plaintiffs have the election to proceed in the same suit against all the defendants; and that the defendants have sought and obtained the removal in their joint right, and upon their joint application. The case discloses but one controversy, and that can be fully determined only between all the parties. Smith v. Rines [Case No. 13,100]. In my opinion, these cases were not rightfully removed into this court, and should be remanded to the supreme court of New York.

PETTIBONE (BABCOCK v.). See Case No. 700.

Case No. 11,043.

PETTIBONE v. DERRINGER.

[4 Wash. C. C. 215;[1] 1 Robb, Pat. Cas. 152.]

Circuit Court, D. Pennsylvania. April Term, 1818.

PATENTS—EXPLANATION OF AMBIGUITY—DEPOSITION—EFFORTS TO PROCURE ATTENDANCE OF WITNESS—LETTERS CERTIFIED UNDER GOVERNMENT SEAL.

1. An ambiguity in a patent and specification may be explained by the affidavit annexed to the specification.

2. Where a deposition taken de bene esse, is offered in evidence, the party who offers it must prove that he has used diligence to procure the attendance of the witness.

[Cited in Hunter v. International Ry. Imp. Co., 28 Fed. 842.]

3. It is no objection to reading the deposition of a witness taken under a rule of court, who lives in another state more than one hundred miles from the place of trial, that he had been

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

in the city during the session of the court, the fact not being known to the party.

[Cited in Whitford v. Clark Co., 119 U. S. 525, 7 Sup. Ct. 308.]

4. The letters of the plaintiff to the secretary of state, containing applications for a patent, and specifications, certified under the seal of that department as papers remaining in that office, were properly admissible in evidence.

5. Depositions taken without a commissioner or rule of court, in the state of New York, more than one hundred miles from Philadelphia, but conforming in all respects to the thirtieth section of the judiciary act of 1789 [1 Stat. 80], may be read in evidence.

6. A deposition taken under the thirtieth section of the judiciary act of 1789, cannot be read in evidence unless the judge certifies that it was reduced to writing either by himself, or by the witness in his presence.

[Cited in Blake v. Smith, Case No. 1,502.]

[Cited in Goodhue v. Grant, 1 Pin. 558.]

This was an action on the case for an infringement of the plaintiff's patent for "a new and useful improvement in boring muskets, pistols and rifles, by an auger called the 'spiral groove' or 'twisted screw' auger." The specification states that this auger consists in the manner of making it, or the particular form or construction of the same, as also the mode of application. It then proceeds to state the way in which the auger is made, and that the difference in the form of this improved auger from the common screw auger used for wood is, that the point or cutter is next to the shank, and the auger is less twisted. That the shank is long enough to put through the barrel and fasten to the socket, and the machine that moves or turns the auger. The auger revolves about once per second, and the points or cutters are pressed against the iron that is to be bored from the inside of the barrel, by the force or application of one or more endless screws that revolve in a rack of cogs attached to the carriage, on which the barrels are fastened. The affidavit annexed to the specification states, that the patentee verily believes himself to be the first inventor of the improved method of making augers or bits, for boring muskets, pistols, and rifle barrels, as above specified and described. The defendant's plea was the general issue, and he gave notice to the plaintiff, that, "he should give in evidence the following matter to prove that the thing secured by patent was not originally discovered by the plaintiff, but had been in use anterior to the supposed discovery, or that he had surreptitiously obtained a patent for the discovery of another person." The notice then proceeds to state the persons by whom the screw auger and the mode of application had been discovered, and the places where they had been used anterior to the plaintiff's discovery. The plaintiff gave in evidence a letter from himself to the secretary of state, dated the 21st of January, 1799, and annexed a specification of an improvement in boring muskets, &c. agreeing in every material circumstance with that annexed to his present patent, except that he states the auger used to be one called the "nut bit," invented by M'Cormick. In this letter he claims to be the inventor of the improvement, and claims a patent for the same. He also gave in evidence a similar application to the secretary of state, dated the 12th of August, 1799, accompanied by a similar specification, except that he speaks of and describes the twisted auger as his invention. Both specifications were accompanied by the usual affidavits. The tendency of the plaintiff's testimony was to prove that he was the first inventor of the twisted auger for boring musket, pistol and rifle barrels; that he was also the inventor of the mode of drawing, instead of pushing the auger through the barrel; and of the application of the endless screw to produce that effect; and also of the superiority of the plaintiff's invention to former modes of boring gun barrels. The defendant examined a number of witnesses to prove that the plaintiff was not the inventor of the twisted screw auger, nor of the mode of drawing the auger through the barrel, but that both had been invented and used before the plaintiff pretended to have invented either; also, that the difference between M'Cormick's auger, which the plaintiff acknowledged to have been in use before January, 1799, and of the screw auger of which he claimed to be the inventor in August, 1799, was not in principle, but in form only. Also, that M'Cormick's auger was preferable to the plaintiff's, and was more generally in use in the public gun manufactories.

WASHINGTON, Circuit Justice. The first question is, what is the discovery for which the plaintiff has obtained a patent? He contends that it is for the twisted auger, made, formed, and used, in the manner set forth in the specification. The defendant insists that it is confined to the twisted auger, and to no more. These cases are always embarrassing, because the originality of the patentee's discovery is almost always in issue, which involves not only the construction of the patent, taken in connection with the specification, which forms a part of it, but also a comparison between the invention for which the patent is granted, and that which is asserted to have been made prior to it. Both of these difficulties occur in the present case. The patent recites, that the applicant had represented himself to be the inventor of a new and useful improvement in boring muskets, &c. by an auger called the "spiral groove," or "twisted screw" auger. These expressions are perfectly equivocal, and may apply as well to an auger constructed for boring muskets, confining the improvement to the auger alone, or to that instrument, and the particular manner of using it, afterwards pointed out in the specification. This latter instrument describes the manner of making

the auger, its form, and how it may be used. But taken in connection with the patent, it does not necessarily follow that the manner of using the machine forms a part of the discovery; because, if the plaintiff was in fact the inventor of the auger only, and meant to claim no more, it was still proper that he should, under the requisitions of the third section of the law, describe in his specification the manner of using the auger, with the principle and several modes in which the application of that principle was contemplated by the inventor. Whether the want of an affidavit will avoid the patent, or will in all cases confine the patent to the invention stated in it, as the defendant's counsel have contended, are questions which need not be decided in this cause. But there can be no doubt, that where the construction of the patent and specification, as to the subject of the grant, is doubtful; the affidavit, if more precise, may be resorted to to explain the ambiguity. It would seem to be particularly proper to do so for restraining general expressions in the specification; as the oath required to be taken by the act of congress is, that the inventor does verily believe that he is the true inventor of the art, machine or improvement for which he solicits a patent.

These observations are strikingly applicable to this patent, which, as explained by the specification, contains no specific assertion that the plaintiff was the inventor of the peculiar manner of using the auger as described in the latter instrument, and the affidavit confines the invention to the improved method of making augers or bits, for boring musket barrels, &c. "as above specified and described." These latter expressions obviously refer to the method of making augers for boring muskets, which is distinctly described in the specification, and not "to the manner of using the auger," which, though described, has nothing to do with the method of making it. In the case of Evans v. Eaton [3 Wheat. (16 U. S.) 454] the supreme court construed the patent to amount to a grant to Evans, not only of an exclusive right to the entire improvement in the manufacture of flour, but to the improvement in the separate instruments employed in producing the general result. But this construction was formed upon the supposed intention of the parties to the patent, drawn not only from certain expressions in the specification, and also in the affidavit, but from the private act of congress, passed for the relief of Oliver Evans. In the specification, the patentee, after describing the hopper boy, the particular machine in controversy, and the other four machines employed in the manufacture of flour, adds, that "he claims, as his invention, the peculiar properties or principles which this machine (the hopper boy) possesses, of spreading, turning, and gathering the meal at one operation;" and the affidavit states, "that he verily believes he is the true and original inventor of the improvements herein above specified, for which he solicits a patent."

Upon the whole, we are of opinion that the plaintiff's patent extends only to the auger described in the specification, and not to the method of using it.

2. The next question is, was the plaintiff the inventor of this instrument, as described in the specification? We have the authority of the plaintiff himself for saying that he made the discovery of that instrument in August, 1799; because, in his application to the state department on the 12th of that month, he so alleges the fact. It appears by a letter from Mr. Ames, the manager of the Springfield works, dated in September, 1799, that he had just received from the plaintiff one of these augers, and in that letter he gives to the plaintiff the merit of the discovery. Three witnesses, one of whom is this Mr. Ames, have sworn, that this auger was introduced at the Springfield works by a Mr. Holmes, about six months prior to the period when a similar one was sent there by the plaintiff. That it was much approved of, and that Holmes not only claimed but was considered at that place to be the inventor. If this evidence is believed by the jury, it is conclusive against the plaintiff. But if the jury should be of a different opinion, then, the next question will be, was the plaintiff entitled to a patent for his improvement? Or, in other words, is the twisted auger, of which he claims to be the inventor, an improvement in the principle, or merely a change in the form and proportions of the auger used for boring gun barrels prior to August, 1799? That the auger, styled the "nut bit," called M'Cormick's, was in use previous to the year 1799 was acknowledged by the plaintiff in his application to the state department in January, 1799, and was the auger which the plaintiff then contemplated using. This fact is corroborated by the testimony of three witnesses, who state that M'Cormick's auger was used at the Springfield works in 1797 and 1798, and was drawn, not pushed, through the barrel. Two other witnesses have stated that it was so used at M'Cormick's works, in the summer or autumn of 1798, and a sixth witness declares that it was so used at a still earlier period at Brian's works. On the other side, there are two witnesses who state that the method of drawing the auger through the barrel was not known or practised, until the discovery was made by the plaintiff. If the defendant's witnesses are believed, then the plaintiff is deprived, not only of the merit of having invented the twisted screw auger, but the manner of using it, by drawing instead of forcing it through the barrel; and then nothing will remain to the plaintiff of all that he has stated in his specification, but the application of the endless screw to move the carriage on which the barrel is placed, instead of the long screw, or the lever, or

weights, which were used by M'Cormick. M'Cormick's auger, or nut bit, as it is called, is made by filing out the grooves from a round solid piece of steel, having the cutters towards the shaft, and is drawn through the barrel. The twisted auger claimed by the plaintiff is made by twisting a plate of steel, so as to form the grooves, having the cutters next the shaft, and it is drawn through the barrel. That the twisted auger is a great improvement on the old method of boring gun barrels is undoubted; but whether it is so of M'Cormick's auger, you will judge from the evidence. The question for your determination is, whether it is an improvement on the principle of M'Cormick's auger, or whether it is merely a change in the form, or proportions of that auger. If only the latter, then it was not such an improvement as the plaintiff was entitled to secure to himself by a patent.

The last question is, whether the defendant has invaded the plaintiff's patent. This you must decide upon the evidence.

(The following questions upon evidence were decided upon the trial.

1. That where a deposition taken de bene esse is offered in evidence, the party offering it must prove that he had used due diligence to procure the attendance of the witness, and particularly that he had made inquires at the last place of abode of the witness, in order to have him served with a subpœna.

2. That it is no objection to reading the deposition of a witness who lives in another state, more than one hundred miles from the city, taken under a rule of this court, that he had been in Philadelphia during the sitting of this court, where it appeared that the fact of the witness being in the city was unknown to the party at whose instance the deposition was taken. Whether, if the party had known that the witness was in the city, the case would have been altered, was not decided.

3. That the letters of the plaintiff to the secretary of state of the 31st January and 12th August, 1799, containing applications for a patent, and specifications certified under the seal of that department, as papers remaining in that office, were propertly admissible in evidence. See 2 Bior. & D. Laws, 52.

4. That depositions taken without a commission, or rule of court, in the state of New York, more than one hundred miles from Philadelphia, but conforming in all respects to the thirtieth section of the judicial act of the 24th September, 1789, might be read in evidence.

5. That a deposition taken under the thirtieth section of the judicial act cannot be read, unless the judge certifies that it was reduced to writing, either by himself, or by the witness in his presence.)

PETTIBONE (HAMLIN v.). See Case No. 5,995.

Case No. 11,044.

PETTILON et al. v. NOBLE et al.

[7 Biss. 449;[1] 23 Int. Rev. Rec. 209; 2 Nat Bank Cas. (Browne) 120; 9 Chi. Leg. News, 314.]

Circuit Court, N. D. Illinois. May 4, 1877.

REMOVAL OF CAUSE FROM STATE COURT—APT TIME—JURISDICTION OVER BANKING ASSOCIATIONS.

1. A case pending in the supreme court of a state at the time the act of March 3, 1875 [18 Stat. 470], in regard to the removal of suits, was passed, and which was remanded from such supreme court for further proceedings, stands like a new cause, and consequently the right of removal may be claimed at or before the term at which the case can be tried.

[Cited in King v. Worthington, 104 U. S. 49; Forrest v. Edwin Forrest Home, 1 Fed. 461.]

2. The defendants not being obliged to re-docket the case, are not bound to take affirmative action for a removal until the complainants have caused the case to be re-docketed, of which they are entitled to due notice.

3. The 10th clause of section 629 of the Revised Statutes of the United States, giving United States courts jurisdiction "of all suits by or against any banking association established in the district for which court is held under any law providing for national banking associations" does not invest said courts with exclusive jurisdiction over this class of corporations. Their jurisdiction is only concurrent with that of the state courts.

4. If suit is brought against such banking association in a state court it has no right to remove the cause to the federal court.

[Disapproved in Cruikshank v. Fourth Nat. Bank, 16 Fed. 890.]

[This was a bill in equity by William Pettilon and others against William T. Noble and others, to restrain the negotiation of certain notes Heard on motion to remand the cause to the state court.]

Omar Bushnell, for complainants.
Gwynn Garnett, for defendants.

BLODGETT, District Judge. This is a suit in equity originally commenced in the superior court of Cook county, Illinois, in December, 1873. The complainants had given certain negotiable notes to the firm of W. T. Noble & Co., and secured payment thereof by a chattel mortgage.

The complainants (mortgagors) filed this bill for an injunction to restrain the negotiation of the notes, and the foreclosure of said mortgage, and to have the same declared void, for certain reasons growing out of the dealings between the mortgagors and the mortgagees.

The notes and the mortgage were, as is claimed by the defendants, transferred by indorsements for value before due, to the Central National Bank of Chicago.

The bank was made party defendant. An-

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

swers were filed by the defendants, and the case came up on motion to dissolve the injunction. The injunction was dissolved, and the court dismissed the bill without prejudice, and complainants appealed to the supreme court of this state.

On the 30th of January, 1875, the supreme court reversed the decree of the superior court, and remanded the case for further proceedings.

On the 15th of April, 1876, an attorney representing the defendants appeared in the superior court, and, on his motion in behalf of the defendants, and the presentation of the mandate of the supreme court, the case was re-docketed for further proceedings.

On the 14th of October, 1876, the Central National Bank filed its petition for a removal of the cause to this court. Afterwards, on November 3d, 1876, defendants filed an affidavit in the superior court, stating that the attorney on whose motion the case had been re-docketed in April, had no authority to act in their behalf, and asked that the order re-docketing the case, as of April 15th, 1876, be set aside.

This request was allowed, and the case struck from the docket. The case was then re-docketed, as of November 3rd, 1876, and then ordered to be removed to this court pursuant to the defendants' petition.

The only ground of removal alleged in the petition is the fact that the defendant, the Central National Bank, is a corporation under the laws of the United States for the organization of national banks, and that it is the chief party to the controversy in the case, and that the controversy can be determined without the other parties to the suit.

Complainants move to remand, (1) because the case was not removed to this court in apt time; (2) because no sufficient ground for removal is alleged in the petition.

When a suit is reversed and remanded in the supreme court of this state, it is the duty of the party seeking relief by the suit to cause the same to be re-docketed in the court from which the appeal or writ of error was prosecuted.

Here the complainants took no action to have the cause re-docketed until November last. True, an attorney assuming to act for the defendants, caused the case to be docketed in April, 1876, but this action was repudiated by the defendants, and the superior court which had the sole right to pass on that question sustained the defendants' motion to strike from the docket.

The application for a removal of a cause must be made "before or at the term at which said cause could be first tried." It has been held that a case pending in the supreme court of a state, at the time the act of March 3d, 1875, in regard to the removal of suits, was passed, and remanded from such supreme court for further proceedings, stands like a new cause, and consequently the right of removal may be claimed at or before the term at which the case can be re-tried.

The defendants, not being obliged to re-docket the case, are not bound to take affirmative action for a removal until the complainants had caused the case to be re-docketed, of which they are entitled to due notice.

Here the unauthorized action of the attorney in docketing the case in April being set aside by the court, the case stands precisely as if it had first appeared on the docket of the superior court on the 3d of November last. I think, therefore, that the defendant bank made the application for removal within apt time.

The act of March 3d, 1875, to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, etc., provides as follows:

"Sec. 2. That any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same states claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit in the circuit court of the United States for the proper district."

Now, while by the 10th clause of section 629 of the Revised Statutes of the United States, the circuit courts of the United States are clothed with jurisdiction "of all suits by or against any banking association established in the district for which such court is held, under any law providing for national banking associations," it will be seen that this court is not invested with exclusive jurisdiction over this class of corporations. Our jurisdiction is only concurrent with that of the state courts.

And the statute in regard to the removal of causes from the state to the federal courts does not, in terms, give this class of corporations the right to remove a suit. The defendant at whose instance this case is brought here is a resident of this district. The complainants might, under this act of congress, have sued this defendant in this court, but if the complainants elect another tribunal, can the defendant bring this suit here? The only

reason urged why this can be done is, that this defendant derives its corporate existence under a law of the United States, and it is therefore claimed that the case is one "arising under the constitution or laws of the United States," within the meaning of that clause in the second section of the act of March 3d, 1875.

In Bank of U. S. v. Devereaux, reported in 5 Cranch [9 U. S.] 61, it was held that although the old United States Bank was created by act of congress, yet, as it was not specially authorized to sue or be sued in the federal courts, those courts had no jurisdiction, while in the later case of Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 819, it was held that the federal courts had jurisdiction, because the charter expressly provided therefor; and one of the main questions discussed and passed upon in that case was the constitutionality of this provision, the court in substance holding that as the bank was a creature of federal legislation, it could give the federal courts jurisdiction over it. But I do not construe that case as going to the extent contended for by defendants' counsel in this case, that because congress had created the bank in question, therefore it could sue or be sued in the federal courts. The reverse of this doctrine was held in the case I first cited, and was not overruled in the latter case.

So, too, the federal courts are clothed with jurisdiction in all cases where the United States are plaintiffs in a suit at law, or petitioners in a suit of equity, and yet congress seems to have deemed it necessary to expressly confer upon the United States the right to remove a suit commenced by themselves in a state court to the federal courts.

Then again, by section 640, Revised Statutes of the United States, it is provided that: "Any suit commenced in any court other than a circuit or district court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof, as such member for any alleged liability of such corporation, or of such member as a member thereof, may be removed for trial, in the circuit court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the constitution, or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section." Here the right of removal is expressly denied to banking corporations.

In the light of these authorities and the reason of the law, I conclude that this defendant had no right to remove this cause to this court. The motion to remand will therefore be sustained, and the cause is remanded.

Case No. 11,045.

PETTINGILL v. DINSMORE.

[2 Ware (Dav. 208) 212;[1] 2 N. Y. Leg. Obs. 119; 6 Law Rep. 255.]

District Court, D. Maine. May 22, 1843.

PLEADING IN ADMIRALTY—DISTINCT ALLEGATIONS FOR EACH WRONG—PROOFS—SEAMEN—PUNISHMENT—JUSTIFICATION—HABITUAL MISCONDUCT.

1. In a libel for a marine tort, the libellant must set forth, in a distinct allegation, each separate and distinct wrong on which he intends to rely, and for which he claims damages.

2. If he intends to rely on general ill treatment and oppression on the part of the master, in aggravation of damages, it must be propounded in a distinct allegation, to enable the master to take issue upon it in his answer.

3. The proofs in the case must be confined to the matters that are put in issue by the libel and answer.

4. When a master is prosecuted in the admiralty for punishing a seaman, he may be permitted, in justification or in mitigation of damages, to show that the seaman was habitually careless, disobedient, or negligent in his conduct. The Lowther Castle, 1 Hagg. 385.

5. But in order to be admitted to this defense, he must set forth such habitual misconduct in a defensive allegation in his answer, in order that the libellant may be enabled to meet the charge by counter evidence.

This was a libel in personam for an assault and battery on the high seas. The libellant shipped as steward, in October, 1841, on board the barque Massasoit, of Bath, for a whaling voyage. He was, in the language of seamen, a green hand; that is, it was his first voyage as a seaman. For the first two weeks he was so much affected by sea-sickness as to be unable to perform his duty. After that time he entered on his duties, and no difficulty, or at least none of a serious nature, occurred until the 28th of November. On that day the cabin boy, in shaking the cabin table cloth over the side of the vessel accidentally dropped it into the sea, and it was lost. He mentioned the fact to the steward, who told him to inform the master. The boy replied that he was afraid, and requested the steward to do it for him, who accordingly did, and the first assault complained of was then made. The next morning the libellant was called on deck and seized up to the rigging and kept so for from half an hour to an hour which is the other wrong complained of.

Mr. Sewall, for libelant.
Mr. Tolman, for respondent.

WARE, District Judge. This is what in the language of the admiralty is technically termed a cause of damage. It appears from the testimony of the libellant's witnesses that, when the table cloth was lost by the boy, he mentioned the fact to Maxwell, the cooper, who advised him to mention it to the master. He replied that he was afraid the

[1] [Reported by Edward Daveis, Esq.]

master would flog him. He then advised him to inform the steward and ask him to communicate the facts to the master. This being done, the steward came on deck and informed the master. He was irritated and answered very roughly. The steward replied that he would pay for the cloth. The master answered that he wanted no other pay than what he could get from his hide; that he had promised him a flogging, and that he would keep his promise. Pettingill replied that if he flogged him he would have satisfaction if he lived to get home; upon which the master struck him and brought him to the deck, either by the violence of the blow or by throwing him down. While down he shook him violently, brought his knees or feet upon his breast, seized him by the hair with such violence as to pull or tear a considerable quantity from his head, so as to leave a spot bare, and after holding him in this manner for some time, allowed him to get up and ordered him into the cabin. The next morning all hands were called aft and the steward was called from the cabin on the quarter deck. The mate was then directed to seize him up by both hands to the rigging, with his arms spread and extended upwards to their full length, and as high as they could be to leave him standing on the deck. In this position he was kept for from half an hour to an hour. Two of the witnesses state that his shirt was stripped up, so that his body was left bare. The other witnesses do not mention this fact, and the witnesses for the master deny it. While the libellant was in this position the master called the attention of the crew to him, and walked the deck forward and back, apparently in great passion, applying to the steward various insulting and degrading epithets, and observed that this was what he called a spread eagle, and that he would make an example of Pettingill. Except where the hair was torn from his head there were no marks of violence apparent on the person of the steward. For two or three days afterwards he complained of a severe pain in his head, though he was not so injured but that he immediately returned to the performance of his duty. The witnesses for the master give a more subdued and mitigated account of the assault on the 28th, and of the seizing up to the rigging on the morning of the 29th. They saw no blows inflicted, no stamping, or jamming, with the knees or feet, on the breast of the libellant, and no pulling of hair, nor did they hear any complaint of the steward; but they say he acknowledged his fault and asked the master's pardon. But with respect to the cause or the occasion of the punishment there is no discrepancy between the witnesses. This is the substance of the testimony so far as it applies to the allegations of the libel in the form in which it was originally drawn. But after the evidence was taken and the cause ready for a hearing, the counsel for the libellant moved for liberty to file an amendment to the libel. The amendment offered sets forth more particularly the assaults on the 28th and 29th, and also contains two new substantive allegations, one of another distinct assault in the cabin in the evening of the 28th, and another of general ill usage and oppressive cruelty on the part of the master. The amendment is objected to on the part of the respondent.

The court without doubt has the power to allow an amendment in any stage of the proceedings before a final decree, when the purposes of justice require it. But a motion to amend is addressed to the discretion of the court, and, when it will necessarily lead to delay and an increase of expense, it will not be allowed unless the court sees that substantial justice cannot be attained without an amendment. The practice of the admiralty does not insist on all that technical exactness in pleading, which is required by courts proceeding according to the course of the common law. But the libellant is required to state in clear, distinct and intelligible allegations, the whole gravamen of his complaint. He must set forth every material and substantive wrong, upon which he intends to rely and for which he claims damage, in a distinct allegation. If he intends to claim damages for separate and independent assaults, they should be separately set forth; otherwise the respondent will not know what he has to answer. And the proofs in the case must follow the allegations. It is not intended to be said that every circumstance of aggravation attending an assault and battery must be minutely described, but when the libellant proposes to offer proof and claim damages for separate assaults at different times, he is bound to set them out in separate allegations. And so if he means to rely on general harsh treatment and continued and systematic oppression and cruelty, either in aggravation or as an independent and substantive wrong, the libel should contain, in a separate article, an allegation to that effect, in order that the respondent may take issue on the matter and prepare his defense accordingly. Orne v. Townsend [Case No. 10,583]; Treadwell v. Joseph [Id. 14,157].

Now, in the libel as originally framed, there is no mention of an assault in the cabin, and yet, as it is alleged in the amendment, it can in no sense be considered as a continuation of that which took place on deck, nor is there any distinct charge of habitual ill-treatment and oppression so formally set out as to give notice to the respondent that this matter would be insisted upon as an independent ground of damages, or that it would be relied on in aggravation to enhance the damages for the assaults particularly articled in the libel. The answer is drawn to meet the allegations in the libel, and consequently neither of these matters are put in issue. If the amendment is allowed, the master must have liberty to amend his an-

swer, and time must be given to produce evidence on the new issues presented by the pleadings. This will necessarily lead to delay, and involve an increase of expense, and as the necessity of an amendment to reach the whole justice of the case, if any such necessity exists, of which I am not convinced, was occasioned by the fault of the libellant himself, in my judgment the amendment ought not to be allowed.

The master in his answer justifies the act as a necessary and proper act of discipline, and alleges "that at the time, the said libellant was not obedient to the respondent's commands, but assumed and took upon himself to do and act as he saw fit, in subversion of the necessary discipline and subordination of the crew of said ship, and in a manner to destroy the objects of the voyage and produce mutiny;" and he then proceeds to state that he gently laid him down on the deck and detained him there a short time, and on his promise to conduct better he was allowed to get up; but notwithstanding his promise he still manifested insubordination and insolence to the respondent, upon which he told him that he would seize him up in the rigging, and that "thereupon Pettingill threatened and dared him to do so, alleging if he did, that he the said Pettingill would make this respondent sweat for so doing;" and that afterwards, on mature consideration the following day he did cause him to be seized up for a short time and in a manner not to produce pain or injury, and that the chastisement was mild, necessary, and proper. Evidence has been offered by the master, in his defense, tending to prove that Pettingill was careless and negligent in the performance of his duty. I have no doubt that evidence of general and habitual negligence and carelessness in the discharge of duty, may be admitted in justification of punishment, when in a proper case it is administered to correct such habits of sloth and negligence, and may go in mitigation of damages when it does not amount to a full justification. The right of the master to correct a seaman by some kind of punishment, for habitual and systematic sloth and negligence, seems to result from his peculiar relation to the crew and the nature of the authority with which the law has intrusted him. He is invested with a sort of domestic authority, but it is of a peculiar character and of limited extent. It has an analogy to that of a parent over his children, or a master over his apprentice or pupil, but the analogy does not hold throughout. He has not the authority of a custos morum to correct his crew for general immorality of conduct. His power is limited to the correction of such delinquencies as are connected with the due performance of their special duties on board the vessel. But when the law imposes on the master the responsibility for the government of the vessel and the discipline of the crew, it clothes him with an authority commensurate with his duties and responsibilities. The safety of the ship, the comfort and health of the crew, and the success of the voyage depend on the prompt and punctual performance by each man of his appropriate duties, and it is a part of the master's duty to see that these duties are performed in a proper manner and with reasonable diligence. It would seem, then, that habitual sloth and negligence or wanton carelessness, if persevered in after proper admonition, may be corrected by suitable punishment.

When a seaman brings a suit for damages against the master for illegal and unjustifiable punishment, he puts in issue his general conduct and character during the voyage, or rather enables the master to put it in issue. But when the master means to rely on such matter in justification, or in mitigation of damages, he must set it out in his answer in a distinct allegation. The libellant has then notice of the defense and may be prepared to meet it. But if the answer contains no such defensive allegation, the libellant has no reason to suppose that his general conduct for the voyage is intended to be called in question. The evidence, therefore, to this point, in the actual state of the pleadings, is not properly admissible. But, if it were in the case, it is not of such a character, in my judgment, as ought to have a material influence on the decision. How, then, stands the case on the evidence that is properly applicable to the matters in issue between the parties? The cabin-boy lost a table cloth overboard. He being, from some cause, afraid to communicate the fact to the master, at his request the steward does it for him. Whereupon, without further apparent cause, the master commences a violent assault on the steward, knocks him down on the deck, shakes and jams him violently against the floor with his feet or knees, and seizes him with such force as to tear out a considerable quantity of his hair. The only offense that Pettingill had committed was his reply, when the master told him that he would flog him, that he would then seek redress from the laws of his country. But this threat as the master calls it, was not uttered, according to his answer, until after the assault on the deck; and it is represented in the answer as encouraging a mutinous spirit in the crew and as a justification of the punishment the next day. The next morning, without any further cause than that of avowing his intention to seek redress when he returned, and, as the master in his answer says, for an example, he caused him to be seized up by both hands, with his arms extended, as the master facetiously remarked, like a spread eagle, and kept him suspended in that ignominious posture before the crew for from half an hour to an hour, not, it is true, in a manner to cause great bodily pain, but exposing him to derision and ridicule, and accompanying the whole with a copious effusion of taunting and opprobrious language.

I can find in the evidence no cause for this punishment except the state of irritation into which the master was thrown by the loss of the table cloth; and the punishment was inflicted not on the boy who lost it, but on the steward who brought him the information. Pettingill might well say after this experience, the "bearer of ill tidings hath but a losing office," when he was obliged to expiate by a vicarious punishment in his own person, the offense which he only announced as a messenger. It is now, indeed, said, by the way of extenuation, that the steward was habitually remiss in his duty. But this, as has been before observed, was not relied upon in the answer and is not properly in issue, and, from the character of the evidence which is offered in support of it, seems brought in by an after-thought as a palliation of a gross outrage that is entirely without justification. On the whole evidence the punishment appears to me to have been a wanton abuse of power without any cause which could operate on the mind of a reasonable man, and I shall award damages to the amount of eighty dollars, with costs of suit.

Case No. 11,046.

In re PETTIS.

[2 N. B. R. 44 (Quarto, 17);[1] 7 Am. Law Reg. (N. S.) 695.]

District Court, N. D. New York. 1868.

BANKRUPTCY — EFFECT OF ADJUDICATION UPON DEBT CREATED BY FRAUD—EXEMPTION FROM ARREST.

1. No debt created by a fraud is discharged by an adjudication of bankruptcy.

2. A bankrupt, during the pendency of bankruptcy proceedings, is not absolutely exempt from arrest.

3. A court of bankruptcy has no power to discharge a judgment based upon a fraud of the bankrupt, and will not interfere to prevent imprisonment therefor, unless to enable it to exercise its proper authority and jurisdiction.

In this case the bankrupt applied for an order staying the execution of an issue against his body, upon a judgment obtained against him by Richard J. Connor and Charles J. Richardson, of the city of New York. This motion was opposed on the ground that the judgment was obtained for a debt created by the fraud of the bankrupt. The application was denied.

R. W. Townsend and Mr. Cornwell, for bankrupt.

Ganson & Smith and B. C. Thayer, for judgment creditors.

HALL, District Judge, said: "The judgment against the petitioner, under which he anticipates arrest, appears to have been rendered upon a debt created by fraud of the bankrupt, and the thirty-third section of the bankrupt act expressly provides that no such debts shall be discharged under that act. The twenty-sixth section, which provides for the production and examination of the bankrupt, in case he is imprisoned, and which provides that no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him, shows that he is not to be considered as absolutely privileged from arrest, and as the court in bankruptcy has no power to discharge the judgment, it should not interfere to prevent its enforcement by imprisonment, unless it be necessary to enable the bankrupt court to exercise its proper authority and jurisdiction in the case. The effect of the protection which the register is authorized to grant is not now under consideration, and the present motion is disposed of without reference to the extent of that protection, and without determining any question other than that directly in controversy. The motion is denied, but as this is the first time the question has been presented, it is without costs."

[1] [Reprinted from 2 N. B. R. 44 (Quarto, 17), by permission.]

PETTIS (UNITED STATES v.). See Case No. 16,038.

Case No. 11,047.

Case of PETTIT.

District Court, D. Massachusetts.

ADMIRALTY—LIBELANT'S COSTS—MISCONDUCT OF DEFENDANT.

[Cited in Dunlap, Adm. Prac. 102; 2 Pars. Shipp. & Adm. 479, to the point that costs will be decreed to a libelant though no debt is recovered, where he was misled into bringing suit by the misconduct of defendant. Nowhere reported; opinion not now accessible.]

PETTIT (BEALE v.). See Case No. 1,158.

Case No. 11,047a.

PETTIT v. The CHAS. HEMJE.

[5 Hughes, 359.]

District Court, E. D. Virginia. March 9, 1882.

MARITIME LIENS—REPAIRS MADE BY PART OWNER—RIGHTS OF MORTGAGEE.

[A part owner who furnishes material and labor for making repairs, is entitled to a maritime lien therefor, notwithstanding his relation to the vessel, which will be superior to the rights of a mortgagee under a mortgage given by the other part owner upon his interest in the vessel.]

In admiralty. The libellant [Charles W. Pettit] and John H. Wemple were owners of the steamer Chas. Hemje, Wemple being managing owner. Wemple becoming embarrassed, gave a mortgage to the Home Savings Bank upon various interests that he owned in different vessels, his interest in the Chas.

Hemje among the number, to secure it for large advances made by it to him to enable him to carry on the many different branches of business in which he was engaged. At length he failed, and immediately the different maritime creditors of the Chas. Hemje libelled her for their bills incurred whilst being run by Wemple. The libellant Pettit was a boilermaker and machinist and had furnished a new boiler to the Chas. Hemje and done various work upon her, amounting to about $3,300. The Home Savings Bank intervened and resisted his claim, on the ground that he could not maintain a libel against a vessel in which he was part owner.

Sharp & Hughes, for libellant.

Walke & Old and W. G. Elliott, for mortgagee.

HUGHES, District Judge. It is to be observed that the question here is not whether a part-owner has a lien upon the vessel for advances and disbursements over and above his proportion. The counsel for the respondent have argued forcibly against such a right; and it must be confessed that the authorities on the subject are in hopeless conflict. It is settled that admiralty has no jurisdiction of suits for the mere settlement of accounts between part-owners, or owners and their agents. The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; Minturn v. Maynard, 17 How. [58 U. S.] 477. But no case goes so far as to hold that the mere fact of an account being incidentally involved is sufficient to defeat the jurisdiction. In The Larch [Case No. 8,086], Judge Ware, after full consideration, decided that such a lien existed, and that it was enforceable in admiralty. It is true that this decision was subsequently reversed by Justice Curtis, see [The Larch, Id. 8,085], but the learning and reputation of Judge Ware entitles it, though a reversed case, to the highest respect in another circuit, where the decision of Justice Curtis is only persuasive. The English authorities on the subject are irreconcilable, while the American authorities rather preponderate in favor of the existence of such a lien. See Story, Partn. § 441 et seq., and notes, where the cases pro and con are collated and discussed. But however that may be, there is a wide distinction between that doctrine and the question now before me for decision. The libellant is not trying to assert a lien for advances made by him as part-owner. He is not in court as a part-owner. He is here in a different capacity, claiming for work put upon the vessel in a different capacity. He is here as a material-man, trying to assert the lien given by the admiralty law to all who furnish supplies or repairs to a vessel. The reasons and policy of the admiralty law apply as forcibly in his favor as in favor of any other material-man. The mere fact that he is part-owner furnishes no reason why he should be denied the security enjoyed by others, unless for some special reason he has estopped himself from asserting his claim. Of course an admiralty court, in the exercise of its extended equity powers, will not allow him to deprive other maritime creditors to whom he is personally responsible, of their security. But the mortgagee of the other part-owner's interest is a mere assignee of that other part-owner, and can set up no defences which that other part-owner can not set up. The mortgagee has a lien only on the interest of its assignor, and that interest is nothing until the maritime claims are all paid. Nor is there anything in the technical objection that to allow such a proceeding would allow a man to sue himself; for the real defendant in an action in rem is the vessel. In the case of Foster v. The Pilot No. 2 [Case No. 4,980], a libel by a seaman who was part-owner of a boat, for his wages, was sustained, the court basing its decision on the ground that his service as seaman was in a capacity distinct from and unconnected with the appropriate business of a partnership such as exists among part-owners of a vessel. We may say the same of a material-man. In the case of the West Friesland, Swab. 454, Dr. Lushington sustained a libel against a vessel for supplies by a firm, one of whom was a part-owner, saying: "That Mr. Bremer was a part-owner is only a technical objection. At common law partner can not sue partner, but that is a rule that does not obtain in this court; and here the property is sued and not the co-partner."

I can see no ground therefore, either on principle or authority, for denying to the libellant his lien. I will sign a decree ordering his claim to be paid next after the other maritime claims and in preference to the mortgage.

A copy.
Teste. H. S. Ackiss, Clerk.

PETTITT v. The KALLISTO. See Case No. 7,600.

Case No. 11,048.

PETTUS et al. v. GEORGIA RAILROAD & BANKING CO. et al.

[3 Woods, 620.] [1]

Circuit Court, M. D. Alabama. May Term, 1879.

REMOVAL OF CAUSES—SUIT FOR COUNSEL FEES IN PENDING LITIGATION.

A bill was filed in a state chancery court, by certain complainants, in behalf of themselves and other creditors, to assert and enforce a lien on certain railroad property which had been sold and was in the possession of the purchasers. After final decree by which the lien was established, and while a reference to the master was pending to ascertain the amounts due the cred-

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

itors who sought the benefit of the decree, the purchasers of the railroad property against which the lien had been declared, paid the complainants their claims in full, and bought up and settled other claims entitled to the benefit of the decree. Counsel for complainants received no compensation for their services, in respect to these last-mentioned claims. They, therefore, filed their petition in the state chancery court, entitled of the original cause, against the purchasers of the railroad property, in which they claimed a lien on said property for their fees in the original case, and prayed that the defendants to the petition might be served with notice thereof, and allowed to answer the same; that an account might be taken of what was due the petitioners for their said services; that the defendants might be decreed to pay them for said services such sums as were just and equitable; that they might be declared to have a lien on said railroad property therefor; and if said sums were not paid, that the property might be sold to pay the same, and for general relief. *Held*, that this petition was not a mere graft upon or appendage to the original suit, but was, to all intents, a suit in equity; and as the case fulfilled all other requirements of the statute, it could be removed from the state to the federal court, by virtue of the act of March 3, 1875 [18 Stat. 470] for the removal of causes.

Heard upon motion to dismiss the suit, on the ground that it had been improperly removed from the state court.

The facts were as follows:

Branch Sons & Co., and other complainants, filed their bill in equity in the chancery court for Montgomery county, Alabama, on May 8, 1875, against the Montgomery & West Point Railroad Company of Alabama, and the Georgia Railroad & Banking Company and the Central Railroad & Banking Company of Georgia, the two latter being corporations and citizens of the state of Georgia, and against other defendants. The bill was filed, not only for the complainants named therein, but for the benefit of all others who might be creditors of the said Montgomery & West Point Railroad Company, not secured by mortgage, who should come in and share the expenses of the suit. The bill was a general creditors' bill, and its purpose was to establish, by the decree of the court, a lien upon the Montgomery & West Point Railroad and its equipments, and upon all real and personal property used by or appurtenant to said railroad, prior to September, 1870, in favor of all the unsecured creditors of said Montgomery & West Point Railroad Company, in proportion to the amount of their claims. The property sought to be subjected to said claims was of the value of $1,200,000, and was within the jurisdiction of the said court. On May 3, 1877, the chancery court rendered a final decree condemning all of said property to the payment of the claims of said Montgomery & West Point Railroad Company, and directed an account to be taken of the amounts due and owing to the complainants in the bill, and other creditors of said railroad company. The register of the court gave notice to the creditors, requiring them to file their claims, and soon thereafter debts, consisting mainly of bonds and coupons, and in other forms, were filed in said court, to the amount of $300,000. Before the time for presenting claims had expired, an appeal was taken from the decree to the supreme court of the state of Alabama, by which the decree was superseded. On May 20, 1878, the decree was affirmed by the supreme court, and by an order of said chancery court, dated June 1, 1878, the register was directed to proceed with the reference ordered by the final decree. The register again gave notice to the creditors of the Montgomery & West Point Railroad, to file their claims, and a large number of the creditors did come in and file their claims and seek the benefit of said final decree, and the claims thus filed amounted to $250,000, in addition to those filed before the appeal. All these claims were just debts and liabilities of the Montgomery & West Point Railroad Company, all of them accrued before the filing of the bill, and were not secured by any mortgage, and were included in the debts of said company, mentioned in the bill of complaint, and every claimant had a lien for the debt due him on all the property of said company, held by it prior to the year 1870, and condemned by said decree to the payment of said debts.

On June 1, 1875, the Georgia Railroad & Banking Company, and the Central Railroad & Banking Company of Georgia, had possession of the railroad and other property which belonged to the Montgomery & West Point Railroad Company at the time of its dissolution in 1870, and continued to possess the same and claim it as their property, but the creditors of said last named company claimed that the said Georgia corporations held the same as trustees for them. About November, 1878, the register of the chancery court began to execute the reference ordered by said final decree, and to take an account of the debts due from the Montgomery & West Point Railroad Company to persons who had filed their claims, and pending said reference, the said Georgia corporations paid the complainants named in the bill the claims in full, principal and interest, which they held against the Montgomery & West Point Railroad Company, and said complainants agreed to keep said payment secret from their counsel in said cause, until said Georgia railroad corporations could have time to settle or buy up all other claims against the Montgomery & West Point Railroad Company which had been filed in said cause, and said Georgia corporations, under this arrangement, went forward and acquired possession and control of all said claims which had been filed as aforesaid. The said Georgia corporations, before they bought up or settled any of said claims, had active notice that the counsel for complainants claimed a lien on all the claims filed in said cause, and were entitled to be paid for their services as counsel, out of the property which had formerly belonged to the Montgomery & West Point Railroad Company,

and which was held by said two Georgia corporations, and said latter companies, before buying and settling said claims, had entered into negotiations with the counsel of complainants to fix the amount of the compensation to which they were entitled for their services as such counsel. The said Georgia corporations paid for all of said claims, except those of the complainants named in the bill, far less than their nominal value. Other creditors of the Montgomery & West Point Railroad Company, who held claims to the amount of $40,000, but who never filed their claims, after said decree had been affirmed by the supreme court, accepted and obtained the benefit of the services of complainants' counsel by demanding and receiving from said Georgia corporations a large part of their respective claims, in settlement and payment, with the condition imposed that they should not file said claims. The counsel for complainants in said cause received compensation for their services, as such, rendered the original complainants and a few other creditors, but received no compensation for their said services from any other of said creditors. The said Georgia corporations, before they paid off or settled any of said claims, had notice of the services rendered by said counsel for said creditors, and of the lien claimed therefor by the counsel of complainants. The said Georgia railroad companies having obtained possession and control of all the claims filed, and claims not filed, as above stated, asserted their right to hold and own the same, without paying to the counsel of the complainants any compensation for their services in reference to said claims.

On this state of facts Messrs. Pettus & Dawson and Messrs. Watts & Sons, who were the counsel for the complainants in said suit, filed, on April 15, 1878, their petition entitled of said suit, and addressed to the chancellor of said chancery court, in which they set out, in detail, the facts heretofore stated, and claimed that they, by reason of said facts, became the owners in equity as assignees of a part of each one of said claims, on account of which they had not been paid for their services. They further alleged that, after deducting all the compensation they had received for their said services, there was justly due to them large sums on account of their services in said suit, to creditors who came in and received the benefit of such services without making any compensation therefor; that at the time said bill was filed, the said claims against the Montgomery & West Point Railroad Company, not secured by mortgage, were not worth exceeding ten cents on the dollar, and were considered by the holders thereof to be of little value; but by the services of said counsel, said claims after the affirmance of said decree, became of par value. They claimed, further, that their said services were worth twelve to fifteen per cent of the full value of said claims. The petition repeatedly referred to the record of said equity cause, on file in the said chancery court. It prayed that the said Georgia Railroad & Banking Company, and the said Central Railroad & Banking Company of Georgia, might be made parties defendant to the said petition, and have notice thereof, and be allowed to answer the same, and that they might be required to produce before the register of the court all the claims against the Montgomery & West Point Railroad Company, which they had bought or settled, that an account might be taken of the amounts justly and equitably due to the petitioners for the services rendered by them as solicitors in said cause, for the benefit of the creditors of the Montgomery & West Point Railroad Company, who accepted and received benefit from said services, that, if necessary, an account might be taken of the debts owing by the said Montgomery & West Point Railroad Company at the date of said final decree, and petitioners be declared to be entitled to such parts of each of said claims (except those claims in reference to which their services had been compensated), as might be just and equitable; that said Georgia corporations might be required to pay to the petitioners such sums as might be found reasonably due them for services rendered in said cause, which had not been paid for, and that petitioners might be declared to have a lien on all the property mentioned in the bill of complaint, which formerly belonged to the said Montgomery & West Point Railroad Company, and was then in the possession of the said Georgia corporations, for the amounts found due to petitioners, and that if said sums were not paid, that said property might be sold, under the decree of the court, to pay the same, and for general relief. This petition was sworn to by one of the petitioners, and an affidavit averring the non-residence of the parties defendant having been filed, the chancery court ordered that they be brought into court by publication, and directed that defendants plead answer or demur thereto within thirty days after service.

The defendants to this petition, on April 24, 1879, filed their petition, accompanied by a bond executed according to law, in which they prayed for the removal of the cause instituted by the petition to this court. The prayer of this petition was denied, on the sole ground that the suit was not one which could be removed, under the acts of congress.

Thereupon the defendants to the petition filed a transcript of the petition and the proceedings thereon, and the same was docketed in this court as the suit of Pettus & Dawson and Watts & Sons v. The Georgia Railroad & Banking Company, and the Central Railroad & Banking Company of Georgia.

The petitioners thereupon moved to dismiss the cause out of this court, and on this motion the case was heard.

Thomas H. Watts, Walter L. Bragg, and Wm. S. Thorington, for the motion.
Henry C. Semple, contra.

WOODS, Circuit Judge. The removal attempted in this case is claimed to be by virtue of the act of March 3, 1875. It is conceded that the petition and bond for removal were sufficient in form and substance, that they were filed within the time limited by the statute, and that the transcript of the record of the state court was filed in this court "on or before the first day of its then next session," as required by law. The ground, and the only ground of the motion to dismiss is, that this is not such a suit as can, under the act of congress, be removed to this court. The second section of the act of March 3, 1875 (18 Stat. 470), declares "that any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * and in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States for the proper district, and where, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district." The matter in dispute, in this petition, largely exceeds the sum of five hundred dollars, exclusive of costs, the petitioners are all citizens of Alabama, and the defendants to the petition are all citizens of Georgia; it is therefore, a controversy between citizens of different states; the petitioners and the defendants are alone interested in the controversy, therefore it can be fully determined as between them. It is clear, therefore, that the controversy set out in the petition is one proper for removal, if the matter removed is "a suit of a civil nature at law or in equity." The counsel for the petitioners assert that it is not a suit, but a mere incidental proceeding, an appendage to, or graft upon, a suit still pending in the state chancery court.

In support of this view they cite the following cases: West v. Aurora City, 6 Wall. [73 U. S.] 139; Bank v. Turnbull, 16 Wall. [83 U. S.] 190; and Webber v. Humphreys [Case No. 17,326].

The case of West v. Aurora City [supra] arose on an attempted removal of the case from the state to the federal court, under the twelfth section of the judiciary act, which restricts the right to remove to the defendant. Under the Code of the state of Indiana, where the suit was pending, the defendant was allowed, with his defense, to set forth counterclaims, or set-offs. In this case the suit appeared to be upon interest coupons on bonds issued by the defendant. The defendant having made defense by answer under the Code, filed by leave of the court, three paragraphs, setting up new defensive matter, and prayed an injunction against the plaintiffs, to restrain them from proceeding in any suit on the coupons or bonds, etc., and for a decree that the bonds be delivered up. Thereupon the plaintiff discontinued his suit, and assuming that the new paragraphs of the answer would remain in substance a new suit against him, filed his petition for the removal of the cause to the federal court, and it was removed accordingly, but was afterwards remanded by the federal to the state court.

In passing upon the propriety of this action of the circuit court, the supreme court said that the circuit court was clearly right in its action. The right of removal is given only to a defendant who has not submitted himself to the jurisdiction; not to an original plaintiff in a state court, who, by resorting to that jurisdiction, has become liable, under the state laws, to a cross-action. And it is given only to a defendant who promptly avails himself of the right at the time of appearance, by declining to plead, and filing his petition for removal. It is evident that this cause, decided under the twelfth section of the judiciary act, is not an authority applicable to the matter in hand.

In the case of Bank v. Turnbull, supra, there was an execution issued upon a judgment recovered by the bank against one Thomas, which was levied on property claimed by Turnbull, who were allowed to intervene and set up their ownership, and a jury was ordered to be called to decide whether the property levied on belonged to Turnbull or Thomas. This issue was removed to the United States circuit court, and, after final judgment, to the supreme court, and the question was presented to the supreme court, whether it was a suit properly removable, under the act of March 2, 1867 (14 Stat. 558), for the removal of causes. The supreme court held that the matter removed "was merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation. * * * The contest could not have arisen but for the judgment and execution, and satisfaction of the former would at once have extinguished the controversy between the parties."

In the case of Webber v. Humphreys, supra, a Missouri statute provided that if no property of a corporation could be found to satisfy an execution issued against it, then such execution might be issued against any of the stockholders to the amount unpaid on their stock, provided that execution should not issue against a stockholder except by order of the court, made upon due notice to him. Such a motion was made in that case, and the court held that it was not a suit which could be removed from the state to the federal court.

The case of Bank v. Turnbull [supra] and the case just referred to, were clearly not independent suits. They could not be severed from the case to which they belonged. In both cases they were merely proceedings to regulate and control the processes of the court in the case to which the proceedings appertained.

The question then recurs, is the petition in this case a suit? In my judgment, it has all the necessary elements of a bill in equity, and is a bill in equity. If the purpose of the petition in this case were to obtain an order of the court that the petitioners' fees for services might be paid out of the property of their clients, which their services had secured and brought into court, or which the court had in its possession, there might be some ground for the idea that this was a graft on the main suit. But that is not the object of the petition. The petitioners are asserting a claim for their fees, not against their own clients, but, in effect, against the property of the opposite party. The clients of the petitioners were primarily liable for the petitioners' fees. Their claims have been satisfied, but they have failed to pay the fees due the petitioners. The attempt is, in effect, to subject the property of the opposite party to the payment of the fees of petitioners. This surely is not a graft on the main case. The petitioners assert a lien on the property of defendants. They declare that defendants are trustees for them, and they charge fraud practiced by defendants to their damage and injury. They seek to enforce the lien and trust. They pray for an account of the amount due to them by reason of the trust. Seek to enforce the lien by a sale of the property on which it rests, and they pray that defendants may answer, and for general relief, and that notice may be served on the defendants. An order to bring defendants in by publication was actually taken.

Here are all the essential elements of a bill in equity. See Stickney v. Wilt, 23 Wall. [90 U. S.] 150, where a proceeding, not as much like a suit in equity as this, was declared to be such. This case might have been brought as an independent suit, either in the state chancery court or in this court. The full settlement and adjustment of the original claim would not settle or adjust the controversy between these parties. This suit had its origin in the original case, but is not a part of it, or dependent on it. The case falls within the rule laid down in West v. Aurora City, supra: "It is a suit regularly commenced by a citizen of the state in which the suit is brought, by process served on a defendant who is a citizen of another state." This court, if it should proceed to a decree in favor of the petitioners, and establish their lien on the property of defendants, would not necessarily interfere with the property in the possession of the state court. If this court establishes the claim and lien of the petitioners, that lien can be enforced as soon as the hand of the state court is taken from the property; or, the petitioners, having established their lien in this court, could propound their claim in the state court, if that court were proceeding with the administration of the property.

We are satisfied that this is a new cause, entirely independent of the original case, that could be commenced and prosecuted after the original case had been entirely disposed of and ended. That it is a suit in equity between new parties on a new cause of action, and as it fills all other requirements of the statute, it is a cause proper to be removed to this court. The motion to dismiss must therefore be overruled

[NOTE. Upon the hearing of this case upon its merits, a decree in favor of plaintiffs was entered for $35,161.21. Case unreported. This was reduced by the supreme court, upon appeal, to $17,580. 113 U. S. 116, 5 Sup. Ct. 387.]

Case No. 11,049.

PETTY v. MERRILL.

[See Case No. 9,211.]

Case No. 11,050.

PETTY et al. v. MERRILL et al.

[9 Blatchf. 447.] [1]

Circuit Court, E. D. New York. Feb. 23, 1872.

COLLISION—MEASURE OF DAMAGES.

1. In a case of collision, the district court allowed, as an item of damages, $500, for depreciation in the value of the libellant's vessel, besides allowing $600 for future repairs. It appeared that the $600 would put the vessel in a seaworthy condition, and in as good and serviceable a condition as she was in before the collision; but the ship-builder testified, that, with such repairs, the vessel would not be as valuable, by $500, as before the collision, and that, there is a general damage, which vessels sustain when they come together, that they show when they grow old: *Held*, that the allowance of the $500 was improper.

2. When a vessel is made as serviceable as she was before, any conjecture that she is not as valuable, or that, when she is old, some damage will appear, as the result of the collision, not now discoverable, is too vague and uncertain to warrant the finding of the conjectural amount of damage.

This was an appeal by the respondents [Henry B. Merrill and others] from a decree of the district court, in a case of collision, in which the libellants' vessel, the schooner Mary Eveline [John W. Petty and others, owners], was damaged.

Franklin A. Wilcox, for libellants.

Richard H. Huntley, for respondents.

WOODRUFF, Circuit Judge. The allowance of five hundred dollars for depreciation in the value of the libellants' vessel, does not seem to me well sustained. The witness upon whose estimate it was allowed is the

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

ship-builder, who estimates the future repairs required at six hundred dollars; and the six hundred dollars are allowed. He testifies to having the vessel on his ways before the collision, that he examined her all over, and that her condition was good. Again, he testifies that he had her on his ways just after the collision, and again examined her; and he specifies the particular injury she received. Being asked, on behalf of the libellants: "In your opinion, what repairs are still necessary to place the Mary Eveline in a seaworthy condition?" he says: "Six hundred dollars." Again: "In your opinion, what repairs are still necessary to place the Eveline in as good condition as she was before the collision?" He says: "Six hundred dollars." He enumerates the particulars of the injury, and, being asked: "What would it cost to repair the damages you have mentioned?" he again says: "Six hundred dollars." On cross-examination: "Do you mean to be understood that six hundred dollars will repair all the damages you saw when you examined the vessel, after the collision?" He answers: "It would." On re-direct: "As I understand, from your testimony, there are certain repairs, yet to be done to the Mary Eveline, to place her in as serviceable a condition as she was before the collision; please state what it will cost?" Again, for the fifth time, he answers: "Six hundred dollars." This is very distinct evidence, by the libellants' own witness, that the expenditure of six hundred dollars will repair all the damages, will place the vessel in as good a condition as she was before the accident, and will place her in as serviceable a condition as she was before the collision. Nevertheless, in answer to a species of cross-examination by the libellants' counsel, on inquiry: "Would six hundred dollars place the schooner in as good a condition as she was previous to the collision?" He replies: "It would not." "With the repairs which you have mentioned, would the vessel be as valuable as she was previous to receiving the injury sustained by the collision?" "The vessel would not be worth as much, by five hundred dollars, after these repairs, as before the collision." It is after this testimony, that he testifies, in answer to the libellants, that six hundred dollars would place her in as serviceable a condition as she was before the collision; and, by way of further explanation, on cross-examination, he says: "There is a general damage, that vessels sustain when they come together, that they show when they grow old."

I am not satisfied, that, upon such testimony, five hundred dollars should be allowed, in addition to the cost of the repairs. It rests upon no certain or definite grounds, for an estimate. The witness had stated all the cost of making the vessel as good as she was before; and then, having stated that she would, nevertheless, not be so valuable, he states that she would be as serviceable; and, finally, the cross-examination shows that his estimate of five hundred dollars less in value rests upon a conjecture, based upon what he states as a general result of all collisions,—that the vessels sustain a damage that "will show when they grow old." This is altogether too vague, uncertain and unreliable, to warrant the inference, as a fact, in this particular case, that, beyond any injury which the witness could detect, by his careful examination as an expert in building and repairing vessels, she had, also, received some undiscovered and undiscoverable damage, which, although it did not render her less serviceable, yet detracted five hundred dollars from her value, because it would show when she was old. The elements of calculation, or of estimate of amount, are wanting. Palpably, the assumed fact of such hidden injury, and its extent and character, are conjectural, and the amount of money required as an indemnity is even more so. It may be conceded, that the shock of a violent collision will be felt throughout the vessel; but the injury from that cause, if any, is not to be estimated, and cannot be determined, as a fact, in a court of justice, by reasoning upon any general rule, such as appears to have guided the witness, if, indeed, his estimate was anything more than a rough guess, without any specific facts to support it. No two collisions are alike in any of their circumstances or results. The injury in any given case must be quite peculiar, if the skill of the shipbuilder, at liberty to employ all the expense requisite, is incapable of repairing it; and, when a vessel is made as serviceable as she was before, any conjecture that she is not as valuable, or that, when she is old, some damage will appear, as the result of the collision, not now discoverable, is too vague and uncertain to warrant a finding of the conjectural amount of damage. There may be proof of injury, which, though known, cannot be repaired without unreasonable cost, where the party in fault will be benefited by an allowance for actual depreciation, because an attempt to make complete repairs would involve an expense greatly disproportionate to the amount of such depreciation. But, in general, estimates of depreciation, founded in speculative opinions of the probable effect of a collision, where no such effect is known or discernable, and estimates of diminished value, founded as they sometimes are, upon the idea, that, although the vessel is as serviceable as she was before, yet she will not sell for so much as she would before are not of sufficient reliability to warrant the taking of the money of one party and awarding it to another. See, on this subject, The Isaac Newton [Case No. 7,091]; The St. John [Id. 12,224]; The Favorita [Id. 4,695].

The sum of five hundred dollars allowed to the libellants, for supposed depreciation in the value of the vessel, must be disallowed.

[See note to Case No. 9,211.]

Case No. 11,051.

PETTY et al. v. MERRILL et al.

[12 Blatchf. 11.] [1]

Circuit Court, E. D. New York. April 25, 1874.

ADMIRALTY—REHEARING.

A collision occurred between two vessels, the M. and the E. The libellants, as owners of the M., brought this suit, in personam, in the district court for this district, against the owners of the E., to recover for damages caused by such collision, claiming $2,100. The owners of the E. sued the M., in rem, in the district court for the Southern district of New York, claiming to recover $3,489.37, as damages caused by the collision. Both suits were tried together, on the same proofs, before the same judge, in the district court. In this suit, the libellants had a decree for $1,695.92. The libel in the other suit was dismissed. The owners of the E. appealed to circuit court, in each suit. The decree in the suit in the Southern district was directed to be affirmed in November, 1870, and the formal decree of affirmance was entered in February, 1871. In the latter month the owners of the E. appealed from that decree to the supreme court. In November, 1871, the appeal in this suit was heard by the circuit court, and, on the 8th of March, 1872, the libellants had a decree therein, in this court, for $1,292.81. In the latter month, the owners of the E. appealed from that decree to the supreme court. That court dismissed the appeal for want of jurisdiction. Afterwards, that court, on the merits, reversed the decree of the circuit court for the Southern district dismissing the libel in the suit in that district. The respondents in this suit, in June, 1873, moved this court for a rehearing of this suit: *Held*, that the motion must be denied.

In admiralty.

Charles Donohue and Franklin A. Wilcox, for libellants.

Richard H. Huntley, for respondents.

WOODRUFF, Circuit Judge. On the 20th of September, 1868, a collision occurred in the East river, between Blackwell's Island and Long Island, between the schooner Mary Eveline, belonging to the libellants, and the sloop Ethan Allen, belonging to the respondents. The schooner was damaged, and the sloop was sunk, and so injured as to be unfit to repair. [Henry B.] Merrill and others, owners of the Ethan Allen, filed their libel, in rem, against the Mary Eveline, to recover, for their loss, $3,489.37, in the district court for the Southern district of New York, and [John W.] Petty and others intervened as owners of the latter, to defend, &c. Petty and others, as such owners, filed their libel in the district court for the Eastern district of New York, in personam, against Merrill and others, as owners of the Ethan Allen, to recover for their loss by injury to the Mary Eveline, to the amount of $2,100. By arrangement between the proctors for the respective parties, the two causes were tried before the district judge of the Eastern district of New York, (he being authorized to act in the Southern district.) The same proofs were taken and used in each case. In the district court, the causes were argued together. The district judge was of opinion, that the proofs showed that the Ethan Allen was wholly and solely in fault, and that her fault caused the collision and the resulting damage. The Mary Eveline [Case No. 9,211]. Decrees were accordingly entered in the respective district courts. The libel filed in the Southern district by the owners of the Ethan Allen, Merrill and others, was dismissed; and, in the Eastern district, the owners of the Mary Eveline were adjudged entitled to recover the damages sustained by the injury to that vessel, which, with interest and costs, were fixed, by the decree of that court, at $1,695.92. Appeals in each case were taken to the circuit court for the respective districts. The appeal in the Southern district was brought to a hearing on the 20th of November, 1870, and the decree dismissing the libel filed by the owners of the Ethan Allen was, on that day, decided, and directed to be affirmed, though the formal decree to that effect, appears not to have been entered until February 1st, 1871. From that decree the owners of the Ethan Allen, the present petitioners, on the 11th of February, 1871, appealed to the supreme court of the United States. Pending that appeal, and nearly one year after the decision of that case in the circuit court for the Southern district, by which decision the opinion of the circuit court respecting the merits of both cases, upon the proofs, was made known to both parties and their counsel, and on the 2d of November, 1871, the appeal in the present case was brought to a hearing in the Eastern district. No application, founded on the pendency of the appeal, and the possibility of a reversal in the supreme court, with the suggestion that, in this case, no appeal to the supreme court could be entertained, was made herein, to postpone the hearing or decree herein, until the decision of the supreme court could be had. It followed, that this cause was heard, and, on the 8th of March, 1872, the decree of the district court was modified by the deduction of one item of damage claimed, but held not recoverable (Petty v. Merrill [Id. 11,050]), and a final decree in favor of the owners of the Mary Eveline was entered, for $1,292.81, including costs. The owners of the Ethan Allen, the present petitioners, on the 18th of March, 1872, appealed, also, from the decree of the circuit court in this cause, to the supreme court of the United States. But, on a motion to dismiss such appeal, made at the December term following, the supreme court held (Merrill v. Petty, 16 Wall. [83 U. S.] 338) that it had no jurisdiction of the cause, the amount decreed herein being less than $2,000, and the appeal was dismissed. But, thereafter, in due course, the appeal of the owners of the Ethan Allen, from the decree made in the Southern district, dismissing their libel, was heard and decided. The supreme court therein declared their opinion (The Mary Eveline, Id. 348) that, upon the

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proofs therein, the collision between the two vessels was caused solely by the fault of the schooner Mary Eveline, and that she was solely responsible for the damages resulting from such collision. The decree of the court below in her favor was, therefore, reversed. Although no such fact is stated in the papers upon which this motion is founded, I am, probably, at liberty to state, that, (as appears by the files and entries of the court) the said owners of the Ethan Allen, Merrill and others. the petitioners here, after their appeal in this cause, applied for and obtained a stay of execution, until such appeals should be decided. Such stay was made in anticipation of the possibility of some such application as is now made, though without concluding either party thereby. After the announcement of the decision of the supreme court reversing the decree in the other case, in May, 1873, the owners of the Ethan Allen, on the 10th of June, 1873, gave their notice of the present motion. They ask a rehearing of the cause wherein the owners of the Mary Eveline had a decree in personam to recover damages caused by the said collision, for which damages the supreme court have adjudged that, upon the proofs before them, the owners of the Ethan Allen were not liable. The libellants oppose the motion, insisting that this court, according to the rules and practice of the court, has no power, after the lapse of several terms since the decree was entered, to grant this motion and proceed again to try the cause.

It is material to observe, that, if the motion could be granted, it would be of discretion, and as an indulgence to the respondents, and it would not be proper to order a rehearing and confine such hearing to the record upon which the cause was heard on the former trial. I should think it just, on setting aside the decree already made, to permit the parties to give further proofs, if they desired to do so. The order would be in the nature of an order for a new trial, to be had in view of the decision of the supreme court, which would be a guide to the principles by which it should be governed, and which did not govern the former trial. It would be just to assume that, on the former trials, the libellants, as well as the court, were misled by erroneous ideas touching the propriety of the navigation by the two vessels in question. The order, if made, should permit the libellants to open the case for a new trial. It cannot, therefore, be certainly known that, upon proofs which may then be given, the decision of the supreme court in the other case will be conclusive. On the contrary, it may then appear that, the whole truth being now developed, the present libellants are clearly entitled to recover, and that, under the decision of the supreme court, the recovery of the owners of the Ethan Allen in the other case works gross injustice. I might, nevertheless, if I thought the granting or denial of this motion rested in mere inclination, uncontrolled by settled rules, be strongly disposed to give to the parties the benefit of the decision of the supreme court in the other case, by directing a new trial in this. As the circumstances now appear, the libellants have a decree against the respondents, to recover damages which the supreme court have, in another case, held the respondents were not liable to pay. The decree has not yet been executed. The tribunal which is the supreme and final judge in such matters has, in effect, determined that the decree is not according to the law, upon the proofs now before the court, and it is, therefore, not just that it should be executed. But I am not in the exercise of arbitrary power; nor is it an unimportant consideration, that litigation ought to end according to some general rules which may guide the conduct of parties. To depart from them, according to the ideas of the judge, of what is abstractly just in each particular case, would be dangerous and productive of evils which can hardly be estimated. I have already suggested that, to grant the motion, would be to order a new trial, the result of which cannot now be certainly known.

A further hypothetical suggestion will show how the granting of the motion might carry the argument, that exact justice between the parties has not been done, to the extreme of making litigation nearly or quite endless. Suppose a new trial should be ordered, and, on that trial, the libellants were not only able to establish a right to recover, by proof of facts and circumstances withdrawing this case from the decision of the supreme court, but should also show that they were, by the former decree, allowed damages grossly inadequate to their indemnity, and a recovery should thereupon be had of more than $2,000. Suppose that, on an appeal then taken, the supreme court should be satisfied that, on the further case made, the libellants were entitled to recover, and should affirm the decree. It would then appear that the owners of the Ethan Allen ought not to recover from the Mary Eveline. Exact justice would seem to forbid it. Ought the supreme court to thereupon recall their mandate directing a recovery by the Ethan Allen? And ought then a new trial to be had in that case? And, if it was had, and the aspect of the case should then be changed by other proofs, and a recovery be thereupon again ordered, ought there then again to be a return to this case, and the proceedings therein be again overhauled, on the ground that abstract justice requires it? Where would be the end of litigation?

The precise question, under the identical circumstances now before me, does not appear to have been decided in any case to which my attention has been called. There are rules of practice, however, to which parties are bound to conform, and which constitute the guide of the courts themselves.

It is of much importance, to the administration of justice, and to the policy which demands that litigation be not indefinitely protracted, that such rules, when made or settled, should be adhered to. The observations of Chief Justice Taney, upon the facility with which a rehearing could be obtained in the English court of chancery, and its consequences, and the refusal of the supreme court to permit such a practice in that court, bear forcibly upon this subject. Brown v. Aspden, 14 How. [55 U. S.] 25.

The case of Rich v. Lambert, 12 How. [53 U. S.] 347, was, probably, in its form, a more obvious case for the granting of a rehearing, if the power existed, than the present. There, several causes of action had been consolidated, and the district and circuit courts had, upon the same proofs and grounds of decison, decreed for the libellants, awarding each a specific amount. The respondents appealed to the supreme court. That court dismissed the appeal as to all the libellants but two, (as the appeal was here dismissed,) for want of jurisdiction, and the decree as to the others was reversed. We know nothing of the subsequent history of the case in the circuit court of South Carolina, but it is obvious that the enforcement of the decrees which were not reversed was liable to all the suggestions of injustice urged here.

In The New England [Case No. 10,151], Mr. Justice Story discusses the question of rehearing in admiralty, and, while he says, "that it is competent for a court of admiralty to rehear a cause after a decree has been pronounced, pending the term, and before the proceedings have been finally enrolled, or drawn up and entered on the record, I confess I do not entertain the slightest doubt," he also says: "I am not aware that, after a decree has been enrolled or entered on record, and the term has passed, any court of admiralty, at least in this country, has ever entertained an application for a rehearing;" and, adverting to the practice in the supreme court, he adds further: "In the case of Hudson v. Guestier, 7 Cranch [11 U. S.] 1, the supreme court held, that a case could not be reheard after the term in which it had been originally decided; and this rule has ever since been constantly adhered to."

No authority or precedent has been found to sanction the order now applied for. It does unfortunately happen that the inferior courts are sometimes found by the court of last resort to have made erroneous decisions. That court has sometimes felt constrained to pronounce prior decisions, made in exercise of its own high jurisdiction, erroneous. And yet neither that tribunal nor the other courts can, where the last expression of the highest wisdom is promulgated, be called upon to look backward indefinitely over its records and conform prior judgments and decrees to such latest utterance. Some time must be limited, or some state of the record must constitute the test of the right and power to recall and review the previous action of the courts, and the rules governing the subject should, so far as possible, be general, else no one can know when or where is the end of litigation. There are many limitations of the power of courts, which do not rest in questions of exact justice. The case now before us furnishes an illustration of one kind. No suggestion that the decree herein was wrong, and that the supreme court knew, and were about to decide, (as in effect was decided,) that it was wrong, could warrant that court in reversing it.

On examination of the rules prescribed by the supreme court for the courts of admiralty, no intimation is found which will sanction a rehearing of a decree made several terms before the application therefor, upon an appearance by all the parties, or which, in such case, would seem to recognize a power to do so, beyond the general power of courts over their own decrees during the term at which they are pronounced, and at any time before they are enrolled or finally entered. What those rules do declare seems rather to indicate the contrary. By rule 40, "the court may, in its discretion, upon the motion of the defendant, and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel has been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct." Under the acts of congress, the supreme court had authority to make this rule, and confer the power which it declares. They have not thought proper to extend the power to other cases in which it has not heretofore been deemed to exist, according to the views of Judge Story, already referred to.

Conformably to the generally recognized power of courts over their own judgments and decrees, while in paper or during the same term, the 155th rule of the district court for the Southern district of New York provides for a rehearing, or, more literally, it limits, in precise terms, the time within which a rehearing may be granted. That rule is as follows: "A rehearing will not be granted in any matter in which a decree has been rendered, unless application is made at the term when the decree is pronounced, or there is a stay of proceedings by order of the judge." That rule contemplates, I think, a stay in the enrollment or final entry of the decree on the record, although pronounced in form by the court, and not a stay to enable the respondent to try the experiment of an appeal to the supreme court, wh e that court has no jurisdiction to review the decree. Although the decree has been pronounced, yet, while it has not been properly drawn up, settled, and entered, this rule seems to allow

an application for a rehearing, if a stay of such entry is procured, though the term at which a decision was announced has passed. If that rule may be permitted to influence a decision in this district, as presumptively an expression of a general and recognized rule of admiralty practice, then it is significant to notice, that the decision in the other case was made in the Southern district, dismissing the libel of Merrill and others, and the opinion of the circuit court on the merits involved in both cases was announced nearly one year before the hearing and final decree in this case. There was, therefore, abundance of time to apply for a suspension of the hearing or of the entry of the final decree, pending the appeal to the supreme court in the other case, if the considerations now urged were deemed sufficient.

It is possible for this court to assume to disregard the rules which courts have heretofore recognized on this subject, but it is not proper. It may be possible to say that justice will be thereby effected, and, therefore, this court will make a precedent, although, in all past adjudication, none can be found; but this would be unseemly and dangerous. The power of the court is not despotic in its nature. It consists in conforming to the law as it is, and giving it effect, and not in making law, or declaring what ought, in the circumstances of each particular case, to be the law.

These considerations constrain me, against what would otherwise be my desire, to deny the motion.

Case No. 11,052.

The PETUNIA.

[8 Ben. 349.] [1]

District Court, E. D. New York. Jan., 1876.

COLLISION—VESSELS AT ANCHOR.

1. The brig O. and the bark P. were lying at anchor in a harbor at a safe distance apart. The anchor of the P., which was the windward vessel, dragged till she was near the O., when a second anchor was dropped, which held her so that the vessels were still at a safe distance apart. But afterwards, when the P. undertook to remove from that place, she was brought in contact with the O., doing her some damage. The P. claimed that her anchor was fouled, which caused her dragging, and that the coming in contact, when the P. attempted to remove, was inevitable, under the circumstances then existing. *Held*, that the P. was in fault for dragging, and that her watch was in fault, in not sooner discovering that she was dragging, and dropping the second anchor.

2. The P. took the risk of attempting to remove when she did from the place where she was held by the second anchor; and she was liable for the damages.

In admiralty.

Scudder & Carter, for libellants.

J. N. Whiting and W. W. Goodrich, for claimants.

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

BLATCHFORD, District Judge. The bark must be held in fault for dragging her anchor. Even with one anchor fouled she was securely held after the other anchor was dropped. If the other anchor had been dropped at the place where she was when she began to drag, she would not have dragged at all. She dragged some distance before the second anchor was dropped. If it had been dropped sooner, after she began to drag, she would not have dragged to a point so near to the brig. It was a fault on the part of the bark for her watch not to discover the dragging at an earlier moment.

Then, when the bark had been brought up by her second anchor, she was in a safe place with reference to the brig. In undertaking to remove from that place, she took the risk of colliding with the brig. The evidence shows, that, if the bark had not undertaken to remove from that place at the time she did, she would not have collided with the brig. She could have waited until she could certainly remove with safety to the brig, and she ought to have waited.

I see no fault on the part of the brig. She did what she was requested by the bark to do, and as promptly as possible. She could not anticipate the manœuvres of the bark, and was not bound to change her position after the bark was brought up by the second anchor, as the two vessels were in safe berths then with reference to each other and to all surrounding vessels, if neither undertook to move.

There must be a decree for the libellants, with costs, with a reference to ascertain damages.

Case No. 11,053.

In re PEVEAR et al.

[17 N. B. R. (1878) 461.] [1]

District Court, N. D. New York.

BANKRUPTCY—PRIORITY—WAGES.

The claimant had been employed by the bankrupts for the term of one year, but was discharged at the expiration of six months, and for a long time thereafter was unable to procure employment. He was paid for the time he actually worked. The register decided that he was entitled to priority in the payment of the sum claimed as wages for the time he was unemployed. *Held*, that the decision of the register was erroneous.

The question certified to the court is whether the claimant is entitled to priority in the distribution of the assets as for wages due to him as an operative. He was employed for a year at a salary of nine hundred dollars, but, owing to the insolvency and suspension of his employers, the bankrupts [Warren E. Pevear and William La Croix] was discharged at the expiration of six months. He was paid for the time he actually worked, but for a long time after was unable to obtain other employment.

[1] [Reprinted by permission.]

By HAKES, Register:

As matter of law, aside from the question of preference or priority under section 5101, it is conceded that the claimant would be entitled to pay for the time he was out of and unable to find employment. The objection is raised by the assignee and certain of the creditors that the case does not fall within the scope of either subdivision of the section referred to, and that the language of subdivision 4 of that section is not broad enough to include such a claim as preferred. It is true that, by the literal wording of that subdivision, priority is given "for labor performed." Still, the purpose and intention of the provision therein made for this class of creditors is apparent, and should have a controlling influence in giving construction to the language used. The statute manifestly contemplates making provision for laborers and their families whose occupation suggests that they have but limited or moderate means, and whose daily, weekly, or monthly wages are necessary for their support; and it is insisted that a fair construction of the statute will embrace the operative who has been ready and willing to work for his employer, and who has been deprived of the opportunity to work by such employer, as well as the person who has actually performed the labor, especially when he has been unable to find other employment during the time in question. The necessity for expenses for the support of the operative or his family does not cease when the employer suspends business or fails to furnish employment for the operative under his contract, and the reason and justice of the provision of the statute apply with as much force in a case of this kind as where the operative has actually performed the labor. Besides this, the mere suspension of business on the part of the employer did not release the laborer from his obligation under the contract, and the employers could, at any time between the 9th day of December and the 18th day of January, 1877, have required the creditor (operative) to commence and proceed with his labor under the contract. The wages of the claimant from the 9th of December to the 18th of January aforesaid amount to more than fifty dollars, and in the opinion of the register the creditor is entitled to priority in the payment of that sum.

WALLACE, District Judge. I cannot concur in the opinion of the register. The operative is entitled, under section 5101, to priority "for wages due to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy." Under the register's construction, the operative is allowed priority, not for wages due for labor performed, but for damages for breach of contract in not permitting him to perform labor. The fact that his measure of damages under the circumstances is equivalent to his wages is not material. He has not performed labor, and he is not entitled to wages which are a compensation for labor.

[See 21 Fed. 121.]

Case No. 11,054.

The PEVENSEY.

[Blatchf. Pr. Cas. 628.] [1]

District Court, S. D. New York. June 10, 1865.

PRIZE—CONDEMNATION.

The vessel having been chased at sea while attempting to break the blockade and driven on shore in the enemy's territory and captured, with her cargo, and wrecked after capture, a part of her cargo having been brought into this district, was condemned as prize of war.

In admiralty.

BETTS, District Judge. This case was submitted to the court upon the pleadings and proofs, by the district attorney, after considerable delay in endeavoring to collect fuller proofs, which had been much dispersed, owing to the circumstances following the capture. The rapid change of military forces and events on the spot, and the closing operations of the war, leaving small hopes that a more perfect command of the particulars of the prize may come again to the use of the government, probably demands that the case be disposed of without further procrastination.

On the 9th of June, 1864, the steamer Pevensey, on the Atlantic Ocean, off Beaufort, North Carolina, was chased at sea while making the attempt to enter the port of Wilmington, then being in a state of blockade, driven on shore, and captured, as prize of war, by the United States supply steamer Newbern, together with the goods, wares, and merchandises laden therein. The said prize vessel was then and there wrecked, after capture, and a portion of her lading was brought to this port for adjudication. Thereupon due proceedings were taken on behalf of the United States, in the prize court within this district, and process of monition and attachment was regularly sued out, August 13, 1864, and on such seizure and attachment of the property captured, and upon and after the return filed, and proclamation duly made by the marshal upon the aforesaid process, judgment by default thereon was duly entered in open court; and on motion subsequently made in court, by the district attorney, in June term, 1865, conformably to the due course of procedure of the court in such cases established, final judgment of condemnation and forfeiture of the said property so seized as prize of war is now rendered by the court.

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

Case No. 11,054a.

PEYATTE et al. v. ENGLISH.

[Hempst. 24.] [1]

Superior Court, Territory of Arkansas. Oct., 1824.

PLEADING—WHAT THE PLEA MUST CONTAIN—PLEA IN BAR—INSOLVENT ESTATE.

1. Every plea must contain an answer to the whole cause of action or some certain part of it.

2. A plea that an estate is insolvent, is not a good plea in bar.

3. If the administrator of an insolvent estate pursues the course pointed out by law, he cannot be held personally liable.

[This was an action by James Peyatte and wife against Simeon English, administrator to John English.]

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. This is an action of debt, brought by the plaintiff against the defendant, as administrator of John English, deceased, upon an obligation executed by the intestate to the plaintiff. The defendant has pleaded in substance that the estate of which he is administrator is insolvent, and to this plea the plaintiff has demurred, and the only question presented to the court is, whether the plea is good as a bar to the action. We are of opinion that it is not, because, according to the well-established rules of pleading, every plea must contain an answer to the whole cause of action set out in the declaration, or to some certain part of it. Steph. Pl. 215; 6 Com. Dig. "Pleader," 3 M. 40, 41. The plea in question is not an answer to the whole declaration, for the reason, that although the estate may be insolvent and unable to discharge the full amount of debts against it, yet it may be able to pay a portion of them. It is not an answer to any certain claim of the plaintiff; because the plea does not state what part of the debt the estate is able to pay, and even then it would not be good. On these grounds, we think the plea insufficient. But it has been argued, that unless the defendant be allowed in this action to plead the insolvency of the estate, he must be subjected personally to liability in another action brought upon this judgment. The answer to this is, that if the defendant has taken the legal steps and pursued the course pointed out by the administration law in relation to insolvent estates, he cannot be injured in his individual character, in any action which may be brought against him on the judgment which may be rendered in this case. Demurrer sustained.

PEYTON (AULD v.). See Case No. 654.

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

Case No. 11,055.

PEYTON v. BLISS.

[Woolw. 170.] [1]

Circuit Court, E. D. Arkansas. April Term, 1868.

THE REMOVAL FROM STATE COURTS OF CAUSES INVOLVING THE VALIDITY OF TITLES UNDER THE DIRECT-TAX LAW—ACT OF 1833 STILL IN FORCE—EXCEPTION—DIRECT TAXES UPON STATES—THAT ACT IS A REVENUE LAW.

1. The provisions of the act of March 2, 1833 (4 Stat. 632), relating to the removal of causes from state to federal courts, are still in force, except as to cases arising under the internal revenue system.

2. The act imposing direct taxes upon the states (12 Stat. 294) is not within this exception.

3. That act is a revenue law, and therefore cases arising under it are subject to removal under the act of 1833.

[Cited in Eaton v. Calhoun, 15 Fed. 156.]

4. Insurance Co. v. Ritchie, 5 Wall. [12 U. S.] 541, and Philadelphia v. Collector, Id. 720, commented on and distinguished.

At a prior term of the court, the defendant presented his petition for the removal of a suit then pending against him in the state court, alleging that it involved the question of the validity of a title to lands, to recover which it was brought, which title he derived from a sale of the lands for taxes, made by tax-commissioners under the acts of 1861 and 1862; and he prayed a certiorari to the state court, directing the return of the record under section 3 of the act of March 2, 1833. The writ was allowed, issued, and served, and the record returned, and the cause duly entered here. The defendant now moved to dismiss the writ which he had thus procured.

MILLER, Circuit Justice. The defendant, Bliss, filed his petition in this court at its last term, in which he stated that he was sued in the state court of Pulaski county, by the plaintiff, Craven Peyton, for the possession of certain real estate, and that his only title to said real estate is derived from a tax-sale made by the commissioner of taxes, appointed under the act of congress of June 7, 1862 (12 Stat. 422), to assess and collect the direct tax imposed by congress in the act of 1861 (12 Stat. 294), upon the state of Arkansas. He therefore prayed that a writ of certiorari might be issued, to remove said cause from the state court into this court, in pursuance of the 3d section of the act of March 2, 1833 (4 Stat. 632). In accordance with the prayer of this petition, the writ of certiorari was issued, and directed to the judge of the circuit court of Pulaski county, and was duly served on him the 6th day of June last.

The petitioner now moves to dismiss the

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

writ of certiorari, on the ground that it was issued improvidently, and without authority of law. The plaintiff in the state court resists the motion.

It is clear that if the writ legally issued, the plaintiff in the suit cannot now be turned out of this court at the option of the party who brought him here. The only question is, therefore, whether the court had authority to issue the writ originally.

The act of March 2, 1833, under which this proceeding was instituted, was passed to enable the federal government to collect its customs, the only species of tax then authorized, in the state of South Carolina, which state, under its nullification ordinances, was attempting to resist their collection. It was a statute of several sections, and was known in the political dialect of the day as the "Force Bill." Some of its provisions were, by their terms, temporary, but those which relate to the removal of suits from state to federal courts, were intended to be permanent, and are now in full force, except as to cases arising under the laws known collectively as the "Internal Revenue System." By section 50 of the act to amend the internal revenue law, approved June 30, 1864 (13 Stat. 218), the provisions of the 1st and 2d sections of the act of 1833 were made applicable to cases arising under that system. But this section was repealed by section 67 of the act of July 13, 1866 (14 Stat. 98, p. 171), which also enacted, that the act of 1833 shall not be construed to apply to "causes arising under the internal revenue act, nor to any case in which the validity or interpretation of these acts shall be in issue."

If the act imposing a direct tax on the states, under which the petitioner's rights accrued, is an internal revenue act, within the meaning of the act of July, 1866, then the act of 1833 cannot be applied, because the act of 1866 expressly forbids it. But that act undoubtedly had reference to the system of laws known as the "Internal Revenue System"—a series of statutes commencing in 1862, and amended and modified at every session of congress from that time to the present. The act of 1861, on the contrary, imposed a direct tax on the states for a limited period, and has not since been extended or repeated. It is clear that the proviso to the act of 1866 must be limited to cases arising under the internal revenue system, and can have no application to cases arising under the act for assessing and collecting the direct tax.

Does the original act of 1833 apply to such cases? The 2d section of that act extends the jurisdiction of the circuit court of the United States to all cases in law or equity arising under the revenue laws of the United States, for which other provision is not already made by law. The 3d section gives to the defendant, in any suit commenced in any state court, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by him under any such law of the United States, a right to remove such suit into the proper federal court.

If the direct-tax law, under which this petitioner claims title to the property for which he is sued, is a revenue law, this case is within the terms of this statute. Any law which provides for the assessment and collection of a tax to defray the expenses of the government, is a revenue law. Such legislation is commonly referred to under the general term "revenue measures," and those measures include all the laws by which the government provides means for meeting its expenditures. I can imagine no definition of a government revenue which would not include all the money raised by any form of taxation. This view receives strong confirmation from the fact that the direct tax is imposed by a statute which revises and increases the duties on imports, and for the first time taxes incomes, thus embracing in one revenue law, customs, duties, direct taxes, and internal revenue. Its title is, "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes." It is true that the act of 1833 is entitled, "An act to provide for the collection of duties and imports;" and, doubtless, imports, as a source of revenue, were mainly in the minds of its framers, as that was the only tax then authorized by congress. But the act was prospective, and gave the right in cases arising under the revenue laws, in the plural, and under any such law, that is, any revenue law. Congress could not have intended to provide a permanent remedy for the evils which caused the passage of that act, and at the same time to limit its effect to revenue laws then in force. I know of no rule of construction which, if it were applicable to future laws imposing duties on imports, would make it inapplicable to future laws raising revenue by direct taxation. The latter would be much more likely to need the aid of such a statute than the former.

It is supposed that these views are in conflict with some casual remarks on this statute found in the opinions of the supreme court in the cases of Insurance Co. v. Ritchie, 5 Wall. [72 U. S.] 541, and Philadelphia v. Collector, Id. 720. But it is obvious that the writers of these opinions had in their minds, at that time, no other revenue law than those which related to the customs, and those which were a part of the system of internal revenue already spoken of. They held that the statute was in force as regarded revenue from customs, and that by reason of the proviso to section 67 of the act of 1866, it was not applicable to cases arising under the internal revenue laws. But their attention was not called to the relation of that act to cases arising under the direct-tax law; and it would be an unsafe rule to interpret language used under such circumstances as intending to settle a principle not before the court, and in refer-

ence to a revenue law not in the minds of the writers of the opinion.

The motion to dismiss the writ of certiorari is overruled. Motion overruled.

Case No. 11,056.

PEYTON v. BRENT.

[3 Cranch, C. C. 424].[1]

Circuit Court, District of Columbia. April Term, 1829.

ACTS OF MARSHAL APPOINTED BY PRESIDENT DE FACTO.

Upon a motion to discharge a defendant arrested upon a capias ad respondendum by a marshal appointed by the president de facto of the United States, the court will not decide the question whether he has been duly elected to that office.

The writ of capias ad respondendum having been on motion of the defendant [W. Brent, Jr.] returned, cepi corpus, the defendant in proper person, moved to be discharged from the arrest, because the commission to T. Ringgold, as marshal of this district, was issued by John Q. Adams, claiming to hold and exercise, and then actually exercising, the duties of the office of president of the United States, but who was not, of right, president of the United States, inasmuch as he was not duly elected to that office agreeably to the provisions of the constitution of the United States.

Which motion was overruled by THE COURT, (MORSELL, Circuit Judge, absent,) no other reason for such discharge being alleged by the defendant; and this motion and judgment of the court were ordered to be entered on the minutes of the court.

PEYTON (BROOKE v.). See Cases Nos. 1,933 and 1,934.

PEYTON (GARDNER v.). See Case No. 5,234.

PEYTON (HUTCHINSON v.). See Case No. 6,958.

PEYTON (NEALE v.). See Case No. 10,071.

PEYTON (RICHARDSON v.). See Case No. 11,794.

Case No. 11,057.

PEYTON v. VEITCH et al.

[2 Cranch, C. C. 123.][1]

Circuit Court, District of Columbia. Nov. Term, 1816.

DEPOSITION—CAPTION—MAGISTRATE'S CERTIFICATE—SUPERCARGO—PAYMENT FOR OWNER'S ACCOUNT.

1. It is not necessary that a magistrate who takes a deposition under the act of congress, should certify that he was not of counsel with either party.

[Cited in Stewart v. Townsend, 41 Fed. 123.]

2. It is competent for the plaintiff to give evidence of orders given to him in former voyages, in order to raise a presumption that similar orders were given in the voyage in question.

3. The caption of the deposition must name all the parties in the suit.

4. If the supercargo violates the laws of the foreign country by making short entries of the homeward bound cargo, and thereby subjects the vessel and cargo to seizure and condemnation, and pays a sum of money to obtain the release of the property, such violation of the laws of the foreign country will not prevent the supercargo from recovering from the owners the sum of money thus paid for the release of the property, unless it was paid in violation, also, of the laws of that country; in which case, he cannot recover.

This was an action of assumpsit brought by Thomas W. Peyton, against Richard Veitch and Anthony Crease, joint merchants, trading under the firm of Richard Veitch & Co., Jonah Thompson and Craven P. Thompson, joint merchants, trading under the firm of Jonah Thompson & Son, and Jacob Hoffman, to recover the sum of $4,000 paid by the plaintiff to redeem the schooner Alert and cargo, which had been seized as forfeited, in Curacoa, for violation of the laws of that place, by short entries of the cargo taken in there for the homeward voyage.

THE COURT (in the absence of CRANCH, Chief Judge) had decided that it was not necessary that the magistrate who takes a deposition under the act of congress, should certify that he is not counsel for either of the parties. It having been proved that the usual course of trade to Curacoa was to enter and clear by short invoices, so as to evade the payment of duties, and that this course was winked at by the revenue officers of the place, the plaintiff offered evidence that the defendant Veitch had given him orders to that effect, in former voyages, in order that the jury might draw an inference that similar orders had been given to the plaintiff in the present case.

THE COURT (CRANCH, Chief Judge, contra) admitted the evidence.

Mr. Taylor, for plaintiff, objected to the defendants' depositions that they did not appear to have been taken in this cause, the names of three of the defendants having been omitted in the caption.

THE COURT (nem. con.) rejected them on that ground.

E. J. Lee and Mr. Swann, for defendants, contended that the money was paid in an illegal transaction, and therefore could not be recovered, and prayed the court to instruct the jury that if they should believe, from the evidence, that the plaintiff had violated the law of Curacoa, and thereby subjected the cargo to seizure and condemnation, and that the plaintiff paid to the revenue officer the sum of $4,000 to release the vessel and cargo from such seizure and condemnation, the plaintiff had no right, in this action, to recover any part of the money so paid.

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

Which instruction THE COURT (nem. con.) refused to give, because the prayer did not state that the payment of the $4,000 for the release of the vessel and cargo, was contrary to the law of Curacoa, or in violation of the duty of the officer who received it; although the seizure was for a violation of the law of that place.

Mr. Jones, for plaintiff, then prayed the court to instruct the jury, in substance, that if the plaintiff acted in conformity with the defendants' instructions, and according to the usage and course of the trade, in making the short entries which caused the seizure, and that by paying the $4,000 he made a saving to the defendants of more than double that sum, and that the payment was necessary to preserve the vessel and cargo to the defendants, the plaintiff was entitled to recover in this action the money so paid.

Which instruction THE COURT refused to give, unless with this proviso, that it should not appear to the jury, by the evidence, that such payment was contrary to the laws of the island of Curacoa.

E. J. Lee, for defendant, then prayed the court, in effect, to instruct the jury that if they should believe, from the evidence, that the $4,000 were paid to the revenue officer of Curacoa as a bribe for releasing the vessel and cargo without the knowledge or consent of the governor of the island, the plaintiff had no right to recover, in this action, any portion of the money so paid.

Which instruction THE COURT (THRUSTON, Circuit Judge, contra) gave as prayed.

Bills of exception were taken, but no writ of error prosecuted.

Upon the question whether the illegality of the payment should prevent the plaintiff from recovering, the defendants' counsel cited 1 Esp. N. P. 89, 21, and 23; Mabin v. Colson, 4 Dall. [4 U. S.] 298; Belding v. Pitkin, 2 Caines, 147; and the plaintiff's counsel cited Holman v. Johnson, Cowp. 341; Biggs v. Lawrence, 3 Term R. 454; Waymell v. Reed, 5 Term R. 599, and Esp. N. P. (Am. Ed.) 20.

Case No. 11,058.

The PEYTONA.

[2 Curt. 21.] [1]

Circuit Court, D. Maine. Sept. Term, 1854.[2]

SHIPPING—CARRIAGE OF GOODS ON DECK—DELIVERY ON WHARF—NOTICE TO CONSIGNEE—EXCUSES FOR FAILURE TO GIVE SUCH NOTICE.

1. The burden is on the ship-owner to prove that the shipper agreed that his property might be carried on deck.

[Cited in Chubb v. Seven Thousand Eight Hundred Bushels of Oats, Case No. 2,709. Cited in brief in The Delaware, 14 Wall. (81 U. S.) 594.]

2. In a suit in rem against the vessel, to recover the value of the goods lost or damaged, the master is an interested witness; but a release from some of the part owners renders him competent.

3. Though delivery may be made by landing property on a wharf and giving notice to the consignee, where such is the custom of the port, yet such notice, or a valid excuse for not giving it, is indispensable.

4. If the master has wrongfully omitted to sign bills of lading, and sailed without learning the names of the consignees, he cannot avail himself of this ignorance as an excuse for not giving notice of the landing of the goods.

[Cited in The Thames, 14 Wall. (81 U. S.) 107.]

[Cited in Robinson v. Chittenden, 69 N. Y. 535.]

5. Though, ordinarily, the master is not bound to seek out the consignor for the purpose of signing bills of lading, yet if, when they are presented to him by an agent of the consignor, he objects to one of their stipulations, and says he will call on the consignor, and sails without doing so, he is in fault, and cannot have any advantage from the non-existence of bills of lading.

[Cited in Fox v. Holt, Case No. 5,012.]

[Cited in Hatch v. Tucker, 12 R. I. 505.]

In admiralty.

Fessenden & Deblois, for appellants.

Mr. Evans, contra.

CURTIS, Circuit Justice. This is a libel filed by John Plaisted, of Gardiner, in the district of Maine, against the schooner Peytona [Daniel Lane, Jr., claimant], in which it is alleged, that on or about the fourth day of February, 1854, Lee, Claflin & Company, by order of the libellant, shipped on board the Peytona, then lying at Boston, four hundred and seventy-three slaughter hides, the property of the libellant, to be carried to Belfast, in the district of Maine, and there delivered in like condition as when shipped to the libellant, or his agent, the dangers of the seas only excepted. That the schooner arrived at Belfast on or about the ninth day of the same February, but the hides were not then and there delivered to the libellant or his agent. That the master of the schooner, contrary to his duty in that behalf, stowed the hides on deck, whereby over one hundred and eighty-four were lost, and the residue were landed at Belfast, and left in the open air, for the space of four weeks, without any notice to the libellant, or his agent, and thereby were materially injured. The answer admits the shipment of the hides, but alleges that the shippers knew they were to be carried on deck and assented thereto; that it became necessary in the course of the voyage to make a jettison of some of the hides, and that others were washed overboard. That on the arrival of the schooner at Belfast, the remainder of the hides were landed as soon as practicable, the schooner having been delayed in the river six or seven days by the ice. That the master was not informed by the shipper, who was the owner of the hides, nor to whom they were to be

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

[2] [Affirming Case No. 11,059.]

delivered at Belfast. That they were not in a condition to be stored; that all that could be done was to pile them up on a wharf; and that this was done. Upon these allegations, proofs having been taken, the district court made a decree in favor of the libellant [Case No. 11,059], and the claimant appealed.

The case presents two distinct questions,—the first being whether the vessel is answerable for the hides washed or thrown overboard on the passage; the second, whether the vessel is liable for the damage suffered by the hides which were landed. The first of these questions depends upon the authority of the master to stow the hides on deck. If he was authorized so to do, it is not seriously questioned by the libellant that the destruction was, under the circumstances, his loss. If he wrongfully placed them on deck, it is not denied by the claimant, that they were at the risk of the vessel. And it was also properly conceded by the counsel for the claimant, that the burden is upon him, to prove the consent of the shippers to have them carried on deck. Upon a shipment being made, it is an implication of law, in the absence of a special contract, that the master is to sign bills of lading in the usual form; and the effect of such a bill of lading is, to oblige the master to carry the goods under deck. This part of the case, therefore, is merely a question of fact, whether the claimant has proved a special contract to carry the goods on deck? He relies on the testimony of Asa S. Small, the master of the schooner, of Horace G. Small, the mate, of Samuel West, who was temporarily employed on board while the vessel lay at Boston, and of Benjamin Small, the master of another vessel, who speaks to the state of the cargo of the Peytona on the day when the hides came on board.

The testimony of the master was objected to, as not competent. I consider him interested in the event of this suit. If a recovery is had against the vessel, the master will be liable to the owners for the amount of damages and costs which they will have been obliged to pay. In such a case it is well settled, at the common law, that the master is not a competent witness to disprove his own negligence or improper conduct. Green v. New River Co., 4 Term R. 589; De Symonds v. De La Cour, 2 Bos. & P. (N. R.) 374; Hawkins v. Finlayson, 3 Car. & P. 305; Whitamore v. Waterhouse, 4 Car. & P. 383. No reason is perceived why the same rule should not be applied in the admiralty, in cases not coming within the exception on account of necessity. The Boston [Case No. 1,673]. And it has been so applied by Mr. Justice Story, in The Hope [Id. 6,678], and by Judge Ware in The William Harris [Id. 17,695]. In the case of Citizens' Bank v. Nantucket S. S. Co. [Id. 2,730], which was very strongly contested, and in which I was of counsel while at the bar, no doubt was entertained that the master was incompetent without a release. It was so held by Sir William Scott in The Exeter, 2 C. Rob. Adm. 261.

But this witness has been released by all but one of the part owners of the Peytona, and I am of opinion this release has rendered him competent. A claim over, on him by the part owners, would be a joint claim, and, consequently, a release by one bars all. Whitamore v. Waterhouse, 4 Car. & P. 383; Hockless v. Mitchell, 4 Esp. 86; Bulkley v. Dayton, 14 Johns. 387. I have, therefore, taken the deposition of the master into consideration. But I am not satisfied upon the whole evidence, that the shippers assented to the carriage of this property on deck. I do not deem it necessary to detail the evidence, or the considerations, which, upon a careful examination of it, have left serious doubts on my mind concerning the correctness of the master's last deposition. He is a released witness, testifying to the controlling fact in the cause, so as to exonerate himself from blame. There are important discrepancies between his two depositions. Though he is corroborated by the mate, and by Wells, in part, yet the latter admits he paid no particular attention to the conversation, and the memory of the former is so much at fault upon facts of some importance, that full confidence cannot be given to his evidence. The rate of freight is admitted to have been the customary rate, and this renders it improbable that the shippers agreed to have the property go on deck. The witness, Cunningham, who applied to the master to have the hides carried, denies that he agreed to have the hides go on deck, or undertook to inquire of the shippers if they would consent thereto. The fact that the bills of lading were made out as for under deck freight, tends to support his statement. Pingree, who brought down the bills of lading, and Gill, who accompanied him, contradict the master on very material points. If their evidence is credible, it is hardly possible there could have been a contract to carry on deck, and there is nothing in the cause which tends to shake their credit. There is testimony from the claimant's four witnesses, tending to show that when the hides were shipped, the hold was full, and they could only be carried on deck. There is evidence from two of the libellant's witnesses to the contrary. Without undertaking to decide how the fact was, I think it safe to conclude, that if the hold were then full, Cunningham did not know it. If he is to be credited, he certainly did not. If the claimant's witnesses are believed, the hatches were on and he could not know what was in the hold. But at all events, the fact is not decisive, because the master might choose to take this property on deck at the risk of the vessel, as indeed he admits he did, some of his deck freight; for in enumerating his deck load, he mentions, "some satin white, which ought to have gone into the hold, but we could not

get the casks in there, the hold was so full." Upon a careful consideration of the evidence, such serious doubts remain in my mind, that I cannot pronounce the contract to carry on deck proved, and must therefore hold the vessel liable for the loss of the hides thrown or washed overboard.

The other part of the case is attended with less difficulty. The duty of a master is, to deliver property to its consignee. Where such a mode of delivery is usual, it may be made by depositing the goods on a customary wharf, and giving notice thereof to the consignee. But this notice, or some equivalent for it, or excuse for not giving it, is indispensable. Ostrander v. Brown, 15 Johns. 39; Chickering v. Fowler, 4 Pick. 371; Gibson v. Culver, 17 Wend. 305; Merwin v. Butler, 17 Conn. 138; Gatliffe v. Bourne, 4 Bing. N. C. 314, and same case in error, 3 Scott, N. R. 1. The excuse set up by the answer in this case is, that the master was not informed by the shipper, who was the owner of the hides, or to whom they were to be delivered at Belfast. This is not supported by the proofs. It is true, no bills of lading were signed, and so, there was no consignee named in the customary way. But, in the first place, I consider the master in fault, that bills of lading were not signed. Pingree says, when he presented the bills of lading a second time to the master, he promised to come to the counting-room of the consignors that afternoon at four o'clock, and see the senior consignor about the bills. The master does not deny this. He did not go. He moved his vessel to another wharf so that when Pingree went to his former berth, the next day, he did not find the vessel, and supposed she had sailed. In point of fact, the vessel waited four or five days for a wind, and then sailed. Now though it is, I think, usual, to present bills of lading to the masters of vessels for signature, and ordinarily, it is not incumbent on them to seek out consignors and sign them at their places of business, yet a bill of lading is the customary and proper shipping document, and should be signed by the master before sailing. The particular place where they are to be signed is regulated by usage, founded on convenience, in the absence of a special undertaking. When a master agrees to go to the counting-room of the consignor and settle the terms of the bills of lading, and sails without doing so, it would be allowing him to take advantage of his own wrong, if he were permitted to avail himself of the want of a bill of lading, to excuse himself from the performance of the duty of giving notice to the consignee, of the arrival of the goods. Besides, the master did know that it was the intention of the shippers to consign these goods to Lewis & Millan. They were named as consignees in the bills of lading presented to him for signature. He did not object, and he had no right to object to their being the consignees. The point left unsettled was, whether he should agree to deliver to Lewis & Millan at their wharf. I am by no means clear that under the circumstances he was not bound to do so. As the bills of lading were drawn, they imposed that obligation on him. He refused to sign them, but agreed to see one of the consignors. He sailed with the goods without doing so. Certainly the consignors had not assented to any other delivery than that provided for by the bill of lading. Non constat that they would have assented to any other. And I think it would be difficult to maintain, that sailing with the goods under such circumstances was not an assent on his part to the terms of the bills of lading. But it is not necessary to decide on this ground. The master was apprised by the bills of lading that Lewis & Millan were designated by the shippers as the consignees of the goods, and to them he was bound to give notice of their arrival. Having failed to do so, the vessel is liable for the deterioration of their value, from exposure to the weather on the wharf.

In respect to the amount of damage I affirm the judgment of the district court. The libellant having taken additional evidence on the question of damages, has sought to increase the sum awarded below. But he did not appeal from the decree. It is only where the circuit court reverses the decree of the district court, that it is to proceed to render such a decree as the district court ought to have rendered. 1 Stat. 85, § 24. This court cannot pronounce a decree for increased damages, without first reversing the decree of the district court on the subject of damages. This it cannot do on the prayer of the appellee. Stratton v. Jarvis, 8 Pet. [33 U. S.] 4; Canter v. American Ins. Co., 3 Pet [28 U. S.] 307. A cross-appeal should have been taken, if he was dissatisfied with the amount of damages awarded by the district court. Having omitted to do so, he has waived all right to further damages, and can claim nothing more than an affirmance of the decree of that court. The decree of the district court is affirmed with costs.

Case No. 11,059.

The PEYTONA.

[1 Ware, 541.] [1]

District Court, D. Maine. July 24, 1854.[2]

AFFREIGHTMENT—STOWAGE UNDER DECK—DAMAGE TO GOODS ON DECK—MASTER AS WITNESS FOR OWNERS—RELEASE.

1. Under a contract of affreightment, whether in writing or verbal, for the transportation of merchandise on the high seas, the master is bound to have it safely stowed under deck.

[1] [Reported by Hon. Ashur Ware, District Judge.]

[2] [Affirmed in Case No. 11,058.]

2. If it is carried on deck without the consent of the shipper, and suffers damage by any accident that would not have happened to it equally under deck, the master and owners must bear the loss.

3. In a libel against the ship on a contract of affreightment by the shipper, the master is not a competent witness for the owners without a release, but if there are several owners, a release by a part of them is sufficient.

This is a libel in rem against the schooner Peytona, on a contract for the transportation of 472 hides from Boston to Belfast, consigned to Messrs. Lewis & Miller. The hides were stowed on deck, and on the voyage 184 were either washed overboard, or thrown over by the crew on account of stress of weather, and for the safety of the ship. The residue were carried to Belfast; but the harbor being frozen, the vessel was not able to reach the wharf of the consignees, and the hides were taken out on the ice, carried ashore in sleighs, and left on another wharf. There they were exposed to the changes of the weather for four or five weeks, and by this exposure, received, as is alleged in the libel, material damage. No notice of the arrival of the goods was given to the consignees, and the libellant not hearing from them as he expected, and having some time afterwards been informed that they had been shipped, found, by inquiry, that they had arrived, and were on Miller's wharf. The hides were examined on the wharf by two tanners, and they reported the damage equal to one dollar on a hide, upon an average. But on a further and more critical examination by one of the witnesses, to whom they were delivered to be tanned, he says that 20 of the hides were badly damaged to the extent of 50 or 75 per cent. of their value, but with respect to the remainder, he could not say whether they had sustained any injury, or if any, how much. The libellant claimed damages for the 184 hides lost, and for the injury to the hides that were delivered, by exposure on the wharf.

Mr. Evans, for libellant.

Fessenden & Deblois, for respondents.

WARE, District Judge. There can be no doubt that the loss of the hides that were washed overboard by the sea, or thrown over by the crew, is to be ascribed solely to the fact of their being carried on deck, because the whole cargo stowed under deck arrived safe; and in point of law, that the ship is herself bound in specie for the safe delivery of the merchandise according to the contract of affreightment, the dangers of the seas excepted, admits of as little doubt. The question of her liability in this case depends on this fact, whether the master by the law of the sea, or by the terms of his contract, was authorized to carry the hides on deck. I take it to be too clear to admit of controversy, that under a common contract of affreightment the maritime law binds the master to have the cargo safely stowed under deck. This is the ordinary mode of stowage, and it is a condition ordinarily implied in every contract for the transportation of merchandise in sea-going vessels on the high seas. A clean bill of lading, that is, one which is silent as to the mode of stowage, always imposes the obligation of securing the goods under deck. 3 Kent, Comm. 206. And there is no reason why the same principle should not apply when the contract is verbal. If they are carried on deck, it is at the master's risk, and if they are lost or damaged by any accident, that would not have been equally fatal if they had been secured under deck, the master and owners must bear the loss, or the merchant, at his election, may proceed directly against the ship herself. But this right, as to stowage of his goods, is in favor of the shipper, and, like all other rights, may be waived, and the only question of difficulty in this part of the case is, whether it was so waived. The evidence which has a bearing on the question is somewhat contradictory, and not easily reconcilable. The contract was verbal. Cunningham, a witness for the libellant, and a clerk in the house of McLafflin & Co., the shippers, says that he went to the wharf to find a vessel, and there found the Peytona, of which one of the house was a part owner, bound to Belfast. He inquired for the master by name, but the master having been recently changed, he asked a man on board, who appeared to be master, and in fact was so, whether he could take a quantity of hides to Belfast, and he agreed to take them. There was no agreement as to the freight, but they were to go at the common rate of freight. Nothing was said, according to this witness, as to their stowage, whether on deck or under deck. He left, saying that they would be sent down in the afternoon.

The master was offered as a witness on the part of the respondents, and objected to, on the ground that he had an interest in the event of the suit. A release was then offered, signed by all the co-owners, except one, and this was objected to because it was not signed by all. Undoubtedly if the master was guilty of a fault, for which his owners were responsible, and they suffered, he might be answerable over to them, and would therefore be inadmissible as a witness, on the ground of interest, without a release. But a release of part of the co-owners is sufficient. If they should have any right of action against him, it would be a joint action, and a release of one of the joint parties would be as effectual a bar to the action as a release by all. 1 Greenl. Ev. 427, note. The testimony of the master, as well as that of the mate, differs in some respects from that of Cunningham. According to them, a young man came to the vessel in the morning to engage transportation for a quantity of hides. The master told him he would take them, but that the vessel was full below, and that they must go on deck. On this he said that he would return to the store for orders, and that some time after he came back and said that the hides would be sent down in the afternoon. This is stated more

particularly by the mate, but in this part of his testimony, he is certainly under a mistake. Cunningham, who made the contract, did not return, and the mate is also mistaken as to the person who engaged the freight. But the hides were received in the afternoon of the same day and put on deck. Pingree, a clerk in the store, brought down a bill of lading. The master, after examining it, declined to sign it, because the consignment was to a firm that had dissolved, and ceased to do business. Pingree then returned to the store and brought another bill of lading, by which the hides were consigned to Lewis & Miller. The master also declined signing that, because the harbor was frozen and he could not carry his vessel to their wharf. Pingree then left, on the promise of the master, as he says, that he would go to the store and there execute a bill of lading. He failed to go, and left Boston with the hides without signing one.

This is the substance of the testimony which goes to show the nature and conditions of the contract. Without imputing to any of the witnesses intentional misrepresentation, it appears to me that the reasonable inference from the whole is, that this was a common and ordinary contract of affreightment. It is a common and well-known practice for vessels in this trade to carry a deck-load, and it is proved in the present case that it is not unusual to carry green hides on deck. The shipper and the master know perfectly well that where they are so carried, it is at the master's risk, unless the shipper consents to take it on himself. Even then if it were admitted that Cunningham knew that the hides if taken must be carried on deck, it would not of necessity follow that the risk would be shifted from the master to the shipper. He might be willing that they should be thus carried on the master's responsibility, as is often if not most usually done by packet masters in the coasting trade. When the bills of lading were brought to the master for his signature, he twice objected to signing them for different reasons. But though they were in the common form, he made no objection on that account. And yet he well knew that under such a bill of lading he took the risk of a deck passage on himself. His not objecting to the bill of lading on this account can hardly be considered less than a tacit admission, as full freight was charged, that the risk was to be on him. If this be a correct view of the evidence, it follows that the ship is liable for the loss of the deck-load.

The second claim is for the injury sustained by the hides which were exposed on the wharf. The master knew to whom they were consigned. He declined signing a bill of lading, which required him to deliver them at the wharf of the consignees, on account of the obstruction of the ice; and this might perhaps excuse him for landing them at some other convenient place. As a general rule a delivery of the goods on the wharf is sufficient to discharge the master. The consignee must be there ready to receive the goods, and the master is not bound, in ordinary cases, to transport them to his storehouse. But, as it is justly observed by Chancellor Kent, the rule has this reasonable qualification. They must be there delivered to some one, who is authorized to receive them, or a previous notice must be given to the consignee of the time and place of delivery, and the master is not justified without such notice in leaving them unprotected and exposed on the wharf. 3 Kent, Comm. 315. In this case, no notice was given, but the hides were left exposed to the weather on an open wharf, nor did the consignees know of their arrival until they were informed by the owner, who went to find his goods. The damage they received from this exposure was through the fault and neglect of the master, or the agent of the vessel, and for this the owners are responsible.

The whole number of hides was 472, and the whole cost $2,527.21, giving an average of a fraction over $5.35 for a hide, and $985.18 for 184 lost. Twenty hides were damaged from 50 to 75 per cent.—on an average 62½ per cent. The loss being $107.08, the damage at 62½ per cent. will be $66.92, making a total of $1,052.-10. Decree, $1,052.10 damages, and costs.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 11,058.]

PEYTONA, The (BROOKS v.). See Case No. 1,959.

Case No. 11,060.

In re PFAFF.

[7 Ben. 61.] [1]

District Court, S. D. New York. Nov., 1873.

MARSHAL'S COMMISSION ON MONEY COLLECTED AS MESSENGER.

The marshal, as messenger, when he collects moneys of a bankrupt's estate under a warrant, is entitled to charge a commission on the amount collected.

The marshal collected the sum of $1,615.40, belonging to the bankrupt [Frederick Pfaff] and, among his fees for services authorized under the warrant, put in "commissions on receipts, $65.40." The assignee disputed the charge, and the register allowed it, presenting his views to the court as follows:

"The statute does not expressly make provision for commissions to the messenger on moneys of the bankrupt received and paid over by him. The fourth subdivision of so much of the forty-seventh section of the statute as prescribes the fees of the messenger, relates to expenses only. It does not absolutely preclude a right to commissions on moneys collected and paid over. The custody and safe keeping of money involves a risk and liability very different from, and altogether greater than, that involved in the care and preservation of other personal prop-

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

erty; and, when an officer of the law, be he sheriff, marshal, receiver, assignee, executor, administrator, or trustee, safely keeps and honestly accounts for moneys which have come into his hands in the discharge of his official duties, the policy of the law seems to be established that he is to be compensated for the risk and for his services, by a commission on the amount of the moneys received and paid over. There is not any reason why this policy should be departed from in the case of a messenger under the bankruptcy act, who, in the execution of a warrant in bankruptcy, collects moneys belonging to the estate in bankruptcy. In the judgment of the register, the clause next following the fourth subdivision of the section above mentioned of the statute, authorizes such allowance to be made. The cause has been shown. The fact that the moneys were collected by the messenger, and the amount of the moneys, are admitted, and the assignee has been heard. The allowance to the messenger of commissions in these cases, will, it is believed, be in analogy to the allowances made to the marshal for similar services rendered by him in the district court, in cases at common law and in chancery. See Anonymous [Case No. 437]; Bump, Bankr. (6th Ed.) 644. Nor is the allowance of commissions to be determined, or their amount measured, by the trouble to which the messenger, sheriff, executor, or trustee may have been put in collecting or paying over the money. Such questions are foreign to the considerations upon which commissions are allowed. The register is of the opinion that the charge of the messenger for commissions in this case is a proper charge."

BLATCHFORD, District Judge. I concur with the register.

Case No. 11,061.

In re PFROMM et al.

[8 N. B. R. 357.] [1]

District Court, E. D. Michigan. Feb. 21, 1873.

BANKRUPTCY—CHANGE OF VOTE FOR ASSIGNEE—CORRUPT VOTING—EFFECT.

1. A creditor may change his vote as often as he sees fit until he has signed the certificate of choice of assignee.

2. Where a creditor votes corruptly, as by reason of a consideration paid by bankrupt, his vote will be excluded.

3. An election of assignee will not be sent back because a creditor has voted corruptly, unless the result would be changed by excluding his vote.

[In the matter of John and Martin Pfromm, bankrupts.]

This matter came up on a certificate of the register, Hovey K. Clarke. It appears from the certificate of the register that at the first meeting of creditors, held on the 18th of February, for the choice of assignee, the following named creditors, who were entitled to vote for an assignee, had proved their claims before proceeding to take the vote, to wit: August Thormann, three hundred and fifty-nine dollars and sixty-one cents; Frank Maltz & Co., three hundred and thirteen dollars and fifty cents; Peter Herbste, two hundred dollars; John Grossteick, two hundred dollars; total, one thousand and seventy-three dollars and eleven cents; that at the first vote for assignee the votes of the creditors were divided between Francis G. Russell, Henry A. Harmon and Cornelius J. Reilly, neither of whom having a majority in number or value of said creditors, a second vote was taken, which resulted in a vote of three creditors, representing eight hundred and seventy-three dollars and eleven cents, for Henry A. Harmon, and one creditor, representing two hundred dollars, for Cornelius J. Reilly, It thus appearing from the vote that a majority in number and value of said creditors had nominated Henry A. Harmon as such assignee, the register proceeded to prepare the memorandum that such creditors, by their signatures, might certify their choice. Before any creditor had affixed his signature to the memorandum, Mr. John Grossteick, who had voted for Mr. Harmon, being present and attended by his counsel, Mr. W. E. Cheever, through Mr. Cheever expressed a desire to change his vote. The reason for this change of vote, as stated by Mr. Baker, in his objection filed on the 18th of February, was not stated publicly, nor was it heard by the register. The result of such change would leave the creditors equally divided in number, and would therefore result in no election. The right of the creditor thus to change his vote was objected to by Mr. H. L. Baker, who attended on behalf of Mr. L. C. Hanmer, a secured creditor, on the grounds: (1) That it was not competent for Mr. Cheever thus to declare the purpose of the creditor; and (2) that after a vote had been taken, the result of which indicated a majority in number and value concurring, no creditor was at liberty to change his vote. Upon the first point the register allowed Mr. Baker to interrogate Mr. Grossteick himself as to whether he in fact desired to change his vote, but declined to allow him to inquire as to the reason of the change.

Before proceeding to a third vote Mr. Christian Schneider, who had appeared at ten o'clock, the hour appointed for the meeting, and offered to prove his claim against said estate, but who had retired for the purpose of verifying by his books an item of his account, now re-appeared and proved his claim at the sum of three hundred and twenty-six dollars and seventy-five cents. A third vote for assignee was then taken, which resulted in a vote of four creditors representing one thousand and eighty-six dollars and thirty-six cents for Cornelius J. Reilly, and one creditor representing three hundred and thirteen dollars and fifty cents for Henry A. Har-

[1] [Reprinted by permission.]

mon; and the creditors voting for Mr. Reilly thereupon signed the memorandum certifying their choice.

Mr. Baker objecting to the confirmation of Mr. Reilly as assignee, all further proceedings were suspended, and the meeting of creditors adjourned to the 25th of February, at ten o'clock a. m., in order to afford an opportunity to certify the questions arising to the district judge for determination.

By HOVEY K. CLARKE, Register:

Form number fifteen, appended to the general orders in bankruptcy, prescribes the mode by which creditors meeting for the election of an assignee may certify their choice. Unless this memorandum shall bear the signatures of a majority in number and value of creditors who have proved their claims and are entitled to participate in the election, there can be no authentic evidence of such election, and the register must certify a failure to make choice by the creditors. The duty of preparing the memorandum for the signatures of the creditors devolves on the register. The recital it contains, as to notice, must be within his knowledge, derived from the files in his office. In it must be stated the name of the assignee chosen or nominated; and to ascertain this the usual practice is to take a viva voce vote of the creditors, and when the required concurrence appears, to prepare the memorandum for the signatures of the electing-creditors. This preliminary vote, therefore, concludes nothing. It may be illustrated by the practice prevailing in some parts of the country at political conventions to take an "informal vote" before proceeding to the final vote, by which the will of the convention shall be known. In this case the expression by Mr. Grossteick of his desire to change his vote, I accepted as equivalent to a refusal on his part to sign the memorandum which was then ready for signatures, but had not then been signed by any creditor; the effect of such refusal being to leave but two creditors, who, if they were still willing to sign, would not be a majority in number; and regarding this as a failure to certify, as required, a choice of assignee, a third vote was necessary, which resulted in the concurrence above stated.

As to the right of a creditor to change his vote at any period during the progress of electing an assignee, I do not see how it can be questioned. Such changes are often necessary to effect an election. If he change it with a corrupt motive, or if he vote originally with such motive, and that fact appear, undoubtedly the court, upon a proper showing of the facts, may apply any proper remedy. But the attempt to show any such corrupt motive, by oral interrogatories addressed by one creditor to another, during the progress of the meeting, strikes me as not only disorderly in practice, but as leaving the court without any authentic record of what might thus orally appear, and thus without adequate means to review the proceedings before the register. I do not think the right of any creditor, whose claim has been duly proved, to participate in a creditors' meeting can be impeached except upon a sworn statement of facts, either by affidavit, or upon an examination after due notice, and therefore the attempt to examine Mr. Grossteick orally, as to the reasons which influenced him to change his vote, was irregular, and ought not to have been allowed to interrupt the proceedings by the creditors to choose an assignee.

How far the affidavit of Mr. Martz, subsequently filed, shows a case proper for the interference of the court in the choice by the creditors of an assignee, is a question foreign to the purpose of this opinion. It is appended and returned with the papers at the request of the party objecting.

LONGYEAR, District Judge. The foregoing views of the register as to what constitutes the evidence of election of an assignee by creditors, and as to the legal right of a creditor to refuse to sign the certificate of an election after having orally voted to do so, are concurred in and approved.

As to the objections to the confirmation of the choice of assignee as certified, it is sufficient to observe: First. Throwing out the vote of Grossteick, who is charged with having voted corruptly, there still remains an unquestioned majority in number and amount in favor of the person certified as chosen; and it is well settled that the court will not send a case back for a new election when it is not apparent that a different result would or might be thereby attained. Second. Nothing appears upon the face of the proceedings, and no evidence is adduced to support the charges of undue influence in the election, on the part of the bankrupts, or as to the alleged unfitness of the person chosen. The objections are therefore overruled.

It results, that upon the acceptance of the trust by the person chosen, the choice of assignee in this matter, as certified, must be approved and confirmed.

Case No. 11,062.

PHARO v. SMITH.

[18 How. Pr. 47.]

District Court, S. D. New York. Oct., 1859.

ADMIRALTY PRACTICE—STIPULATIONS FOR COSTS—WAIVER BY LIBELANT.

[The right of a libelant in a suit in personam to require the respondent to file a stipulation for costs may be waived by delay, and if no action is taken until after a decree against respondents, and a notice of appeal, the libelant is not entitled by an order nunc pro tunc to require such stipulation to be filed.]

[This was a libel in personam by Joseph W. Pharo and others against George Smith. A decree was entered in favor of libelants (case unreported), and, defendants having

given notice of appeal, libelants now move for an order requiring them to file, nunc pro tunc, a bond or stipulation for costs.]

I. T. Williams, for libelants.

Benedict, Burr & Benedict, for respondents.

BETTS, District Judge. This action in personam was commenced in November term, 1855, and alias process was returned in February term, 1856, personally served upon the defendants. They appeared and filed their answer to the libel August 16th, 1856, and, as it appears by the files of the court, the suit continued in prosecution to June 18th, 1859, when a final decree was rendered in favor of the libelants, on the confirmation of the commissioner's report, after exception heard thereto, for the sum of $10,500 damages, and $397.37 costs.

On the 28th day of June, the defendants filed a notice of appeal in this court, giving the same day a notice thereof in writing to the proctor of the libelants. On the 19th of July thereafter, the libelants obtained an order staying proceedings on the appeal until a decision upon the motion then noticed, —that the defendants file nunc pro tunc a bond or stipulation for costs in the main action,—should be made by the court. Any further movement upon that notice has been delayed from time to time by mutual assent between the parties to the present period.

The application is now supported by the affidavit of the proctor of the libelants that the defendants gave no bail or stipulation in the action when the process was served, or at the time they appeared and answered, nor since, and that the defendants are now about to appeal the said cause to the circuit court, and that the proctor is informed and believes the defendants are insolvent, having since the judgment and decree was rendered in this cause put their property out of their hands, and that the proctor further believes the libelants are wholly remediless against the defendants for either the damage or the costs recovered against them in this court, and that he always supposed and believed that the usual bond and stipulation for costs, with sufficient sureties, had been duly filed by the defendants in this court at the time they perfected their appearance in the cause, and never knew or suspected the contrary until after the decree therein was docketed on the 8th of July last.

The proposition on the part of the libelants is that the defendants have been guilty of malpractice and dereliction of duty in omitting to give bail to the marshal, or to file a stipulation to cover the costs of the action at the time of their arrest, or on filing their appearance or answer in the action, and that they are legally bound now to place the libelants in the same condition as if that duty had been fulfilled at the inception of the cause. This, I think, is a misapprehension of the rules and principles of practice. The defendants were guilty of no wrong or irregularity in tendering their appearance and pleading to the action, if the libelants choose to accept them, without first giving the securities appointed by the course of practice. Those sureties are a privilege to the opposite parties which may be waived by those entitled to exact them, without impairing the validity of any after steps in the proceeding. Indeed, the elementary books impose on the actor in the suit the obligation of coercing his antagonist, by special mandates of court, to supply in time the suretyships which the due order of practice ordains for the guarantee of his demands or costs involved in the suit (Clarke, Prac. tit. 9; Dunl. Adm. Prac. 145); and when he omits to exact the compliance of his adversary with rules affecting his particular interest, the presumption should be that he intends to waive the obligation, it being merely his personal privilege. In this instance, the libelants proceeded for a series of months, conducting a sharp controversy upon a large demand, with the fact patent upon the minutes of the court and before their face that the defendants had not taken the preliminary step to file a stipulation in the cause, making answer or offering proofs, and they must thereby be deemed in law to have waived a claim to that act as a condition to the right standing of their adversaries in court. All the obligations of the defendants to the libelants, as to the manner of conducting the cause, were merged in the final decree.

The claim, to have the defendants compelled, at this day, to furnish the security for the costs which accrued, does not rest upon any purposed act of the defendants proposed to be yet done by them in this cause within this court. They call for no further action or favor in their own behalf, in the district court, in the case. The powers and aid of a different and higher tribunal are now invoked, and the remedy of the libelants if any they have, must be in that forum, to screen themselves against further charges on account of the action in its subsequent stages. The case is fully ended in this court, with the exception of the right of the libelants, at its hands, to execution of the decree here rendered, if that be not transferred by the appeal to the circuit court. The libelants make no equity, after the litigation is wholly ended here, to have the defendants compelled to give the stipulation or bond, not exacted at the commencement of the suit, if it be competent to the court at this stage of the case to grant such application. There would be equal fitness, if not a greater propriety, in a defendant demanding, after final judgment in a cause, that a plaintiff be called upon to supply security for costs, which was not imposed upon him, as it might have been, at the election of the defendant, before he proceeded in the cause. The court interposes its

powers to hold parties to the observance of its rules who are watchful over their rights, and does not break up a completed course of practice, pursued without fraud or deception on one side, when the other has slept over the proceeding with every opportunity to object to it and have it rectified, if erroneous. The motion is denied.

[An appeal from the decree of the district court in favor of libelants (Case unreported) was taken to the circuit court, where the decree of the district court was reversed. Case No. 11,063.]

Case No. 11,063.

PHARO et al. v. SMITH et al.

[17 Leg. Int. 381.]

Circuit Court, E. D. New York. 1860.

APPEAL IN ADMIRALTY—COLLISION—MISFORTUNE —NO FAULT OF EITHER VESSEL.

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

[This was a libel in admiralty by Joseph W. Pharo and others against Geo. Smith and others to recover damages for collision. The The decree of the district court was in favor of the libelants. Case unreported. The district court overruled a motion of libelants to require the defendants to file a stipulation for costs on appeal. Case No. 11,062.]

NELSON, Circuit Justice. The libel was filed in this case to recover damages for a collision between the schooner M. E. Pharo, and the schooner Wm. Smith, which happened on the night of April 9, 1855, off Barnegat. The M. E. Pharo was bound from Philadelphia to Rhode Island with a cargo of coal; the Wm. Smith on her way from New York to Savannah, Georgia. The wind was heavy and about north-west, the night dark. Both vessels had lights at their bows, but were not discovered until within some one hundred yards of each other. They were moving at the rate of about six miles an hour, making a combined speed of twelve miles. The M. E. Pharo was heading north-east by north when she discovered the approaching vessel, and then changed her course by falling off more eastwardly. The Wm. Smith was at first heading south by west, and afterward changed to south-west. When the vessels first discovered each other, they were approaching nearly a-head, the Wm. Smith rather upon the larboard bow of the M. E. Pharo. Both (according to the account given by the hands of each) in this position adopted the proper movement to avoid a collision. The Wm. Smith ported her helm and came up into the wind, and the M. E. Pharo the same, and fell off. But unfortunately they came immediately together, the Smith striking the starboard side of the Pharo, head on, just aft of the fore chains, and breaking her side so that she sank in a few minutes. It is impossible to reconcile the testimony, for if the hands are to be believed, upon the respective vessels, the collision would not have happened. The courses given would necessarily have continued to separate them further and further from each other, and this notwithstanding the Pharo starboarded her helm and came up into the eye of the wind, as stated by those on board, for even then she could not have reached the Smith. The misfortune, we think, is to be attributed to the darkness of the night. With the combined speed of the vessels, the time between the discovery of the lights and the collision was very short—less than a minute. There seems to have been no neglect of a proper look-out on either vessel, and the lights were seen as early as the darkness of the night would admit. We are inclined to think the collision was rather the misfortune than the fault of either, and shall reverse the decree below and dismiss the libel. The respondents have very much changed the aspect of the case by the proofs introduced in this court. Decree reversed and libel dismissed.

PHARO, The WALTER W. See Case No. 17,124.

Case No. 11,064.

The PHEBE.

[1 Ware (263) 265.] [1]

District Court, D. Maine. March 13, July 12, 1834.

BILL OF LADING—SHIPPER'S LIEN FOR BREACH OF CONTRACT—CHARTERED VESSEL—OWNER'S RIGHT TO CONTRADICT BILL OF LADING.

1. The shipper has a lien on the vesesl for the execution of a contract by a bill of lading, entered into by the master, which may be enforced by process in rem in the admiralty.

[Cited in Mendell v. The Martin White, Case No. 9,419; The Panama, Id. 10,703; The Atlantic, Id. 620; The Flash, Id. 4,857; The Susan G. Owens, Id. 13,634; Wilson v. Pierce, Id. 17,826; McGuire v. The Golden Gate, Id. 8,815; Smith v. The Creole, Id. 13,033; The Hendrik Hudson, Id. 6,358; The Regulator, Id. 11,665; The Avon, Id. 680; The Champion, Id. 2,583; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 435. Cited in brief in Thomas v. Osborn, 19 How. (60 U. S.) 28. Cited in The China v. Walsh, 7 Wall. (74 U. S.) 68; The Maggie Hammond, 9 Wall. (76 U. S.) 451; Ex parte Easton, 95 U. S. 76; The T. A. Goddard, 12 Fed. 178; The Brantford City, 29 Fed. 385; The Wilmington, 48 Fed. 568.]

2. And it makes no difference in this respect whether the vessel is in the employment of the owner, or be let by a charter-party or parol agreement, on the condition that the hirer shall have the whole control of her.

[Cited in Stone v. The Relampago, Case No. 13,486; Hill v. The Golden Gate, Id. 6,491; Scull v. Raymond, 18 Fed. 550; The International, 30 Fed. 377; The Wilmington, 48 Fed. 568.]

3. In the latter case, if the shipper proceeds against the vessel for the fault of the master, in

[1] [Reported by Hon. Ashur Ware, District Judge.]

not executing a contract entered into by a bill of lading, the owner may contradict the bill of lading by parol testimony, he being a stranger to the contract, and intervening as a third person for his own interest.

[Cited in The Illinois, Case No. 7,005.]

4. It is only those contracts which the master enters into in his quality as master, that specifically bind the ship and affect it by way of lien or privilege in favor of the creditor.

[Cited in The Zenobia, Case No. 18,208; The Edwin v. Naumkeag Steam Cotton Co., Id. 4,301; The Illinois, Id. 7,005; The Wilmington, 48 Fed. 568.]

This was a suit founded on a bill of lading. The libel alleged that on the 24th of August, 1832, G. W. McLellan, the libellant, shipped on board the Phebe, of which Otis Roberts was master, 136 tons of gypsum, consigned to Jabez Ellis & Son, of Boston, of the value of $259.78, the master to have for his freight all the net proceeds of the sales over that sum, for which he signed three bills of lading; that the master, instead of carrying the gypsum to Boston, stopped at Castine, transhipped it on board another vessel, and has never delivered it to the consignees. Perkins, the owner, filed a claim and put in an answer to the libel, alleging that on the first day of August, 1832, he let the vessel to Roberts, to be employed in the coasting trade, on a parol agreement, by which Roberts was to victual and man and have the entire control of the vessel, and that the owner was to have one half of her earnings for the hire of the vessel; that Roberts having taken the vessel on this agreement, to be employed solely by him and on his account, went with her to Eastport, and there purchased on his own account a quantity of gypsum, or plaster-of-paris, for which he paid in part and agreed to pay the balance to Ellis & Son; that after the plaster was laden, McLellan illegally compelled Roberts to give him a bill of lading of the plaster in question, as security for the payment of the balance due; that it was agreed between Roberts and McLellan that Roberts should sell the plaster, and from the proceeds of the sale, pay over the balance due to McLellan to Ellis & Son; that after the brig sailed, she became so leaky, by the dangers of the seas, that the master was obliged to put into Castine and there procure another vessel to carry the plaster to Boston; that Perkins, the owner, had no interest in the contract made by Roberts, and he prays that the vessel may be pronounced free from the lien, and delivered to him. The libellant, to prove his case, offered in evidence the bill of lading signed by Roberts, the master. The claimant, to prove the facts alleged in the answer, offered the depositions of the master and one of the crew. The master's deposition was objected to on the ground that he was interested in the result of the suit, and both were objected to on the ground that parol evidence was inadmissible to control the effect of the bill of lading.

C. S. Daveis, for libellant.

Mr. Longfellow, for claimant.

WARE, District Judge. The case has been argued on the allegations in the libel and answer, and on the admissibility of the evidence offered by the respondent. The general principle that the vessel is liable in specie to the shippers, for the non-execution of a contract of affreightment by a bill of lading, has not been controverted; but it is contended that the circumstances of this case take it out of the general rule. In the present case, the vessel was not in the employment of the owner. When a vessel is let by charter-party, and the charterer victuals and mans, and has the entire control of the vessel, the general owner is not responsible for the acts of the master. The charterer is substituted in his place, and becomes owner pro hac vice. There was, in this case, no charter-party in writing; but the vessel was let by a parol agreement, under which the hirer was to have the entire control of her. The owner had no right to interfere in any way in the employment of the vessel, while the contract remained in force. The master, also, was not appointed by him, and cannot therefore be considered as his agent, nor can he be held directly responsible for his acts.

It has been contended in argument, by the counsel for the libellant, that though the owner has divested himself of all right of control with respect to the employment of the vessel, yet as he receives for the hire of the vessel, not a fixed and stipulated sum, but a certain proportion of the freight and earnings, be they more or less, he is directly interested in the freight, and ought to be held jointly liable with the hirer. The principle on which the owner is bound for the acts of the master is supposed to be borrowed by the maritime law directly from the exercitory action of the civil law. He is not liable in his character of owner or proprietor of the vessel, but as employer, for that is the meaning of the word "exercitor." In that character he is responsible for the acts of the master, first, because he is his agent and is appointed by him, and subject to his orders, and secondly, because he is entitled to the earnings of the vessel. The definition of exercitor is, the person who receives the earnings of the vessel. "Exercitorem autem eum dicimus ad quem obventiones et reditus omnes pervenient." Dig. 14, 1, 1, 15. As the profits of the vessel were to be equally divided between the general owner and the charterer, it is contended that they are liable as joint exercitors; that the form of the contract constituted them, in fact, partners in the business carried on by the vessel. The argument is certainly not without force, and would deserve to be maturely considered if the question could be considered as an open one in this country. But it is too firmly settled by judicial decisions to be now brought into controversy. The cases of Reynolds v. Toppan, 15 Mass. 370, Taggard v. Loring, 16 Mass. 336, Thompson v. Snow, 4 Greenl. 268, and Emery v. Hersey, 4 Greenl. 407, have fixed

the legal construction of a contract like this. The general principle is that when, by a contract of charter-party, the charterer takes the vessel into his own possession and control, and navigates her by his own master and crew, he alone is responsible for the acts of the master; and these cases decide that it makes no difference, in this respect, although the owner may be so far interested in the voyage that he receives for the hire of his vessel a certain proportion of her earnings, instead of a fixed sum. Although this mode of determining the hire of the vessel gives to the contract the aspect of a partnership transaction, it is not admitted to draw after it the consequences of a partnership, but is considered merely as an equitable mode of ascertaining the charter, or the real value of the use of the vessel. And the rule of construction applied to contracts in this form, is analogous to the other decisions of the maritime law, and the law merchant. It was formerly a common practice, and is now perfectly legal for seamen to engage, not for wages, at a fixed and stipulated price, but for a share of the freight and profits of the adventure. It is still customary in some branches of business, as in the fisheries, both in the cod and whale-fisheries, for seamen to engage on shares, by which they become directly interested in the profits of the voyage; but contracts of this kind have never been considered as constituting partnerships, in the proper sense of the word, and the incidents belonging to a contract of partnership have never been considered as applicable to them. So a clerk may agree with a merchant to receive as a compensation for his services a certain portion of the profits of the business, instead of a fixed salary, without being involved in the liabilities of a partner; that is, he may stipulate for a contingent compensation, to be ascertained by some future event, and that event may be the issue or success of the business in which he is employed. 3 Kent, Comm. 33. The distinction is, whether he is interested in the profits, as profits, or whether recourse is to be had to them only to determine the measure of his compensation. The distinction savors, it is true, of refinement and subtlety, and its solidity and justice has been questioned by high authority (Ex parte Hamper, 17 Ves. 404), but it is too firmly established to be now brought into doubt. The principle is applied, in the cases cited, to the hire of a vessel upon the terms on which this was hired. If, then, this action had been brought against the owner in personam, it could not have been sustained.

Inasmuch as the owner cannot be held directly and personally responsible in this case, it is contended that he cannot be indirectly held, by subjecting his property to this responsibility. The argument is, that the liability of the vessel is merely collateral or accessory to that of the owner, and stands in the nature of a surety or pledge. This objection admits of two answers. In the first place, conceding it to be correct in principle that the liability of the vessel is only collateral and subsidiary to that of the personal responsibility of the owner, by the owner in this case is meant, not the proprietor but the employer. Roberts, the charterer, is for this purpose the owner; he is the exercitor, and it is to the quality of exercitor or employer that the liability is attached. Allowing, then, the liability of the vessel to be not primary but collateral, it is collateral to that of Roberts. But the argument is founded on a misconception of the true principles of the law. This rule, by which the vessel is bound in specie for the acts of the master, is not derived from the civil law, but has its origin in the maritime usages of the middle ages; and it is to these usages that we must look to ascertain its true character. The civil law considered the master as the simple præpositus, or agent of the owner or exercitor, and authorized him to bind his principal in all matters relating to the business with which he was intrusted. Dig. 14, 1, 1, 7. The act of the master, while acting within the limits of his authority, bound the principal in the same manner as it would if it had been the act of the principal himself. If there were several exercitors, each was bound in solido, that is, to the full amount of the obligation contracted by the master, because he was the præpositus of each exercitor; and also in favor of the creditor, ne in plures adversarios distringatur qui cum uno contraxerit. Dig. 14, 1, 1, 25; Id. 14, 1, 2. The exercitor was equally bound for the acts of the master, whether the obligation was ex contractu or ex delicto, and whether resulting from the fraud or negligence of the master; not indeed by the exercitory action which relates exclusively to the contracts of the master, but by other appropriate actions of the law. Huber. Prælect. Jur. Civ. Lib. 14, 1, 8; Dig. 4, 9, 3, 1; Id. 4, 9, 4; Id. 44, 7, 5; Id. 47, 5, 1; Voet, ad Pand. 14, 1, 7. But for the obligations of the master ex delicto, if there were several exercitors, each was bound only for his own proportion. Dig. 4, 9, 7, § 4 and 5. But by the maritime usages and customs of the middle ages, which, having been generally adopted by merchants, silently acquired the force of a general law, the master, who was ordinarily a part owner (see Consulat de la Mer, passim, particularly chapters 46–57, or chapters 1–11 of the edition of Pardessus. Jugemens d'Oleron, art. 1; Droit Maritime de Wisbuy, Pardessus Ed., art. 15; Collection des Lois Maritimes, p. 470, note 7), was not considered as properly the agent or mandatary of the other part owners, but rather as the administrator of the property, that is, of the vessel which was intrusted to his care and management. He was authorized to employ it for the common benefit of all the owners, more in the character of the acting partner of a societé en commandité, or limited partnership, than

in that of agent for his co-owners. As the gerant or active partner, he was authorized to act for the other owners, and bind them in all matters relating to the employment of the vessel, to the extent of their interest in it; or to speak more correctly, to bind the property itself which was confided to his administration; but his authority did not extend to a sale of the ship without the express consent of his co-owners, except in a case of necessity. Consulat de la Mer, c. 256. The ship and freight were pledged for the fulfilment of these obligations, and might be seized and sold to satisfy them. This is evident from many chapters of the Consulate of the Sea, the most complete and authentic record of these primitive usages and customs. Consulat de la Mer, cc. 58, 63, 72, 138, 186, 193, 227. Thus all the contracts of the master with the mariners for their wages, with material-men, for repairs and supplies of rigging, or for provisions, or other necessaries for the vessel, involved a tacit hypothecation of the ship and freight. But he was not authorized, in his character as master, and as representing his co-owners, to bind them beyond the value of their share in the ship and freight. To do more than this, he must have a special power for that purpose. Consulat (Boucher's Trans.) c. 34. He was the agent or representative of the other owners, only so far as they had confided their capital to his administration. If the vessel was lost before the creditors were paid, they had no remedy except against the master. The other part owners were discharged from all responsibility. Let the lender, then, says the Consulate, take care how he lends, for the owners lose enough when they lose their shares. Chapter 239, or 194 of the edition of Pardessus. The master could not, therefore, in the proper sense of the word, bind the owners, personally, at all, because they could always withdraw themselves from their personal responsibility by abandoning the ship and freight. 2 Pard. Lois Mar. p. 235, note.

If there were some exceptions to the general rule, in cases where the other part owners were present, and unreasonably refused to contribute their proportion towards the necessary repairs and outfit of the ship, as in the case mentioned in the Consulate (chapters 239 and 245; and see note of Pardessus cited above), these are but exceptions standing on their own peculiar reasons, and applied only when the owner was present, and when it might be imputed to them as a fault that they unreasonably refused to contribute to the necessary expenses of the ship. But in a foreign port, or where the owners were not present, and the master was acting under the general authority which the law or custom gave him as master, he could only bind the ship and freight. It was for this reason that Emerigon, whose mind was deeply imbued with the maritime traditions of the middle ages, says that the liability of the owners to answer for the acts of the master is rather real than personal. The legal power of the captain, says he, does not extend beyond the limits of the vessel of which he is master, that is, administrator. He cannot bind the other property of the owners, unless he have a special power for that purpose. Contrats a la Grosse, c. 4, § 11. There was the same limitation of the responsibility of the owners, whether the demand of the creditor was founded on the contract or tort of the master, or whether the damage for which he sought reparation resulted from the fault of the master, or the defects or insufficiency of the vessel, or her tackle or apparel. Consulat de la Mer, c. 227 and 63–72. Whenever a merchant formed any engagement with the master, he could look for his security only to the master himself, and to the capital of the owner, the administration of which was confided to him, that is, the ship and the freight. Thus we find, when the principle is traced back to its source, that it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner. On the contrary, in the origin of the custom the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to his other creditors. This limitation of the responsibility of owners, though generally if not universally received by the maritime states of continental Europe, at least so far as relates to obligations arising from the faults of the master, has never been adopted in England or in this country, as a mercantile usage or customary law. Several acts of parliament have limited the responsibility of owners for the tortious acts of the master, to the value of the ship and freight, but the common, like the civil law, holds the owner responsible without limitation. Abb. Shipp. pt. 3, c. 5. And what is alone material in this case, the principle that the ship and freight are bound for the acts of the master, has been incorporated into the maritime jurisprudence of England, though from the limited jurisdiction of the admiralty, the shipper cannot have the full benefit of it. Abb. Shipp. p. 93. In this country the lien is not only acknowledged, but is enforced by our courts of admiralty. And having been borrowed from the general maritime law, or the customs and usages of the sea, we must look to them, rather than to our own peculiar maritime jurisprudence, for its true character and the cases to which it applies. By that law, the master's authority to bind the vessel is the same, whether he is appointed by the owners, or the ship is let to him by a charter-party. The Consulate

of the Sea (chapter 289) presents a case of the letting of a ship by a contract identical in all its conditions with this, (the contracts of commenda or commande,) to be employed by the hirer for a share of the profits, and the ship is declared to be liable in the hands of the hirer, and he to be answerable to the owners. Whoever deals with the master, in all cases where he is acting within the scope of his authority as master, is entitled to look to the ship as his security. There is, therefore, no foundation in law for the distinction insisted upon by the respondent's counsel. Nor has it any more foundation in reason or mercantile policy. If this privilege is given as an additional security to the merchant, the reason for it is quite as strong, to say the least, when the ship is employed under a charter-party, as when it is in the employment of the owner. The owner has his remedy against the charterer.

The other question is, whether the respondent can, in this case, be admitted to contradict, by parol evidence, the bill of lading executed by the master. The question is not whether the master can himself contradict it, or the employers of the vessel by whom he is appointed and for whose acts they are responsible. The proprietor in this case intervenes as a third person, who has no interest in the contract between the master and shipper. The rule of law that parol evidence shall not be admitted to control or contradict a contract reduced to writing, applies between those who are parties to it and those who represent them or derive their rights from them. It does not apply against third persons, whose rights may be incidentally affected by the contract. Admitting, then, that the bill of lading is conclusive against the master, which is undoubtedly true as a general rule, it does not follow that it is so against the respondent, who is a stranger to the contract. It would open a wide door for fraud if third persons could in this way be precluded from proving the truth. The bill of lading, says Valin, is conclusive against the assured, and nothing can be admitted against its tenor. 2 Valin, Comm. p. 139. He is a party to it. But it is not conclusive on the insurers. They may disprove it by every species of legal evidence. Emer. Ins. c. 11, § 3; 2 Valin, Comm. p. 144. Nor is the bill of lading conclusive against other shippers, in cases of jettison and contribution. Valin, Sur Ordonnance de la Marine, liv. 2, tit. 3, art. 7; Id., liv. 3, tit. 8, art. 9. "The nautical laws of all times, have," says Boulay Paty, "given to the bill of lading the character of proof; it is received not only between the master and merchant shipper, but also against the insurers and all other persons, saving the right to prove fraud or collusion. It is beyond doubt, that third persons, who are not parties to the bill of lading, have a right to contradict and prove its incorrectness by every species of proof." 2 Cours de Droit Mar. p. 306. The proprietor, who in this case is a stranger to the contract, may, on the principles both of the common and maritime law, be admitted to explain and contradict it by every species of legal evidence.

After the foregoing opinion was delivered, the cause was continued on the motion of the libellant, to enable him to introduce further evidence in support of the libel. The principal evidence was the testimony of Mr. Buckman, who at the time of the transaction was a clerk in the store of the libellant. He stated that Roberts, in the first place, purchased 220 1-2 tons of plaster, of McLellan, on account of the owners; that the original intention of Roberts was to carry the plaster to New York, but that after the brig was loaded, it was found that she leaked so badly that it was necessary to take out part of the cargo, namely, about eighty tons; that the sale was then rescinded, and the destination of the vessel changed to Boston; and that it was agreed that the master should carry the plaster which remained on board, on freight, and receive for the freight all the proceeds of the sale over $259.78, which was the price he had agreed to pay for it.

The respondent offered the depositions of Roberts, the master, and Gray, one of the hands. Gray stated that when Roberts arrived at Eastport he went to McLellan, and asked him to put on board a cargo, on freight; that McLellan declined, on account of the low price of plaster, and that Roberts afterwards purchased of him a cargo of plaster, intending to carry it to New York, but on account of the leaky state of the vessel part of it was relanded by the order of McLellan. Roberts, in his deposition, says that he purchased the plaster of McLellan, and that, after the vessel was loaded, McLellan required him to sign bills of lading of the plaster as being shipped by him, as security for the sum due for the purchase, and for cash advanced; and that after the bills were signed, McLellan agreed that instead of delivering the plaster to Ellis & Son, he might sell it, and pay over to them the sum due, that is, $259.78, and that he, not being much acquainted with bills of lading, thought that he might properly enough sign the bills, as he was requested.

WARE, District Judge. It has been suggested at the argument that after the Phebe put into Castine, and the cargo was transhipped into another vessel, it was actually carried to the port of destination, although it is not pretended that it was delivered to the consignees, or the proceeds of the sale deposited with them. But it is argued that the Phebe having been disabled by the dangers of the seas from pursuing the voyage, and the goods having been transhipped to be conveyed in another vessel, she is discharged from the lien, and that, if any exists, it at-

taches to the vessel to which they were transferred. The argument proceeds on the assumption that the Phebe was prevented from performing the voyage and delivering the cargo, according to the terms of the bill of lading, by the dangers of the seas. But the fact, according to the evidence, was otherwise. It appears that she was in a leaky condition when the plaster was taken on board, and without meeting with any bad weather, or any accident, she was obliged to put into port because she was, in fact, unseaworthy and unfit for the voyage. The goods were laden on board the Phebe, and she became bound for the performance of the contract, supposing it to be a contract of affreightment, unless she was prevented by some of the perils excepted in the bill of lading. Whether the other vessel into which they were transhipped, might not also be liable, is a question which does not arise in this case.

But the principal question which arises on the new evidence is, whether there was in this case a bona fide contract of affreightment, or whether it was a contract for a sale of the goods, disguised under the form of an affreightment. I agree with the respondent's counsel, that if this bill of lading was used merely as a disguise to cover a sale, or if it were an arrangement resorted to as a security for the payment of the purchase-money, it could create no lien on the vessel; and if such were the contract, it is immaterial whether the purchase was made by the master on his own account, or on the account of his owners. In neither case would the vender be entitled to a lien on the vessel for his security. It is only those contracts which the master makes in his quality as master, that specifically bind the ship, and affect it by way of a lien or privilege in favor of the creditor. But is there any evidence that this was not a bona fide contract of affreightment? It is proved by a bill of lading in the usual form. Though this is not binding and conclusive with respect to third persons, it is, with respect to them, evidence of a high character. It may be impeached; but it is not lightly to be presumed that parties, who put their contracts into writing with all the usual forms and solemnities which belong to it, intend a different contract from that which the written agreement plainly expresses. It belongs to him who impeaches it to show by satisfactory evidence that it is a simulated contract.

The first circumstance relied on for this purpose appears on the face of the paper. The master was to receive for his freight, not a fixed and certain sum, but all that the plaster should sell for over a certain sum. This is an unusual mode of settling the amount of freight, but there is nothing illegal in such an agreement. The master could lose nothing but the run of the vessel, for he would be discharged by delivering the cargo to the consignees, and for his compensation he might be willing to take the risk of the market. Another circumstance relied upon is, that at the time when the bill of lading was executed, a bill of parcels was delivered by McLellan to the master, in which 220 tons of plaster was charged to the brig, with some other small charges, and credit was given for the plaster returned, and the account was balanced by this sum of $259.78, to be paid to Ellis & Son, as per bill of lading. It is argued that this paper shows clearly that there was a sale of the plaster, and that the bill of lading was only given as a security for the payment. But this paper is not a contract nor legal evidence per se of a contract. It is but a memorandum of one of the parties, and is satisfactorily explained by the parol evidence. It is proved that in the first instance there was a sale of the plaster, and when it was found, from the leaky condition of the vessel, that she was unfit for the intended voyage to New York, eighty tons of the plaster was relanded, and the voyage changed from New York to Boston. Buckman, the clerk of the libellant, says that the contract was rescinded and a new agreement made, by which the master was to take the plaster on freight. Roberts says that although the plaster was consigned to Ellis & Son, he was authorized to sell it and pay over the amount named in the bill of lading, instead of delivering the plaster to Ellis & Son. Now as Roberts was to have for freight all that the plaster should sell for over a certain sum, and that if it sold for no more he would have nothing, it was but reasonable that he should have the power of trying the market, and getting the best price that could be obtained. The memorandum given to Roberts may be considered as giving him an implied authority to sell the plaster and pay over the balance of the amount, instead of delivering it to the consignees. The only evidence opposed to this view of the transaction is that of Roberts himself. He says that the bill of lading was given merely as a security for the payment of the purchase-money. Now, waiving all objection to the admissibility of his testimony, as a witness to impeach an instrument to which he is a party, his testimony alone and unsupported, for Gray, the other witness, left the vessel before she sailed, is insufficient to overbalance the credit due to the bill of lading, sustained as it is by the direct testimony of Buckman.

[NOTE. The vessel was sold on the issuing of a venditioni exponas, and the counsel for libelant subsequently moved for a rule on the marshal to pay into court the residue of the money for which the brig was sold. The motion was granted. Case No. 11,065. A motion was thereupon made, by the counsel for the actor, for a monition to Perkins, the purchaser, to show cause why he should not pay to the marshal the balance of the purchase money, which is unpaid. The motion was granted. Id. 11,066.]

Case No. 11,065.

The PHEBE.

[1 Ware (354) 360.] [1]

District Court, D. Maine. Feb. 7, 1837.

MOTION FOR A RULE ON THE MARSHAL TO PAY THE PROCEEDS INTO THE REGISTRY.

1. When property has been ordered to be sold by the admiralty on process in rem, the gross proceeds of the sale, deducting only the expenses of the sale, are paid into the registry.

2. All claims, liens, or charges on the property must be presented to the court for allowance, and are not paid but by order of the court.

3. The liens which the officers of the court have for their fees and expenses do not in this respect differ from other liens or privileged debts.

4. A wharfinger has a lien on a vessel for wharfage. But when a vessel is under arrest on legal process and in the custody of the law, he cannot enforce his lien by a detention of the vessel. He must apply to the court for its allowance, and it will be ordered to be paid in concurrence with other liens standing in the same rank of privilege.

[Cited in The Kate Tremaine, Case No. 7,622; Gilbert Hubbard & Co. v. Roach, 2 Fed. 394; The Young America, 30 Fed. 790.]

[Cited in City of Jeffersonville v. The John Shallcross, 35 Ind. 23.]

At a former term of the court, a decree was obtained by McLellan against the Phebe, for the non-performance of a contract of the master by a bill of lading, for the transportation of certain merchandise described in the libel from Eastport to Boston. [Case No. 11,064.] A venditioni exponas was issued, on which the vessel was sold, and the return of the marshal states that the brig was sold to "Robert Perkins, of Castine, he being the highest bidder therefor, for $370, upon a credit of nine months, and I have taken notes signed by said Perkins and C. J. Abbot for said sum." It is admitted that the brig was sold on a credit with the assent of the agent of the libellant, who was present; and one of the notes given, for $56.75, was delivered to and accepted by the attorney of the libellant in part payment. The term of credit on which the sale was made having expired, C. S. Daveis, proctor for the libellant, moved for a rule on the marshal to pay into court the residue of the money for which the brig sold.

The marshal, in his answer to the motion, states:

That the Phebe was seized by virtue of a warrant of arrest issued on the libel, by Isaac Allard, a deputy, by whom Charles J. Abbot was appointed keeper of the brig, with the following written orders: "This certifies that I have this day appointed Charles J. Abbot, of Castine, keeper of the brig Phebe, owned by Robert Perkins of said Castine; and I authorize the said Abbot to detain said brig and safely to keep her in said port, at some safe and convenient wharf, and to keep suitable fenders and apparatus attached to her to keep the same from injury, and all such services to be at my expense. (Signed) Isaac Allard, Dep. Marsh."

That immediately after the sale, the following bill was presented by Mr. Abbot, the keeper, and payment demanded.

Wharfage of the brig Phebe, from March 13th, 1833, to Oct. 15, 1834, at 1s. 6d. per day.....	$145.50
Storage of sails and rigging for the same time	25.00
Stripping the Phebe and securing her, her tackle, &c., and taking care of the same for the same time.....	40.00
	$210.50

That, considering the bill exorbitant, he declined paying it, and that after some discussion, it was agreed to refer the bill to Thomas Adams, a merchant of that place, who awarded the sum of $181.75, in full for the several charges of the bill, which was paid by deducting it from the sum due for the brig, and he took Abbot's receipt for it. That the costs due to the clerk have been paid to him, and the balance, being $56.75, he has paid to P. H. Greenleaf, counsel for the libellant; that Wm. McLellan, the father of the libellant, was present at the sale at the libellant's request, and was present when the bill was settled; that the wharf and the store, where the vessel lay and the rigging was stored, belonged to Perkins, the owner of the brig, and that Abbot was understood to be his attorney.

C. S. Daveis, for the motion.
Mr. Longfellow, contra.

WARE, District Judge. There is one irregularity in the proceedings of the marshal, which, though not made subject of complaint, nor remark at the argument, it may be proper to notice. The brig, in this case, was sold on a credit. The precept under which he sells, precludes the idea of credit, for it directs him to pay the proceeds into the court within ten days after the sale. In the present instance, as the agent of the libellant, and the claimant and owner were both present at the sale, and assented to the credit, the claimant, in fact, being the purchaser, it does not now lie with them to make the objection, though it necessarily prevented the marshal from complying strictly with the terms of the precept. The term of credit having expired, the counsel for the libellant now moves for a rule on the marshal to pay the money into the registry. The marshal, in his answer, states that part of the proceeds had been paid to the proctor of the libellant; that the fees due to the clerk had been heretofore paid into the registry; that $181.75 he paid at the time of the sale to Charles S. Abbot, the keeper, for wharfage, storage, &c., by deducting that sum from the amount of sales. It is not understood that the libellant requires the payment into the registry of the part which has been paid

[1] [Reported by Hon. Ashur Ware, District Judge.]

to his proctor, and the amount due to the clerk for fees has been already paid over. The motion I understand as calling for the residue, that is, the sum paid to Abbot, and what the marshal has retained as his own proper fees. It is not apparent what interest the libellant has in having paid into the registry the proper legal fees of the marshal, but as a question of practice it may be proper to consider it. There is no more doubt of the marshal's right to charge the expenses of custody on the proceeds of the sale, than there is of his right to his legal fees for the service of the precept. He is personally responsible for the safe-keeping of the property from the time of seizure to the sale. If he holds the possession by a keeper, as he ordinarily must do, he has an unquestionable right to have this expense charged on the property. The question now raised is, whether he is authorized to adjust and pay such charges, and deduct them from the proceeds, before they are paid into the registry; or whether the whole proceeds of the sale are first to be paid in, and these, as well as other charges, are to be submitted to the court, and not paid until they are allowed and ordered to be paid by the court. The terms of the precept seem to furnish a conclusive answer to this question. They are, that, "the moneys arising from said sale, after deducting the proper charges attending the same, you will pay into the registry of our said district court, within ten days thereafter." That is, the gross proceeds are to be paid into the registry, deducting only the proper charges of the sale itself.

The ninetieth section of the act of March 3d, 1799 [1 Stat. 697] commonly called the "Collection Act," has been referred to as authorizing the marshal to adjust and pay such charges, before paying the money into court. That act, after directing the manner of the sale, provides that "the amount of such sales, after deducting all proper charges, shall be paid, within ten days after the sale, by the person selling the same, to the clerk, &c., to be by him, after deducting the charges which shall be allowed by the court, paid to the collector," &c. In the first place, it may be remarked that the provisions of this section in its terms relate solely to the sales of merchandise and vessels condemned by virtue of that act. It is confined, therefore, by its terms, to cases of revenue seizures in which the United States are prosecutors, and does not profess to regulate the general practice of the court, proceeding as an instance court in private libels. And in the second place, a just interpretation of the act will not, as it appears to me, authorize the marshal to settle and pay such charges in cases falling strictly within the terms of the act. The law says that the marshal shall pay the amount to the clerk, "deducting all proper charges." But the charges he is authorized to deduct do not include all the expenses which are a charge on the property; for the clerk, in the same section of the act, is directed to pay the amount to the collector, deducting charges allowed by the court. The proper charges mentioned by the statute, to be paid by the marshal, are the expenses incident to the sale, not such as are proper to be included in the bill of costs taxed by the court. That this is the construction which the law has uniformly received, is evident from the words of the precept, which has been framed upon it. If, therefore, the provisions of this section of the act are construed as governing the practice of the court in cases which do not arise under that law, they will not extract this case from its difficulties. But the statute, on the construction which has been put upon it, is only in affirmance of the common practice of the admiralty. In a proceeding in rem, the vessel is always taken into the custody of the law; and when it has been decreed subject to the libellant's claim, and ordered to be sold to satisfy it, the whole proceeds of the sale, deducting at most nothing more than the expenses of the sale, are paid into the court, and, like the thing itself before the sale, remain in the custody of the law. All persons having claims against them, of whatever kind they may be, must make them in court, and the money is never paid out but to one who shows a legal right to it. The propriety of this practice is obvious, if it be considered only in reference to the expenses of the prosecution. These expenses form a lien, or are a privileged debt against the property. 1 Valin, Comm. p. 362; Cleirac, Jurisdiction de la Marine, art. 5, note 15. And all the expenses of justice naturally stand in the same rank of privilege. All persons having claims of this kind have a right to look to the proceeds of the sale for their pay, and all are entitled to be paid concurrently. Now the case may happen in a protracted and expensive course of litigation, or by the accidental destruction of a large part of the property arrested, that the whole proceeds of the sale may not be enough to pay the expenses of the suit. In such a case it would be inequitable for one to receive his pay in full, and for another to be turned over to a personal demand against the parties to the suit. Equity requires in such a case, and so is the law of the court, if the balance of the expenses is not obtained from the parties to the suit, who are liable for them, that the proceeds of the sale should be divided among the several claimants, pro rata.

But there may be a variety of claims against the thing sold, standing in different degrees of privilege. Suppose as in the present case it be a vessel. There may be seamen's wages, bottomry bonds, and claims of material-men for supplies, all being privileged debts, and all the creditors having a right to look to the ship for their pay, and after she is sold, having the same right to look to the proceeds in the registry. It is the familiar and daily practice of the admiralty to entertain petitions against the proceeds in

the registry, in favor of creditors having a privilege against the vessel. The proceeds of the sale are as much pledged to them as the vessel herself. The court having possession of the pledge, which it has from the time it is arrested under its process, it necessarily becomes a duty to preserve it for all who have an interest in it, or claims upon it. If it allowed claims to be interposed and paid before the legal right of the claimant was established, it would be nothing else than allowing a man's property to be taken from him without his consent, and without judgment of law. When the property is sold, therefore, the whole proceeds of the sale are brought into court, and every person claiming a right to them, whether by way of lien or otherwise, must make his claim there. All having liens on the property, or a right in the proceeds, may intervene for their own interest, and make themselves parties to the cause, as well after as before the sale; and when parties, they are so not only for the purpose of enforcing their own rights, but of contesting the claims of others interfering with their own. The officer who executes the precept for the sale, has no more authority to settle and pay one claim than another; he has no more authority to allow and pay any of the expenses which have accrued in the prosecution, than he has any other privileged debt. The liens created by law in favor of these debts, do not differ from any other liens, except in the rank of their privilege. These, like all others, can only be allowed and established by virtue of a judgment of the court.

But it is argued that the principal items from which a deduction was made, and to which the main objection is made, that is, the wharfage, storage, &c., are privileged debts, constituting a lien on the property, and that the owner of the wharf and store had a right to detain the vessel until they were paid. It was under this idea that the marshal paid the demand, by deducting the sum from the amount of the sale. I admit the law that the owner of a wharf has generally a lien on a vessel for the wharfage, but I do not admit that he has, in a case of this kind, such a lien as authorizes him to detain the vessel for his pay. The right of detention is founded on possession, and necessarily supposes that the person having such right has the possession, or at least, the quasi possession of the thing. 1 Story, Eq. Jur. p. 483, note 506. But in this case, after the vessel was arrested on process from the court, she was in the custody of the law, and subject to the order of the court, and continued to be so until she was sold. It cannot be admitted that the wharfinger, by permitting her to lie at his wharf, withdrew her from the custody of the law or the possession of the court. His lien for wharfage, admitting it to exist, was not one which could be enforced by a detention of the vessel, but only by an application to the court, and that not in exclusion, but in concurrence with other liens standing in the same degree of privilege. Nor is there any hardship in qualifying his lien in this way. She was under arrest on legal process, and he must be presumed to know, for no one can plead ignorance of the law, that his claim for wharfage, like all other claims against the vessel, must be presented to the court for allowance before it could be paid.

It is further said that the charge in this case is reasonable and moderate, and that if the money were paid into the registry, the court would immediately order it to be paid out again on the same charge. The answer is, that the court had no opportunity of informing itself whether it be reasonable and moderate or not; and it will not be questioned, it being a charge on the property which accrued in the prosecution of the suit and while it was in the custody of the law, that it is peculiarly the duty of the court to be satisfied that it is reasonable and proper to be paid, before the claim is allowed. In the mean time, the libellant demands that the money be paid into the registry according to the direction of the precept, and it cannot have escaped the counsel on the other side that he intends to contest this very item, and demand the judgment of the court whether the charge, under all the circumstances, is reasonable and proper to be allowed. My opinion is, that a rule must pass for the marshal to pay the money into court.

It appears from the marshal's answer that, in point of fact, the money has never been paid by the purchaser. It was deducted from the amount of the sale, and though nominally it was for the keeper, yet by far the largest part is for the benefit of the purchaser, who was also the owner. The vessel lay at his wharf, and the rigging was kept in his store. See The Collector, 6 Wheat. [19 U. S.] 194.

[NOTE. A motion was next made by the counsel for the actor for a monition to Perkins, the purchaser, to show cause why he should not pay to the marshal the balance of the purchase money which remained unpaid. The motion was granted. Case No. 11,066.]

Case No. 11,066.

The PHEBE.

[1 Ware (362) 368.] [1]

District Court, D. Maine. April 3, 1837.

MONITION TO THE PURCHASER TO PAY THE PURCHASE-MONEY.

1. In proceedings in rem the thing is taken into the custody of the court, and remains in its custody until all claims before the court are finally adjusted and satisfied.

2. The officer in whose hands it is, is the official keeper of the court, and if the thing is taken from him, its redelivery will be enforced by attachment.

[Cited in The Isaac Allerton, Case No. 7,088.]

[1] [Reported by Hon. Ashur Ware, District Judge.]

3. It is no objection to the issuing of a summary process, on motion against the person who has taken the thing from the hands of the keeper, that he is neither a party in the cause nor an officer of the court.

4. If after the sale by the marshal on a venditioni, the purchaser obtains possession of the property without paying the price, the court will enforce by summary process either a redelivery of the property in specie, or the payment of the purchase-money.

[Cited in The Witch Queen, Case No. 17,915; Re Wright, 16 Fed. 485.]

[This was an action for the nonperformance of a contract of the master upon a bill of lading. There was a decree in favor of the libelant and a sale of the vessel thereunder. Case No. 11,064.]

An order having passed on the marshal to pay into the registry the proceeds of the sale of the Phebe [Case No. 11,065], a motion was thereupon made by the counsel for the actor, grounded on the facts which are disclosed by the return on the venditioni and the marshal's answer to the rule, for a monition to Perkins, the purchaser, to show cause why he should not pay to the marshal the balance of the purchase-money which is unpaid.

C. S. Daveis, in support of the motion.

Mr. Longfellow, contra.

WARE, District Judge. The facts upon which this motion has been argued, appear in the return of the marshal on the venditioni, and his answer to the rule upon him to show cause why he should not pay over the proceeds of the sale. By the return it appears that the vessel was sold to Perkins, the respondent, for 370 dollars, who was also the claimant in the original suit, upon a credit of nine months. From the answer, it appears that when Perkins paid over the purchase-money, there was deducted from the amount of the sale, $181.75, for which the marshal received a receipted bill for the same amount of Charles J. Abbot, for wharfage and storage of the vessel and her rigging, while she was in the custody of the law. It was decided on the motion for a rule upon the marshal, that he was not authorized to allow and pay such charges, but that the whole purchase-money, after deducting the necessary expenses of sale, should be brought into the registry, and that all persons having charges or claims against the proceeds must submit them for allowance to the court, before they could be paid. The object of this process is to require the purchaser to pay over the balance of $181.75, which it appears from the marshal's answer is remaining in his hands.

It is objected on the part of the respondent, that the court has no jurisdiction to issue this process against a purchaser at a marshal's sale; that being a mere stranger—for in this proceeding he is regarded as a purchaser only, and not as claimant in the original suit—and having no privity nor connection with any of the previous proceedings in the cause, he cannot be called into court by a rule or citation grounded on motion; but that this process can be applied only to those who are already before the court, as parties to a suit, or to an officer of the court; and that the purchaser is responsible only to the marshal, who alone is liable to a process of this kind. If it be admitted that the objection is well founded as it relates to the practice of courts proceeding according to the course of the common law, it will not necessarily follow that it is equally valid against the issuing of this process by a court which proceeds in rem. Process in rem is founded on a right in the thing, jus in re, and the object of the process is to obtain the thing itself, or a satisfaction out of it for some claim resting on a real or a quasi proprietary right in it. The first step taken by the court is to arrest the thing and take it into its possession and hold it for him who has the right to it; nor does it part with the possession unless when it is delivered on stipulation for its value, which stipulation becomes a substitute for the thing, until the right is adjudicated upon and a satisfaction obtained. Jennings v. Carson, 4 Cranch [8 U. S.] 2; 2 Brown, Civ. & Adm. Law, p. 397o The court holds its possession by its officers, but they are merely the official keepers of the court; and the property, in contemplation of law, is in the custody of the court itself. The officer holds it under the order of the court, he is responsible to the court for it, and is bound to obey and execute all its orders in relation to it. As the court has the legal possession, it necessarily follows that it must have the faculty of defending its possession. It would be an anomalous state of things, if the court, when it takes the res into its custody for the express purpose of securing it for him to whom it shall ultimately be adjudged to belong, could not by its own process maintain and vindicate its possession, should the property by any means become abstracted from the hands of the keeper. Without this power, the jurisdiction in rem could not be exercised with safety to suitors. But this infirmity does not belong to the jurisdiction. If the thing is taken out of the hands of the officer by a stranger, no point of practice is better settled than that the court can compel such person to redeliver it, by attachment or other summary process. Slocum v. Mayberry, 2 Wheat. [15 U. S.] 1; Burke v. Trevitt [Case No. 2,163]. It is not, therefore, a valid objection to the issuing the process asked for, that the person against whom it is asked is neither a party in the cause nor an officer of the court. It is a process that lies against any person who by any means, whether under color of legal process from some other tribunal or without it, has obtained the possession of that which is in the legal custody of the court.

It may be said that after a sale by the marshal on an order of the court, the thing ceases to be in the custody of the law, and that the right of possession, with the right

of property, is transferred to the purchaser. This is perfectly true after the price is paid, but not before. The right of property, jus dominii, is transferred by the contract. The purchaser acquires a right to the thing and the seller to the price, but the purchaser gains no right to the possession but by the payment of the price, nor is the vendor bound to part with the possession until that is paid. If, therefore, the buyer takes the possession before paying the price, it is deemed in law a tortious act, and the remedy of the seller is not limited to an action on the contract for the price; he may maintain trespass for the tort. 2 Kent, Comm. (3d Ed.) 492; Noy, Max. c. 42. If the price is paid, and it is lost or misapplied by the officer, this will not affect the purchaser. The court can then look only to its officer. But if the purchaser obtains the possession without paying the price, I can see no legal reason why the court may not compel either a redelivery of the thing or a payment of the price by the same summary process that it may apply before the sale. The custody of the law continues until the price is paid. There is the same reason for it in one case as in the other; and it seems to me necessarily to result from the fact that the thing is taken into the custody of the court for the purpose of securing the rights of all who have an interest in it. But in the present case the sale was on credit, and when a credit is given, the right of possession as well as the right of property is transferred by the contract, without payment of the price. It is stated, and has not been controverted, as the reason of selling on credit, that no person appeared at the sale to purchase for cash, and that the credit was given with the assent both of the libellant by his agent, and the claimant. But it is to be observed that the marshal was not authorized, either by law or the tenor of the precept to allow a credit on the sale. Now waiving all questions which might be raised as to the validity and effect of a sale made on conditions different from those prescribed by the law and by the precept under which the sale was made, while the thing remains specifically in the hands of the purchaser, and the rights of strangers are not involved, and giving to it all the effect which can be asked for it, the position of the case on the evidence now before the court will be this: The purchaser has acquired the absolute property in the thing, and the term of credit having expired, the proceeds to the amount which he has not paid over to the marshal are in his hands. For the receipted bill which was delivered to the marshal cannot be admitted as payment; in the first place because it does not appear that any thing has been paid on account of it by Perkins. Indeed, much the largest part of it consisted of his own claim for wharfage and storage while the vessel lay at his wharf and the rigging in his store. It was retained, therefore, to satisfy his own claim. And in the second place, because it was a claim which the marshal had no legal authority to allow, but which must be presented to the court for allowance, after the money is paid into the registry. If the money had been actually paid over by the purchaser, he must be presumed to be acquainted with the law, and to know that it was paid without legal authority. Whatever view is taken of the case, the unpaid balance must be considered as the proceeds in Perkins' hands. Can there be a serious doubt whether the court has the authority to call for this and enforce the payment? It has the same authority to follow the proceeds in whatever hands they may be, and under whatever pretext, that it has to follow the thing in specie. 1 C. Rob. Adm. 331. Having originally taken the property into its custody for the purpose of protecting the rights of all persons having an interest in it or claims upon it, the control of the court over the thing itself, or its proceeds if it has been sold, continues until all these rights have been adjudicated and satisfied. My opinion is, that the order must be made absolute for the payment of $181.75, and in default of payment a writ of attachment, or some other process adapted to the exigency, to issue to enforce the payment.

Case No. 11,067.

PHELAN v. The ALVARADO.

[14 Law Rep. 451; 4 Am. Law J. (N. S.) 352.]

District Court, S. D. New York. Oct. 11, 1851.

COMMON CARRIERS BY WATER—DUTY OF SHIP-OWNERS

The master signed a bill of lading in July, 1849, for return of twenty kegs of brandy, shipped on board from New York to Chagres, and sent back for want of a market. The vessel sailed the same month. The night the vessel left Chagres, she was struck by lightning, and compelled to put back for repairs. No materials or means of repairing her being found at the port, she remained there till supplies were sent on for the purpose from New York. The brandy remained on board. The captain was sick with the coast fever when the vessel left Chagres, and on her return was delirious. He was sent to New York in a steamer. Two or three weeks after, the mate was sent home, and two seamen, also sick with the fever. The vessel and cargo were put in charge of an agent or keeper. She lay at Chagres five months or more, and, being sufficiently repaired for the purpose, was brought back to New York, when the consignor demanded the brandy. None was found on board. The claimants set up for defence that the brandy was lost by leakage at Chagres, the casks being perforated by worms, and the iron hoops also having rusted, and burst off. During the time the vessel remained at Chagres, steamers and other vessels left that port, by which the brandy might have been transhipped to New York.

HELD, that it was the duty of the ship-owner to have had the brandy transhipped and forwarded to its port of destination, if the shipper did not accept it at Chagres, the voyage being in effect broken up. That the disabling of the master and mate, by sickness, from attending to the duties of the ship, did not exonerate the owner from his responsibility, and that he stands liable on the bill of lading for the value of the brandy not delivered to the consignee. The value is to be taken at Chagres at the time of shipment. An order of reference must be taken to ascertain the worth of the brandy; but the claimant is at liberty to prove before the commissioner, an actual loss of any part of the brandy before the bill of lading was signed.

Case No 11,068.

PHELAN v. HAZARD.

[5 Dill. 45; 6 Cent. Law J. 109; 5 Reporter, 363; 24 Int. Rev. Rec. 70; 25 Pittsb. Leg. J. 143.] [1]

Circuit Court, E. D. Missouri. 1878.

LIABILITY OF SHAREHOLDERS IN CORPORATIONS—PAYMENT IN PROPERTY.

1. Unless prohibited by statute, an agreement between the incorporators of a company and the directors, by which the former convey to the company property needed for the purpose of its operations, and receive payment therefor in full-paid shares of the stock of the company, is, in the absence of fraud, binding upon the parties, and such stock is full-paid stock.

[Cited in Steacy v. Little Rock & Ft. S. R. Co., Case No. 13,329.]

[Cited in Clayton v. Ore Knob Copper Co., 109 N. C. 385, 14 S. E. 39; Coffin v. Ransdell, 110 Ind. 422, 11 N. E. 23; Eylton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 9 South. 132; Jackson v. Traer, 64 Iowa, 469, 20 N. W. 764; Young v. Erie Iron Co., 65 Mich. 126, 31 N. W. 814.]

2. Whether subsequent creditors of the company can impeach such transaction as respects shares of stock which purport to be full-paid shares, when they are in the hands of a subsequent registered transferee for value, and who purchased the same as full-paid shares, relying upon the certificates and the records of the corporation that full payment therefor had been received by the company, quære?

[Cited in Steacy v. Little Rock & Ft. S. R. Co., Case No. 13,329.]

[Cited in First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co., 42 Minn. 327, 44 N. W. 200.]

3. The petition of a creditor of the company which had become insolvent and dissolved was held not sufficient to open an inquiry into the transaction between the corporators and the company as to the value of the property conveyed to the company in payment of shares, with a view to hold a shareowner for the difference between the agreed value and the actual value of the property conveyed.

The plaintiff is a creditor of the La Motte Lead Company, in which the defendant is a shareholder. The plaintiff in his petition alleges that the said company was incorporated as a manufacturing and business corporation under the laws of Missouri (1 Wag. St. 332); that said company issued to Rowland G. Hazard, John G. Copelin, William A. Scott, and R. B. Lockwood all of the stock it ever issued, of which said Rowland G. Hazard received and held eleven hundred and twenty-five shares, and on the 25th day of October, 1873, transferred eleven hundred and twenty-four of said shares to the defendant, Rowland Hazard, which he still holds, and that said shares have never been paid for by any person to the said company, in whole or in part, but remain wholly unpaid. The petition then alleges that the Central Savings Bank, of which the plaintiff is the assignee, owns and holds certain unpaid promissory notes of the said La Motte Lead Company, dated in April, June, August, and September, 1873; that suit was brought thereon within one year after the same became due (1 Wag. St. p. 336, § 13), and that there is due thereon to the plaintiff, from the La Motte Lead Company, $110,000; that there has been no meeting of the directors of said company since March 10, 1871, and that said company, before and at the time the said notes fell due, was, and still is, insolvent, and without property, and that it has wholly ceased to do business. The petition also states that, by the laws of Missouri, the defendant is liable for the plaintiff's debts aforesaid to the extent of the par value of said eleven hundred and twenty-four shares; wherefore the plaintiff demands judgment against the defendant, Rowland Hazard, for the amount of his said debt against the La Motte Lead Company. The answer admits the incorporation and organization of the La Motte Lead Company, as alleged; that Rowland G. Hazard was an original subscriber for stock, and received eleven hundred and twenty-five shares; that he transferred eleven hundred and twenty-four shares thereof to the defendant, Rowland Hazard. The answer denies that the said shares were not paid for, and avers that said company was paid for the same in full at the time the certificates of stock were issued; that they were issued as full-paid stock, and that the records and books of the corporation so showed, on the faith of which the defendant bought of the said Rowland G. Hazard the said eleven hundred and twenty-four shares for value as full-paid stock, and the same was transferred to him on the books of the company. Such were the issues joined, so far as it is now material to state them. On the trial the facts stated in the charge of the court to the jury appeared.

The charge of the circuit judge to the jury, as taken down by the stenographer, was as follows:

"Gentlemen of the Jury: Mr. Lockwood, Mr. Scott, and Mr. Rowland G. Hazard in

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 5 Reporter, 363, and 25 Pittsb. Leg. J. 143, contain only partial reports.]

1869 owned certain real estate, supposed to be mining property, and known as the Mine La Motte property. They owned it subject to certain mortgages—a mortgage to Fleming for $525,000 on five-sixths of the property, which was a first mortgage, and a mortgage to one Valle on the other one-sixth for about $40,000, or for a considerable sum of money; and the said Rowland G. Hazard held a second mortgage on the property for about $50,000. While the property was in this condition, Lockwood, Scott, and Grant, under the statute of Missouri, framed articles of incorporation to incorporate themselves as the Mine La Motte Company, the name being subsequently changed to the La Motte Lead Company, and in the articles of incorporation the said Rowland G. Hazard, the said Lockwood, and the said Scott were named as directors. When the corporation had been thus organized, the said Lockwood, Scott, and Rowland G. Hazard made a contract with the directors of this company, they being the directors, and the only directors, whereby they agreed to convey the property, subject to these mortgages, to this newly-formed organization, for the consideration of $300,000. The directors of this corporation agreed to purchase it at that rate, and pay for it by the issue of full-paid stock to the vendors. A deed was made by the vendors and accepted by the company, and full-paid stock issued as follows:

	Shares.
To the said Rowland G. Hazard.....	2,250
" " " B. B. Lockwood.....	375
" " " W. A. Scott.....	375
Making in all.....	3,000

—And certificates were issued for full-paid stock accordingly. The only payment made for this stock was the execution of a deed by Hazard, Scott, and Lockwood to the corporation for an express consideration of $300,000, and reciting therein the incumbrances above referred to. One of the certificates of stock held by the defendant is as follows: 'Organized under the Laws of the State of Missouri. Full-Paid. Non-Assessable. La Motte Lead Company. 50 Shares—Shares $100 each. Capital, $1,000,000. This is to certify that Rowland Hazard is the owner of fifty (50) shares of the capital stock of the La Motte Lead Company, transferable only on the books of the company in person or by attorney on surrender of this certificate. (Signed.) ——, Secretary. ——, President. Mine La Motte, Mo., October 25th, 1873.' The company adopted a by-law as follows: 'The stock of the company shall be assignable or transferable at its office by any holder thereof, either in person or by regularly appointed attorney, in the presence of the treasurer or secretary, or one of the directors.' The books of the lead company, under date of December 3d, 1869, show that, on motion, it was 'Resolved, that the company proceed to the purchase of a tract of land called Mine La Motte, and the pine lands, agreeably to the proposal for the sale thereof submitted by the owners, and now standing in the names of Bradley B. Lockwood and William A. Scott, and that the secretary be directed to receive a conveyance therefor.' The deed was received and recorded, and subsequently reported to the corporation. Of this $1,000,000 of capital stock, only $300,000 were ever subscribed or issued. The defendant purchased from said Rowland G. Hazard, in good faith, for value, eleven hundred and twenty-four shares of this stock, which he now holds, and which were transferred to him on the books of the company. On these facts, gentlemen of the jury, the plaintiff, in this form of action, and under the averments made in the petition, is not entitled to recover, and it is not competent for the plaintiff in this case to establish a liability on the part of the defendant by showing, in point of fact, that the property originally conveyed by Lockwood, Scott, and Rowland G. Hazard to the company was not worth $300,000, or that it was not worth anything over and above the mortgages upon it at the time of the transfer to the company in payment of the stock subscribed, even although the said corporation is insolvent and dissolved, as alleged in the petition."

The jury thereupon found a verdict for the defendant. The plaintiff moved for a new trial, on the ground that the foregoing charge was erroneous in point of law. The motion was overruled, for the reasons stated in the opinion of the court.

Broadhead & Conroy, for plaintiff.
Noble & Orrick, for defendant.

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

DILLON, Circuit Judge. The gravamen of the plaintiff's case is that the defendant is the holder, by transfer, of certain unpaid shares of stock in the La Motte Lead Company, and that, under the statutes of Missouri (1 Wag. St. p. 293, § 22), the plaintiff, as a creditor of that company (which is insolvent and dissolved), may compel the defendant to pay for the said shares held by him, or pay the balance due thereon. As between the transferrer of said shares and the corporation which issued them, it was agreed that the shares had been fully paid for by the transferrer to the company.

The charge to the jury was given without any opportunity to examine the law, and in accordance with what seemed, at the moment, to be the principle applicable to the case as made at the trial. Mr. Broadhead's argument at the bar for the plaintiff, in support of the motion for a new trial, tended to shake the impressions I had at the trial; and this, in connection with the importance of the case, in the amount as well as the principles involved, has induced me to look into the matter with some care and deliberation.

It will be observed that the petition charges no fraud in the agreement by which the corporation purchased the mining property and received a conveyance thereof, in payment for which, and as part of the same transaction, it issued its paid-up shares of stock. The records of the corporation showed the whole transaction—that it had received and recorded a deed for the property, and paid the consideration agreed upon by the issue of full-paid certificates of stock to the vendors. This was long anterior to the creation of the indebtedness to the plaintiff's assignor.

The plaintiff—a single creditor—does not for himself, or for himself and other creditors, file a bill to impeach as fraudulent this transaction between the corporation and the original shareholders; but he simply states that the shares of stock issued to Rowland G. Hazard have not been paid for, either by him or by the defendant, the transferee and present holder of the shares. Issue was taken on this averment, and the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz.: by a conveyance of the mining property to the corporation. This conveyance has been received and recorded by the corporation. Unless this agreement is rescinded or set aside for fraud, how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive, unless it is rescinded or impeached for fraud, and this cannot be done unless the attack is directly made. Undoubtedly such an attack could be made while the stock was in the hands of the original takers of it; but it is not so clear that it could be made by a subsequent creditor of the corporation against a transferee of the stock for value, who purchased the same in good faith as full-paid stock, relying upon the records of the corporation, which showed the shares to have been fully paid for, and the manner in which the payment had been made.

Lord Justice Mellish, in one case, seemed to be of opinion that a bona fide transferee of shares of stock which purported to be full paid, held the same exempt from a liability to be called upon to make payment therefor on the ground that the original subscriber had not fully paid for them. But it is not necessary, under the pleadings in this case, for us to consider or determine that question.

The cases are numerous in which such transactions as that which was entered into in this instance between the owners of the mining property and the corporation which they formed have come before the courts, and, in absence of fraud, have been sustained. Pell's Case, L. R. 5 Ch. 11; In re Baglan Hall Colliery Co., Id. 346; Maynard's Case, L. R. 9 Ch. 60; Schroder's Case, L. R. 11 Eq. 131; Cleland's Case, L. R. 14 Eq. 387; Sichell's Case, L. R. 3 Ch. 119; Jones' Case, L. R. 6 Ch. 48; Forbes' Case, L. R. 5 Ch. 270; Pritchard's Case, L. R. 8 Ch. 956; Ferrao's Case, L. R. 9 Ch. 355; Bush's Case, Id. 554; Dent's Case, L. R. 8 Ch. 768; Carling's Case, 1 Ch. Div. 115; Savage v. Ball, 17 N. J. Eq. 142; Smith v. North American Min. Co., 1 Nev. 423; Goodrich v. Reynolds, 31 Ill. 490; Spense v. Iowa Valley Construction Co., 36 Iowa, 407, 411.

The exigencies of the case now before the court do not require us to examine into the soundness or consistency of all these decisions. We shall refer to a few of them by way of illustration, and because, whatever else they hold, they clearly establish these propositions: (1) That such a transaction as that here in question is not ultra vires, and absolutely void. (2) That the contract is valid and binding upon the corporation and the original share-takers, unless it is rescinded or set aside for fraud, and that, while the contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be payment.

These propositions are decisive of the present case.

For the purpose above indicated, a brief statement of some of the English cases upon this subject will now be given. In the origin, purposes, situation of the property, and fate of the company, the Case of Baglan Hall Colliery Co., L. R. 5 Ch. 346, is strikingly analogous to the Case of the La Motte Lead Company. In the case just cited, nine persons bought a moiety of a colliery from Parker for £10,000, and the ten, after working it for some time, agreed to form a company for carrying it on, and a company was accordingly registered, the memorandum of association of which was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests; the nominal amount of shares subscribed for being £20,000. The memorandum of association stated nothing as to the shares being treated as paid-up shares, but the articles of association provided that all the shares subscribed for in the memorandum should be treated as fully paid up. The colliery was made over to the company, but no other payment was made by any of the subscribers of the memorandum. No other shares than those subscribed for by the memorandum were ever allotted; and it was held (reversing the decision of Malins, vice-chancellor) that the subscribers of the memorandum of the association were not liable as contributories, for that the shares must be taken as having been fully paid up by the handing over the colliery. In pronouncing his judgment on appeal, Lord Justice Giffard said: "Here was a colliery in which at first Parker was alone interested. He sold a moiety to certain gentlemen for £10,000, which was paid. The colliery was then subject to two mortgages, for £3,000 and £1,000.

The owners went on working the colliery, not very successfully, and then determined to form a limited company, in order to avoid incurring further personal liability. It was the policy of the companies act to enable this to be done, and with the soundness of that policy we have nothing to do."

After stating that the colliery had been handed over to the company in consideration for the shares of the subscribers, the lord justice adds: "According to the decided cases, this, in the absence of fraud, was an effectual paying up of the shares in full. The test to be applied is this: Could the company, by any proceeding, have set aside the transaction by which it was arranged that the owners of the colliery were to have paid-up shares as the price of their interests in the colliery? And I say, on the evidence, that the company clearly could not. It was urged that the parties only agreed with themselves, and that therefore there was no contract. But every company is started by parties agreeing among themselves, and it is idle to say that they have nobody to agree with. There is nothing in the evidence to show that any person has been deceived. It appears probable that if the additional £3,000 which was raised by the last mortgage had been applied in working the colliery, the concern would have prospered." (The colliery had been sold by the mortgagee under his power of sale for £4,500.) "The case is precisely the same as Pell's Case, L. R. 5 Ch. 11, and it must be held that the persons who subscribed the memorandum of association have paid all that they were bound to pay. Creditors have no ground for complaint, for persons who are about to enter into transactions of magnitude with an individual make inquiry into the state of his circumstances; and so, if they enter into them with a limited company, it is their own fault if they do not inquire into the nature of the memorandum and articles, and look to the register of shareholders. In this case there was no concealment, and it would, in my judgment, be a total misapplication of the act to say that a transaction like the present is not authorized by it. If strangers (no misrepresentation being made) choose to deal with a company without inquiry, they have no right to complain when it turns out that the shareholders are under no personal liability."

"In Pell's Case (above referred to) the master of the rolls," says Lord Justice Giffard, in the same opinion (L. R. 5 Ch. 355), "allowed the agreement between Pell and the company that he should hand over the property to the company, and that his shares should be taken as fully paid-up shares, to stand, so far as the value of the property went, but directed an inquiry as to its value. This was varied on appeal, and the agreement not being impeached, it was held that the shares must be taken as fully paid up by the handing over of the property."

Commenting on Pell's Case, Lord Chancellor Hatherley said: "The master of the rolls thought that Pell, being bound to pay the full amount of £20 per share, was not to be taken to have paid it in full unless the property he handed over was worth that amount. That result, however, could only be arrived at by rescinding the contract to buy Pell's business, and Lord Justice Giffard thought that the contract, not being impeached, must be treated as a good contract, and one that ought to be acted upon, so that no question could be raised as to the actual value of the business made over." Forbes' Case, L. R. 5 Ch. 270–273; Fothergill's Case, L. R. 8 Ch. 270; Pritchard's Case, Id. 956.

In Schroder's Case, L. R. 11 Eq. 131, shares taken in a company were decided to be lawfully paid for in Confederate bonds, at the market price, and in tea which was required for the company's purposes.

In Spargo's Case, L. R. 8 Ch. 407, decided by the lord justices on appeal, the same doctrine was applied with reference to a company to which the companies act of 1867 (section 25) applied. That section in the act was in these words: "Every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at and before the issue of such shares."

Spargo's Case is thus stated by Vice-Chancellor Malins in a subsequent similar case (Coates' Case, L. R. 17 Eq. 169, 177): "Spargo signed the memorandum of association for thirty-one shares, and he was, in consequence, liable to pay £1,550. It does not require the act of 1867 to show that such a person is liable for the amount for which he subscribes, and the vice-warden of the stannaries court put him on the list of contributories, considering that he had incurred a liability by signing the memorandum of association, which could only be discharged by payment in cash. But Spargo had also agreed to sell to the company the lease of a mine for £2,776, and in a settled account they gave him credit for the £2,776 as against the price of his shares. That was treated by the court of appeals as a good payment. The lease of the mine was the thing with which the company was trading, and so they gave him credit for that." And it was held that the aforementioned section 25 of the companies act of 1867 had not altered the law as to what would constitute a good payment for shares.

In Coates' Case, supra, the facts were shortly these: The memorandum of association of a company formed for the purpose of purchasing and carrying on the business before that time carried on by Coates was subscribed by Coates for twenty-five hundred shares, which were of £1 each. It was also subscribed by other persons, by which the number of shares taken amounted to sixty-two

hundred and sixty-five, out of a total capital of seventy-five hundred shares; and the company could only issue fresh shares by special resolution. The articles of association stated that an agreement had been prepared between Coates and the company for the sale of the business to the latter for £5,000, of which one-half was to be in fully paid-up shares of the company. This agreement was executed shortly after the registration of the memorandum and articles of association, and was filed with the register of joint stock companies. As between Coates and the company, the shares for which he signed the memorandum were treated as being the fully paid-up shares which he took as part of the purchase-money, and he was debited in the books with £2,500 due on the shares, and credited with £5,000 as the price of the business. Under these facts it was held that Coates was entitled, even as to creditors of the company, to treat the shares for which he subscribed the memorandum as the same shares as those for which he sold his business, and that the shares were paid for in cash, within the meaning of the 25th section of the act of 1867. "In truth, it appears to me," says Lord Justice James (L. R. 8 Ch. 411), "that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of this provision (section 25 of companies act of 1867). The object of the section was, I apprehend, to prevent such contracts as had been before the court in Pellatt's Case, L. R. 2 Ch. 527, and Elkington's Case, Id. 511, in which a man was to take shares and to pay for them by supplying goods when wanted." Applying these principles to Coates' Case, above referred to, Vice-Chancellor Malins (Coates' Case, L. R. 17 Eq. 169, 179) says: "It is perfectly clear that in this case the company had entered into a contract which would have justified their paying Mr. Coates £2,500 in cash. If they had fulfilled that contract they would have handed him bank notes or a check, which he would have handed back again in discharge of the twenty-five hundred shares for which he signed the memorandum of association. * * * I am, therefore, of opinion that the transaction by which credit was given to Mr. Coates for the value of his business is precisely the same as giving Mr. Spargo credit for the value of his lease. It was settled in account, and they would have been justified in handing the money to him, and then he would have handed it back to them in payment of the calls on the shares for which he had subscribed the memorandum of association. I think, therefore, that Mr. Coates is not liable to pay anything on these shares." The case was one in which the official liquidator of the company, which had become insolvent, sought to enforce the alleged liability of Mr. Coates by having him placed on the list of contributories for twenty-five hundred shares in the company for which he had signed the articles of association.

Without pursuing the subject more at length, we are of opinion that the direction to the jury was right, and that the motion for a new trial must be overruled. Judgment on the verdict.

NOTE. There are later decisions than those cited in the principal case, to the effect that the bona fide purchaser for value of shares issued by a corporation which falsely purport to be full-paid shares cannot be held liable to pay the same where it is not shown that he purchased with notice of the facts. Foreman v. Bigelow, [Case No. 4,934], Dist. of Mass. Oct. 1878, before Clifford and Lowell, JJ., and where the later cases are referred to, including Nicholls' Case, 26 Wkly. Rep. 334; Burkinshaw v. Nicholls, Id. 819; Steacey v. Little Rock & Ft. S. R. Co. [Case No. 13,329].

Case No. 11,069.

PHELAN v. IRON MOUNTAIN BANK.

[4 Dill. 88; 16 N. B. R. 308; 5 Cent. Law J. 351.] [1]

Circuit Court, E. D. Missouri. Sept. Term. 1877.

BANKRUPT ACT—PREFERENCES—DEPOSITS MADE WITH BANKRUPT BANK TO MEET ITS CHECKS IN CLEARING-HOUSE NOT A TRUST FUND.

1. Where a bank agreed to act as the agent of another bank for clearing-house purposes, and, as such agent, agreed to pay all the checks of the latter which came through the clearing-house, and received for that purpose, from time to time, the funds of the latter bank, which it passed to the credit of the latter bank, without keeping such funds separate from its own: *Held*, that the relation of debtor and creditor—the ordinary one of the bank to its depositors—was created, and that the deposits could not be considered as trust funds, which, on failure of the former bank, would not pass to its assignee.

2. Under such circumstances, the funds, when deposited, became the property of the bank receiving the same, freed of any trust character; and where the bank that received and credited such deposits paid, on the day of its failure, the amount thereof to the bank which made the deposit, the latter bank having knowledge of the insolvent condition of the former bank, such payment is an illegal preference, which may be recovered by the assignee in bankruptcy.

[Cited in brief in Drovers' Nat. Bank v. O'Hare, 119 Ill. 649, 10 N. E. 361.]

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

This was an action by Phelan, assignee in bankruptcy of the Central Savings Bank, against the Iron Mountain Bank, to recover the amount of an alleged illegal preference. The cause was submitted on an agreed statement of facts, and judgment was rendered by the district court for the plaintiff. The defendant sued out a writ of error. The bank-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 5 Cent. Law J. 351, contains only a partial report.]

rupt act provides that "no property held by the bankrupt in trust shall pass by the assignment." Rev. St. § 5053. The main question in the case arose under this provision. The material facts are stated in the opinion.

Mr. Broadhead, with Donavan & Conroy, for plaintiff, cited Bank of Commerce v. Russell [Case No. 884]; In re Hosie [Id. 6,711]; In re Janeway [Id. 7,208].

Wood & Whitney, with E. T. Farish, for defendant, cited: Perry, Trusts, pars. 2, 18–24; Voight v. Lewis [Case No. 16,989]; Ex parte Sayers, 5 Ves. 172; Grant, Banks, 4, 5; Morse, Banks, p. 26, c. 2. As to following trust funds into hands of an assignee: Cook v. Tullis, 18 Wall. [85 U. S.] 342; Brocchus v. Morgan, 5 Cent. Law J. 53; Ex parte Hobbs [Case No. 6,549]; Hamilton v. National Loan Bank [Id. 5,987].

MILLER, Circuit Justice (orally). This case was submitted upon an agreed statement of facts, from which it appears that before the Central Savings Bank, of this city, went into bankruptcy, when Mr. Phelan became its assignee, there was an arrangement between it and the Iron Mountain Bank by which the Central Savings Bank acted as the agent of the Iron Mountain Bank for clearing-house purposes, the latter being incapable of entering that association for want of sufficient capital. By the agreed statement of facts made up between the parties and submitted to the court, it appears that the Iron Mountain Bank undertook to keep on deposit with the Central Savings Bank a sum sufficient to meet all its checks which that bank should be called upon to put through the clearing-house, and that in the main it did so. And it appears that the Central Savings Bank came under an obligation to the Iron Mountain Bank by which it agreed to pay all the checks of the latter, whether it had money enough of the latter to meet the checks or not; it had to assume that obligation when it agreed to become the agent of the other bank for the discharge of the checks in that way. Through a considerable course of business, the Iron Mountain Bank had at times on deposit with the Central Savings Bank more money than was necessary to pay those checks, and at times less money, but the Central Savings Bank always met those obligations. The Central Savings Bank kept a regular account with the Iron Mountain Bank, debtor and creditor, as it was bound to do, in regard to the transactions. The Central Savings Bank did not keep the funds furnished for that purpose separate and distinct from other funds, but merely passed the amount to the defendant's credit. When the Central Savings Bank failed, or knew that it was going to fail, and after banking hours, it found that it had in its possession, beyond what was necessary to pay the checks of that day, some $12,000 or $15,000 on deposit of the Iron Mountain Bank, and it gave them notice to come in and withdraw these deposits, as they would not on the next day protect their checks in the clearing-house. They did come in, and after banking hours the Central Savings Bank paid out, in money and checks, all the deposits of the Iron Mountain Bank.

It is claimed that this was a preference to one of the creditors of the Central Savings Bank, and that the Iron Mountain Bank knew that the Central Savings Bank was in an insolvent and failing condition; and, conceding this knowledge, the only question before the court is whether that was a preference within the meaning of the statute. A very ingenious argument is made by the able counsel, Mr. Wood, to prove that this was some kind of a trust fund, a special trust deposit, which it was the duty of the bank to protect from its general creditors, and turn over to the cestui que trust, which was the Iron Mountain Bank.

I am not able to see, from the facts in this case, that the transaction possessed that character. I do not perceive any difference between that deposit and the deposit of any individual doing business with the Central Savings Bank. No special trust relation was created by this transaction in question. It does not follow, because a fund is placed in the hands of a man or corporation, that it can be followed everywhere, under all circumstances. And in this particular case there was no means of following specifically the money which was placed by the Iron Mountain Bank in the hands of the Central Savings Bank, because it went into the bank as other money did, was mingled with other money, and paid out in its ordinary business as other money was. There is another consideration which shows that relation between the parties. Why is it that a bank in this or any other city provides clerks to keep accounts, provides and furnishes its depositors a check-book, and goes to a great deal of trouble and expense and liability in securing them against the loss by fire or thieves? Why is it that they do these things, and some go further and pay interest for the privilege of having and holding the money? It is because it becomes their money; because the moment it is deposited there it is their money, and that they may make money out of it in the regular banking business. In this case, the Central Savings Bank not only consented to pay the checks of the Iron Mountain Bank which were drawn against it, but undertook, in addition to what an ordinary bank does, to take care of and protect its operations in the clearing-house. What was it to get for all this? According to the theory of the plaintiff's counsel, Mr. Wood, they were to hold this fund as a separate and distinct trust fund, with which they could make no operations, which they could not loan out, and

which they were to hold until exhausted by checks; and they were to do this for nothing.

The case of the Marine Bank v. Fulton Bank, 2 Wall. [69 U. S.] 252, in which I had the honor of delivering the opinion of the supreme court, is in point, and is decisive of the case at bar. In that case, the Fulton Bank sent to the Marine Bank, of Chicago, two notes for collection. The currency at Chicago had at that time become deranged, and consisted exclusively of bills of Illinois banks. The Marine Bank sent a circular to its correspondents informing them that in the disturbed state of the currency, it would be impossible to continue remittances with the usual regularity, and that it would be compelled to place all funds received in payment of collections to the credit of its correspondents in such currency as was received in Chicago—bills of the Illinois stock banks—to be drawn for in like bills.

The notes were collected by the Marine Bank and placed to the credit of the Fulton Bank. About a year after the collection made, the New York bank made a demand of payment from the Chicago bank, which was refused, unless the former bank would accept the Illinois currency, now sunk fifty per cent below par. The Marine Bank was engaged, like other banks, in receiving deposits, lending money, buying and selling exchange, and the money collected on the two notes in question was not retained in any separate or specific form. The court held that the proceeds of the notes, when collected, became the money of the collecting bank, and that the depreciation in the currency fell upon that bank. The court, in deciding that case, said:

"But the truth undoubtedly is, as stated in the second branch of the proposition, that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collections, and that the defendant would use the money in his business. Thus the defendant was guilty of no wrong in using the money, because it had become its owner. It was used by the bank in the same manner that it used the money deposited with it that day by city customers, and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation."

In the case at bar, I cannot see that the relation between the banks was any other than one of ordinary deposit, by which the Central Savings Bank became the debtor of the Iron Mountain Bank, and liable to pay its drafts through the clearing-house. It follows that the assignee is entitled to recover; and the judgment of the district court, being in conformity with these views, is affirmed. Affirmed.

PHELAN (KELLY v.). See Case No. 7,673.

Case No. 11,070.

In re PHELPS.

[9 Ben. 286;[1] 17 N. B. R. 144.]

District Court, S. D. New York. Jan. 16, 1878.

BANKRUPTCY—PROOF OF DEBT—LIABILITY TO FORMER PARTNER.

P. and E. being copartners, P. sold out to E. his interest in the firm, P. agreeing to pay all the firm debts, and to save E. harmless thereon. Afterwards, P. being adjudged a bankrupt, and firm debts remaining unpaid, E., without having paid anything on such debts, claimed the right, under section 5068 of the Revised Statutes, to prove against the estate of P. for the differences between the amounts of such debts and the dividend which the estate would pay thereon, and to have the present value of P.'s liability to him ascertained: *Held*, that he was not entitled to make any such proof and that there was no present value of such liability which could be ascertained.

[In the matter of John F. Phelps, a bankrupt.]

Wilson & Wallis, for Everdell.

Gurdon S. Buck, for the assignee.

BLATCHFORD, District Judge. Prior to January 24th, 1877, one Everdell and the bankrupt were copartners in business under the name of Phelps & Everdell. On that day Phelps sold out to Everdell his interest in the firm. Part of the consideration for such sale was the written agreement of the bankrupt, then made, to pay all the firm's debts then due or owing, and to indemnify and save harmless Everdell for and from any liability thereon. On the 14th of February, 1877, the bankrupt filed a voluntary petition in bankruptcy, on which he was adjudicated a bankrupt. Debts of the firm to the amount of about $4,000, to sixteen creditors, still remain unpaid, and Everdell will remain liable thereon for the respective differences between the total amounts of such debts and the dividend which the estate of the bankrupt will pay thereon. Although Everdell has not paid any part of such differences, or any part of any of such debts, he now claims the right, under section 5068 of the Revised Statutes, to make proofs of claim of such differences, as "contingent debts" or "contingent liabilities" "contracted by the bankrupt," and he asks the court to ascertain the amounts for which he should prove claims, and he also asks to have the present value of the debts or liabilities of the bankrupt to him ascertained and liquidated. Section 5068 of the Revised Statutes provides as follows: "In all cases of contingent debts and contingent liabilities contracted by the bankrupt and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and

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

liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

The claim made by the counsel for Everdell is, that, when he shall have paid the differences above mentioned, he will have been damaged in such amounts by the failure of the bankrupt to keep his agreement, and will have a valid claim against the bankrupt to such amount; and that such claim may, under section 5068, be proved as a contingent claim, in advance of any actual payment by Everdell.

Section 5070 of the Revised Statutes provides as follows: "Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders."

It is contended for Everdell, that, although, as between himself and the bankrupt, he may be regarded as a surety, within the meaning of that term in section 5070, yet he has, over and above such suretyship as grew out of his position as a joint debtor with the bankrupt, a claim against the bankrupt growing out of the bankrupt's contract of indemnity. It is such claim, based on such contract, that he seeks to prove under section 5068, by proving for some present value, based on the difference between the debts in question and the amounts which the estate of the bankrupt will pay of such debts. The view seems to be, that, in some manner Everdell can prove a present debt, and secure the payment of a dividend to him thereon, without his paying, prior to making such proof, any part of the debts due to the creditors from him as a member of the firm.

Whether under the original liability of Everdell, as a partner, to the creditors of the firm, or under the agreement made between him and the bankrupt, Everdell occupies the position of a surety in respect to the bankrupt. Under the original liability of the firm, each of its members was a surety to the other for one-half of the debts. Under the agreement subsequently made the bankrupt became, as regarded Everdell, the principal debtor, and Everdell became surety for the bankrupt in respect of the whole amount of the debts of the firm. Everdell, therefore, under section 5070, and general order No. 34, as a surety for the bankrupt, or a person contingently liable for him, may prove the claim in respect of which he is such surety, or so contingently liable, under the conditions prescribed by that section and that general order.

I do not perceive that Everdell can make any proof under section 5068, as the case now stands. What is the contingent debt or the contingent liability contracted by the bankrupt in favor of Everdell? By virtue of the partnership relation, the bankrupt became liable to Everdell, contingent upon Everdell's paying more than his one-half of the debts of the firm. Everdell has not paid any part of such debts. By virtue of the subsequent agreement between Everdell and the bankrupt, the bankrupt bound himself to pay all the debts of the firm, and to indemnify and save harmless Everdell for and from all liability thereon. This was substantially a liability to Everdell contingent upon Everdell's paying any part of the debts. In either case, there must be a payment by Everdell before he can prove any claim. In the one case he must show that he has paid more than one-half of the debts. In the other case he must show that he has paid some part of the debts. Section 5068 clearly states that Everdell cannot share in the dividends till the contingency happens. Under the latter clause of section 5068 there is no present value of the bankrupt's liability to Everdell that can be ascertained or liquidated. It follows that the prayer of the petition must be denied.

Case No. 11,071.

In re PHELPS et al.

[1 N. B. R. 525 (Quarto, 139); [1] 2 Am. Law T. Rep. Bankr. 25.]

District Court, D. Kentucky. 1868.

BANKRUPTCY—CHOICE OF ASSIGNEE—FIRM AND INDIVIDUAL CREDITORS—JOINT POWER OF ATTORNEY—MEETING FOR CHOICE OF ASSIGNEE.

1. Creditors who have proved a debt against a partner of a firm in bankruptcy, have no right to participate in the election of the assignee for the company, who must be chosen by the creditors of the company only.

2. The powers given by a letter of attorney to several persons jointly, cannot be exercised by one of the attorneys alone.

3. A meeting to prove debts and choose an assignee, should be organized at the hour designated in the official notice, and should be kept open until an assignee is chosen, or it is ascertained that no choice can be made.

[In the matter of Phelps, Caldwell & Co., bankrupts.]

BALLARD, District Judge. The register certifies for decision by the district judge, the following questions, as having arisen in the course of the proceedings before him, to wit:

First. "Have creditors who have proved debts against one of the bankrupt partners, a right to participate in the electing the as-

[1] [Reprinted from 1 N. B. R. 525 (Quarto, 139) by permission.]

signee?" The register thinks they have. He says, "He sees no reason why creditors of members of a firm should not participate in the electing an assignee for the firm; for such assignee is not only assignee of the firm, but of each member's estate."

I do not agree with the register. The only provision to be found in the whole bankrupt act [of 1867 (14 Stat. 517)] which relates directly to the question propounded is to be found in the 36th section. It is as follows: "That where two or more persons who are partners in trade shall be adjudged bankrupt * * * the joint stock and property of the copartnership and also the separate estate of each of the partners shall be taken * * *; and all the creditors of the company and the separate creditors of each partner shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company." Whilst the statute is explicit that the separate estate of each bankrupt partner shall pass to the assignee in bankruptcy, it is equally explicit, that it is the creditors of the company only, who shall participate in choosing him. It can hardly be necessary to consider the reason on which a provision so express is founded; but it may not be inappropriate to say that every creditor of a firm is also a creditor of each partner, but that a creditor of one member of a firm is not a creditor of the firm, nor has he any interest in the property of a bankrupt partnership. His interest generally in property which his debtor owns in common with partners, is in the share or part that may be left to his debtor after paying all partnership debts and all claims due the copartners. Of course, when the partnership is insolvent, this share will be nothing. It follows that if a separate creditor of a partner were allowed to participate in choosing an assignee who should have the management of partnership property, he would have a voice in the management of property in which he has no interest whatever; but if the election of the assignee who takes both the firm and separate property of each member, be confined to the firm creditors, no one has a voice who has not an interest in the whole property which passes, though some may be excluded who may have an interest in part.

Second. "When a letter of attorney is given to several persons jointly, can the powers therein given be exercised by one of the attorneys alone?" The register thinks not, and I agree with him. But the register should understand that a letter of attorney in the form prescribed by general orders, form No. 14, or form No. 26 is not a joint authority, and that a power conferred by such a letter may be exercised by any one of the persons to whom it is addressed.

Third. "How long should a meeting advertised for a certain hour, be considered as open for transacting the business for which such meeting is held?" The meeting here referred to, as the context shows, is the meeting contemplated by the 12th and 13th sections of the bankrupt act, and by the warrant, form No. 6, called to choose an assignee. The register thinks that "this meeting should be considered open during the business hours of the day on which the meeting is advertised to be held."

I do not agree with the register. I think the meeting should be organized at the hour designated in the notice, or as soon thereafter as practicable, and should be "kept open" until a choice be made, or it is ascertained that no choice can be made. The terms of the warrant, form No. 6, require that the creditors shall "meet" to choose one or more assignees, not merely on a given day, but at a given hour. Section 12 of the act provides that at this "meeting" "one of the registers of the court shall preside." Section 13 provides "that the creditors shall at the first meeting, held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and number of the creditors who have proved their debts." Taking the two sections together, it seems to me that the manner of choosing or electing an assignee by the creditors of a bankrupt is not, as the register seems to suppose, similar to that observed in electing civil officers at our state elections. The creditors do not go to the place designated, and at or after the hour fixed in the warrant, separately deposit their ballots or votes in presence of the register; but they actually "meet" and so far organize themselves into a meeting as to have a presiding officer, to wit: the register designated, and when this meeting is organized, at, or after, the hour named in the notice (it cannot be organized before), the creditors in the meeting, if they be the greater part in value and number, proceed to choose an assignee. The manner of proceeding is not prescribed by the statute, and may therefore be determined by the creditors themselves. It should, however, conform to the general practice of meetings; and form No. 15, prescribed by general orders, seems to contemplate that each creditor shall vote, and that his name, residence, and amount of debt shall be recorded. If, on the first vote, no choice be made, by reason of a greater part in number and value failing to concur, a second, third, or any number of ballots, may be had until the required concurrence be obtained. If no such concurrence be had and the meeting adjourn sine die, the contingency happens which authorizes the judge, or, if there be no opposing interest, the register, to appoint one or more assignees.

Whether this meeting, after organizing and failing to make choice of an assignee, can adjourn to another day and then pro-

ceed to choose one, is a question which is not distinctly answered by the statute. Section 12 requires an adjournment when "it appears that the notice to the creditors has not been given as required in the warrant." But, manifestly, this adjournment must have taken place in the case supposed, even if the statute had not required it, because the very foundation of authority in the creditors of a bankrupt to meet and choose an assignee is, that all creditors are notified to meet for such purpose in the manner required by the act. It seems to me, therefore, the requisition that an adjournment shall take place in such a case, does not even inferentially preclude the creditors, who meet in pursuance of a proper notice, from adjourning to another day and then proceeding to choose an assignee. True, section 13 provides "that the creditors shall, at the first meeting * * * choose one or more assignees," and that if no choice is made by the creditors at said meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees; but I am inclined to the opinion that the meeting of creditors to choose an assignee is the "first meeting" in contemplation of the act, whether it is held on the day designated in the warrant or on a day to which the meeting, assembled on that day, has adjourned, the several adjournments constituting but one meeting and affecting the proceedings in no other way than would a necessary postponement of business from one to another hour of the same day. The term "first meeting" employed in section 13 seems not to mean the actual first assembling of creditors, but to refer to the meeting called to choose an assignee—whether it be held on the day designated in the notice or on a day to which it adjourns, and is used in contradistinction to the terms "second meeting" and "third meeting" employed in general order 25, in forms Nos. 28 and 29 and in sections 27 and 28 of the act, which second and third meetings are called to consider the matter of a dividend. Both the statute (section 11) and the warrant issued in pursuance thereof, form No. 6, contemplate that this "first meeting" of creditors is held for them to "prove their debts" as well as to choose an assignee. This provision is copied almost literally from the Massachusetts insolvency law (see chapter 118, § 18, of the General Statutes), and in that state it seems to be the rule that creditors can prove their debts only at a meeting. 7 Metc. [Mass.] 431–434; 4 Cush. 584; Id. 529; 11 Cush. 375. Of course, if this be the rule under the bankrupt law, an adjournment of the first meeting may be sometimes actually necessary. It is only the creditors who have proved their debts, that can participate in choosing an assignee. The proving of debts must therefore precede the choosing of an assignee. But it may often happen that a bankrupt owes a hundred or more debts, and that it may be impossible, owing to the complicated nature of some, to go through the proofs of one tenth of them, on the day designated in the warrant and notice. If, therefore, in such case, the meeting cannot adjourn to the next, or another, day, to take proof of other debts, it will follow that a power, which the statute contemplates shall be exercised by a greater part in number and value of the whole, is actually exercised by only a few creditors, representing but a small portion of the debts. The plainest principles of justice would seem to require such an adjournment of the meeting, from day to day, as would furnish proper opportunity to all creditors present to prove their debts, and thus qualify themselves to join in selecting an assignee.

It may be that, under the bankrupt law, creditors may prove their debts before the first meeting, and elsewhere than at a meeting; still they are not required to do so, and certainly they should be allowed to do at the meeting what both the statute and warrant, form 6, authorize them to do there, that is, "prove their debts." The necessity for allowing an adjournment of the first meeting, to give opportunity to creditors present to prove their debts under the bankruptcy law, is almost as great as if it required proof of all debts to be made at a meeting. What can or should be done if the creditors persist in adjourning from day to day without choosing an assignee, I need not now say, since it is hardly a practical question. The interest of creditors so obviously requires the prompt choosing of an assignee, that it is not to be supposed the choice will be unreasonably delayed. Should such a contingency arise and be properly made known to the court, some appropriate remedy may doubtless be found.

I am not sure that more has not been said than is necessary to answer the questions propounded by the register, and I am not certain that what I have said in respect to the right of the first meeting "to adjourn," conforms to the interpretation of the statute. My apology for what I have written is that the interrogatory of the register is very comprehensive and seems to refer to the whole manner of conducting the first meeting, and that the conclusion which I have announced seems consonant to reason and to conform to the interpretation put by the supreme court of Massachusetts on a provision in their insolvency law quite similar to that in the bankrupt law which we have been considering. Rice v. Wallace, 7 Metc. [Mass.] 431–434.

I have had little or no opportunity to ascertain what is the actual practice elsewhere in respect to this matter of adjourning the first meeting. If the practice has not yet been established in any of the district courts, it has no doubt been settled both in England and in Massachusetts, and, as our

bankruptcy statute is understood to have been copied in the main from the English bankruptcy and Massachusetts insolvency statutes, I shall willingly conform the practice here to the practice there, if it be ascertained to be different from that which is here indicated as proper.

The clerk will send a copy of this opinion to the register, John H. Ward, Esq.

PHELPS (BENTLEY v.). See Cases Nos. 1,331 and 1,332.

Case No. 11,072.

PHELPS et al. v. BROWN et al.

[4 Blatchf. 362; 1 Fish. Pat. Cas. 479; Merw. Pat. Inv. 701; 4 Wkly. Law Gaz. 183.] [1]

Circuit Court, D. Connecticut. Sept. 24, 1859.

PATENTS—PRIORITY—FIRST INVENTOR—NOTICE OF INTERFERING PATENT—PURPOSE OF CAVEAT.

1. C. filed in the patent office a caveat, under section 12 of the patent act of July 4, 1836 (5 Stat. 121). Three months afterwards, M. filed a caveat for the same invention. Seven months after that, C. applied for a patent for the invention, which was granted two months after his application. Fifteen months after the granting of the patent to C., a patent was granted to M. for the same invention. No notice was given by the commissioner of patents to M., of the application of C. In a suit brought by C., for the infringement of his patent, against parties holding under the patent to M.: *Held*, that if M. in fact first discovered the invention, and if, when C. applied for his patent, M. was using reasonable diligence in adapting and perfecting his invention, although he had not then given practical shape to his discovery, C. had unjustly obtained his patent, within the meaning of section 15 of the act, and could not maintain the suit.

2. Whether the commissioner of patents had power to issue the patent to C., in violation of the provisions of section 12, which required him to give notice to M. of the filing of the application by C., quere.

3. But M. cannot be prejudiced by the omission to give him the notice.

4. The 12th and 15th sections of the act were designed to protect the right of the first inventor, although he was not the first to adapt his invention to practical use, provided he has filed his caveat and has used reasonable diligence in perfecting his discovery.

5. The purpose of the caveat is to save an inventor from the effect of the rule of law, which gives to the inventor who first adapts his invention to practical use the right to the grant of the patent.

[2][This was a motion for a new trial. The plaintiffs [Anson G. Phelps and others] had brought suit against the defendants [James Brown and others], a corporation under the laws of Connecticut, to recover damages for the alleged infringement of letters patent [No. 12,227] for an "improvement in machines for manufacturing brass kettles," granted to plaintiffs as assignees of Lyman C. Camp, January 12, 1855. The defendants claimed under letters patent for substantially the same machine granted to Orlando W. Minard, April, 1856. Camp filed a caveat and drawing, describing his machine, January 16, 1854, and Minard filed a caveat and drawing containing a description of his machine, April 17, 1854. The application of Camp was filed November, 1854, but no notice was given to Minard of its pendency, and the patent issued without interference or opposition. There was proof tending to show that Camp had made his invention as early as 1848, and completed a practical machine in January, 1854, and that Minard had made his discovery as early as 1847, and completed a practical working machine in October, 1854. Thereupon the plaintiffs' counsel prayed the court to instruct the jury, that, "if they should find that Lyman C. Camp was an original and bona fide discoverer of the combination claimed in the letters patent granted to the plaintiffs as his assignees, and was the first who succeeded in reducing his idea to practice by embodying and carrying it into practical operation, in the form adapted to practical use, said letters patent were valid, unless they were fraudulently obtained for that which was, in fact, invented or discovered by another who was using reasonable diligence in adapting and perfecting the same; and, that, if the jury should find that said Camp and Minard were both bona fide original and independent inventors, and that said Camp had first succeeded in perfecting his invention and adapting it to practical use, the plaintiffs were rightfully entitled to their patent therefor, even though they should find that said Minard had first conceived the idea of said combinations, and was, at the time of the plaintiffs' application and of the granting of their patent, using reasonable diligence in adapting and perfecting the same."

[But the court (INGERSOLL, J.) refused so to charge the jury; and, on the contrary, instructed them that, "although it was true, as was claimed by the plaintiffs, that it was not enough, to defeat a patent already issued, that another had before conceived the possibility of effecting what the patentee accomplished, but that to constitute a prior invention the party alleged to have produced it must have reduced his idea to practice and embodied it in some distinct form and adapted it to practical use, if, nevertheless, they should find that Minard had succeeded in establishing another claim and ground of defense the plaintiffs must fail of a recovery. That other claim was this: 'That Minard was the first discoverer and inventor of the combination, and that, although he might not, at the time of the application by Camp

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and the opinion are from 4 Blatchf. 362. The statement is from 1 Fish. Pat. Cas. 479. Merw. Pat. Inv. 701, contains only a partial report.]

[2] [From 1 Fish. Pat. Cas. 479.]

for a patent, have given any particular shape to his discovery, yet, that when said application was made Minard was the first discoverer and inventor, and that while he was using reasonable diligence in adapting and perfecting his invention Camp unjustly obtained a patent for the same.' The patent act of 1836, in section 15 thereof, provides among other things that a patent issued shall be void if it has been unjustly obtained for that which was invented or discovered by another who, at the time the patent was obtained, was using reasonable diligence to adapt and perfect the same.

["When the patent to the plaintiffs was issued, there was a caveat filed by Minard in the patent office. It was the duty of the commissioner, before he issued a patent on the application of Camp, to have notified Minard so that he could present his claim to a prior invention. That duty was not performed by the commissioner. Contrary to his duty he issued the patent to the plaintiffs without any notice to Minard. The patent was, therefore, irregularly issued. If, therefore, Minard was the original discoverer of the invention or idea embraced in the combination, and if, when the patent was issued to the plaintiffs, the caveat of Minard was on file in the patent office; if no notice was given to Minard by the commissioner, and if, when the application for the patent was made, and when the same issued to the plaintiffs, Minard was using reasonable diligence to adapt and perfect the same, and did perfect the combination patented, then the patent to the plaintiffs, so far as it respects Minard and those claiming under him, was unjustly obtained and can not be made use of to prevent Minard, with those claiming under him, from using the combination described in his patent." The jury found a verdict for the defendants, and the plaintiffs moved for a new trial.][2]

R. J. Ingersoll and C. M. Keller, for plaintiffs.

N. J. Buel, W. D. Wooster, and R. S. Baldwin, for defendants.

Before NELSON, Circuit Justice, and INGERSOLL, District Judge.

NELSON, Circuit Justice. The 12th section of the patent act of July 4, 1836 (5 Stat. 121), provides for the filing of a caveat in the confidential archives of the patent office, and that, if application shall be made by any other person within a year from the filing of the caveat, for a patent for an invention that shall interfere with the one described in the caveat, it shall be the duty of the commissioner to give notice of the application to the person filing the caveat, who shall, within three months, file his description, specification, drawings and model, and if, in the opinion of the commissioner, the specifications of claim interfere with each other, like proceedings shall be had as in the case of interfering applications. The 15th section specifies, among other things, as a defence to an action for the infringement of a patent, that the plaintiff "had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same." The instructions of the court to the jury turn on these two provisions of the law.

There is some difficulty in maintaining the power of the commissioner to issue the patent to the plaintiffs, within the terms of the 12th section, providing for the filing of a caveat, and in upholding such patent against the right of a party who has complied with the provisions of that section. The section directs that the commissioner shall, instead of issuing the patent, file the papers accompanying the subsequent application, pending the force of the caveat, and that if, in his opinion, there is an interference, then such proceedings shall be had as in the case of interfering applications. These proceedings will be found in the 8th section of the act. But we are of opinion, that the case falls within the scope and meaning of the defence prescribed in the 15th section, already referred to. It is true, there is nothing in the case implicating the good faith of Camp or of his assignees, and hence the injustice relied on is rather injustice in the abstract than injustice resulting from any intentional wrong. We are inclined, however, to think that the term was used and intended to be used in its broadest sense; and that the two provisions, the 12th and the 15th sections, taken together, were designed to protect the right of the first inventor, although he was not the first to adapt his invention to practical use, provided he has filed his caveat and has used reasonable diligence in perfecting his discovery. The purpose of the caveat is to save the discoverer from the effect of the rule of law which gives to the inventor who first adapts his invention to practical use the right to the grant of the patent; and, in case the commissioner complies with the terms of the 12th section, it does secure him against the effect of that rule. It is not surprising, in the multiplicity of applications before the commissioner, that he should accidentally overlook a caveat filed some time before the making of an application by another party, and, doubtless, that officer issued the second patent in this case, with the view that the patentee might have an opportunity of correcting the error. He should not be prejudiced by the accidental omission to give him the notice. A new trial must be denied.

[2] [From 1 Fish. Pat. Cas. 479.]

Case No. 11,073.

PHELPS et al. v. The CAMILLA.

[Taney, 400.] [1]

Circuit Court, D. Maryland. April Term, 1838.

MARITIME LIENS—MATERIAL MEN—FOREIGN SHIP—CREDIT—PURCHASE BY AGENT OF OWNER—CREDIT OF VESSEL.

1. S. & T., at New York, were agents and consignees of the brig Camilla, owned in Boston. At the request of the master of the Camilla, S. & T. gave their written order on P., D. & Co., for certain copper required to repair the vessel. The order was delivered by a clerk of S. & T. In the order no mention was made of the vessel or her owners, and the copper was furnished by P., D. & Co., and charged on their books to S. & T., to whom they also presented the account for the copper, and whose negotiable note they took, payable in six months. S. & T. charged the Camilla, on their books, with the amount of the note, deducting three per cent. therefrom, to make it a cash transaction. The Camilla sailed from New York on her voyage. Before the note fell due, the owner of the vessel, and also S. & T., became insolvent, and this libel was filed by P., D. & Co., against the vessel, whilst lying at Baltimore, to recover the amount due for the copper. *Held*, that prima facie, the necessary repairs furnished by material men, to a foreign ship, are a lien on the vessel.

2. The six months' credit given would not prevent the lien from attaching.

3. But if the credit was given to the owner or any one else, and not to the vessel, then there was no lien.

[Cited in The James Farrell, 36 Fed. 501.]

4. Where the owner of a vessel has an agent residing at the place where the repairs are being made, who purchases the materials in his own name, and gives his personal undertaking to pay the price, there will be no lien on the vessel, unless specially given.

5. In such case, the transaction becomes an ordinary one between buyer and seller, and although the materials are afterwards applied to the use of the vessel, that circumstance will not create a lien upon her.

6. The materials must be supplied for the vessel, and upon her credit, in order to create a lien.

7. Even if the materials had been originally charged to the vessel and her owner, the lien thus acquired would have been waived, by the material men afterwards taking the individual note of the agents or of the owner.

8. If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied.

9. If he takes a note or bill of exchange, or any other personal engagement for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue.

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

The libel in this case was filed in the district court on the 21st of April, 1837, by the members of the firm of Phelps, Dodge & Co., of New York, against the brig Camilla, of Boston, then lying at the port of Baltimore, and against E. G. Wiswell, and all others who might intervene in the cause. [Case unreported.] The claim was for materials furnished by the libellants to said vessel, at New York, between the months of August and November in the year 1836; and alleged to have been furnished at the request of the master, and upon the credit of the vessel, as well as of the owners and master thereof. The libellants' claim was contested by the master of the vessel, who answered the libel, stating that he had been master of the brig Camilla since the 1st of March, 1836, and contended, by way of plea, that the said libel could not be sustained against the said brig or the respondent, according to the law of the land and the course of admiralty proceedings, but that the same, if any claim existed which could be enforced in admiralty, could only be enforced or sustained separately against the brig Camilla, her tackle, apparel and furniture, or against the owner, or the master thereof, or against the two latter jointly. And for further plea in this behalf the respondent contended and insisted that if any lien existed against the said brig (which was not admitted), the same had been lost or relinquished, as would thereafter appear by the answer, or the evidence adduced in support of it. And for further defence and answer to the aforesaid libel, the respondent stated that the said brig was, from the 17th day of September to the 16th of October, 1836, in the port of New York; when and where, certain repairs being required for her, some person (it was presumed the libellants) furnished the copper set forth in their accounts, and the respondent admitted that the said account was true and correct, as there shown, so far as respected the furnishing thereof for the use of the said brig; that during, or about the same time, Smith & Town, merchants in New York, to whom the said brig and cargo were consigned, received for the owner of the said brig (who was T. D. Parker), and for the respondent as master, $1,775, which was sufficient to pay all bills and charges against the said brig and master, including the account of the libellants; and the respondent supposed and believed that the funds thus in their hands for this purpose had been honestly applied accordingly, but whether this account was paid or not, the respondent did not know, further than that provision was made for payment.

The respondent further set forth that the said brig belonged to the port of Boston, that she went from that port to Rio de Janeiro, thence to New Orleans, and thence to New York, where she lay one month, during which said copper was furnished, and the repairs aforesaid were made; that on the 1st of October, 1836, the respondent advertised her, in three newspapers, to sail to Rio de Janeiro on the 5th of October; that then he adver-

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

tised her to sail on the 10th of October, and lastly, on the 15th of October, and she did actually sail on the 16th of October, 1836; that during all this time, the libellants made no application for payment, nor did he know or suppose they had not been paid, for other bills were actually paid by said Smith & Town, and among others, the caulkers and gravers who put on the said copper. That having arrived at Rio de Janeiro, where she lay some time, the brig returned to New York, where she lay twenty days, and during all this time, the libellants did not call on the respondent for payment of their account, although the brig's arrival was advertised in all the newspapers in New York, and he believed it to have been paid. That having cleared from the custom-house in New York, which clearance was advertised in the different newspapers, two days afterwards, to wit, from the 20th to 25th of March, 1837, she sailed for Baltimore, where she arrived on the 27th of March; and that the first time the respondent knew that the account aforesaid was not paid, was seeing the monition in this case stuck upon the mast of the said brig, on the 22d of April, 1837. And the respondent further alleged that the libellants, who made the contract for furnishing the said copper with the said Smith & Town (this respondent never having seen either of the libellants, nor ever been called on by them), looked to Smith & Town for payment, and not to the said brig or to her then owner or master; and even if they did not, their lien, if any they had, had been lost by their neglect to enforce it, when the said brig was in New York repeatedly; and by their acquiescence in her repeated departures therefrom; and also had lost all claim on the owner or master of said brig. The respondent also prayed leave further to state, that since the arrival of the said brig in the port of Baltimore, to wit, on or about the 8th of April, 1837, she, with her tackle, apparel and furniture, had been sold to a certain William Dehone, of Boston, who had no knowledge of this pretended claim, at the time of his purchase, the libel in this case having only been filed on the 21st of the same month. It was agreed, in writing, between the parties, that the copy of the deed of trust for the benefit of creditors, from T. D. Parker to William Dehone, of Boston, might be given in evidence; and also that the New York newspapers, containing advertisements offering the brig Camilla for sale, freight or charter, and announcing her clearances, departures and arrivals at the port of New York, might be offered in evidence, to prove the facts set out in such advertisements. And it was also agreed, that said brig was, at the time the copper and materials were furnished as set out in the accounts, in the port of New York, and belonged to the port of Boston.

A commission was issued to New York to take testimony, at the execution of which, Smyth Clark, a competent witness produced by the libellants, stated that he knew the brig Camilla (Captain E. G. Wiswell), at the port of New York, about the months of August and November, 1836; he always understood the brig was owned by T. D. Parker, of Boston, and she belonged at that time to the port of Boston. That he never saw the bill of copper filed by the libellants, but he knew there was copper furnished by the libellants for the use of the said brig Camilla, the prices of which he could not recollect, but that the total amount of the bill was correct, being upwards of $1,100; that the copper was furnished said brig at the request of her master. The brother of the owner, Mr. Stanton Parker, Jr., requested deponent to send down the copper, after the master had given the order; but said Stanton Parker was not, to deponent's knowledge, either part-owner, or acting as agent of the owner. That the copper was furnished, through Smith & Town, in the following manner: Deponent was then a clerk of the said house of Smith & Town, and by their authority gave an order on the libellants to supply the copper, after the master requested it to be done; Smith & Town were then the agents of the brig, and had been so previously. That he could not say that the copper was furnished on the credit of the brig and her owners, nor that the libellants were informed it was for the use of the brig. The written order was in the name of Smith & Town, and signed by deponent as their clerk; it did not mention the brig Camilla; deponent could not say in what manner the libellants looked to Smith & Town's note when they took it, nor why the bill referred to in the defendant's fourth interrogatory, was made out to Smith & Town. Deponent knew that the copper was for the brig. From the appearance of that bill, if he looked at it alone, he would say that Smith & Town were looked to. Smith & Town gave their note to Phelps, Dodge & Co., in settlement of the bill, through the deponent; such bill, when originally rendered, extended to the figures $1,197.08, inclusive, and the deduction of three per cent. interest was a subsequent matter, to make it appear as cash between owner and agent. Previously to sending the order, deponent called on the libellants to know the price, and that being approved of by Stanton Parker, deponent gave the order; the bill above mentioned was checked by deponent and had some of his writing on it. That he had heard the captain say that the copper was necessary for the brig. That within a day or two of the protest of the note given by Smith & Town for the copper, perhaps on the same day, deponent delivered a message from Smith & Town to the libellants, informing them that they would not be able to take up the note, and that the vessel for which the copper was furnished, was then lying at Baltimore. In making up the accounts of Smith & Town against the brig, long before their failure, such copper was charged in the

blotter to brig Camilla, and posted to the credit of T. D. Parker, the owner. On cross-examination, he stated that he gave the order for the copper, being the clerk of said Smith & Town; that he was now a merchant; he never examined the brig before the copper was furnished; he knew nothing personally of her being seaworthy or not, and his only information upon the subject was that obtained from the captain and before stated.

Nathaniel E. James, on the part of the libellants, stated that he knew of the copper being furnished by the libellants, at the prices charged, for the use of the Camilla; deponent delivered the copper himself. That the copper was furnished through Smith & Town; he did not know personally of their being agents of the brig or of her owner; the copper was furnished at the request of Smith & Town; the entry in the libellants' books was made by him, in the hurry of business, and by mistake charged to Smith & Town, instead of "the brig Camilla and owners, per Smith & Town," as was the uniform usage of the libellants; that the bill was made out from deponent's entry; afterwards, when the error was detected, which was several months subsequently, the entry was corrected. As to the credit on which the copper was sold, he could only say, that the settled rule of the house was to enter a charge for copper furnished, against the vessel and the owners thereof; he believed the present the only case in which he made a different entry; he considered that the libellants looked to the brig and owners, as responsible, in case the note of Smith & Town was not paid. On cross-examination, he stated that Mr. Clark, the clerk of Smith & Town, called upon the libellants to buy the copper, and the order was given by said Clark as their clerk; that deponent was a clerk; he never examined said brig, and knew nothing about whether she was seaworthy or not.

Smyth Clark, being again examined on the part of the respondent, stated that Smith & Town were consignees of the brig Camilla. That the paper marked Exhibit A was a bill furnished the consignees by the libellants for the copper; this bill was settled by a note given by Smith & Town, at six months, which was not paid at maturity; that the firm of Smith & Town suspended payment about the 1st day of April, 1837.

By a further agreement, it was admitted, that the statement of the witness examined under the above commission, "that the captain of the Camilla stated that the copper in question was necessary for the brig," be received in evidence, without objection to its admissibility, on the ground that it was the declaration of the captain, who ought to have been produced and examined; also, that the libel be considered as amended so far, that the same be a libel in rem and not in personam, and that the plea to that part of the libel be withdrawn. The bill rendered by the libellants to Smith & Town, and referred to in the testimony as Exhibit A, was headed as follows: "Messrs. Smith & Town, bought of Phelps, Dodge & Co." The bill referred to as Exhibit B, being the one filed with the libel, differed only from Exhibit A in the heading, which was as follows: "Brig Camilla & owners, per Smith & Town, to Phelps, Dodge & Co., Dr."

R. N. Martin and Geo. W. Nabb, for appellants.

N. Williams, Joseph B. Williams, and John H. B. Latrobe, for appellees.

TANEY, Circuit Justice. The libel is filed in this case in order to charge the brig Camilla with the sum of $1,197.08, the amount due libellants for copper sold by them, and applied to the use of the brig. The Camilla belonged to the port of Boston, and was owned by Theodore D. Parker, of the state of Massachusetts. The brig being in the port of New York in the month of September, 1836, and requiring new copper to make her seaworthy, the master applied to Smith & Town, merchants of New York, who were the agents and consignees of the brig, to procure the necessary supply; the copper was bought from the libellants, on a credit of six months, in the following manner: Smith & Town gave their written order on the libellants for the copper, which order was sent to them by one of the clerks of Smith & Town; the order for the copper did not mention the brig Camilla or her owners, and was simply an order from Smith & Town. Upon this order, the copper was furnished by the libellants, and charged in their books to Smith & Town, and no reference whatever was made in the entry to the brig or her owners; and the libellants afterwards presented their account to Smith & Town, for the amount, and took their negotiable note, payable in six months.

The account originally presented by them has been produced, and is headed as follows: "New York, September 30, 1836. Messrs. Smith & Town, bought of Phelps, Dodge & Co."

The note given by Smith & Town does not purport to be made by them as agents, but is their own personal engagement to pay the money, and is in ordinary form of a negotiable note; and in their accounts with Theodore D. Parker in their books, they charged the amount of the note, deducting three per cent. from it, against the brig Camilla. The three per cent. was deducted in order to make the transaction a cash one, as between the owner and consignees.

The brig, on the 16th of October, 1836, after these repairs were made, sailed for Rio de Janeiro; from which place she returned to New York, about the 1st of March, 1837; remained there about twenty days; then sailed for Baltimore, where she was found when

the process in this case was served upon her. Parker, the owner of the vessel, stopped payment in March, 1837, and on the 26th of that month, executed a deed to a trustee, conveying all his property for the benefit of his creditors. Smith & Town stopped payment about the 1st of April, 1837, and within a day or two of the time when the note for the copper fell due, they informed the libellants that they would not be able to take up the note, and that the vessel, for which the copper was furnished, was then lying at the port of Baltimore; the libellants thereupon instituted these proceedings against the vessel, and the monition was served on the 22d of April, 1837.

These are the material facts in the case. It is true, that Nathaniel E. James, the clerk of Phelps, Dodge & Co., states that the entry above mentioned, in the books of the libellants, was made by him in the hurry of business, and the copper, by mistake, charged to Smith & Town, instead of "the brig Camilla and owners, per Smith & Town"; and that when the error was detected, which was several months afterwards, the entry was corrected. But the court think that the charge against Smith & Town is not accounted for, by the statement of the witness, that it was made in the hurry of business; for the account afterwards rendered to them, charged the copper in the same manner. The personal engagement of Smith & Town was also taken for the payment of the money in six months; and Phelps, Dodge & Co. not only received this note, but afterwards negotiated it, or intended to negotiate it, as appears by their endorsement upon it, which has since been cancelled. These acts of the libellants, taken together, can hardly be reconciled with the notion, that Smith & Town were erroneously charged with the copper, by a mistake of the clerk, in the hurry of business. If the copper had been charged to the "brig and her owners," per Smith & Town, they would not have been personally responsible to Phelps, Dodge & Co.; yet, all the acts of the parties are perfectly consistent with their personal responsibility, according to the charge in the original entry, and inconsistent with the one subsequently made; for Smith & Town, after having given their note to Phelps, Dodge & Co., at six months, proceed to charge against the owner the cash price of the copper, as if the amount had been settled with the libellants by them; besides, the vague manner in which the witness states the time when the error was discovered, and the omission to mention what circumstance led to the discovery, leave no doubt (when the testimony of this witness is compared with that of Smyth Clark) that this alleged error was never discovered, and the alteration in the libellants' books never made, until they were informed by Smith & Town that they were about to stop payment. An alteration made in the books of the libellants, under such circumstances, cannot be allowed to affect, in any degree, the decision of the controversy now before the court.

It is admitted in the argument, that the lien given by the statute of New York cannot affect this case, and the question to be decided is, whether the debt due to Phelps, Dodge & Co., for this copper, is, by the general maritime law, a lien on the brig.

Prima facie, the necessary repairs furnished by material men to a foreign ship, are, without doubt, a lien on the vessel. The Camilla was a foreign vessel in the port of New York, so far as this question is concerned; the copper, it appears, was necessary, and the credit of six months would not prevent the lien from attaching. But all the authorities on the subject agree that, if the respondents show that the credit was given to the owner or any one else, and not to the vessel, then there is no lien; and I think it evident, from the testimony in this cause, it was furnished on the personal credit of Smith & Town.

In the case of The St. Jago de Cuba, 9 Wheat. [22 U. S.] 417, the supreme court decided that, if the vessel was in the port of a state to which she did not belong, yet, if the owner was present, and the contract made personally with him, it would be presumed to be made on his personal credit, and there would be no lien on the vessel, unless it was specially given. Can there be any difference in principle, where the owner has an agent residing at the place, who purchases the materials in his own name, and gives his personal undertaking to pay the price? I think not. If the circumstance that the contract was made with an owner transiently present at the port, would repel the legal presumption that the credit was given to the vessel, it would seem to follow, that the same rule must govern, where the contract was made by the consignee and agent of the owner, and he became personally responsible to the party furnishing the materials. In either of these cases, the transaction becomes an ordinary one between buyer and seller, and although the materials are afterwards applied to the use of the vessel, that circumstance will not make them a lien upon her; they must be supplied for her and upon her credit, in order to create the lien.

In the case before the court, they were, in truth, furnished to the vessel by Smith & Town. Phelps, Dodge & Co. sold the copper to Smith & Town, upon their personal credit, and Smith & Town furnished it to the brig; this is obviously the real history of this transaction, and Phelps, Dodge & Co., therefore, never had a lien upon the brig for the price of this copper.

There are strong reasons for believing that Smith & Town had funds of the owner of the Camilla in their hands, at the time this copper was purchased; for they would otherwise hardly have given their note for it, at six months, at the credit price, and charged it against the owner, at the cash price, deduct-

ing in their charge three per cent. from the amount for which they gave their note. And if they had funds in their hands, it would readily account for the manner in which they procured the copper, and would show the reason for purchasing it in their own names, and upon their own responsibility, instead of procuring it as agents merely, and upon the credit of the brig and her owner.

But I do not put the decision upon this ground, for if the issue of the controversy depended on this fact, I should have thought it incumbent on the respondents to establish it by more satisfactory proof, than the inference to be drawn from the circumstance I have mentioned. I do not, therefore, place the decision upon the ground that Smith & Town had funds in their hands sufficient to purchase the copper, but upon the ground, that the whole evidence shows, that it was sold to them by Phelps, Dodge & Co., upon their personal credit, and was not furnished on the credit of the brig and her owner; and that the first entry in the books of the libellants, gives the true account of the transaction.

It must not, however, be understood, that the decision would be different, if the copper had been originally charged to the Camilla and her owners. It is true, that upon such a sale, the libellants would, in the first instance, have acquired a lien upon the brig; but that lien, in my opinion, would have been waived by taking afterwards the note of Smith & Town. This is the doctrine recognised in The Nestor [Case No. 10,126], and in the case of Murray v. Lazarus [Id. 9,962], where the material men had agreed with the master to take a bill of exchange on the agents of the owners, the court held that it was a waiver of the lien.

In the last-mentioned case, the court say: "If this is to be considered a regular and ordinary bill of exchange, it was a satisfaction for any lien that might have existed, and must be considered as a relinquishment thereof." The same may be said of the note given by Smith & Town in this case, even if the account in the books of Phelps, Dodge & Co. is corrected in the manner stated in the testimony of James. If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue.

In either view, therefore, of the facts stated in the testimony, there is no lien on the Camilla, for the copper furnished by the libellants, and the decree of the district court dismissing the libel must, therefore, be affirmed.

I have said nothing of the deed made by Theodore D. Parker for the benefit of his creditors, because I do not think that the deed affects the merits of this controversy; and upon the principle adopted by the court, the decision must have been the same, even if Parker had remained solvent, and was still the owner of the brig. Decree affirmed, with costs.

Case No. 11,074.

PHELPS v. CLASEN.

[Woolw. 204; [1] 3 N. B. R. 87 (Quarto, 22) 2 West. Jur. 221.]

Circuit Court, D. Minnesota. June Term, 1868.

OF THE ISSUE IN INVOLUNTARY BANKRUPTCY. HOW IT IS JOINED, AND HOW IT IS TRIED—THE STATUTE OF FRAUDS, AND PAYMENT OF ANOTHER'S DEBT—OF BECOMING PARTIES TO AGREEMENTS—OF PAROL PROOF TO EXPLAIN WRITTEN AGREEMENT, AND ITS ADMISSIBILITY UNDER THE STATUTE.

1. It is doubtful if any answer be necessary in proceedings in involuntary bankruptcy to a rule upon a debtor to show cause why he should not be declared a bankrupt.

2. A paper simply denying the acts of bankruptcy charged, and demanding a trial by jury, is a proper response on the part of a debtor to such rule.

[Cited in Re Heydette, Case No. 6,444.]

3. On such trial, the petitioning creditor, it seems, need not make proof of his debt.

4. The petition in involuntary bankruptcy may be filed by any creditor whose debt is provable under the act.

[Cited in Re Dennery, 89 Cal. 105, 26 Pac. 639.]

5. Any debt existing at the time of the adjudication, although not then due and payable, is provable under the act [of 1867 (14 Stat. 517)].

6. A promise founded on a new consideration, made to one who owes a third party, to pay the debt, is not within the statute of frauds.

7. Persons who signed a paper reciting a contract between them, naming them as the contracting parties, and referring to their intentions in separate clauses, are bound by the obligations thereby imposed, and are entitled to the rights thereby conferred, whether they understood themselves as signing as witnesses or as parties.

8. Parol proof may be received of the consideration of an instrument, different from the one recited in it, as well when it is signed by both parties, as when it is signed by only one.

9. Parol proof is inadmissible to contradict or vary the terms of a written instrument, in which the parties have expressed a clear meaning.

10. Nor is parol evidence admissible to show what the meaning of the parties was, when the terms of the instrument, in the light of all the circumstances, remain unintelligible.

11. But when the instrument does not suggest what the meaning of the parties was, and when the language is susceptible of more than one meaning, and it is uncertain which is the proper construction, parol testimony is admissible of all the circumstances, showing the relation of the parties, their knowledge of the subject matter of the contract, and the state or condition thereof, and of all other facts which shed any light on their intention or meaning.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

12. A partner selling his interest in the firm property to his co-partner and a third party, gave a writing containing the following clause: "And it is further understood by the parties of the second part (i. e., the vendees), that the above sale is made subject to any indebtedness made by the purchase of any of the before mentioned goods, wares, and merchandise, by Jennings & Phelps, and Phelps & Clasen, for which reference is made to an account of liability on the 1st day of April, 1867." *Held*, as the clause did not import a promise on the part of the vendees to pay those debts, proof of extrinsic facts was admissible, viz., whether or not there were liens on the property, and what was the value of the property; and that the clause means that the vendees take the goods charged by this contract with a liability to pay, out of their proceeds, the debts mentioned.

This was a writ of error to the district court. Phelps filed his petition in involuntary bankruptcy against Charles L. Clasen and A. B. Clasen, merchants, doing business under the firm name of A. B. & C. L. Clasen, for reasons not necessary to be here stated. The register having issued the usual order requiring them, at a day therein named, to appear before him, and show cause why they should not be declared bankrupts, according to the act, they, at the time appointed, filed before and with him a paper, informal in its character, but distinctly denying that they had been guilty of the acts of bankruptcy charged, and demanding a trial by jury. The matter being adjourned into court, a trial was had before the district judge and jury. On the trial, Phelps, the petitioning creditor, was introduced as a witness, and testified that he had formerly been a partner in the firms Jennings & Phelps, and Phelps & Clasen,—the latter being successor to the former, and composed of himself and A. B. Clasen; that on the 1st day of April, 1867, he sold his interest in the latter firm to these debtors. He was then shown an instrument in writing, which he said was a bill of sale from himself to them; and that the goods in the store were delivered to them in pursuance of it. This paper was as follows:

"Know all men by these presents, that I, A. I. Phelps, town of Cannon Falls, county of Goodhue, state of Minnesota, of the first part, for and in consideration of nine hundred and nine dollars and ninety cents ($909.90) in lawful currency of the United States, to me in hand paid, at or before the ensealing of these presents, by A. B. & C. L. Clasen, of the same place, parties of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said parties of the second part, their executors, administrators, and assigns, the one equal and undivided one-half interest in the goods, wares, and merchandise, debts due, and demands of whatsoever nature or name owned by and due the firm of Phelps & Clasen, as merchants in said town of Cannon Falls. And it is further understood by the parties of the second part, that the above sale is made, subject to any indebtedness made by the purchase of any of before mentioned goods, wares, and merchandise, by Jennings & Phelps, and Phelps & Clasen, for which reference is made to an account of liabilities on the 1st day of April, 1867. To have and to hold the herein described property, to the said A. B. & C. L. Clasen, their heirs and assigns for ever. In testimony whereof, I have hereunto set my hand and seal this 1st day of April, 1867. A. I. Phelps. (Seal.)

"Signed, sealed, and delivered in presence of Charles L. Clasen. A. B. Clasen.

"(Five cent revenue stamp cancelled.)"

Counsel for the plaintiff then proposed to prove by the witness, that the defendants, in consideration of said sale, verbally promised that they would pay all the debts then owing by the two firms of Jennings & Phelps, and Phelps & Clasen, and that they had failed to do this, in consequence of which plaintiff had been compelled to pay said debts to the amount of $2061.37; and asked witness several questions tending to show those facts. All these questions were objected to by defendants' counsel, and the objections sustained by the court, on the ground that the paper called a bill of sale was the sole evidence of the contract between the parties, and could not be contradicted or varied by oral testimony. After the examination was closed, the court instructed the jury, that there was no evidence to sustain the issue on the part of the petitioning creditor, and that they must find for the defendants, which they did.

Phelps & Wilder, for creditor.
Smith & Gilman, for debtor.

MILLER, Circuit Justice. The creditor complains here against the action of the district court, in the first place, because the motion which, before the trial was entered upon, he made, to have the debtors declared bankrupts, as if in default for want of an answer, was overruled.

There is no formal answer to the petition of the creditor, and it is extremely doubtful if any answer is necessary. Section 40 of the bankrupt act (14 Stat. 517) directs, that on the filing of the petition, a rule shall issue to the defendant to show cause why he should not be declared a bankrupt. The response to this rule is not necessarily to be made by answer to the petition.

The next section requires, that on the return day of this rule, the court "shall proceed summarily to hear the allegations of the petitioner and the debtor;" and if at that time the debtor shall demand a jury in writing, the court shall order a trial by jury at the first term on which a jury shall be in attendance, "to ascertain the fact of said alleged bankruptcy." In this case the debtor did file a written paper at the proper time, denying the acts of bankruptcy charged, and demanding a trial by jury.

I am of opinion that this paper presents a

proper response to this rule to show cause, and entitled the defendants to a jury trial. There was, therefore, no error in overruling the motion of the petitioner.

On the trial before the jury, the question was raised, whether, in a proceeding of this nature, the petitioner must not, on the trial, and to the satisfaction of the jury, establish the existence of a debt due and payable to him from the debtors.

Looking to the language of the act, which seems to confine the inquiry "to the fact of said alleged bankruptcy," it may well be doubted whether this fact might not exist, and be found by the verdict, without regard to the further and distinct inquiry whether the petitioner had established, or had a debt provable, under the act. This view seems to be supported by the further provision of another time and another mode of procedure for that particular inquiry. See sections 22-24. If the debtor intended to deny that he owed the petitioning creditor debts to the amount of $200, he could have raised that question before going to the jury on the alleged acts of bankruptcy. If the question were found for him, the further inquiry would be unnecessary, and the expense and delay of it would be avoided. But as this question was not distinctly made in the district court, and is not mentioned in the briefs of counsel, it is not decided here.

It is also contended, that because the plaintiff had not, at the time the principal act of bankruptcy is alleged to have been committed, paid the debt to the creditors of the firm of Phelps & Clasen, which the defendants assumed, he was not such a creditor as could file this petition against them. Any creditor, whose debt is provable under the act, is authorized to file a petition for the involuntary bankruptcy of his debtor. See section 39. And section 19 provides, that debts which had been incurred and were existing at the time of the adjudication of bankruptcy, whether due and payable at that time, or not due till a future day, are provable under the act. To entitle himself to this remedy, then, it was not necessary for the plaintiff to have made the payment of the debt to the firm. If his demand was a valid one, it was sufficient to support this proceeding.

It is also insisted that this testimony must be excluded, because, being a promise to pay the debt of another, the undertaking is within the statute of frauds. But this is a promise to the plaintiff, founded on a new consideration, to pay a debt which he owed to a third party. Such a promise is not within the statute.

The counsel for the plaintiff insists that the paper which is called a bill of sale is an ex parte instrument of the plaintiff, the main purpose of which was to transfer his interest in the partnership of Phelps & Clasen; that the defendants signed it as witnesses, and not as parties, and that consequently parol proof of their verbal promise to pay the debts of the firm is not excluded by the recital in the instrument of a money consideration. The counsel for the defendants, on the other hand, maintain that the paper is a deed signed by both parties, and that no other contract or promise on the part of the defendants than what is found in the instrument can be proven.

On this point I lay out of view the sworn statement of the plaintiff, that the defendants signed as witnesses merely, and not as parties. I am of opinion that inasmuch as the paper recites a contract between these two parties, naming them as such, refers in separate clauses to their intention, and shows their signatures attached, it is immaterial whether they signed as parties or as witnesses. In either case, they are shown to have made the contract which is set forth in the paper, and are bound by all the obligations which it may establish against them, and are entitled to all the rights which it confers.

It is true that nearly all the cases in which it has been decided that parol proof may be received, of a consideration different from that recited in the instrument, are where but one of the two contracting parties signed it. But the principle is not limited to that class of cases. On the contrary, in De Wolf v. Rabaud, 1 Pet. [26 U. S.] 476, Sweet v. Lee, 3 Man. & G. 452, and Clifford v. Turrell, 1 Younge & C. Ch. 138, among the many which could be cited, the instrument was signed by both parties, and parol proof was admitted to sustain a cause of action founded on a consideration which was not mentioned, and was entirely different from the one which was mentioned in the instrument.

The doctrine may therefore be taken as established, that where it does not appear that the intention of the parties was to state in the instrument all the consideration passing between them, the circumstance of its being signed by both of them does not exclude parol proof of a consideration additional to and different from the one which is recited. If, therefore, no other reference in the bill of sale were made to the consideration for which the plaintiff conveyed his interest in the old firm to the defendants, than the recital of the $909, I should have no hesitation in admitting the parol proof offered by the plaintiff.

But I am satisfied that the second clause in this instrument was by the parties intended to be a statement of their agreement in regard to the very matter which he desired to prove by parol. I take it that these rules of evidence are well settled:

1. Where parties have attempted to put their agreement in writing, and have upon any particular subject expressed any clear meaning, parol evidence is inadmissible to contradict or vary that meaning.

2. When the terms of the instrument, in the light of all the circumstances, do not convey a clear meaning, but remain unintel-

ligible, parol evidence is inadmissible to show what the meaning of the parties was.

3. When the instrument does not suggest what the meaning of the parties was, and when the language is susceptible of more than one meaning, and it is uncertain which is the proper construction, parol testimony is admissible to show all the circumstances, such as the relations of the parties, their knowledge of the subject matter of the contract, the state and condition thereof, and all other facts which shed any light on their intention or meaning. [Bradley v. Steam-Packet Co., 13 Pet. [38 U. S.] 89; Mauran v. Bullus, 16 Pet. [41 U. S.] 528; De Wolf v. Rabaud, 1 Pet. [26 U. S.] 476; Blossom v. Griffin, 3 Kern. (13 N. Y.) 569.] [2]

Upon these principles we proceed to examine this instrument. The particular clause upon which the question arises reads thus: "And it is further understood by the parties of the second part, that the above sale is made subject to any indebtedness made by the purchase of any of the before mentioned goods, wares, and merchandise, by Jennings & Phelps and Phelps & Clasen, for which reference is made to an account of liabilities on the 1st day of April, 1867."

The counsel for the plaintiff insists that this clause means that the vendees in that sale were to pay debts which the two firms had contracted for the merchandise which was the subject of the sale, and which debts were set forth in a list made on the 1st of April. But the clause, considered by itself, does not contain or express any promise by the vendees to pay those debts. If they did so undertake, their obligation in that behalf will appear only by a reference to the whole instrument and to certain extrinsic facts connected with the transaction, which must be shown by parol testimony.

The counsel for the defendants contend that the intention of the parties was, that in the sale the vendees took the goods subject to any lien thereon by way of mortgage or otherwise, existing at the time of the sale, for debts contracted in their original purchase. And they insist that if such is not the meaning, then the clause is unintelligible, and within the rule secondly above laid down.

The clause does not by its terms convey such meaning. No lien on the goods is mentioned. The law does not give a lien for goods sold and delivered, so that there is no implication that the goods were, by reason of the original purchase, charged with a lien. The sale is said to be made subject to any indebtedness contracted for the purchase of these goods, and not merely to such indebtedness as might be a lien on them. The debts referred to are to be found in an account of the liabilities of the firm, of the same date as the instrument which we are construing. A reference to this account is necessary to show what indebtedness is meant. The construction claimed by the counsel for the defendant would not be unreasonable if, to secure debts of the class described, there were specific liens by way of mortgage or otherwise. On the other hand, that construction would be unreasonable if there were no such liens, and the parties contracting both knew it. In order to an understanding of the meaning of the parties, it was material to know, therefore, whether there were such liens or not. And this could be shown only by parol testimony. This fact related to the condition of the property which was the subject of the sale, and must have been well known to both the contracting parties. Parol testimony to show it comes within all the decisions, as proper to elucidate the meaning of the language used in the instrument. But the question being propounded to the witness, he answered that there were no such liens. The court held it inadmissible, and ruled it from the jury. This clearly was error.

We are next to consider whether, from all the circumstances attending the parties and the matters about which they were contracting, and from the other parts of the instrument, we can deduce for this clause a reasonable and sensible meaning.

The plaintiff and one of the defendants were partners in the goods. These parties were jointly indebted on account of the purchase by them of these goods. It was in reference to this stock of goods and these debts that the plaintiff and these defendants were contracting. It was provided that the sale was made subject to any indebtedness made by the purchase of the goods. What was subjected to the indebtedness? What was to be the effect of subjecting this (whatever it was) to the indebtedness?

The subject matter of the sale was all of the plaintiff's interest in the property of the partnership. This appears from the instrument itself. The value of that interest does not appear in any part of the paper. But that is a circumstance which, if it can throw light on any clause in the instrument, can be proved by parol, inasmuch as it does not contradict nor vary its terms. The defendants claim that the $909 mentioned in the bill of sale was the only consideration which they paid, or agreed to pay, for the interest of the plaintiff. He claims that the assumption of the indebtedness contracted by the old firm in the purchase by it of the property, formed a large part of the consideration. If the interest sold by the plaintiff to the defendants was, as the former claims, worth $3,000, and this can be proven, it is unreasonable to suppose that he sold it for only $909. If the defendants gave the fair value of the interest for it, what more reasonable than that the difference above $900 was made up by assuming the debts for which the vendor was liable.

Now, in the light of all these circumstan-

[2] [From 3 N. B. R. 87 (Quarto, 22).]

ces, what is meant by "the sale being made subject to the liabilities of the two firms of Jennings & Phelps, and Phelps & Clasen"? Without further verbal criticism, I may say, that if it were necessary in order to sustain the plaintiff's claim, I would hold that it means a promise on the part of the defendants to pay all such debts of the two firms as were created by the purchase of any of the goods conveyed by the bill of sale, and which should be found in account of liabilities taken on the 1st of April, 1867.

But it is not necessary to go quite so far. It is sufficient to interpret the clause to mean, that the defendants take the goods charged in their hands by that contract, with a liability to pay the debts mentioned out of those goods; and that for this appropriation of the proceeds of the goods, as far as was necessary, the defendants are liable to the plaintiff. This, I think, is consistent with all the circumstances of the transaction, and with the language of the contract, and is a fair and reasonable construction of it.

The defendants having disposed of the goods without applying them to this purpose, and having committed the acts of fraud and bankruptcy charged in the petition, so that the plaintiff was compelled to pay those debts, he had a right of action for the amount so paid by him.

These views of the introduction of parol testimony are well sustained, in addition to the authorities already cited, by the note of Prof. Parsons, at page 555, volume 2, 5th edition of his work on Contracts, where he gives a philosophical statement of some of the principles concerning the admissibility of parol testimony to affect written contracts.

The judgment of the district court is therefore reversed, and the case remanded to that court, with directions to set aside the verdict, and grant a new trial in consonance with this opinion.

Judgment reversed, and cause remanded for new trial.

NOTE. As to the proper answer to a rule to show cause why respondent should not be adjudged bankrupt, see In re Sunderland [Case No. 13,639], if petition indefinite; if insufficient in law, In re Melick [Id. 9,399]; In re Gebhardt, [Id. 5,294]. Demand for jury trial must be filed on return day, In re McNaughten [Id. 8,912]; In re Sherry, 8 N. B. R. 142; In re Hawkeye Smelting Co., Id. 385. When need be sworn to, In re Findlay [Case No. 4,789]. The debt of the petitioning creditor need not be due. It is sufficient that it is a debt provable in bankruptcy. Linn v. Smith [Id. 8,375]; In re Ouimette [Id. 10,622]. The debt must exist at the time of filing the petition. Where a petition was founded on a debt due by a minor, and he failed to affirm the debt, previous to filing the petition against him, held, the adjudication was void. In re Derby [Id. 3,815].[3]

PHELPS (COHEN v.). See Case No. 2,964.

[3] [From 3 N. B. R. 87 (Quarto, 22).]

Case No. 11,075.

PHELPS v. COMSTOCK.

[4 McLean, 353;[1] 1 Fish. Pat. Rep. 215.]

Circuit Court, D. Indiana. May Term, 1848.

PATENTS—ASSIGNEE'S RIGHT TO RENEWAL.

1. A mere assignment of a part of a patent gives the assignee no interest in the renewal of the patent

[Cited in Jenkins v. Nicolson Pavement Co., Case No. 7,273.]

2. But, when the assignment is special, conveying clearly the intention to give an interest in the renewal of the patent, the assignee will take an interest in the renewal.

[Cited in Hodge v. Hudson River R. Co., Case No. 6,559; Jenkins v. Nicolson Pavement Co., Id. 7,273.]

In equity.

Zebulon Baird, for plaintiff.
Samuel Judah, for defendant.

OPINION OF THE COURT. This is an action for the infringement of a patent right to Zebulon Parker and Austin Parker, of Ohio, "for an improved percussion and reaction water wheel," which letters patent are dated the 19th of October, 1829. The declaration avers "that before the expiration of the term for which the original patent was granted, to wit, the 4th of October, 1843, it was in due form of law extended for the term of seven years from and after the 19th of October, 1843." This is objected to, as on demurrer, on the ground that the extension, by the 18th section of the act of 1836 [5 Stat. 124], a special mode is provided for the extension of a patent, which must be set out at large in the declaration. That it is a special power which must be strictly conformed to. A board is constituted which is required to give notice to persons interested, etc., and if, on examination, they shall find the patentee is entitled to an extension, they will so determine; and the commissioner of patents is required to extend the patent by making a certificate, which with a certificate of the board as to their judgment and opinion, shall be entered on record in the patent office." Is the general averment of an extension in due form of law sufficient? The proof must show that the requisites of the act have been substantially complied with. And this is covered by the general averment. Such an averment, we think, is sufficient. By a reference to the law, which the averment alleges the patentees in the renewal complied with, the defendant is fully informed of its requisites, and what was done by the patentees.

There is also an objection as to the assignments, which by agreement are submitted to the court. Zebulon Parker and Robert McElroy, as administrator of Austin Parker obtained a patent for an improvement, on the original patent, dated 27th June, 1840 [patent No. 1,658]. On the 3d July, 1841, McElroy,

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

as administrator, assigned to Zebulon Parker all Austin Parker's interest,—"the same to be held and enjoyed by the said Z. Parker, for his own use and behoof, and for the use and behoof of his legal representatives, the terms for which the letters patent are or may be granted for said improvements, as fully and entirely, as the same would have been held and enjoyed by said heirs, had the assignment and sale not been made." On the 22d of February, 1839, Zebulon Parker assigned to George Parker, and to his heirs, the full and exclusive right and privilege of making and using, etc., Z. & A. Parker's patent, etc., for the term of fourteen years, from the 19th October, 1829. And on the 19th of October, 1840, Z. Parker assigned to George Parker "all his right, title, etc., to the patent and improvement, etc., the same to be held and enjoyed by said George Parker, for his own use, etc., the full end of the term or terms for which letters patent are or may be granted for said improvements, as fully and entirely as the same would have been enjoyed by me had this assignment not been made."

In his objection to these assignments, the counsel refers to [Wilson v. Rousseau] 4 How. [45 U. S.] 687, and says, that he understands that the dissenting judges in that case objected to the decision of a majority, and denied that any right to the extension of the monopoly was intended to pass by the legislature, or could pass to the assignee. The dissenting judges in that case held, that as the renewal of the patent, by the law, was exclusively for the benefit of the patentee, and could only be done, where it was made apparent that he had not been compensated for his ingenuity, expense and labor, a general assignment of a part of the right could not give the assignee any interest in the renewal. That such an interest might be assigned, if the terms of the assignment clearly embraced the renewed patent. And, as conclusively showing the correctness of this position, it is proper to say, according to the decision of a majority of the court, if the whole of the patent had been assigned, there could be no renewal, for the benefit of the patentee. The minority considered that a general assignment of an interest in the patent was limited to the term named in the patent, unless the assignment clearly showed that a greater interest was intended to be given.

It is true, as suggested by the counsel, that the assignment of Zebulon to George Parker, made on the 22d of February, 1839, was for fourteen years from the date of the patent. But the assignment made on the 19th of October, 1840, was an assignment for the patent and improvement, etc., to be held, etc., "to the full end of the term or terms for which letters patent are or may be granted for said improvements, as fully and entirely as the same would have been enjoyed by me had this assignment not been made." Here a reference is not only made to the patent which then existed, and "to any one that may be granted," clearly embracing any subsequent renewal of the patent, whether it should be under the statute or by act of congress.

We think the assignments, for the purposes of this suit, are sufficient.

[For other cases involving this patent, see Case v. Redfield, Case No. 2,494, and note to Parker v. Hatfield, Case No. 10,736.]

PHELPS (DAY v.). See Case No. 3,689.

PHELPS v. DUDLEY. See Case No. 11,080.

PHELPS v. FARRINGTON. See Case No. 11,077.

PHELPS (GOODYEAR v.). See Case No. 5,581.

PHELPS (INDIA RUBBER COMB CO. v.). See Case No. 7,025.

Case No. 11,076.

PHELPS v. LEWISTON.

[15 Blatchf. 131.] [1]

Circuit Court, N. D. New York. Aug. 17, 1878.

MUNICIPAL CORPORATIONS—VALIDITY OF BONDS—BONA FIDE PURCHASERS—AFFIDAVIT OF ASSESSORS AS TO CONSENT OF TAXPAYERS—"LAST ASSESSMENT ROLL"—"SITUATE ALONG THE ROUTE"—DEMAND—INTEREST.

1. Bonds issued by the town of Lewiston, in the county of Niagara, in aid of the construction of the Lake Ontario Shore Railroad, under the acts of the legislature of New York, passed May 11th, 1868, and April 19th, 1869 (Laws 1868, c. 811, and Laws 1869, c. 241), *held* valid in the hands of a bona fide purchaser for value, without notice, before maturity.

2. The plaintiff bought the bonds in September, 1874. Certiorari proceedings in the supreme court of New York, respecting the bonds, which took place in 1872 and 1873, *held* not to affect the rights of the plaintiff, for the reasons set forth in the decision of the court of appeals of New York, in People v. Walter, 68 N. Y. 403, respecting such proceedings.

3. Various offers of proof *held* to be irrelevant, when made by the defendant, on the trial of a suit by such plaintiff against said town, to recover the amounts of coupons on said bonds, on the ground that the plaintiff was a bona fide holder of the bonds.

4. Under the 2d section of said act of 1868, as amended by the 2d section of said act of 1869, the affidavit of the assessors in this case was *held* to be conclusive proof that the required consent of tax payers had been obtained before the bonds were issued, as respected the plaintiff, as a bona fide holder of the bonds, for a valuable consideration, without notice.

[Followed in Irwin v. Town of Ontario, 3 Fed. 49, 57.]

5. Such affidavit having been attached to the consent papers when the two were filed together in the office of the county clerk, it was *held*, in view of that fact, and of the contents of the affidavit and of the consents, that the affidavit was sufficient, although it did not state on its face what the consent was to, or for, or about.

[Cited in Smith v. Ontario, Case No. 13,086. Followed in Irwin v. Town of Ontario, 3 Fed. 49, 57.]

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

6. "The last assessment roll," referred to in the statute, is the last assessment roll next preceding the making of such affidavit, and not the last assessment roll next preceding the issuing of the bonds.

7. The town of Lewiston was a town "situate along the route" of said railroad, within the statute.

8. The pendency of writs of certiorari brought to have the determination of the assessors, and the action of the commissioners in pursuance thereof, declared void, is not such notice of the invalidity of the bonds, as to defeat the title of a purchaser of the bonds for value, before maturity, who has no actual notice of the pendency of the writs or of the objection to the bonds.

9. There being no evidence on which the jury could properly proceed to find a verdict for the defendant on the issue as to whether the plaintiff was a bona fide holder of the bonds for value, it was proper not to allow the defendant to go to the jury on that question.

10. The commissioners having power to issue coupons with the bonds, a statement in the bonds that they have caused one of their number to sign the coupons is equivalent to a signing of the coupons by all of them.

11. Payment of coupons on the bonds having been demanded, it is proper to allow interest on them.

12. The statutes under which the bonds were issued are not invalid.

13. Where legislative authority has been given to a municipality or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some condition precedent, and where it may be gathered from the legislative enactment, that the officers of the municipality were invested with power to decide whether the condition precedent had been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality, for, the recital is itself a decision of the fact by the appointed tribunal.

[Cited in Currie v. Town of Lewiston, 15 Fed. 379.]

[This was an action at law by Henry Phelps against the town of Lewiston, brought to recover the interest on certain coupon bonds. There was a verdict in favor of the plaintiff. Heard on a motion for a new trial.]

Starbuck & Sawyer, for plaintiff.

William S. Farnell, for defendant.

BLATCHFORD, Circuit Judge. This is a motion for a new trial. The suit is brought on 18 interest coupons of $35 each, due October 1st, 1874, being for six months' interest on 18 bonds of $1,000 each, issued by the defendant in aid of the Lake Ontario Shore Railroad Company, and on 7 interest coupons of $17.50 each, due the same day, being for six months' interest on 7 bonds of $500 each, of like issue. The amount of the bonds is $21,500, and the amount of these coupons is $752.50. The suit was tried before Judge Johnson, the late circuit judge, and a jury, and resulted in a verdict for the plaintiff, by direction of the court, for $845.40, of which $92.90 was for interest on the amount of the coupons. The defendant moves for a new trial, on a case containing exceptions.

The bonds are all of them of the same form, of which the following is a specimen: "United States of America, Town of Lewiston. No. 28. $1,000. County of Niagara, State of New York. Lake Ontario Shore Railroad Co. Issued by virtue of an act of the legislature of the state of New York, entitled: 'An act to authorize certain towns in the counties of Oswego, Cayuga and Wayne, to issue bonds and take stock in and for the construction of the Lake Ontario Shore Railroad,' passed May 11th, 1868 (chapter 811 of the Laws of 1868), and an act amending the same, passed April 19th, 1869 (chapter 241 of the Laws of 1869). These acts authorize any town, incorporated village or city, except the city of Rochester, in either of the counties of Oswego, Cayuga, Wayne, Monroe, Orleans, or the Second assembly district of Niagara, situate along the route of the Lake Ontario Shore Railroad, to subscribe for the stock of the Lake Ontario Shore Railroad, and to issue town, village or city bonds in payment thereof. Know all men by these presents, that we, the undersigned, commissioners under the above entitled acts, for the town of Lewiston, in the county of Niagara and state of New York, upon the faith and credit and in behalf of said town, for value received, promise to pay to the bearer the sum of one thousand dollars, on the first day of April, in the year one thousand eight hundred and eighty-three, at the American Exchange National Bank in the city of New York, with interest at seven per cent. per annum, payable semi-annually, on the first days of April and October in each year, at the same place, on the presentation and surrender of the coupons for such interest, hereto annexed. In witness whereof, we have hereunto set our hands and seals, and have caused the coupons annexed hereto to be signed by O. P. Scovell, one of our number, this first day of July, in the year one thousand eight hundred and seventy-two. O. P. Scovell, (Seal.) J. E. Ways, (Seal.) Geo. C. Haywood, (Seal.) Commissioners."

The coupons sued on are all of them of the same form, of which the following is a specimen: "$35.00. Town of Lewiston. The American Exchange National Bank of the City of New York will pay the bearer thirty-five dollars on the first day of October, 1874, being semi-annual interest due on bond No. 28. O. P. Scovell, Commissioner."

The act of 1868, as amended by the act of 1869, provides as follows: "Section 1. On the application in writing of twelve or more freeholders, residents in any town, incorporated village or city, except the city of Rochester, in either of the counties of Oswego, Cayuga, Wayne, Monroe, Orleans, or of the Second assembly district of Niagara, situate along the route of the Lake Ontario Shore Railroad, it shall be the duty of the county judge of the county wherein such town, incorporated village or city, is situated, or a justice of the supreme court, at any special term thereof, within ten days after receiving such application, to ap-

point, under his hand and seal, not more than three freeholders, residents of said town, incorporated village or city, to be commissioners for said town, incorporated village or city, to carry into effect the purposes, and provisions of this act, who shall hold their offices respectively for the term of five years, and until others shall be appointed and shall have duly qualified, a majority of whom shall constitute a quorum for the transaction of any business, or the doing of any act or thing, provided for in this act; and every five years thereafter, and as often as a vacancy shall for any cause occur, the said county judge or justice of the supreme court shall appoint a successor or successors for such commissioner or commissioners for said towns, incorporated villages or cities respectively, upon the like application, as hereinbefore provided. Sec. 2. It shall be lawful for said commissioners to borrow, on the faith and credit of their respective towns, incorporated villages and cities aforesaid, such sums of money, not exceeding twenty per cent. of the valuation of said town, incorporated village or city, to be ascertained by the last assessment rolls thereof respectively, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per cent. per annum, and to execute bonds therefor under their hands and seals respectively. The bonds so to be executed may be in such sums, not exceeding the amount set forth in the consent of the tax payers of said incorporations, and payable at such times and places, not exceeding twenty-five years, and in such form, as said commissioners and their successors may deem expedient; but no such debt shall be contracted or bonds issued by said commissioners of or for either of said towns, incorporated villages or cities, until consent, on or before January first, eighteen hundred and seventy-one, in writing, proved by a subscribing witness, who shall swear, in addition to the ordinary form of affidavits of subscribing witnesses, that the party executing informed the witness that he knew the contents thereof, or acknowledged as provided for conveyances of real estate, shall first have been obtained, of persons owning more than one-half of the taxable property assessed and appearing upon the last assessment roll of such town, incorporated village or city, and a majority of the tax payers, as appears by such assessment rolls respectively, and which fact shall be proved by the affidavits of the assessors, or a majority of them, of such towns, incorporated villages, or cities respectively; and, it shall be the duty of the said assessors, and they are hereby authorized, to make such affidavit, when the said consent shall be obtained. Said affidavit and consent, and a copy of the assessment roll, shall be filed in the clerk's office in the respective counties, and certified copies thereof in the town clerk's office of each of the said towns respectively, and the same, or a certified copy thereof, shall be evidence of the facts therein contained and certified, in any court of the state, and before any judge or justice thereof. Sec. 3. The said commissioners, authorized by this act, may, in their discretion, dispose of such bonds, or any part thereof, to such persons or corporations, and upon such terms, as they shall deem most advantageous for their said town, incorporated village or city, but for not less than par; and the money that shall be raised by any loan or sale of bonds shall be invested in the stock of said company of the Lake Ontario Shore Railroad, and said money shall be applied and used in the construction of such railroad, its buildings and necessary appurtenances, and for no other purposes. The commissioners respectively, in the corporate name of each of their said towns, incorporated villages or cities, may subscribe for and purchase stock of such company, to the amount they may severally have borrowed as aforesaid; and, by virtue of said subscription or purchase of stock, and upon receiving certificates, or the transfer of certificates, for the amount of said stock so subscribed for or purchased by them, the said towns, incorporated villages or cities shall acquire all the rights and privileges, and be liable to the same responsibilities, as other stockholders of said company. And it shall be lawful for the commissioners provided for in this act, or either of them, with the consent of the others, or a majority of said commissioners, to participate in and to act in all the regular and legally authorized meetings of the stockholders; and either of them may act as directors of such company, if he shall be duly elected as such." Section 4 of the act of 1868 provides for an annual report by the commissioners to the board of supervisors of the county, of the amount required during the next ensuing year to pay the principal or interest of any of the bonds. It also provides that the dividends on the stock shall be received by the commissioners and be applied by them to pay the interest on the bonds; and that, if the dividends shall not be sufficient to pay any accruing principal and interest, the board of supervisors shall assess, levy and collect, as a tax, from the real and personal property, the sum reported by the commissioners to be necessary to make good the deficiency; and it shall, when collected, be paid to the commissioners and applied by them to pay the principal and interest of the bonds. The fifth section contains provisions for disposing of the stock. The sixth and seventh sections contain provisions in regard to paying the principal and interest of the bonds. Sections 8 to 11 relate to the official bonds of the commissioners and vacancies and compensation. Section 12 relates to proceedings by the railroad company to obtain compulsorily title to real estate. Section 13 provides as follows: "Sec. 13. No portion of the bonds issued by any town, incorporated village, or the moneys arising therefrom, shall be paid, laid out or expended in any other town than that by which such bonds shall be issued, or in which such incorporated village is situated, until at least ten thousand dollars per mile,

upon an average, shall have been paid or expended upon the grading or construction of each mile of said road lying within such town, unless said road shall be graded and made ready for laying the rails thereon, through such town, at a less cost than ten thousand dollars per mile. This section shall not apply to any town through which said road shall not run."

The first and second sections of the act of 1869 amend, respectively, the first and second sections of the act of 1868, so as to read as before recited. Section 3 of the act of 1869 provides that "all proceedings heretofore taken in the organization of this company, and in filing their articles of association, shall be deemed legal and valid * * * for the purposes of the organization of this corporation." Section 4 provides that "the commissioners of any town, village or city may issue their bonds directly to the directors of said Lake Ontario Shore Railroad Company, at not less than their par value, and receive, in exchange therefor, the stock of said company at not more than par."

The articles of association of the Lake Ontario Shore Railroad Company were filed in the office of the secretary of state of the state of New York, in March, 1868. They set forth, that the corporation is created "for the purpose of constructing, maintaining and operating a railroad for public use, in the conveyance of persons and property from the city of Oswego, in the county of Oswego, to the village of Lewiston, in the county of Niagara;" and that "the line of railroad contemplated, and herein provided for, shall be constructed with all proper turnouts, sidings and branches, from the city of Oswego, through the counties of Oswego, Cayuga, Wayne, Monroe, Orleans and Niagara."

From the proceedings put in evidence on the trial, it appears, that the three commissioners by whom the bonds were issued were duly appointed such by the county judge of Niagara county. The proceedings were originally instituted in June, 1870. The consents of the taxpayers put in evidence are headed thus: "Consents of taxpayers of the town of Lewiston in the county of Niagara, that said town may issue bonds and take stock in and for the construction of the Lake Ontario Shore Railroad." The consents consist of nine separate papers. Eight of them are alike in form. They are all signed by different persons. The form of the eight is this: "The undersigned, taxpayers of the town of Lewiston, in the Second assembly district in the county of Niagara, state of New York, hereby consent in writing, that the railroad commissioners appointed for said town of Lewiston, in pursuance of the provisions of an act entitled 'An act to authorize certain towns in the counties of Oswego, Cayuga and Wayne to issue bonds and take stock in and for the construction of the Lake Ontario Shore Railroad,' passed May 11th, 1868, and the act amendatory thereof, passed April 19th, 1869, chapter 241, Laws of 1869, may borrow, on the faith and credit of the town of Lewiston in said county, the sum of one hundred and fifty-two thousand dollars, that being an amount not exceeding twenty per cent. of the valuation of said town of Lewiston, as shown by the last assessment roll of said town, and may issue bonds therefor, under their hands and seals, in the manner provided in said act and the act amendatory thereof, may subscribe for and take stock in and for the construction of the Lake Ontario Shore Railroad, for the amount above named." The form of the ninth paper is this: "We * * * owners of real estate in the town of Lewiston, county of Niagara and state of New York, do, by these presents, consent to the issue of the bonds by the commissioner or commissioners of the said town of Lewiston, for the Lake Ontario Shore Railroad, under chapter 811 of the Laws of 1868, as amended by chapter 241 of the Laws of 1869, of the state of New York, passed April 19th, 1869." These consents were perfected in March, May, July and August, 1870. They were all in writing and were proved or acknowledged as required by the statute. An affidavit of the assessors of the town of Lewiston was then made and attached to them, in this form: "State of New York, Niagara County, ss.: George C. Hayward and Alexander Lane, being duly sworn, each for himself says, that they are a majority of the assessors of the town of Lewiston, in said county, and that the consent in writing has been obtained of persons owning more than one-half of the taxable property of said town, assessed and appearing upon the last assessment roll of said town, and a majority of the taxpayers, as appears by said assessment roll, which consent has been proved and acknowledged according to the provisions of an act entitled 'An act to authorize certain towns in the counties of Oswego, Cayuga and Wayne to issue bonds and to take stock in and for the construction of the Lake Ontario Shore Railroad,' passed May 11th, 1868, and the act amendatory thereof, passed April 19th, 1869, chapter 241 of the Laws of 1869; that the commissioners of the town of Lewiston, appointed to carry into effect the provisions of said act and the act amendatory thereof, are now authorized by the terms of said act and the act amendatory thereof, to borrow, on the faith and credit of the said town of Lewiston, the sum of ($152,000) one hundred and fifty-two thousand dollars; and these deponents further say, and each for himself says, that the said sum of one hundred and fifty-two thousand dollars does not exceed in amount twenty per cent. of the taxable property assessed and appearing upon the last assessment roll of said town; and these deponents further say, and each for himself says, that they are a majority

of all of the assessors of the said town of Lewiston, and that they have now met together as a board of assessors, to perform the duty required of them in and by said act and the act amendatory thereof. George C. Hayward, Alexander Lane, Assessors of the Town of Lewiston. Subscribed and sworn to before me, at Lewiston, this 24th of August, 1870. S. B. Piper, Notary Public in and for Niagara County." Said affidavit and the consents and the proofs and acknowledgments, attached together, were, with a copy of the assessment roll of the town made on the 30th of September, 1869, filed in the office of the clerk of Niagara county, on the 10th of September, 1870. A certified copy of all said papers was filed in the office of the town clerk of the town of Lewiston.

On the 17th of March, 1871, an act was passed (chapter 127 of the Laws of New York of 1871), entitled "An act to facilitate the construction of the Lake Ontario Shore Railroad, and to amend the several acts in relation thereto." Section 1 gives the railroad company time until January 1st, 1874, for complying with section 2 of the act of April 19th, 1869, and to obtain the consent in writing of taxpayers. Section 2 of the act of 1871 provides as follows: "Sec. 2. No consent of taxpayers of any town, city or village, given or obtained under or by virtue of the several acts passed authorizing the issuing of bonds to aid in the construction of the Lake Ontario Shore Railroad, in writing, nor the bonds issued or to be issued upon the faith of said consent, shall be invalidated or held void, or in any manner affected, by reason of any informal, clerical or other defect, irregularity or omission, in the proofs or acknowledgments of such consents, or in the affidavits required to be made by any assessors, town or county clerk, or other person or body, or in the filing or recording in any town or county clerk's office, provided that a majority of the taxpayers of any such town or city, owning or representing a majority of the taxable property of said town or city, assessed to them, and appearing upon the assessment roll of such town or city, shall have actually executed or signed such consent, and provided that such defect, irregularity or omission is merely technical; and none of the provisions of this act, except sections one and seven, shall apply to towns where the consents were not completed prior to January first, eighteen hundred and seventy-one, pursuant to chapter eight hundred and eleven of the Laws of eighteen hundred and sixty-eight, as amended by section two of chapter two hundred and forty-one of the Laws of eighteen hundred and sixty-nine, but shall be applicable to any town, city or village giving its consent to bond after the passage of this act." Sections 3 and 4 validate conditional consents and conditional subscriptions to stock. Sections 5 and 6 are immaterial. Section 7 provides, that the terms "taxpayers" and "person owning," used in section 2 of the act of April 19th, 1869, "shall be construed and shall mean, all persons owning or representing, as president, trustee or as agent duly authorized for that purpose, including owners of non-resident lands, more than one-half of the taxable property of said town or city, assessed and appearing upon the assessment roll therein referred to."

On the 18th of October, 1871, the three commissioners met together and executed their official bond and took the oaths of office and signed a subscription for $152,000 of the stock of the railroad company. The commissioners, on the 8th of May, 1872, signed $152,000 of bonds. By direction of the commissioners the coupons were signed by Scovell, one of the commissioners. On the 5th of June, 1872, two of the commissioners delivered the bonds to the railroad company, and received in exchange for them a certificate for 1,520 shares of the capital stock of the company, of the par value of $100 each, dated June 5th, 1872. The certificate is in the name of the town of Lewiston, and the town has never offered to surrender it. The commissioners attended meetings of the directors of the company, and voted on the stock on behalf of the town. The company provided for the interest which fell due October 1st, 1872, on the bonds. On a report made by the commissioners to the board of supervisors, the sum of $10,640 was assessed, levied and collected on the real and personal estate of the town of Lewiston, to pay the interest on the bonds falling due April 1st, 1873, and October 1st, 1873, and was paid over to the commissioners by the county treasurer. The interest due April 1st, 1873, was paid by the commissioners out of those moneys, and the coupons so paid (except two) were delivered by the commissioners to the auditors of the town.

The $152,000 of bonds were delivered by the company to the firm of George B. Phelps & Co., contractors, who had contracted to build the road from Oswego to Lewiston. The firm was composed of George B. Phelps, Willis Phelps and Daniel D. Warren. In a division of the bonds, the $21,500 of bonds involved in this suit were taken by George B. Phelps. In September, 1874, George B. Phelps sold the $21,500 of bonds to the plaintiff, in exchange for $20,000 of the stock of the Addison (Vermont) Railroad Company. The plaintiff purchased the bonds in good faith, and without notice of any infirmity in regard to them, and under circumstances which made him a bona fide holder of them for a valuable consideration, without notice.

On the 16th of April, 1872, a writ of certiorari was issued, by the supreme court of New York, to the two surviving assessors of the three assessors who made the affidavit of August 24th, 1870, to review the determination set forth in said affidavit. This

writ was served on the two surviving assessors on the 16th of April, 1872, and, on the same day, a copy of it was served on the three commissioners, with a notice to them that it had been issued and served, and that all proceedings under and in pursuance of the affidavit of the assessors were stayed, as a matter of law. This writ was set aside June 20th, 1872. While a motion to set it aside was pending, and, on the 13th of May, 1872, a writ of certiorari was issued, by the supreme court of New York, to the clerk of Niagara county, commanding him to certify the proceedings on file in his office relating to the matter. This writ was served on the clerk May 23d, 1872. On the 4th of February, 1873, a writ of certiorari was issued by the supreme court of New York, to the three commissioners, commanding them to certify what was their authority to act as such, and what they had done in subscribing for stock, and in signing and issuing bonds, and in reporting to the board of supervisors in respect to a levy to pay principal or interest of the bonds, and in respect to receiving the amount of tax levied, and what they had done with the same. This writ was served on one of the commissioners on the 4th of February, 1873, and on the other two on the 6th of March, 1873. A writ of certiorari to the two surviving assessors, to review the determination of the assessors, contained in their said affidavit, was issued by the supreme court of New York, on the 28th of August, 1873, and was served on each of them within ten days afterwards. To the writ of May 13th, 1872, addressed to the clerk of Niagara county, he made return, certifying the papers on file in his office, relating to the bonding of the town of Lewiston. To the writ of February 4th, 1873, addressed to the commissioners, they made a return, setting forth their doings, and afterwards a further return. To the writ of August 28th, 1873, addressed to the assessors, they made a return, and afterwards a further return. There was a hearing before the supreme court on the three writs of May 13th, 1872, February 4th, 1873, and August 28th, 1873, and the returns thereto, considered as one proceeding, and, on the 23d of October, 1874, the supreme court vacated the proceedings, determination, affidavit and adjudication of the assessors of August 24th, 1870, and the appointment of, and all the acts, doings and proceedings of, the commissioners. On appeal to the court of appeals, that court (People v. Walter, 68 N. Y. 403) reversed the judgment below, so far as it affected the commissioners, and dismissed the appeal as to the assessors. The court say: "The bonds of the several towns interested had been issued and delivered in exchange for the stock of the railroad corporation many months before the initiation of these proceedings, so far as they affect the assessors, a former writ of certiorari having been quashed, and at least one instalment of interest had been levied upon the towns, and paid to the holders of the bonds. These bonds cannot be recalled and restitution made, or the parties restored to their former condition, by any judgment or order in these proceedings, and neither the towns nor the bondholders will be bound or estopped by the judgments of this or any other court in these proceedings. A judgment of any court, whatever its jurisdiction, is only evidence against parties to the record, or those in privity with them. The records would not be competent evidence in an action upon the bonds; and, if our judgment should be adverse to the validity of the proceedings under the statutes authorizing the issue of bonds, the bondholders might laugh at our decision, knowing that it could not affect them; and, if we should affirm the action of the assessors, the town authorities might snap their fingers, and, in an action upon the bonds, make every defence which legal skill should suggest, without the slightest impediment from our opinions or judgments." As to the judgment vacating the appointment of the commissioners, the court held that the supreme court had no jurisdiction to review, by certiorari, the title of the commissioners to office. As to the judgment of the supreme court, so far as it professed to annul the action of the commissioners in subscribing for the stock of the railroad corporation, and issuing the bonds of the town therefor, the court of appeals held that the judgment was a nullity, because it purported to set aside and avoid the contracts and dealings of the commissioners and the railroad company, and to nullify the bonds of the town, without the presence of the town or the railroad corporation as parties to the proceedings, and to annul securities issued to third persons, who had not been heard or had a day in court. It also held, that the action of the commissioners, being purely ministerial, and not calling for the exercise of judicial discretion and determination, could not be reviewed by certiorari. As to the assessors, it held that their action could have been inquired into by certiorari, if the writ had been brought before their action had been consummated, and put beyond their recall or the powers of the court, and had been directed to them, and had not been vitiated by being united with other writs in the same proceeding, directed to other officers. It held, that the supreme court ought to have dismissed the certiorari as to the assessors; but that, inasmuch as any judgment which the court of appeals might render could have no practical effect in determining any pending litigation, or any controversy that might arise in the future, and as no harm could arise from permitting the formal judgment of the supreme court to stand, as to the assessors, it would dismiss the appeal as to them.

At the trial of the present suit, the defendant offered in evidence a copy of the writ of certiorari of April 16th, 1872, and proof of

the service thereof on the assessors and on the commissioners; also a copy of the writ of certiorari of May 13th, 1872, and proof of the service thereof on the county clerk; also a copy of the writ of certiorari of February 4th, 1873, and proof of the service thereof on the commissioners; also a copy of the writ of certiorari of August 28th, 1873, and proof of the service thereof on the assessors; also a copy of the judgment roll forming the judgment of the supreme court, of October 23d, 1874. All of these papers were excluded by the court, on objection by the plaintiff, as being irrelevant. It is entirely clear that none of those papers are competent evidence to affect the rights of the plaintiff in this suit. The reasons for such view cannot be set forth in more convincing language than that before cited from the opinion of the court of appeals of New York.

The defendant offered, also, in evidence, the following matters, all of which were excluded by the court as irrelevant: Proof of service on the commissioners, in August, 1872, of notice of hearing in the matter of the certiorari to the clerk, of May 13th, 1872; proof of the appearance of the commissioners by an attorney, in said matter, in September, 1872; proof of the service of like notice of hearing, in August, 1872, on the attorney for the railroad company, and on the attorney for said Daniel D. Warren; proof that a suit was brought in the supreme court of New York, by certain tax payers of the town of Lewiston, against the three commissioners, the railroad company, the said George B. Phelps, Willis Phelps and Daniel D. Warren, and also Henry W. Phelps and J. W. Phelps, the object of which suit was to restrain the defendants from issuing, transferring or negotiating the bonds of the town, and to have the bonds delivered up to be cancelled; that process in said action was served on the three commissioners on the 14th of June, 1872, and on Warren and the company on the 17th of June, 1872; that with the process an injunction order was served on Warren and on the company; that Warren and the company appeared in said action on the 21st of June, 1872, and put in a demurrer to the complaint, and on the same day the commissioners appeared and put in an answer; that the action was still undisposed of on said answer; that the demurrer was not disposed of until 1873, and an appeal was taken by the plaintiffs from the judgment rendered thereon, and not disposed of until January, 1875; proof of the service on the board of supervisors of Niagara county, and on the supervisor of the town of Lewiston, in November, 1872, of notice of the issuing of the certiorari to the county clerk, of May 13th, 1872, and of notice that the determination of the assessors was void, and that the bonds were void, and that no tax could be legally imposed to pay the principal or interest of the bonds, and that all proceedings were legally stayed until the final determination of the proceedings under said writ; proof of the service on the said board of supervisors, in October, 1873, of notice of the issuing of the writs of certiorari which had then been issued, and that all proceedings to levy moneys for the principal or interest of the bonds were stayed as a matter of law, and that the board was restrained from proceeding until a decision on the writs, and that, if they should proceed, they would be punished for a contempt, and that the commissioners, on October 7th, 1873, had moved the supreme court for leave to pay the interest on the bonds whenever it should become due, and the motion had been denied; proof that the commissioners had moved the supreme court for leave to pay the coupons on the bonds involved in this suit, with others, and that the motion had been denied on October 7th, 1873; proof that an order had been made by the supreme court, January 27th, 1873, enjoining the commissioners from paying out any money as principal or interest on the bonds, until the decision of a motion then pending for a writ of certiorari to be issued to the commissioners; proof that an order had been made by the supreme court, in the certiorari proceedings, in November, 1873, adjudging the commissioners guilty of contempt, in having delivered to the board of supervisors, on the 28th of October, 1873, their report requiring said board to collect from the taxpayers of the town $10,640, to pay the interest for the coming year on the bonds, such delivery having been made after the issuing of the writ of February 4th, 1873, and in disregard of the stay of proceedings imposed thereby, and adjudging that they should be imprisoned until they should withdraw their report, unless they should, within six days, and before any proceedings had been taken thereon by the board of supervisors, withdraw their report, and that they should pay a fine of ten dollars; proof that an order had been made by the supreme court, on the 24th of November, 1873, directing the commissioners to deposit in a bank, within thirty days, to the credit of the certiorari proceedings, to be payable on the order of said court, all moneys in their hands which they received to pay the principal or interest of the bonds; proof that the commissioners, before paying the coupons which they had paid, knew that the writ to the county clerk had been issued and served on him, and had appeared by counsel in that proceeding, and that, before any of the coupons were paid, the attorneys for the commissioners had been served with notice that the writ of February 4th, 1873, would be applied for, and that such notice was read by the commissioners before they had received any money for the town, and before they had paid any money on the coupons; proof that the commissioners paid some coupons before they were due, and that George B. Phelps & Co. were then the owners of the greater part of the bonds to which

the coupons so paid belonged; proof that such coupons were paid before due, at the instigation of one of the commissioners and of the vice-president of the railroad company, and that they knew that writs of certiorari had been served with a view to test the validity of the proceedings to bond the town; proof that, when the assessors met as a board, to ascertain whether consents had been obtained to the issuing of bonds and taking stock in the company, they did not, in making their estimate, take the dog-tax payers into account, and that they counted the taxpayers in the village and town indiscriminately, and estimated the number and property indiscriminately; proof that the commissioners agreed between themselves that the bonds should not be turned over to the company until they should have some indemnity that the suits pending should be settled, and that the road should be built; proof that, at a meeting of the commissioners in January, 1873, the treasurer of the railroad company proposed to discount the interest coupons falling due in April, 1873, and that it was resolved by the commissioners to accept the proposition, provided the company would refund the money to the town in case an injunction should be obtained; proof that, from an examination of the assessment roll and bonding roll of the town, consent had not been obtained of persons owning more than one-half of the taxable property assessed and appearing upon the assessment roll of said town for the year 1869, and of a majority of the taxpayers appearing upon said assessment roll; proof that a map, as a correct map of the proposed location intended to be adopted by the company for their railroad, from the county line of Orleans county, in and through Niagara county, was filed in the office of the clerk of Niagara county on the 10th of October, 1872, and not before, with a certificate endorsed thereon, made by the president, a majority of the directors, and the chief engineer of the company, to the above effect, and further certifying that the railroad was located according to the red line delineated on said map; proof, as a matter of fact, aside from said map, that the road was not located in Niagara county before the bonds were issued; proof of the following matters of fact: (1) That there was no map, showing the location of the railroad, filed in the office of the clerk of Niagara county till the 10th of October, 1872, as required by the statute; (2) that the route on which the road was in fact located was not surveyed or in any manner designated until after the bonds were issued, and not until July and August, 1872; (3) that there are on the assessment roll of the town for the year 1869, 409 names of taxpayers, aside from the names of persons who paid only a dog tax; (4) that only 193 of the persons named on said assessment roll appear upon the consent papers, as consenting to the bonding of the town; (5) that the assessors, in determining the number of persons whose names are on the assessment roll, did not count the persons who appeared on said roll as paying a dog tax only; (6) that there were 57 persons whose names appear on the assessment roll as paying only a dog tax, and which do not otherwise appear on said roll; (7) that the total amount of property which appears upon said assessment roll, as assessed for that year, is $746,395; (8) that the persons whose names appear upon said assessment roll, and who have signed the consent papers, are assessed upon said roll for only the total sum of $216,908; (9) that the railroad was not located until after the issuing of the bonds by the commissioners, and not until after the commissioners were appointed; (10) that consent in writing had not been obtained to the contracting of a debt by, or issuing of bonds of, the town, in aid of the railroad company, or for the purpose of taking stock in the company, of a majority of the tax payers, as appears by the assessment roll of the town for the year 1869; (11) that consent in writing had not been obtained of persons owning more than one-half of the taxable property assessed and appearing upon the assessment roll of the town for the year 1869, to the contracting of a debt or issuing bonds of the town, and taking stock in and for the construction of the railroad.

These offers of proof on the part of the defendant were undoubtedly overruled by the court on the ground that the plaintiff had shown himself to be a bona fide holder of the bonds in question, as the record shows that the court, in connection with the offer in evidence of the writ to the assessors, of April 16th, 1872, held that the plaintiff was a bona fide holder of said bonds.

At the close of the evidence, the defendant requested the court to charge the jury, that, from the evidence in the case, the plaintiff was not a bona fide holder for value of the bonds in question, but the court refused so to charge. The defendant's counsel then claimed that there was sufficient evidence in the case tending to show that the plaintiff was not a bona fide holder for value of the bonds, to entitle the defendant to have that question submitted to the jury, and asked leave of the court to address the jury on that question. The court refused to submit the question to the jury or allow the counsel to address the jury, and decided that the plaintiff was a bona fide holder for value, of the bonds. Then followed the verdict, under the direction of the court.

The defendant, at the trial, took an objection to the affidavit of the assessors, on the ground that it does not recite the facts required by the statute to authorize the commissioners to subscribe for stock or to issue bonds for the town; that it merely recites that certain persons have consented; that it does not state what they have consented to, nor does it purport to recite that the road is

or was located in the town, or that consents were obtained to bond the town; that the affidavit does not relate to the Lake Ontario Shore Railroad; that the commissioners had no authority to act under it; and that it does not appear, in whole or in part, to be in conformity to the requirements of the statute. The objection was overruled.

At the close of the plaintiff's evidence the defendant moved for a nonsuit on these grounds: (1) That the plaintiff had failed to make out a cause of action; (2) that it is incumbent on the plaintiff to prove that the road was located before the bonds were issued; (3) that the plaintiff must prove the fact that the town was situated along the route of the railroad, before the commissioners were authorized to issue its bonds; (4) that the fact that the road terminates in the village of Lewiston, which is an incorporated village, does not prove that the town is so situated; (5) that there is no evidence which shows that the assessors of the town were authorized to make their affidavit authorizing the commissioners to bond the town; (6) that there is no evidence showing that the county judge had authority to appoint the bonding commissioners at the time they were appointed; (7) that there is no evidence showing that the commissioners were authorized to make a contract for the bonding of the town, or to sign or issue the bonds of the town.

It must be regarded now as settled law for this court, by the decisions of the supreme court of the United States, that, where legislative authority has been given to a municipality or to its officers, to subscribe for the stock of a railroad company and to issue municipal bonds in payment, but only on some precedent condition, and where it may be gathered from the legislative enactment, that the officers of the municipality were invested with power to decide whether the condition precedent had been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality; for, the recital is itself a decision of the fact by the appointed tribunal. The foregoing is the statement of the doctrine by Mr. Justice Strong, for five judges of the court, in Town of Coloma v. Eaves, 92 U. S. 484. In the same case Mr. Justice Bradley, concurring, stated the rule thus: "If, when the law requires a vote of tax payers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute, the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the bona fide purchaser of the bonds need go back no further. He has a right to rely on the statement, as a determination of the question." The rule, as stated by Mr. Justice Strong, in Town of Coloma v. Eaves [supra], is re-asserted by the court, in the same language, in Marcy v. Township of Oswego, 92 U. S. 637, and in Commissioners v. Bolles, 94 U. S. 104. It was recognized and applied in Commissioners v. January, Id. 202. In Commissioners v. Clark, Id., 278, the rule is stated thus by Mr. Justice Clifford, for the court: "Bonds of the kind, executed by a municipal corporation, to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, and, if purchased for value, in the usual course of business, before they are due, give the holder a good title, free of prior equities between antecedent parties, to the same extent as in case of bills of exchange and promissory notes. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications; but, if it appears that the bonds issued show, by their recitals, that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity to the prescribed regulations and pursuant to the required conditions and qualifications, proof that any or all of the recitals are incorrect will not constitute a defence to the corporation, in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds, to decide whether or not there had been an antecedent compliance with the regulations, conditions or qualifications which it is alleged were not fulfilled." The same doctrine is re-asserted by the same court in the recent case of County of Warren v. Marcy, 97 U. S. 96.

But the supreme court has gone further. In Knox Co. v. Aspinwall, 21 How. [62 U. S.] 544, one of the grounds on which the decision rested was, that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look farther, for evidence of such compliance, though the recital did not affirm it. In Town of Coloma v. Eaves, it is said, by five judges, that the position so taken in Knox Co. v. Aspinwall [supra] was re-affirmed by the court in Moran v. Miami Co., 2 Black [67 U. S.] 732, in Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83, in Mayor v. Muscatine, Id., 384, and in Supervisors v. Schenck, 5 Wall. [72 U. S.] 784, and has never been overruled. In Town of Coloma v. Eaves, Mr. Justice Bradley dissented from the opinion of the court so far as it might be construed to re-affirm the points thus asserted in Knox Co. v. Aspinwall.

In the present case, the bonds state on their face that they are issued by virtue of the acts of the legislature which the bonds particularly refer to by title, date of pas-

sage, chapter and year, and that those acts authorize any town in the second assembly district of Niagara county, situate along the route of the Lake Ontario Shore Railroad, to subscribe for the stock of that railroad and to issue town bonds in payment therefor, and that the commissioners under said acts for the town of Lewiston, in the county of Niagara, and state of New York, upon the faith and credit, and in behalf, of said town, promise to pay, &c. The statute provides, that no bonds shall be issued by the commissioners until the consent specified shall have been obtained in writing. The bonds do not state that the consent is a condition precedent to the issue of the bonds, nor do they state that the consent required by the acts has been obtained. It is quite clear that the rule laid down in Town of Coloma v. Eaves, and like cases, as applicable where the bonds state that the condition precedent prescribed by the statute has been complied with, is not applicable to the present case. The rule laid down in Knox Co. v. Aspinwall, as applicable where the bonds recite that they were issued under and in pursuance of the statute, may apply to this case, in view of the recital in these bonds that they are issued by virtue of the statutes named. But there is a stronger ground for upholding the correctness of the rulings at the trial. The second section of the act of 1868, as amended by the second section of the act of 1869, provides, that the fact that the prescribed consent in writing of taxpayers, proved or acknowledged as provided, has first been obtained, shall be proved by the affidavits of the assessors, or a majority of them, of the town; that it shall be the duty of the assessors to make the affidavit when the consent shall be obtained; that the affidavit and consent, and a copy of the assessment roll, shall be filed in the county clerk's office, and a certified copy thereof in the town clerk's office; and that the same, or a certified copy thereof, shall be evidence of the facts therein contained and certified, in any court of the state. As the commissioners are to issue the bonds, the meaning of the statute is, that the affidavits of the assessors, or a majority of them, that the prescribed consent in writing, proved or acknowledged as provided, has been obtained, shall be proof to the commissioners of such fact, so as to authorize the issuing of the bonds, without its being necessary for the commissioners to examine the question further; and that the affidavit, or a certified copy of it, as filed, shall be evidence of such fact in any court of the state. Under this provision, such an affidavit of the assessors must be held to be proof of such fact, sufficient to protect a bona fide holder of the bonds, for a valuable consideration, without notice, without its being necessary for him to examine farther into the question as to whether the condition precedent has been complied with. Undoubtedly, there must be statute authority for the issue of the bonds, and the provisions of the statute must be followed. A purchaser of the bonds, even though a bona fide purchaser, is referred by the bonds themselves to the terms of the statute. He there finds it enacted, that the bonds may be issued by the commissioners, if the consent in writing, proved or acknowledged as provided, of taxpayers of the town, to a specified number and amount, is first obtained, and that the affidavit of the assessors to that fact shall be proof of that fact for the action of the commissioners. Although the authority of the commissioners to issue the bonds is made dependent on the condition that the required consent of taxpayers shall be first obtained, yet it is equally clear that the commissioners, who are to issue the bonds, are to ascertain and determine, before issuing the bonds, that the required consent has been obtained, by receiving, as proof thereof, the affidavit of the assessors to the fact. The duty of ascertaining whether the required consent has been obtained is plainly vested by the statute in the commissioners, and the form and nature of the evidence they are to act on, as evidence of the fact, are prescribed. The fact of the issue of the bonds shows that they ascertained and determined that the condition precedent had been complied with; and, although the bonds do not, on their faces, refer in terms to the necessity or the fact of the consent, no bona fide purchaser of the bonds can be required to go back farther than the affidavit to which the statute refers the commissioners as proof. It was made the duty of the commissioners to determine, on specified evidence, whether the statutory prerequisite to an authorized issue of the bonds had been complied with, and it was also made their duty to issue the bonds in the event of such compliance. The case, in these respects, is within the principles laid down in Town of Coloma v. Eaves, 92 U. S. 484.

But, it is contended that the affidavit of the assessors is defective. The affidavit is shown by the evidence to have been attached to the consent papers, when the two were filed together in the county clerk's office. The affidavit states, that "the consent in writing has been obtained," of persons owning, &c., "which consent has been proved and acknowledged according to the provisions" of the two acts, specifying them definitely. It does not state otherwise what the consent is to, or for, or about. But, in view of the attachment of the consents to the affidavit, and of the contents of the affidavit, and of the contents of the consents, it must be held that the "consent" referred to in the affidavit is sufficiently designated therein as being the consent referred to in the statute and the consent specified in the consent papers.

It is further objected, that the statute requires that the assessment roll to be taken shall be "the last assessment roll," and that

the last assessment before the bonds were issued was the assessment roll of 1871. The assessment roll taken was the assessment roll of 1869. This was the last assessment roll in existence next preceding the 24th of August, 1870, when the affidavit of the assessors was made, and was the proper assessment roll.

It is further objected, that the route of the railroad had not been located when the commissioners were appointed, or when the bonds were issued; that there was no legal "route" of the road through Niagara county, until the map was filed in October, 1872; that, until then, it could not be said that the town of Lewiston was "situate along the route" of the road; and that, therefore, the commissioners were not legally appointed, and the bonds were not legally issued. The statute authorizes commissioners to be appointed for any town in the Second assembly district of Niagara county, which is "situate along the route of the Lake Ontario Shore Railroad." The 3d section of the act of 1868 expressly authorizes the investment of the proceeds of the bonds to be issued, in "the stock of the said company of the Lake Ontario Shore Railroad." The 12th section of the act refers to "the Lake Ontario Shore Railroad Company," as an existing corporation, formed under the general act of April 2d, 1850, and as having articles of association. The articles of association, which are in evidence, were filed March 17th, 1868. They are the articles of association referred to in the act of May 11th, 1868. They purport to be made under the general act of April 2d, 1850. They give the name of the corporation as the "Lake Ontario Shore Railroad Company," and state that the railroad for public use which the company is to construct, is to extend "from the city of Oswego, in the county of Oswego, to the village of Lewiston, in the county of Niagara," and is to run "through the counties of Oswego, Cayuga, Wayne, Monroe, Orleans and Niagara." It is shown, by the evidence, that the village of Lewiston is an incorporated village, in the town of Lewiston; that the town of Lewiston is in the Second assembly district of Niagara county, and one of the most westerly towns in the county, and situated on the Niagara river; and that the road ran through the town to the village. The court will take judicial notice of the geographical fact, that it is impossible to proceed from the county of Orleans, through the county of Niagara, to the village of Lewiston, without passing through the town of Lewiston. The town of Lewiston was, therefore, necessarily, a town "along the route" of the railroad. The proceedings for the appointment of the commissioners seem to be entirely regular, and not open to criticism.

It is further objected, that, when the bonds were delivered, on the 5th of June, 1872, the writ of certiorari to the assessors, issued April 16th, 1872, and served on the assessors and on the commissioners on the same day, was in force, it not having been set aside until June 20th, 1872; that the writ of certiorari to the county clerk, issued May 13th, 1872, and served on him May 23d, 1872, was also in force on the 5th of June, 1872; that the pendency of those writs superseded the authority of the commissioners to issue the bonds; and that, if the plaintiff had, before purchasing, examined, as he ought to have done, the records in the office of the clerk of Niagara county, he would have learned those facts. The question then arises, whether the pendency of the writs of certiorari, brought to have the determination of the assessors, and the action of the commissioners in pursuance thereof, declared void, is such notice to all persons of the invalidity of the bonds, as to defeat the title of a purchaser of the bonds for value, before maturity, who had no actual notice of the pendency of the writs, or of the objection to the bonds. The plaintiff, when he purchased the bonds, had no information that there was any question as to the regularity of the issuing of the bonds, or as to their validity. He bought them for value, before maturity. The question involved has recently been passed upon by the supreme court of the United States, in the case, before cited, of County of Warren v. Marcy, 97 U. S. 96. In that case, a suit was brought by a taxpayer, in July, 1870, to set aside, and declare void, the bonding proceedings, and prevent the issue of the bonds. While the suit was pending, the bonds were issued and delivered to the railroad company, in payment of a subscription by the county to its stock. Subsequently the suit was decided in favor of the plaintiff. After that some coupons belonging to the bonds were purchased for value before maturity, by a person who had no actual notice of the alleged invalidity of the bonds, or of any suit in relation to them. The supreme court held, that the coupons were valid in the hands of the purchaser; that, while it is a general rule, that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereof, and purchase it at their peril from any of the parties to the suit, yet that such rule does not apply to negotiable securities purchased before maturity; and that it is immaterial whether the negotiable securities are issued before the bringing of the suit or afterwards. The court say: "This very question was involved in the case of City of Lexington v. Butler, 14 Wall. [81 U. S.] 283. In that case, irregularities had occurred in the preliminary proceedings, and the city authorities refused to issue the bonds. A mandamus was applied for by the railroad company, for whose use the bonds were intended, and a judgment of mandamus was rendered, to compel the city to issue them, and it issued them accordingly. Subsequently this judgment was reversed by the court of appeals of Kentucky, and an injunction was obtained to prevent the railroad company from parting with the bonds. The injunction

was not obeyed. The bonds were negotiated whilst proceedings were still pending, and were purchased by the plaintiff, for value, before maturity, without any knowledge of these circumstances. The court held, that the bonds were valid in his hands." The principle thus decided applies to the present case, even though the bonds were issued in violation of any stay or injunction effected by the issuing and pendency of the writs of certiorari. The honesty and good faith of the plaintiff are not impeached. Under such circumstances, he was not bound to search the records of the town or county for notice of the pendency of litigations. Murray v. Lardner, 2 Wall. [69 U. S.] 110.

Even if the plaintiff in this suit is the person made a defendant by the name of Henry W. Phelps, in the suit brought in June, 1872, his rights cannot be affected by that fact, for it is not shown that he ever heard of that suit before he purchased the bonds. No service on the plaintiff of any notice of the judgment rendered in October, 1874, can affect his rights, for he purchased the bonds in September, 1874.

There was not sufficient evidence to entitle the defendant to go to the jury on the question as to whether the plaintiff was a bona fide holder of the bonds for value. There was no evidence on which the jury could properly proceed to find a verdict for the defendant on the issue of bona fides. That being so, and there being satisfactory evidence that the plaintiff was a bona fide holder, it was the duty of the court so to rule, and to hold that there was no evidence to go to the jury on that subject. Commissioners v. Clark, 94 U. S. 278.

The commissioners certainly had power to issue coupons with the bonds, and the statement in the bonds, that the commissioners had caused the coupons annexed to be signed by Scovell, one of their number, is equivalent to a signing of the coupons by all of the commissioners.

As the coupons appear to have been protested by a notary, and thus payment of them was demanded, it is difficult to see why interest from the time of the demand, on the amount of the coupons, is not recoverable, and it must be assumed that the $92.90 interest is such interest.

I have examined and considered all the exceptions taken at the trial, by the defendant, to the admission of evidence offered by the plaintiff, and to the exclusion of evidence offered by the defendant, and find none of them to be tenable. All of them which involve any substantial question are covered by the various points which have been above considered.

The position that the statutes under which these bonds were issued contravene the constitution of the state of New York, and are void, is not well taken.

I have not overlooked the facts, that interest on the bonds was paid by the town, and that the town has retained the stock issued to it. These facts are urged as showing a waiver by the town of any defects or irregularities in the issuing of the bonds, and as operating as an estoppel against the defendant from raising any of the defences now set up. But the case is one so entirely clear for the plaintiff, without a resort to these considerations, that I do not stop to comment on them.

I find no error in the disposition of this case at the trial, and the motion for a new trial is denied, and judgment is ordered for the plaintiff on the verdict, and the stay of proceedings granted to the defendant is vacated.

Case No. 11,077.

PHELPS v. LOYHED.

PHELPS v. FARRINGTON.

[1 Dill. 512.] [1]

Circuit Court, D. Minnesota. 1871.

MORTGAGE FORECLOSURE—GENERAL EXECUTION.

Under rule 92 adopted by the supreme court, the power of the circuit court, in suits for the foreclosure of mortgages, to order a general execution for any balance remaining after the sale of the mortgaged premises is a discretionary one; and the court in one case refused to enter such an order where the complainant, by reason of his delay, was not entitled to it under the state statute; but it granted such an order in another case although under the state statute an action at law on the notes was barred.

These two suits are by the same plaintiff to foreclose two mortgages respectively executed by the defendants at the dates stated in the opinion of the court. The question in each case was, whether the decree of foreclosure should order a general execution for any balance which might remain after the sale of the mortgaged estate.

John B. Sanborn, for complainant.
Gordon E. Cole, for Loyhed.
Mitchell & Yale, for Farrington.

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

DILLON, Circuit Judge. In Phelps v. Loyhed, the bill is to foreclose a mortgage dated May 1, 1858, securing a note falling due May 1, 1859. In Phelps v. Farrington, the bill is to foreclose a mortgage securing a note which matured in 1862. Both suits were commenced in this court in 1870. The only question in the cases is, whether the decrees shall order a general execution for any balance which may remain after selling the mortgaged estate.

By the statute in force when the mortgages were made, and down to this time, an action at law upon the notes is barred in six years. St. 1849–1858, p. 532; Rev. St. 1866, p. 450. Actions for relief were to be

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

commenced in ten years, and this ten years limitation applied to suits to foreclose mortgages. This is plain, and has been so decided by the supreme court of the state. Consol. St. p. 533; Ozmun v. Reynolds, 11 Minn. 459 [Gil. 341].

By statute in force when the mortgages were made, and until the Revision of 1866, it was enacted that the "court should have power to decree the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied, after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law." Consol. St. 1858, p. 671. By statute of the state also, it is enacted that, "No mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured; and where there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall be given, the remedies of the mortgagee shall be confined to the land mentioned in the mortgage." Id. 398.

After the decisions in Noonan v. Lee (1862) 2 Black. [67 U. S.] 499, and Orchard v. Hughes (1863) 1 Wall. [68 U. S.] 73, the supreme court of the United States, by rule adopted April 18, 1864, provided that, "In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same," &c. Prior to this rule, which was adopted after the notes and mortgages in question became due, the circuit courts of the United States had no power to order an execution for any deficit remaining after the sale of the mortgaged estate.

The rule does not require the court to render decrees for such balance, but it simply authorizes decrees of this character. If the foreclosure in the Loyhed Case were in the state court, it is quite indisputable that it would be precluded by the statutory provisions above mentioned from awarding the general execution which the complainant asks. Admitting that we may have the power under the rule of the supreme court to enter a decree for any balance which may be found due over and above the proceeds of the sale, it is a power discretionary in its nature, and one which, in the case against Loyhed, ought not, under the circumstances, to be exercised.

As to the Farrington Case:—Under the legislation of the state in 1866, repealing the provision found in the acts of 1858 (page 671, above quoted) limiting a personal judgment for the balance to cases where it is recoverable at law, and substituting therefor a special mode of foreclosure requiring a decree for the amount due, a sale, an execution for the balance, &c. (Rev. St. 1866, pp. 565, 566), and providing (as amended in 1870) that "Actions to foreclose mortgages upon real estate shall be commenced within ten years after the cause of action accrues," we are of opinion that, in a bill to foreclose, filed after six years but within ten years from the maturity of the note, the plaintiff would be entitled to an order for a general execution for any residuum of the debt not made by the sale.

In other words, under the revision of 1866, as amended, the debt subsists in full force for all the purposes of a foreclosure for the full term of ten years, and in an action brought within that time in the state courts, though brought after six years from the maturity of the note, the mortgagee would be entitled to a decree in accordance with title 2 of chapter 81, including a right to a general execution, pursuant to section 30 thereof.

In the suit against Farrington, we will enter a decree awarding a general execution for any balance which may remain after the sale of the mortgaged premises. Ordered accordingly.

Case No. 11,078.

PHELPS v. O'BRIEN COUNTY.

[2 Dill. 518.] [1]

Circuit Court, D. Iowa. 1873.

JURISDICTION—STATE LEGISLATION.

1. State legislation cannot affect the jurisdiction of this court; and a person who has the right under the judiciary act [1 Stat. 73] to sue in this court cannot be compelled by an act of the state legislature first to obtain leave of a state court.

[Cited in Edwards v. Hill, 8 C. C. A. 233, 59 Fed. 725.]

2. Upon this principle a provision of the state statutes requiring leave of court to enable a party to sue upon a judgment rendered in any court of the state, is not applicable to the circuit court of the United States.

Action [brought by Thomas Phelps] on a judgment rendered August 5th, 1873, in favor of the plaintiff's assignor, a citizen of Wisconsin, against the county of O'Brien, by the district court of the state of Iowa, for the county of Dickinson, and assigned to the plaintiff, a citizen of Illinois. Defendant demurs, on the ground that the action is brought on a judgment rendered in a court of record of the state, within fifteen years from the rendition thereof, without showing leave of the court to bring the same.

H. D. Perkins and J. H. Swan, for demurrer.

Nourse, Kauffman & Holmes, opposed.

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

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

DILLON, Circuit Judge. Section 2521 of the Code of Iowa enacts: "No action shall be brought upon any judgment against a defendant therein, rendered in any court of record of this state, within fifteen years after the rendition thereof, without leave of the court, for good cause shown, and on notice to the adverse party, except in cases when the record of such judgment is, or shall be, lost or destroyed."

The eleventh section of the judiciary act provides that "The circuit court shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law * * * between a citizen of the state where the suit is brought, and a citizen of another state."

The case made in the petition falls within the jurisdiction of this court as thus prescribed, and this jurisdiction cannot be in any manner limited or affected by state legislation. But in cases at common law properly cognizable in this court, the laws of the several states, where applicable, form rules of decision here, as, for example, the limitation laws of the states are as available to a defendant in this court as in the state court where there is no act of congress to the contrary. It is our opinion that the section of the Code (2521) above mentioned is and must be limited to suits in the state courts of the character therein contemplated. A person who has the right under the constitution and laws of the United States to bring his action in this court cannot be compelled first to obtain the leave of a state court. In principle this case is settled by several adjudications of the supreme court of the United States. Railway Co. v. Whitton's Adm'r, 13 Wall. [80 U. S.] 270, 285; Suydam v. Broadnax, 14 Pet. [39 U. S.] 67; Union Bank, etc., v. Jolly's Adm'rs, 18 How. [59 U. S.] 506; Payne v. Hook, 7 Wall. [74 U. S.] 425. Demurrer overruled.

PHELPS (PENDLETON v.). See Case No. 10,923.

PHELPS (RAWLE v.). See Case No. 11,588.

Case No. 11,079.

PHELPS v. SELLICK.

[8 N. B. R. (1873) 390.] [1]

Circuit Court, E. D. Michigan.

BANKRUPTCY — FORECLOSURE OF MORTGAGE IN STATE COURT—CONTEMPT.

Where a mortgagee proceeded in the state court, after petition in bankruptcy was filed by the mortgagor, with knowledge thereof, to foreclose his mortgage, without first obtaining the permission of the bankrupt court, *held*, he was in contempt, and the sale itself a nullity; by the filing of the petition all the property of the bankrupt is eo instanti placed in the custody of the bankrupt court.

[Cited in Re California Pac. R. Co., Case No. 2,315; Re Sabin, Id. 12,193; Re Jordon, Id. 7,529; Re Hufnagel, Id. 6,837; Augustine v. McFarland, Id. 648; Re Brunquest, Id. 2,055; Schulze v. Bolting, Id. 12,489; Re Sabin, Id. 12,195; Taylor v. Robertson, 21 Fed. 215.]

[Cited in Brooks v. Bates, 7 Colo. 576, 4 Pac. 1072.]

On demurrer to the bill of complaint. The bill is filed for the purpose of setting aside a foreclosure of a mortgage and sale of certain lands belonging to the bankrupt's estate, by advertisement, under the statute of Michigan, for the reasons: First, that the notice of sale was not sufficient under the said statutes; and, second, that the advertisement, foreclosure and sale, were had pending the bankruptcy, and without proof of the mortgage debt in the bankruptcy court, and without leave of that court first obtained. The demurrer is general. The important questions presented, especially the second one stated, have been argued with great ability and exhaustive research, and the same are now for decision. The objection as to the sufficiency of the notice of sale was abandoned, or, at least, was not insisted on upon the argument. The only question for decision is as to the right of a mortgagee to institute proceedings and foreclose his mortgage pending the bankruptcy of his mortgagor, without first proving his debt in the bankruptcy proceedings, and obtaining leave of the bankruptcy court in which such proceedings are pending.

Ashley Pond, for complainant.

G. V. N. Lothrop, for defendant.

LONGYEAR, District Judge. If this were a new question, I should deem it proper and necessary to go over the entire ground for the purpose of developing my own views in the premises. But the whole ground has been gone over so often, and every aspect of it so fully and exhaustively discussed, considered and decided, by so many of my brother judges, that an expression of my own views could be but a mere repetition of what has been already well, and, as it seems to me, sufficiently expressed. In my view of the state of judicial opinion and decision upon this question, it can hardly be considered an open one. It would seem, certainly, that the decisions of the supreme court (cited below) upon analogous questions arising under the bankrupt act of 1841 [5 Stat. 440], and the concurrent opinions and decisions (also cited below) under the present act of 1867 [14 Stat. 517], of at least twelve district judges, four circuit judges, and three associate justices of the supreme court, ought to be sufficient to establish any ordinary legal proposition. At all events, if I entertained any doubt upon the question, on principle (which I do not), I should hesitate long before attempting to overthrow such an array of judicial opinion and decision.

An analysis of the numerous cases cited would serve no useful purpose at all com-

[1] [Reprinted by permission.]

mensurate with the labor involved, and would extend this opinion to an unreasonable length. I have, however, examined them all by the aid and in the light of the able and enlightened arguments at the bar—for which aid I tender to the counsel on both sides my acknowledgement of obligation. I shall therefore do but little more than state the legal propositions applicable to the question involved, sustained by those decisions, and which I consider well founded in principle. These propositions are as follows:

1. That under the law, as it now exists and is administered in this state, and I believe in most of the states of the Union, a mortgage of real estate does not vest in the mortgagee any title or estate in the property. It is only a charge upon the property, and an incident merely to the debt thereby secured; the title, estate and possession, with all their incidents, remaining in the mortgagor. In addition to the authorities cited below, see, as to this proposition, 2 Comp. Laws Mich. 1871, p. 1775, par. 6263; Caruthers v. Humphrey, 12 Mich. 270; Van Husan v. Kanouse, 13 Mich. 303; Ladue v. Detroit & M. R. Co., Id. 380; Hogsett v. Ellis, 17 Mich. 351.

2. That all the estate and property of the bankrupt, and all his right and title to and interest in property, whether encumbered or unencumbered, are in custodia legis, and under the sole and exclusive jurisdiction and control of the bankruptcy court in which the proceedings are had, pending the proceedings, from the filing of the petition for adjudication to the close of the proceedings.

3. As a result of the second proposition, that no portion of the estate or the title thereto, or any interest therein, or charge thereon, can be sold, transferred, prosecuted or enforced, or in any manner interfered with, except under the direction and by authority of the bankruptcy court, and in all respects subject to its jurisdiction and control.

4. That recognizing the express provisions of the act in that regard, as well as the dictates of simple justice, all valid liens and encumbrances are recognized and preserved to their full extent and purpose by the bankruptcy court; but that, as a result of the second and third propositions, such liens and encumbrances can be enforced only by direction and authority, and under the jurisdiction and control of that court.

5. That any attempt to enforce such liens and encumbrances pending the bankruptcy, by the process of any other court, or by any authority whatsoever, without leave of the bankrutcy court first obtained, are in contempt of its jurisdiction and authority, and without any validity whatever, and on application will be restrained, if pending, or if completed will be set aside.

6. That it is competent, however, for the bankruptcy court to treat such process and proceedings as valid and binding upon the estate and persons interested therein; and that it will do so on application of the lien holder, and a showing by him that the estate and the other creditors will suffer no injury thereby.

7. That all the creditors of the bankrupt, secured as well as unsecured, become and are at once, by virtue of the bankruptcy, parties to the proceedings, and they and their debts are thereby brought under and subject to the sole and exclusive jurisdiction and control of the bankruptcy court; and that such jurisdiction and control exist and may be enforced as well before as after proof of debt.

8. That the only difference between a secured and an unsecured creditor is that relating to the fund or assets to which they are respectively entitled to resort for payment, the former being entitled to resort to a particular fund or portion of the assets, and to be paid in full if the proceeds of such fund or particular property is sufficient for that purpose, to the exclusion of all others, while the unsecured creditor can look only to the general assets, and must share the same equally with the other unsecured creditors.

9. That there is no difference whatever between a secured and an unsecured creditor as regards the mode or the proceedings necessary under the bankrupt act, by which they may be placed in a position to enforce their respective rights, that is to say, a secured creditor has no greater or better right to proceed against, or receive payment from, the particular fund or asset upon which he has a lien, without the necessary preliminary step of proving his debt in the bankruptcy, than an unsecured creditor has to proceed against, and receive payment from, the general assets, without such proof.

These propositions, so well founded in principle, are so inevitable as logical deductions, that they hardly need argument or authorities for support. The following selected cases fully sustain them, viz.: Ex parte Christy, 3 How. [44 U. S.] 312 et seq.; Norton's Assignee v. Boyd, Id. 435; Peck v. Jenness, 7 How. [48 U. S.] 624; McLean v. Rockey [Case No. 8,891]; In re Vogel [Id. 16,982]; In re Kerosene Oil Co. [Id. 7,726]; In re Wynne [Id. 18,117]; In re Mallory [Id. 8,991]; In re McGilton [Id. 8,798]; Jones v. Leach [Id. 7,475]; In re Stansell [Id. 13,293]; In re Clark [Id. 2,802]; In re Iron Mountain Co. [Id. 7,065]; In re Bridgeman [Id. 1,866]; In re Bigelow [Id. 1,396]; In re Lambert [Id. 8,026]; In re Vogel [Id. 16,983]; In re Davis [Id. 3,618]; In re Ruehle [Id. 12,113]; In re Bowie [Id. 1,728]; Lee v. Savings Inst. [Id. 8,188]; In re Rosenberg [Id. 12,055]; In re Snedaker, 3 N. B. R. 155; In re Frizelle [Case No. 5,133]; Bromley v. Smith [Id. 1,922]; In re Merchants' Ins. Co. [Id. 9,441]; Davis v. Anderson [Id. 3,623]; In re Lady Bryan Min. Co. [Id. 7,980]; Smith v. Kehr [Id. 13,071]; In re Cook [Id. 3,151]; In re Haake [Id. 5,883].

See, also, as having a bearing upon the subject, Williams v. Benedict, 8 How. [49 U. S.] 107; Wiswall v. Sampson, 14 How. [55 U. S.] 52; Peale v. Phipps, Id. 368; Taylor v. Carryl, 20 How. [61 U. S.] 583; Freeman v. Howe, 24 How. [65 U. S.] 450; Buck v. Colbath, 3 Wall. [70 U. S.] 334; Stuart v. Hines, 33 Iowa, 60.

The above propositions apply equally to proceedings in the courts, and proceedings in pais for the enforcement of liens and other securities, begun after commencement of proceedings in bankruptcy. In the present case, however, it is unnecessary to go to that extent, or to follow the propositions out to their legitimate results, as affecting proceedings in the courts, because in this case the proceeding was not of that character. It was a proceeding in pais merely, to execute a power of sale contained in the mortgage, in the mode and manner prescribed by the state statutes. As the propositions stated apply to proceedings in the courts where the assignee can appear and oppose, a fortiori they ought to apply to a foreclosure by advertisement in which he cannot. In the present case the foreclosure began after the commencement of proceedings in bankruptcy. I therefore express no opinion as to the cases wherein the foreclosure began before the commencement of proceedings in bankruptcy, and are, without objection, allowed to be completed.

It was objected at the hearing that the bill does not aver that the mortgaged property was of greater value than the mortgage debt, or that the property was sold for an inadequate price, or show in any manner that the estate has been injured by the sale; and it was claimed that for that reason the foreclosure and sale should not be disturbed. It is true the bill contains no such averments, the assignee having planted his claim to have the foreclosure and sale set aside solely upon the ground of want of power and authority in the mortgagee to take the administration of that portion of the assets of the bankrupt's estate covered by his mortgage into his own hands, regardless of the fact that the same was at the time in the custody and under the jurisdiction of the bankrupt court. This a mortgagee cannot do. The bill is therefore maintainable without such averments. If the facts are such as to show that the estate has suffered no injury by the foreclosure and sale, the mortgagee, by proceeding in the bankruptcy court, as he should have proceeded in the first instance, to obtain authority to foreclose and sell, may, no doubt, have the sale confirmed; or, perhaps, as this court now has jurisdiction of the subject matter, such result may be reached in the present suit by way of answer and cross-bill; as to which latter suggestion, however, it is unnecessary at present to express any positive opinion. It is sufficient for the present purpose, that as the case now stands, there is sufficient stated in the bill to maintain the suit, and, unopposed by any new facts, to entitle the complainant to the relief prayed.

It was also objected at the hearing that the assignee did not procure the foreclosure proceedings to be enjoined before sale, or take any steps whatever in the premises until the redemption had nearly expired, as he ought to have done. The assignee had two years from the time the action accrued in which to commence suit, and he has brought it in the time limited. The proceedings to foreclose were unauthorized and the sale invalid, and I think it would have been equally so if a stranger had become the purchaser. The mortgagee was himself the purchaser, and for a stronger reason the fact that a sale was allowed to take place can confer no rights which the proceedings themselves would not warrant.

The demurrer must be overruled. The defendant will have leave to put in his answer or plea within twenty days from this date.

Case No. 11,080.

PHELPS v. STERNS.

SAME v. DUDLEY.

[4 N. B. R. 34 (Quarto, 7).] [1]

District Court, D. Maine. 1870.

BANKRUPTCY—PROOF OF DEBTS—SECURITY.

Where a creditor petitions that debts proved by respondents, who are also creditors, be disallowed, on the ground of having taken a mortgage to secure their debts within four months of adjudication, *held*, debts of respondents disallowed.

[These were proceedings by George G. Phelps against S. P. Sterns and the same plaintiff against Smith Dudley.]

J. O'Donnell, for libellant.

FOX, District Judge. These two cases were petitions by Phelps, a creditor of the estate of William H. Porter, of Paris, a bankrupt, against the respondents, who were also creditors of Porter, praying that the debts proved by respondents against the estate of Porter be disallowed. Respondents were creditors of Porter, and March 29, 1869, took a mortgage of Porter's farm to secure their debt. Within four months thereafter Porter was adjudged a bankrupt on petition of Phelps. In August, 1869, the assignee of Porter brought a suit against respondents to break their mortgage; after that suit respondents, before a trial was had, voluntarily released their mortgage and all claims under it to the assignee, and that suit was dismissed; respondents proved their debts against the estate of Porter, and petitioner asks to have them disallowed by reason of this mortgage, alleging it to be a preference in fraud of the bankrupt act [of 1867 (14 Stat. 517)]. Debts of respondents disallowed.

[1] [Reprinted by permission.]

PHELPS (TEESE v.). See Cases Nos. 13,818 and 13,819.

PHELPS (UNITED STATES v.). See Cases Nos. 16,039–16,041.

Case No. 11,081.

PHELPS v. YATES.

[Cited in Smith v. Ontario, Case No. 13,085. Nowhere reported; opinion not now accessible.]

Case No. 11,082.

PHELPS v. YATES.

[16 Blatchf. 192; [1] 8 Reporter, 676.]

Circuit Court, N. D. New York. April 16, 1879.

MUNICIPAL BONDS—RIGHT OF MUNICIPALITY TO SHOW THAT BONDS WERE DELIVERED WITHOUT SEAL—NUMBERS AND DATES.

By the acts of the legislature of New York, of May 11, 1868, and April 19, 1869 (Laws N. Y. 1868, p. 1823, c. 811, and 1869, p. 447, c. 241), commissioners appointed for a town were authorized to borrow money on the faith and credit of the town, "and to execute bonds therefor, under their hands and seals," in aid of a railroad. The commissioners executed bonds and delivered them to the officers of the railroad company. The bonds, when so delivered, contained a recital, over the signatures of the commissioners, that they were issued under the hands and seals of the commissioners. In a suit against the town, on coupons belonging to the bonds, by a person who purchased such coupons for value and bona fide: *held*, that the town could not be allowed to show that the bonds were so delivered before any seals were affixed, and with the dates and numbers of the bonds in blank, upon the understanding that the bonds were not to be negotiated until certain conditions on the part of the company were fulfilled, but that, before such conditions were fulfilled, the officers of the company affixed seals to, and inserted the dates and numbers in, the bonds and negotiated them.

[This was an action by Willis Phelps against the town of Yates. There was a verdict for the plaintiff, and the case is now heard upon the defendant's motion for a new trial.]

James F. Starbuck, for plaintiff.

George F. Danforth, for defendant.

WALLACE, District Judge. The motion for a new trial, on the ground of newly-discovered evidence, must be denied, because, assuming that the defendant would be able to prove, upon another trial, the newly-discovered facts, these facts would not constitute a defence, nor would they be admissible in evidence. The plaintiff was shown, upon the former trial, to be a purchaser of the coupons upon which the action was brought, for value and bona fide, and no evidence to impeach his title as such purchaser, sufficient to go to the jury, was offered, and none is proffered now. The simple question is, whether, as against such a purchaser of the coupons, the defendant can be permitted to show that the bonds to which the coupons were originally annexed, were delivered, by the agents of the defendant, to the officers of the railroad company, before any seals were affixed, and with the dates and numbers of the bonds in blank, upon the understanding that the bonds were not to be negotiated until certain conditions on the part of the railroad company were fulfilled; but that, before these conditions were fulfilled, the officers of the railroad company affixed seals to, and inserted the dates and numbers in, the bonds, and negotiated the bonds.

The bonds were issued by commissioners for the defendant, appointed under chapter 811 of the Laws of this state, of 1868, passed May 11, 1868 (page 1823), and chapter 241, of 1869, passed April 19, 1869 (page 447), by which the commissioners were authorized to borrow money on the faith and credit of the town, "and to execute bonds therefor, under their hands and seals." The bonds, when delivered to the officers of the railroad company, contained a recital, over the signatures of the commissioners, that they were issued under the hands and seals of the commissioners.

It has been decided (Avery v. Springport [Case No. 676]) that bonds issued under a similar statute, without being sealed, were not in conformity with the statute, and did not bind the town. In that case, however, the absence of the seals was patent to every purchaser, and the bonds, upon their face, carried evidence to purchasers that the agents of the town had not executed their authority in the manner prescribed by law. Here, however, the purchaser had the right to assume, from the recitals in the bonds, over the signatures of the commissioners, that, when the bonds were issued, they were duly sealed.

The general doctrine, undoubtedly, is, that a municipal corporation, being the creature of the law by which it is created, can act only in the manner provided by its organic law, and, if its agents fail to observe the forms and methods prescribed by that law, in any substantial particular, their acts are not the acts of the corporation. This doctrine, however, has been greatly modified by the decisions of the courts of the United States, in its application to municipal bonds issued by agents of municipal corporations, when the rights of bona fide purchasers are involved. As is said in one of the latest cases in the supreme court of the United States, a bona fide purchaser of municipal bonds "takes the instrument freed from all infirmities in its origin, unless it is absolutely void, from want of power in the maker to issue it." Cromwell v. Sac Co., 96 U. S. 51. The bonds in suit were not void for want of power in the agents to issue them, but were only invalid because the power was exercised irregularly.

Assuming, also, for present purposes, that the officers of the railroad company negotiated the bonds after their delivery, in contra-

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

vention of the agreement upon which they were delivered, these facts do not justify granting a new trial. Proof of facts, amounting to a fraudulent diversion of the bonds, would impose on the purchaser the burden of showing a purchase for value, and without notice. He could not rest upon the presumption derived from the possession of the coupons; and the only effect of the newly-discovered evidence, in this case, would be to shift the burden of proof, and not to change the result of the controversy. For these reasons, the motion is denied.

Case No. 11,082a.

PHENIX INS. CO. v. The FRANK G. FOWLER.

CONWAY v. SAME.

[See 17 Fed. 653.]

PHETTEPLACE (PARKER v.). See Case No. 10,746.

Case No. 11,083.

PHETTIPLACE v. SAYLES et al.

[4 Mason, 312.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1826.

INSOLVENCY—WHAT AMOUNTS TO REPRESENTATION AS TO PROPERTY—FRAUDULENT CONVEYANCE—RELEASE—RE-EXAMINATION OF WITNESS AFTER CLOSE OF DEPOSITION.

1. If a release be given by a creditor to a debtor, where he has been misled by a fraudulent misrepresentation, or other artifice of his debtor, the release may be set aside in equity. But the mere fact that the debtor had made a previous assignment of property, which would be fraudulent as to creditors, if known to the creditor, or if not intended to mislead him, will not alone work such an effect.

[Cited in Benter v. Patch, 18 D. C. 592; Richards v. Hunt, 6 Vt. 255; Reynolds v. French, 8 Vt. 88.]

2. What circumstances amount to a misrepresentation.

3. Where a party applies for, and attains the benefit of an act of insolvency upon his petition and representation of such insolvency, and a statement of what his property is; such statement is a representation to all his creditors, that it contains all his property, and is made in good faith.

4. What circumstances are presumptive of a conveyance being fraudulent as to creditors; want of possession of real estate is not, as it is of personal estate, a presumption of fraud.

[Cited in Almy v. Wilbur, Case No. 256; Re Hussman, Id. 6,951; Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 763.]

[Cited in Hempstead v. Johnston, 18 Ark. 123; Quill v. Wolfe, 4 D. C. 190; Shaw v. Thompson, 43 N. H. 132.]

5. In chancery, where the deposition of a witness has been once taken and closed, it is not the practice to allow him to be re-examined without an order of court, and then only upon good cause shown.

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

[This was a bill in equity by Ebenezer Phettiplace against Daniel Sayles and Hardin Sayles, for relief.]

Mr. Steere, for plaintiff.

Whipple & Tibbetts, for defendants.

STORY, Circuit Justice. This is a suit in equity, brought by the plaintiff, a judgment creditor of the defendant, Daniel Sayles, to set aside a release and composition discharging the debt, and to obtain other relief against the judgment debtor, and also against his son, the co-defendant, Hardin Sayles, as the asserted owner of certain real and personal estate of his father, under a conveyance made to defraud creditors. The circumstances of the case are as follows: The plaintiff commenced suits for the recovery of the debts due him from the defendant, Daniel Sayles, in May, 1817, and obtained judgment thereon at December term of the court of common pleas, in the same year. On the first day of the same month, and pending the suits, the defendant, Daniel Sayles, conveyed to one Cyrus Sayles (his nephew), in fee simple for the asserted consideration of $1,000, the farm on which he (the defendant) then lived, and has ever since continued to live, with the dwelling-house, barn, mill, &c. thereon, and also a wood lot of about 20 acres. On the 13th of March, 1818, Daniel Sayles conveyed certain real and personal estate therein mentioned (not including that conveyed to Cyrus Sayles), to one John Wood, in trust to sell the same, and to distribute the proceeds among certain scheduled creditors (including the plaintiff), who should accept the assignment, with a proviso, that the conveyance should be void, unless the creditors to one third of the amount of the debts should accept the same in writing, and discharge him from their debts. In April, 1818, Daniel Sayles being in gaol on execution by some of his creditors, filed a petition to the general assembly of Rhode Island, praying for the benefit of the insolvent law of that state. In this petition he sets forth that he has nothing to offer as an inventory of property but his wearing apparel, his "property being all assigned for the benefit of all the creditors who may choose to accept the same." The petition was granted by the general assembly at its June session, 1818, and the petitioner having, in the mean time, on the 8th of May, been committed on executions, which issued on the plaintiff's judgments against him, was in the usual manner discharged therefrom under the insolvent law. An instrument of release bearing date the same day with the assignment to Wood, and reciting the purport of it, was executed by the scheduled creditors, and among others by the plaintiff, accepting the assignment, and upon payment of their distributive shares (which have been received), discharging their debts. The plaintiff did not sign this instrument until after the debtor was discharged under the insolv-

ent act. There is an allegation in the bill, that the debtor also conveyed real estate and personal estate to the amount of $1,500 to his son Hardin, to defraud his creditors. But neither the answers nor the evidence take any, even the slightest notice of this matter, and it was abandoned at the argument.

The bill, after stating the substance of these facts, proceeds to charge, that the plaintiff signed the release, believing that the assignment was an honest assignment of all the debtor's property, "and at the time the creditors signed said release, and took said assignment, the said Daniel represented said assignment to contain all his property of every kind, and fraudulently concealed said real estate and personal property from them, and that the creditors, and especially the plaintiff, was ignorant of the said Daniel's owning this property, confided in his said representation, and thereupon, and so confiding in the same, signed said release." This is the charge laid to invalidate the release; and although the charge is not made with technical precision and accuracy (and indeed in many respects the bill is inartificially drawn); yet I think that it is sufficient, if proved, to require from the court a decree which shall declare the release a nullity. A deed procured by a fraudulent misrepresentation, cannot be permitted to have the slightest validity to bar rights in a court of equity. The bill then proceeds to state, that Enoch Steere, another of the releasing creditors, has assigned his debt to the plaintiff. But no facts are stated as to the time when the assignment was made, nor whether it be such as can, with the limited jurisdiction of this court, under the eleventh section of the judiciary act of 1789, c. 20, be maintained in this court; nor even any allegation that there has been any fraud in respect to this debt, either on the creditor or the assignee. We may therefore dismiss all consideration of this part of the bill as utterly inadmissible for any purpose of relief. The bill then proceeds to state, that Cyrus Sayles, in December, 1819, by his deed (which is in fact a mere release), conveyed the same farm and lot of land to Hardin Sayles for the pretended consideration of $1,100, but in fact for the same purpose of defrauding the creditors of Daniel Sayles, and that he is now in possession thereof. It charges that Hardin was a party and privy to the original fraud upon the creditors, and took an active agency in the transactions, and that the defendants are now in possession of property of Daniel Sayles more than sufficient to pay all his debts. The prayer of the bill is for general relief. The defendants, by their answers, expressly deny any fraud; and assert that the conveyances to Cyrus Sayles, and from him to Hardin, were made for a valuable consideration and bona fide; and that there was not any fraudulent misrepresentation by the debtor to obtain the release, as suggested in the bill. The general replication having been filed, the cause has been argued upon the whole evidence in the case, and is indeed principally a question of fact.

The first question for consideration is, whether there has been, on the part of the debtor, any fraudulent misrepresentation to procure the release. I agree to the doctrine, that the mere fact that the debtor had previously made a fraudulent conveyance, is not of itself sufficient to set aside the release. If the creditor knew of such conveyance, there is no pretence to say, that he would not be bound by his release, for he would act with his eyes open. And if he is wholly ignorant of it, and gives a release without any artifice to mislead him, or any attempt to make the property assigned appear to be the whole property of the debtor, it would be going a great way to affirm, that he would be entitled to relief, if upon more reflection and better advice he should find that he had concluded an unfavorable bargain. But if there be a concealment of property or a fraudulent conveyance by the debtor, with intent to mislead the creditor, and under such circumstances the creditor, trusting to the good faith and honesty of his debtor, signs a release, I should be sorry, that at least in a court of equity, there might not be found sufficient morals in the law to defeat such overreaching baseness. A fortiori an actual or direct misrepresentation ought to have this effect.

It has been further argued, that the assignment to Wood was fraudulent, because it stipulated for benefits on the part of the debtor, which he had no right to demand. I agree that it would be so in relation to creditors, who should not choose to come in and confirm it. But except as to such creditors, it would certainly be valid; for it is competent for other creditors to waive their rights; and it is impossible that there can be any fraud upon those who deliberately, voluntarily, and with knowledge of all the facts, assent to the terms of the debtor. The whole question, therefore, turns upon the point of misrepresentation to the creditors who have signed the release.

Now what are the circumstances of the present case? It is said, that there is no proof that the debtor ever did represent that the property assigned to Wood was his whole property, as an inducement to the release. That is true, if by proof is intended a personal, direct, and unequivocal declaration. But are not the facts in evidence tantamount to such a declaration? The assignment was made to Wood in March, and the petition to the legislature in the succeeding April. That petition contains an express affirmation, on oath, that the party had no property except his wearing apparel, which had not been assigned for the benefit of all his creditors. This was in no sense a private document; but a public representation as well to all his creditors, as to the legislature, of the actual posture of his affairs. Upon the faith of

this document, the legislature granted him the benefit of the insolvent act, and thereby discharged him from imprisonment under the executions of his creditors, and particularly of the plaintiff. The act went farther, and presuming a rightful legislative authority, it undertook to discharge the party from all the debts of all his creditors. Every creditor might be presumed to be conusant of public representations and acts so vitally affecting his own rights and interests. And what is most material to the case, the plaintiff did not sign the release or accept of the assignment to Wood, until after these transactions were past and notorious. The plaintiff must therefore be presumed to have known the facts stated in the petition, and to have acted under the most entire reliance upon the good faith of the party. The defence of the debtor himself does not attempt to impeach this conclusion. On the contrary, his answer asserts that the assignment to Wood "was a fair and honest assignment of all the real and personal estate of every kind and nature belonging to" him, and that he "delivered to the said Wood, under said assignment, all and every part and kind of property belonging to him, or to which he had any claim or title, and received from his said creditors the release and discharge stated in said bill, and which he now relies upon as a defence against the unjust claim of the complainant;" and he proceeds to deny "that at the time of making said assignment, and obtaining said discharge, he made any false representations as to his insolvency, the amount of his debts, or property, or that he in any way deceived any of his creditors in regard to his ability to pay his debts, but that said discharge was voluntarily executed by said creditors." The plain import of all this is, that he had made no fraudulent conveyance of his property; that his representation was therefore true, and that his creditors under the assignment to Wood, were entitled to have, and in fact had, the full benefit of all his property. If this be so, then the release ought to stand; if otherwise, then upon principles of common justice it ought to be set aside.

The material question, therefore, is, whether the debtor had at this time made a fraudulent conveyance of real or personal estate for the purpose of cheating his creditors. I say of real or personal estate, for it is sufficient if either existed, since to the extent of the property so concealed or subducted, there was a fraud upon the creditors, and a misrepresentation of the debtor vitally affecting the release. Two conveyances are relied upon by the plaintiff as fraudulent: First, the conveyance of the farm to Cyrus Sayles; secondly, the conveyance of personal property to Polly Smith.

And first, as to the conveyance of the farm to Cyrus Sayles. This was made on the first day of December, 1817, a short time before the judgments obtained by the plaintiff, and for the asserted consideration of $1,000. The debtor was, at this time, beyond all question, insolvent, and in a few months afterwards, applied for the benefit of the insolvent act. He notwithstanding possessed a right to sell the farm, or any other property for a full and valuable consideration, and bonâ fide to any person whatsoever. He might sell to his nephew as well as to any other person, although such a sale by an insolvent debtor to a relation, would naturally excite more suspicion than a sale to a mere stranger. Still if bonâ fide made, for a fair consideration, and without any design to defraud creditors, the sale would be entirely valid in point of law. So the debtor had a perfect right to prefer one creditor to another; to pay one and omit to pay another; to give security to one and refuse it to another; and a previous debt would be just as good a consideration to uphold a sale, as money paid at the moment. All that the law requires in such cases, is good faith and honest intentions between the parties. If there be bad faith, or an intention to defraud creditors, no consideration, however valuable, will give effect to the deed against third persons, who are injured by it. As to them, it is utterly void and unsupportable. The manner, in which the consideration was paid by Cyrus Sayles, is stated in the answers to be as follows: First, about $400 due on an antecedent mortgage of the estate to one John Arnold, and paid by Cyrus Sayles; secondly, a debt due upon notes of the grantor to Cyrus Sayles himself, for work and labour of about $375; thirdly, a debt due to one Ziba Whipple by the grantor, and paid by Cyrus Sayles; and, lastly, the balance in money paid to the grantor. These statements being responsive to the matter of the bill, in its charges and interrogatories, is evidence in favour of the defendants; and if they are not overturned by counterproofs or circumstances, they are decisive on this point. The burthen of proof of fraud, indeed, rests on the plaintiff; and the fraud being explicitly disavowed by the answers, the plaintiff must maintain the suit by his own strength. This, then, being the posture of the case, it is necessary to consider whether the circumstances relied on as presumptive of fraud are of such a nature as ought to outweigh the positive denials of the answers. It is not sufficient for the plaintiff to show circumstances of suspicion or doubt, or even of inflamed suspicion or doubt. Nor is it sufficient to establish contradictions in the testimony of either party, which might induce the court to pause or hesitate, as to the side on which the truth lies. He must go farther, and establish beyond a reasonable doubt, that the weight of evidence and circumstances is so decisively in his favour, as to destroy the ordinary credit of the answers.

There are some facts in the case which are not disputed, and indeed are incontrovertibly proved. One is, that at the time of the conveyance, Daniel Sayles was bonâ fide indebt-

ed to Cyrus in a sum exceeding $300, and probably from $375 to $400. Another is, that there was due to John Arnold on his mortgage, upwards of $400, which was secured and finally paid to him by Cyrus. The weight of evidence also is, and it is positively sworn by Ziba Whipple, that a debt of Daniel of about $100 was transferred by him (Ziba) to Cyrus, and formed a part consideration of the conveyance. A small sum of money, not probably exceeding $100, appears to have been paid by Cyrus to Daniel at the time of the execution of the deed. It may be taken also as a fact, that the farm was not at the time worth more than $1,000. There is some testimony in the cause to establish a higher value; but it is encountered by stronger testimony on the other side; and the argument itself does not affect to place much reliance on a supposed undervaluation to discredit the sale. Indeed, considering that there was no release of the wife's dower, and that the time of the sale was a period of great depression, it would be very difficult upon the proofs to doubt, that if bonâ fide, the sale was for the full value of the estate. What then are the circumstances, on which the plaintiff relies, to establish a fraud in the face of these facts? At most, the excess of value, beyond debts actually extinguished or provided for, did not reach $200; and the whole machinery of fraud must have been deliberately got up to cover an insignificant sum, such as would not commonly tempt a party to very extraordinary subterfuges and evasion.

One circumstance, on which the plaintiff relies, is, that Cyrus Sayles, in one of the three depositions given by him as a witness, has asserted, that three fictitious notes were made by Daniel to him, antecedently to the conveyance, for the purpose of swelling the balance due to him, so as to cover all the purchase money. If this statement were confirmed by the proofs, it would be entitled to very great weight in the cause. But there is some difficulty in admitting it. The deposition, here alluded to, was taken in another and prior cause, pending in another court, and not in the present cause. It forms no direct and positive proof of itself, and can be used in no other manner than to affect the credibility of the other testimony of the witness. The plaintiff himself, in February, 1825, took the deposition of the witness, under a commission, as evidence in this cause, and the defendants, on that occasion, cross examined him. It is certainly not for the plaintiff, under such circumstances, to impeach the credibility of his own witness. The most, that he is entitled to do, is to substantiate, by other witnesses, any material facts, which that witness has misstated. Afterwards, in June, 1825, the defendants, without any order or leave of the court, took the deposition of the same witness, under the same commission, and the plaintiff, on that occasion, on his cross examination, brought out the fact of the first deposition, and procured a verified copy of the same to be annexed to the cross examination. The magistrate, before whom it was taken, has also proved the original. It is in this manner, that the first deposition has found its way into the cause. An objection has been taken by the plaintiff to the use of the third deposition upon the ground, that, after the first examination of the witness was completely closed on each side, it was irregular to re-examine him without an order of the court. It is certainly the practice of the court of chancery not to allow a witness, whose examination has been once taken and closed, to be re-examined without an order of the court, and then only upon good cause shown. Wyatt, Pract. Reg. 420; Harris, Ch. Prac. p. 273, c. 42; 2 Ch. Cas. 217; Sawyer v. Bowyer, 1 Brown, Ch. 388; Sandford v. Paul, 1 Ves. Jr. 399; Kirk v. Kirk, 13 Ves. 280, 285. The reason assigned for the rule is, to prevent perjuries, and tampering with witnesses, after the pressure of the evidence is known. I think the practice a salutary one; and shall adhere to it on this occasion, and direct a suppression of the third deposition. The first deposition would still be in the cause, as it is regularly before the court, by the testimony of the officiating magistrate; but the difficulty is, that it is not evidence in chief, and can be used only to discredit the witness by a party entitled to use it for that purpose. The plaintiff, having taken and used his testimony, is certainly not in this predicament. The only deposition of the witness, then, which can be examined by the court, is the second, and that is so far from supporting the plaintiff's allegations, that, if it be entitled to credit, it comports mainly with the defence. It is, too, corroborated by the testimony of the magistrate, before whom the deed of Daniel Sayles to Cyrus Sayles was executed and acknowledged.

Another circumstance, relied on to invalidate the good faith of this conveyance, is, that no change of possession took place, but the grantor continued in possession notwithstanding the sale, and occupied the farm as he had been accustomed to do. This circumstance is not without weight, and in a doubtful case would incline the court not to yield any just suspicions, arising from other causes. But possession, after a sale of real estate, does not per se raise a presumption of fraud, as it does in the case of personal estate. In the latter case, possession is primâ facie evidence of ownership, and where a party, who is owner, sells personal property absolutely, and yet continues to retain the visible and exclusive possession, the law deems such conduct a constructive fraud upon the public, and the sale, as to creditors, wholly inoperative, whether it be for a valuable consideration or not. This doctrine has its foundation in a great public policy, to protect creditors against secret, collusive transfers. The same rule does not apply to real estates. Possession is not here deemed

evidence of ownership. The laws of most civilized nations require solemn instruments to pass the title to real property; and in Rhode Island, as in most of the states in the Union, a deed executed with due formalities, and acknowledged before a magistrate, and recorded in the public registry, is indispensable to make a perfect transfer of real estate. The public look not so much to possession as to the public records, as proofs of the title to such property. The possession, therefore, must be inconsistent with the sale, and repugnant to it in terms or operation, before it raises a just presumption of fraud. Now, in the present case, there is nothing of this nature. Admitting that there was an understanding, that if Daniel Sayles should be able he might re-purchase the estate, at a future time, by paying a sum equal to the original price, there is nothing fraudulent in such an agreement. If bonâ fide made, by parol or in writing, there is nothing in law or morals, that repudiates it. Then as to the possession of Daniel, during the succeeding winter, that would not be an unusual indulgence granted upon any sale. There is no pretence to say, that the conveyance was, for a moment, kept secret. It was put on record as soon as it was executed, and became notorious. The subsequent lease to Hardin Sayles, under which he and his father remained in possession, until the sale to him in May, 1819, at a stipulated rent, is certainly compatible with a real and bonâ fide change of the ownership.

But it is argued that the sale itself to Hardin Sayles is evidence, that the sale originally made to Cyrus Sayles was merely nominal. First, it is said, that this second sale was originally contemplated by the parties. But in what manner? It was solely upon the ground, that Hardin should be able to pay to Cyrus a full consideration for it. There is certainly nothing unnatural, immoral, or illegal, in a son's wishing to re-purchase for his father the family estate, which the latter is compelled to sell. And if the purchaser is willing to accede to such an agreement, I am not prepared to admit, that a transaction, otherwise bonâ fide, would be tainted by it. The most that can be said is, that it may justly be deemed a circumstance corroborative of marked badges of fraud; but of itself it cannot create a fraud. Then again, it is urged that Hardin Sayles was a young man, without family and without property, and therefore not likely to make such a purchase, or to be credited for it on his own account. It appears, however, that though just of age, he was enabled, from his industrious habits, to obtain credit, and that he has since been pursuing a profitable business, by which he has discharged the whole purchase money for the estate. It is not unnatural, that he should, from filial affection, have been willing to incur considerable personal responsibility to save his parent, with whom he lived, from absolute ruin and suffering. I agree, that his conduct should, under such circumstances, be closely watched; but taking the whole evidence together, I cannot say, that there is anything, after his purchase, to lead to any just question of his being a fair purchaser on his own account, and not a mere trustee, acting in fandem legis, for the benefit of his father. The acts and language of his father, in respect to the farm, after the purchase, are quite consistent with the absence of any farther interest than age, experience, and the ascendency of the parental character would ordinarily imply. If, however, his acts and language should be thought to raise some doubts, still it is to be remembered, that, in a case like the present, doubts are not sufficient to justify a decree for the plaintiff.

I pass over all particular notice of the sale of the cotton goods, supposed, but not proved, to have been the property of Cyrus Sayles, and of the application of the proceeds towards the payment of the mortgage of John Arnold, because I am not satisfied by the evidence, that this payment originally constituted a part of the agreement on the sale to Cyrus Sayles, nor that, when applied, it was not a debt incurred by Cyrus to Hardin Sayles. I do not say, that the transaction is free of doubt; but it is susceptible of different explanations, and my mind does not repose with confidence on it. It certainly ought not to outweigh the positive denials of the answers of both of the defendants, as to the integrity and good faith of both conveyances. There are other circumstances, upon which I might comment; but they are far more slight than those which have been mentioned. The court cannot feel itself at liberty to set aside deeds of real estate upon the ground of fraud, unless that fraud is manifest beyond a reasonable doubt. It is not to substitute conjecture for proof; nor suspicion for plain, direct, positive presumption.

2. It remains to examine the conveyance of personal property by Daniel Sayles to Polly Smith. That the grantor was truly indebted to the grantee, in the full amount of the consideration stated in the bill of sale, is not denied, and indeed, upon the evidence, admits of no dispute. That the personal property so conveyed, consisting partly of stock of the farm, and partly of household furniture, was left in the absolute possession of the grantor, is not disputed. Under such circumstances, even if bonâ fide made between the parties, it was, in contemplation of law, as I have already stated, void as to creditors; but between the parties themselves it was undoubtedly valid. It is clear, that there was no intention to cheat the creditors by a pretended sale, or by any secret contrivance whatsoever. The parties evidently acted upon a misconception of the law, from sheer ignorance, and not from guile. How else shall we account for the fact, that the notes for the debt were given up, and a perfect confidence placed in this bill of sale, not as a sufficient, but as a legal and the only indemnity which the party

could give. There is no evidence which establishes, that the property was equal in value to the amount of the debt; and as far as it goes, the evidence strongly inclines the other way. If, then, between the parties this was a good bill of sale, however ineffectual it might be against creditors, if they chose to enforce their rights, what ground is there for the court to say, that the omission, by Daniel Sayles, to include this property in his inventory, was a fraudulent misrepresentation? The bill of sale was not void, but only voidable; not voidable by himself, but by his creditors only. It seems to me, that it would be going very far for a court to hold, that a bill of sale, merely constructively fraudulent, and which the party himself in honor and honesty could not contest, was yet property which he was bound to include in his inventory as his own property. My judgment is, that a transaction, innocently intended, but failing, from the ignorance of the parties, to effectuate their object, ought not to receive such an interpretation.

Upon the whole, my judgment is, that the present bill is not, upon the evidence, sustained in its material allegations, and therefore it ought to be dismissed; but I do not think it a case for costs. The district judge concurs in this opinion, and therefore there is to be a decree of dismissal.

Decree accordingly.

Case No. 11,084.

The PHILADELPHIA.

[Olc. 216.] [1]

District Court, S. D. New York. Nov., 1845.

SEAMEN'S WAGES—LEAVING VESSEL AT FOREIGN PORT—CONSENT OF MASTER—REINSTATEMENT OF CONTRACT—WORKING PASSAGE.

1. A seaman leaving a ship at a foreign port during her voyage, with or without leave, and not returning within a reasonable time before another man is hired in his place, forfeits the wages then due him.

[Cited in The John Martin, Case No. 7,357.]

2. If he abandons the ship by consent of the master, such mutual agreement annuls the shipping contract between them, and the seaman cannot afterwards reclaim his place on board the ship. The master may be subject to penalties or the ship to a charge of extra wages, by positive law, for abandoning or leaving a seaman in a foreign port, but this does not reinstate the shipping contract.

3. After a mariner has voluntarily left his vessel in a foreign port without leave of the officer in command, and his place has been supplied by another, he cannot acquire a right to be reinstated and to wages, by coming clandestinely on board, and remaining concealed from her officers until she is out at sea.

[Cited in Allen v. Hallet, Case No. 223.]

4. The master, under such circumstances, is authorized to compel him to work his passage whilst he continues with the ship, and no engagement to pay him wages can be implied therefrom.

5. When a seaman receives payment for wages during an outward voyage apparently equal to, and rather exceeding the amount due, and afterwards, without demanding further payment, voluntarily leaves the vessel, and on her return to her home port brings suit against her for wages for the full voyage, the court will not order a reference to compute the exact state of his claim when he abandoned the vessel, but will dismiss the libel, with costs, against him.

This libel was filed in rem for the recovery of wages. It alleges that the libellant shipped at New-York, on board the ship Philadelphia, to perform a voyage to Hamburgh and back to New-York, at $15 per month. That he entered into her service the 2d day of May, 1845, and continued on board until after arrival at Hamburgh and her return to New-York. The defence in the cause offered by the respondent was, that the libellant deserted the ship during the voyage, and was never afterwards received into her service, and that all right to wages, if any were due, was thereby forfeited. On the 24th June the libellant left the ship to avoid, as he asserted, being arrested by the police of Hamburgh, for a previous desertion from a Russian vessel. Two of the seamen testified that he asked leave of the mate to go ashore, and that the mate gave him leave, directing him to be sure to come back again; and that libellant engaged to come on board, if not before, when the vessel went down the river to Coxaven. The mate testified that he never gave the libellant permission to go ashore; that he left the ship in the absence of the master, and without leave of him, the mate. Proof of the declarations of the libellant also were given to corroborate the mate's testimony. The mate further testified that he entered the name of the libellant the day he left the ship, on a slate, (the log-book being on shore,) as absent without leave; and when the log-book was brought back to the vessel, he transcribed into it the entry made on the slate. The log-book having that entry in it was offered in evidence to prove the desertion of the libellant, and was objected to as incompetent evidence. It further appeared that the libellant got on board the ship in Coxaven harbor, in the night of the 5th July, without the knowledge of any of the officers, and secreted himself there; and after the ship had got under way, and was twenty-five miles at sea, he made his appearance on deck, and that was the first knowledge the officers had of his being in the ship. One of the seamen testified that he met the libellant in Hamburgh some days after he left the vessel, and at his request, told the master the libellant would join the ship again at Hamburgh, or down the river, and wished his clothes should not be sent ashore. The steward swore he was present at that conversation, and the master told the sailor he would not consent to the libellant's coming on board again. The mate testified that men were shipped at Hamburgh to sup-

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

ply the places of several of the crew, including the libellant, who had left, and one more in number than the ship took out. He and the steward also swore that when the libellant first showed himself to the master at sea, he was told by the master that his things were all sent on shore at Hamburgh. He replied he did not ask for them, he only wanted a passage to New-York. The master then told him he must work for it, and he answered he was willing to do so.

G. Gifford, for the libellant, contended that no statute forfeiture was proved, and none under the marine law, and cited Curt. Merch. Seam. 134; Cloutman v. Tunison [Case No. 2,907].

H. Nicholl, for claimant, cited Douglass v. Eyre [Case No. 4,032]; 20 Wend. 72.

BETTS, District Judge. Without passing upon the competency and sufficiency of the proof offered to establish a desertion at Hamburgh, and the consequent forfeiture of wages to that time, with those demanded by the claimant to the arrival of the vessel in this port, I shall place my decision chiefly upon the other ground of defence, that after the libellant had voluntarily separated himself from the ship and her voyage, even if with the assent of the master, he had no right to reclaim and resume his place on board at his own option, and thus render the ship liable to him as on a contract of hiring.

The libellant intentionally absented himself from the vessel from the 24th of June to the night of the 5th of July. If he received permission from the mate to go ashore, it was a limited one, and under orders to return immediately to the vessel. The mate denies he gave him any leave of absence, and testified that the libellant went off without his knowledge, and when the master was not on board. This statement is contradicted by the testimony of some of the crew, but is satisfactorily corroborated by others, and the result of the whole evidence shows that the libellant went from the ship of his own will, without authority of the mate or the knowledge of the master. His wilful absence that period of time, in a foreign port, without offering to return to his duty, must be deemed intended to be a final leaving of the ship on his part (Cloutman v. Tunison [Case No. 2,907]; 1 Hagg. Adm. 163); and if assented to by the officers, would only render it a leaving or discharge by mutual consent. It is this aspect of the case which will be mainly considered. The penalty of forfeiture of wages incurred by a wilful desertion, or unauthorized continuation of an absence originally permitted, inflicted by the maritime law, or under the United States statute, could only apply to his previously earned wages, and will afford no defence against the main claim in this action. Had he then left the ship on mutual agreement with the master, he could not make himself one of the crew again without the assent of the master; the shipping contract being rescinded by consent of both parties, cannot be reinstated by an after offer of the seaman to perform it on his part. A fair and honest offer of his services to the ship a reasonable time before she sailed from Hamburgh, or before another man had been shipped in his place, would not have compelled the master to receive him; his case would have stood upon an entirely different footing from that of a deserter returning penitently to the ship, and proposing a submission to her authority, or that of a wrongdoer, who had been expelled the ship by the master for misconduct on board. In either of these cases, the law, upon the subsequent and full submission of the seaman, may interpose, and exact from the master a condonation of the offence, and a restoration of the seaman to his place in the ship. Curt. Merch. Seam. 150. The master may also, by positive law, be subject to damages or penalties for leaving a seaman abroad, or even discharging him by his consent (Act Feb. 28, 1803, § 3 [2 Stat. 203]; Abb. Shipp. 147, and notes); but that liability rests on other grounds than that the contract still subsists between the mariner and the ship. The principle and purpose of the rule is to control the punitive power of the master in relation to the misconduct or negligence of seamen, and to coerce the exercise by him of the pardoning power in cases equitably and fairly entitled to claim it, and with a leniency and liberality adapted to the dispositions and capacities of seamen, as well as the quality and effect of their wrongful conduct towards the ship. Whitton v. The Commerce [Case No. 17,604]; Abb. Shipp. 147, and notes.

What the libellant could not secure to himself by an open offer to return to the vessel, he cannot effect surreptitiously. His entry clandestinely on board, and secreting himself there without the knowledge of the master, does not restore him again to the service of the ship, and entitle him to demand the place and privileges of one of the crew. His desertion from the ship, or agreement with the master to leave her, annulled the contract he had made with her owners, and a new engagement would be necessary to clothe him with any rights against the vessel for after services on board. Those rights result from contract, express or implied, and the mere rendition of services under circumstances negativing the idea that they were voluntarily accepted by the master, or with a view to the benefit of the ship, will lay no foundation for a claim of compensation against her or the master. The evidence is clear that the master ordered the libellant to work his passage, in order to indemnify the owners for the expense imposed upon the ship by his unauthorized and unjustifiable intrusion on board. The ship was out at sea when he exhibited himself to the master, and could not then be freed from him. The

master could rightfully have enforced this service upon him without his consent; but I think there is sufficient evidence that the libellant freely agreed to comply with that order. He was told his place was supplied by another, that his services were not wanted, and that his clothes and effects were sent ashore at Hamburgh. He replied he did not ask for them, and only wanted a passage to New-York. This sufficiently establishes the consent of the libellant to do duty on board in satisfaction of his pasasge, and not in the character of one of the ship's crew. He had received, as it appears, in pay and hospital money, when he left the ship, $26 80, and his wages on the outward voyage amounted to only $26 50. On this statement of the account he had been already overpaid. In this point of view there would be nothing for the forfeiture to act upon beyond the contract, if he is held to have incurred one. A more exact computation may possibly show there was still a balance in his favor, but as no such balance was claimed at the time by him, I do not consider it advisable to send the case to a commissioner on that inquiry, as, independent of the right of forfeiture, the claimant would more than extinguish the balance, if any is found due, by the costs to be decreed against the libellant. I shall, therefore, order the libel dismissed, with costs.

PHILADELPHIA (GIRARD v.). See Case No. 5,459.

PHILADELPHIA (MURTAGH v.). See Case No. 9,969.

PHILADELPHIA (SUMNER v.). See Case No. 13,611.

PHILADELPHIA, The (THOMPSON v.). See Case No. 13,973.

PHILADELPHIA (VIDAL v.). See Case No. 16,939.

PHILADELPHIA & A. STEAM NAV. CO. v. The DELAWARE. See Case No. 3,763.

Case No. 11,085.

PHILADELPHIA & HAVRE DE GRACE STEAM TOW-BOAT CO. v. PHILADELPHIA, W. & B. R. CO.

[5 Am. Law Reg. (1857) 280.]

District Court, D. Maryland.[1]

MARINE TORTS—ADMIRALTY JURISDICTION—COLLISION WITH PIER—NEGLIGENCE OF CONTRACTOR.

1. The admiralty has jurisdiction over marine torts, which may be defined to be unlawful acts, injurious to others, independent of contract, happening or being committed upon the sea or tide-water.

2. A steam-tug, regularly licensed under the acts of congress, plying between ports in different states, is within the provision of the constitution as to the regulation of commerce, and the observance of the special state laws regulating Sunday labor, is not compulsory upon such steam-tug; but it would have been otherwise had the tug been engaged in towing vessels between ports of the same state.

3. Where the respondents had contracted with certain parties for the building of a bridge across the Susquehanna river, and the bridge contractors, at the request and for the convenience of the respondents' engineers, had driven in the bed of the river a "sight-pile," upon which a steam tug-boat run, without fault on her part, and was thereby much damaged, *held*, that the negligence of the contractors and engineers, in not removing the "sight-pile," was the negligence of the respondents, the relation of each master and servant being established by the facts.

[This was a libel by the Philadelphia & Havre de Grace Steam Tow-boat Company against the Philadelphia, Wilmington & Baltimore Railroad Company, to recover damages for an injury alleged to have been sustained by a towboat belonging to the libelants in running against a pile in the Susquehanna river, left in said river by the agents of the respondents.]

Dobbin & Talbot, for libelants.

Schley, Donaldson & Evans, for respondents.

GILES, District Judge. This cause has occupied the attention of the court for several days, and has been fully and ably argued by the several counsel engaged in it; and since the adjournment of the court yesterday, I have examined the various authorities to which I had been referred, and the several cases cited by the counsel; and I will now announce the conclusion to which I have arrived. This is a libel filed by the libellants, (a company incorporated by the state of Pennsylvania, and who are engaged in towing canal boats from the end of the tide water canal, at Havre de Grace, to Philadelphia, through the Chesapeake & Delaware canal,) to recover damages for an injury which the steam tow-boat "Superior" (one of the boats of their line) received from a pile placed in the Susquehanna river by the respondents, or their agents. The evidence showed, that on Sunday morning, the 11th of May, 1856, the said tow-boat left her wharf at Havre de Grace, with thirty-one canal boats in tow, for the Chesapeake & Delaware canal; that she had just got into the stream, and had shaped her course down towards the bay, when she suddenly received a shock, by striking against something in the water, and was found immediately to leak so rapidly that the bilge-pumps could not free her; and that, to prevent her sinking in deep water, the captain immediately cast loose from the canal boats, and run the steamer to the wharf at Havre de Grace, where he had wintered his boat the previous winter, and where she sank in five minutes. That he attached her to the wharf with two ropes and four hawsers, new, and of the strongest kind, but that in the course of an hour and a half, she

[1] [Affirmed by circuit court. Case unreported. Decree of circuit court affirmed by supreme court in 23 How. (64 U. S.) 209.]

snapped these fastenings and slid out into deep water, where she lay until she was raised, some twenty days after. That she was raised at a cost of $1,567, and sold, unrepaired, at Havre de Grace, for $1,714. A survey was held on her after she was raised, by experienced men, who estimated the costs of repairing her at $2,830, and who recommended that she should be brought to Baltimore to be repaired, as there was no marine-railway at Havre de Grace. That her injury was caused by her running against a pile stuck down in the bed of the Susquehanna river, in the place where vessels usually pass, in twenty feet water, and that the top of the said pile was about five feet below the surface of the water; and there was no buoy or other visible object to indicate its presence. That it was one of the eight piles used by the engineers of the respondents, when laying out the foundations of the bridge they intended to build across the Susquehanna river; that it had been put down by the contractors for the building of the said bridge, but they did so at the request of the engineer of the respondents, and for their convenience; and the said pile, with the other eight piles, were furnished by the respondents; that the placing or removing of these eight piles formed no part of the contract of the said contractors, and that the piles to which that contract had reference, had been sawed off, or removed previous to this accident. There were some other facts given in evidence, but they were not important, and it is not necessary to recite them here, as those I have presented raise all the questions upon which the case was argued, and are sufficient for the purposes of this opinion.

Four defences have been taken by the respondents to the recovery of the claim of the libellants in this case; three deny any right of recovery at all, and the fourth and last one denies the right of libellants to recover the whole amount of the claim (some $11,000) set forth in their libel.

The first defence taken is, that this court has no jurisdiction of this case, and that if respondents are liable at all, it is only in a court of common law, in an action of trespass on the case. The learned counsel for the respondents contended that the remedy, if a suit had been brought in a court of common law, would be an action on the case, and not trespass; in such a case this court would have no jurisdiction. That the torts of which courts of admiralty have jurisdiction, are those where the agency of man is immediate and direct in their commission, and does not embrace cases where the injury is only consequential. Now, it is laid down in all the elementary writers on admiralty jurisdiction in this country, that in all cases of contract, the jurisdiction of the admiralty court depends upon the subject matter of the contract, and in all cases of torts, the jurisdiction depends upon the locality. And that over marine torts, the admiralty courts have jurisdiction. I need only refer, for this position, to Conk. Adm. p. 21; Ben. Adm. § 308, and to the case of Waring v. Clarke [5 How. (46 U. S.) 441], which also decided that not only torts "super altum mare (as in England,) but those upon tide-water, "infra corpus comitatus," belong to the jurisdiction of the admiralty courts. Now, what are torts? For a true and concise definition, I refer to the second volume of Bouvier's Institutes, one of the best elementary books we have. On page 491 of that volume, in treating of wrongs, the writer makes this explanation: "Tort, a term of signification somewhat similar to wrong, is an unlawful act, injurious to another, independent of contract. Torts may be committed with force, as a trespass, which may be an injury to the person, such as assault, battery and imprisonment; or they may be committed without force; torts of this latter kind are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property corporeal, or incorporeal in possession or reversion; these injuries may be either by nonfeasance, malfeasance or misfeasance." A marine tort, then, is an unlawful act, injurious to another, independent of contract, happening or being committed upon the sea or upon tide-water. Such was, no doubt, the view taken by Judge Grier, in the case of Vantine v. The Lake [Case No. 16,878]. That was the case of a vessel (the Lake) entering a dock in which a smaller vessel was at that time lying, and which dock contained a rise in the bed of the stream, in which but little water was left at low tide, so that when the tide went out, a vessel lying there would careen over on its side; and that this was known to the consignees of the vessel, who had directed her to be placed in the dock; when the tide went out, the Lake fell over on the smaller vessel and injured it, and for which damages thus caused, the libel was filed. Judge Grier held the Lake responsible, and decreed accordingly. A similar case would be, where a vessel was anchored in the stream, near a port much frequented by vessels, and showed no light or signal at night; and another vessel, in the darkness of night, passing in or out of said port, without any want of care, should run against the anchored vessel, and be thereby injured. The vessel at anchor, and her owners, would certainly be responsible. I have no doubt, therefore, that this court has jurisdiction of the case.

The next defence is, that as this steamer was towing on Sabbath, and the injury was received on that day, there can be no recovery in this case, because said steamer was acting in violation of the law of Maryland, passed in 1723, which, in its 10th section, provided: "That no person whatsoever shall work, or do any bodily labor on the Sabbath day, commonly called Sunday, works of necessity and charity always excepted." The evidence

showed, that the "Superior" was regularly licensed for the coasting trade. There was some evidence that there had been a breach in the tide-water canal, which caused the canal-boats to accumulate at Havre de Grace, and that the Superior was under the necessity of making this trip on Sunday, to relieve this pressure. But in the view of this court, that is not such a work of necessity as would bring the case within the exception of the act of 1723. The libellants had the monopoly of this towing business between Havre de Grace and Philadelphia, and were bound to look to all the contingencies of the service, and provide boats sufficient for it. The question then remains, was the "Superior" amenable to this act, and bound to obey its provisions? To solve this question truly, we must first see what her license authorized her to do, and what force and effect that license had, when coming in conflict with a law of this state. It is perfectly clear, that if this boat had been engaged in the domestic commerce of this state, towing barges or boats from the eastern shore to Baltimore, or from Havre de Grace to Baltimore, the provisions of this law would have been obligatory upon her. But by the 8th section of article 1 of the constitution of the United States, the power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes," is given to congress. This power is an exclusive power; and no act of a state, which in any way would seek to regulate, restrain or limit foreign commerce, or the commerce between the states, can be of any binding effect, except it be adopted by, or otherwise receives the sanction of congress. This principle was decided in the case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1. That case also decided, that the power given to congress to regulate commerce, extends to vessels propelled by steam, as well as those navigated by the instrumentality of wind and sails; and also, that a license under the acts of congress for regulating the coasting trade, gives a permission to carry on that trade. The opinion in that case was delivered by Chief Justice Marshall. This was in 1824. But, recently, this question has been again brought before the supreme court, and was there very fully argued, and received the careful examination of that learned tribunal. I allude to the Passenger Cases decided in 1849, and reported in 7 How. [48 U. S.]. The cases commence on page 283 of that report, and embrace two hundred and ninety pages, nearly one-third of the volume. The judges gave their opinions seriatim, but Justices McLean, Catron, McKinley, Wayne and Grier, united in the opinion, that the laws of Massachusetts and New York, brought up to review in those cases, were void, as they were regulations of foreign commerce, and therefore beyond the constitutional powers of the states. I can only here make two short extracts from these able opinions. On page 400, Judge McLean announces the conclusion to which he arrived, in the following language: "Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of the court in the case of Gibbons v. Ogden [supra], reiterated in Brown v. Maryland [12 Wheat. (25 U. S.) 419], and afterwards re-asserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion, that the power 'to regulate commerce with foreign nations, and among the several states,' by the constitution, is exclusively vested in congress." And on page 414, Judge Wayne, in announcing the conclusion to which he and a majority of the court had arrived upon this most important question, says: "That the power in congress to regulate commerce with foreign nations, and among the several states, includes navigation upon the high seas, and in the bays, harbors, lakes and navigable waters within the United States, and that any law by a state, in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant." Now, it must be admitted, that if this law of Maryland, for the observance of the Sabbath, can be made applicable to vessels engaged in the commerce between the states, then they are made subject to a regulation which congress never authorized or sanctioned. Under her license, what were the rules and regulations by which this vessel was bound, and under which she was authorized to sail? These regulations will be found in Act Sept. 1, 1789, § 22 [1 Stat. 60], and in the second and third sections of Act March 2, 1819 [3 Stat. 493]. But there is no provision in these, or in any other acts of congress, that she should not sail on Sunday. I consider, therefore, that the steamer of the libellants was not bound to obey the law of Maryland, to which reference has been made, and that there is no valid objection to the recovery of the libellants for the damages they have suffered on that ground. Reference has been made, in the course of the argument, to the quarantine and pilot laws of the several states, which we recognized as valid and binding upon the commerce of the country. But an examination of the acts of congress, will show that they have been sanctioned and adopted by congress. By the 4th section of the act of August 7, 1789 [1 Stat. 54], it is enacted: "That all pilots in the bays, &c., of the United States, shall continue to be regulated in conformity with the existing laws of the states, respectively, in which such pilots may be, &c., &c., until further legislation shall be made by congress." And by the act of February 25, 1799 [Id. 619], the quarantine and health laws of the several states were sanctioned and approved.

The next objection taken to the recovery of this claim by libellants is, that the contractors for building the bridge are the re-

sponsible parties, and not the respondents. And in the argument of this point, I was referred to some twelve English decisions, and three American cases. I have examined these cases, and according to the view I take of the facts of this case, I do not deem them applicable. The law they lay down is not disputed by the libellants' counsel, nor could it be controverted in a case where similar questions might arise. In nearly all of them the question was, whether the party committing the tort was the servant of the defendants, or whether he was not the servant or agent of another party, acting under an independent contract. Of this character are the cases of Rapson v. Cubitt, reported in 9 Mees. & W. 709; Reedie v. London & N. W. Ry. Co., reported in 4 Exch. 244; Knight v. Fox, 5 Exch. 721; Quarman v. Burnett, 6 Mees. & W. 499; and the late case of Steel v. Southeastern Ry. Co., 32 Eng. Law & Eq. 366. In all these cases, except Quarman v. Burnett, the work from which the injury resulted had been performed by the employee of one who had a contract for the execution of said work. Quarman v. Burnett was the case of an owner of a carriage hiring horses of a job-man, who provided a driver; and the owner of the carriage was held not responsible for an injury caused by the carelessness of the driver. The case of Milligan v. Wedge, 12 Adol. & E. 737, was the case of a butcher who had employed a licensed drover to drive him a bullock he had bought at market, and the drover's boy, by his negligence, suffered the bullock to run into the plaintiff's show-room, where he did considerable damage. It was held that the owner of the bullock was not responsible. The three American cases to which I have been referred are Blake v. Ferris, in 1 Seld. [5 N. Y.] 48; Mayor, etc., of New York v. Bailey, 2 Denio, 434; and Lowell v. Boston & L. R. Corp., 23 Pick. 24. These cases maintain the same principle upon which the English cases were decided. And in the cases in Denio and Pickering, the defendants were held responsible, on the ground that a party is responsible for an injury resulting from the negligence and unskillfulness of his servants or agents. See the very late case of Hilliard v. Richardson, 3 Gray, 354.

Now, the evidence in this case, in my opinion, clearly shows that the steamer was injured by running upon a sight-pile, which had been placed in the river by the direction and for the use and convenience of the engineers of the respondents, and was not placed there by the contractor, in the execution of his contract for building the bridge. It was clearly, therefore, the negligence of the engineers in not removing this pile, when they had ceased to use it; and for the injury resulting from this negligence of their agents, I think the respondents are answerable. The only question remaining, is the amount of damages to which the libellants are entitled. The rule of damages which has been laid down by the supreme court in collision cases, seems to me to be a just one in this case. I refer to the case of Williamson v. Barnett, 13 How. [54 U. S.] 101. I shall allow the libellants the following items: Furniture lost, $500.00; cost of raising steamer, $1,567.36; net earning for 60 days, which it would take to raise and repair her, $1,890.00; necessary repairs, to place her in as good a condition as before the accident, $2,890.00; cost of taking her to Baltimore, estimated at $153.00,—$7,000.36. For which sum I will sign a decree. I do not think that, under all the circumstances, the libellants were justified in selling her at Havre de Grace; and I therefore decline to allow them the amount claimed by them, growing out of that sale, and the small amount realized from it. I think her leak might have been stopped, so far as to have enabled the libellants to bring her round to Baltimore, where she could be taken upon the railway and repaired; and the intelligent gentlemen who examined her at the request of the libellants, recommended this course, and gave it as their opinion, that there would be but little risk in bringing her to Baltimore.

[An appeal was taken to the circuit court, where the decree of this court was affirmed. Case unreported. An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed, with costs. 23 How. (64 U. S.) 209.]

Case No. 11,085a.

In re PHILADELPHIA & R. R. CO.

[12 Reporter, 644.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 19, 1881.

RECEIVERS—CAR TRUST LOAN—INTEREST ON BONDS—POWER OF COURT.

1. A petition of receivers of a railroad for leave to create a car trust loan will not be granted, when the money necessary for the procurement of the rolling stock and equipment required can be raised from the net earnings of the road, even if by so applying the earnings the receivers are rendered unable to pay the interest on the company's bonded debt.

2. Whether the court has any power to make such an order—dubitatur.

A petition was presented by the receivers of the railroad asking to be allowed to create a car trust loan of a million of dollars, to provide for the rolling stock and equipment of the road.

S. Dickson and R. L. Ashhurst, for receivers.

J. C. Bullitt, for certain stockholders.

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

BUTLER, District Judge, in delivering the opinion of the court, said: Two questions arise in considering the application: First. is the

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matter contemplated within the scope of the court's duty and authority, as custodian of the road and other property of the company? Second, if it is, would it be wise to grant the application? As respects the first, it must be borne in mind that the custody of the court is only temporary, to preserve the property so long as may afford reasonable time to the plaintiffs in the foreclosure bill to prosecute their proceeding to a close, in case the company fails to make satisfactory arrangements to relieve itself from the proceeding. Whether the order asked for by the receivers, or the allowance of it, falls within the proper scope of the court's authority, under the circumstances, is certainly open to doubt. I will not, however, enlarge upon this subject, for if it were not so open to doubt, I am satisfied that it would not be wise to make the order.

The petitioners admit, and the testimony proves, that the net earnings of the road are amply sufficient to make the purchase required; and if necessary these earnings should be so applied. The ground on which the petitioners desire to bond (instead of using such moneys) is that the moneys should be applied to payment of the bonded creditors of the company, in discharge of interest. We esteem it wise, if necessary, to allow such interest to go unpaid, rather than to pay it by means of borrowing money—which may tend to mislead creditors and others respecting the actual condition of the road and its earnings. It must be borne in mind that the court's custody of this property is not likely to continue much longer. The foreclosure proceeding has been running for eighteen months, and it should reach its close without unnecessary delay; and the court expects it to do so. The modern practice prevailing to some extent, elsewhere, of transferring corporate property to the custody of the courts to be thus held and managed for an indefinite period of years, to suit the convenience of parties, whereby general creditors and stockholders are kept at bay, I regard as a mischievous innovation. I have no doubt the petitioners are fully satisfied of the wisdom of the measure they suggest, and that they are actuated by a sincere desire to promote the best interests of the road. We do not, however, agree with them in this matter, and must be governed by our own judgment.

McKENNAN, Circuit Judge, concurring, said: I concur in what Judge Butler has said. We hold the property of the railroad company to preserve it, to keep it in its present condition, while the proceedings under the bill of foreclosure are being prosecuted. I entertain considerable doubt of the authority of the court to make the order asked for, and this of itself is sufficient for me; but I agree with Judge Butler in all he has said respecting the expediency of making the loan, even if we had authority so to do. The property should pass, with as little delay as is reasonably practicable, into the possession and control of owners, who will best be able to determine how it should be managed, and what measures relative to it are most likely to promote their interests. To the exent that the earnings of the road are required to keep it up, the receivers have authority so to apply it; but to borrow money to enable them to continue to pay money to bondholders, I consider unwise.

Petition disallowed.

Case No. 11,086.

PHILADELPHIA & R. R. CO. v. BARNARD et al.

[3 Ben. 39.] [1]

District Court, E. D. New York. Nov., 1868.

FREIGHT—BILL OF LADING—ASSIGNEE.

1. Where a cargo of coal, before its delivery from the vessel, had been sold by the shippers to one Merritt, who sold it to one Blanchard, and he sold it to one Bass, who received part of it, and paid to the owners of the vessel freight on what he received, and refused to receive any more, and Blanchard then sold the rest to the respondents, who received no bill of lading, but received the coal from the vessel, and gave a receipt for it upon the captain's bill of lading, and gave Blanchard two notes, one for the price for the coal, and one for the freight, which Blanchard agreed to see paid, but which he failed to pay, and died insolvent, *held*, that the respondents were liable to the owners of the vessel for the freight on the coal which they received.

[Cited in North-German Lloyd v. Heule, 44 Fed. 101.]

2. Whoever receives cargo from a vessel under a bill of lading, in the absence of circumstances showing a different understanding, is liable for the freight.

3. It is not necessary that a bill of lading should be actually indorsed, or even delivered, to a buyer, to make him an assignee of it.

This was an action brought [by the Philadelphia and Reading Railroad Company against John T. Barnard and Sons] to recover $287.92 freight on a portion of a cargo of coal transported and delivered by the libellants under the following circumstances: L. T. Conner & Co., at Philadelphia, shipped 214 tons of coal on board the boat of the libellants, for which the ordinary bill of lading was issued, according to which the coal was to be transported to New York, and there delivered to the shippers or their assigns, he or they paying freight for the same at the rate mentioned therein. The margin of the bill of lading contained a memorandum that the freight was to be paid to D. E. Moore, the agent of the libellants, at Trinity Buildings, New York. Under this contract, the coal was safely transported to New York, and delivered as follows: Twenty-one tons to one Bass, who paid to the libellants freight on what he received, but declined to receive any more on account of an objection to the qual-

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

ity, whereupon the balance, 179 tons, was delivered from the vessel's side to the defendants in this action, who thereupon gave a receipt upon the back of the captain's copy of the bill of lading, acknowledging the receipt from the libellants of the 189 tons. It appeared that the coal, before delivery, had been sold by the shippers to one Merritt, by him sold to one C. A. L. Blanchard, by him sold to Bass; and when Bass threw up the purchase after receiving the twenty-one tons, Blanchard sold the rest to the defendants. The defendants objected at first to buying the coal, because coal was dull of sale, and they would be obliged to pay the freight at once; whereupon Blanchard agreed to see that the freight was paid, if the defendants would give him their note for the amount of it. This was done, and the defendants, after the receipt of the coal from the vessel, gave Blanchard their two notes, one for the price of the coal, the other for the amount of the freight, with the interest added, both of which notes were duly paid. No copy of the bill of lading was indorsed or delivered to the defendants, nor any other evidence of the purchase made.

Benedict & Benedict, for libellants.
Geo. W. Wingate, for respondents.

BENEDICT, District Judge. Upon the facts in this case which are not disputed, there can be no doubt of the libellants' right to recover their freight of the defendants. It is clear law that whoever receives cargo from a ship under a bill of lading, in the absence of circumstances showing a different understanding, is liable to the ship for the freight. It is not absolutely necessary that a bill of lading should be actually indorsed, or even delivered to the buyer, to make him the assignee thereof. Other circumstances may be shown equally sufficient to show the real relationship of a party to the cargo. Here the defendants received the coal themselves from the vessel's side; they gave no notice to the master or any one that they did not receive it under the bill of lading. After its delivery, they gave to the master, upon the back of his copy of the bill of lading, a receipt stating that they had received the coal from the libellants. Under such circumstances, they cannot be permitted to say that they dealt only with Blanchard, and are strangers to the contract for the freight. As between them and the vessel, they became, under the circumstances, the assignees of the bill of lading. They dealt with the ship in that capacity and no other, and the receipt of the coal made them liable, as such, for the freight. Besides it is clear that the defendants understood themselves to be liable to the ship for the freight, for one of them testifies that he at first declined to buy the coal of Blanchard because coal was dull, and he knew he would have to pay the freight, which objection Blanchard obviated by agreeing to take their note for the freight, and seeing they were not compelled to pay it. This was accepted, and after the coal was delivered and their liability for the freight fixed, they gave to Blanchard their note for the amount of the freight, with interest added, of all which the libellants knew nothing. This indicates clearly that the defendants understood their liability to the ship and relied upon Blanchard to save them from it. Their misfortune is to have relied upon a man whose death and insolvency made it impossible for him to protect them. There must be a decree in favor of the libellants for $287.92 with interest and costs.

Case No. 11,087.

PHILADELPHIA & R. R. CO. v. BARNES et al.

[3 Am. Law Rep. U. S. Cts. 170; 12 Int. Rev. Rec. 112; 7 Phila. 543; 27 Leg. Int. 308; 3 Chi. Leg. News, 1; 5 Am. Law Rev. 383; 2 Leg. Gaz. 300.] [1]

Circuit Court, E. D. Pennsylvania. Sept. 19, 1870.[2]

INCOME TAX—PERCENTAGE OF CORPORATION DIVIDENDS.

1. The tax of five per cent. out of dividends payable by a bank, railroad company, &c., is a tax on the income of the holder of the stock, and only differs in the mode of collection from his other income tax. The corporation is made the agent of the government for its collection.

2. A dividend declared payable after December 31st, 1869, although for earnings of the year 1869, is not liable to the income tax.

3. The collector cannot justify in an action of trespass for levying on the property of a company for such tax.

In equity.

James E. Gowen, for plaintiffs.
Aubrey H. Smith, U. S. Dist. Atty., for defendants.

STRONG, Circuit Justice. The substance of the second plea, to which there has been a demurrer, is, that the plaintiffs, who are a railroad company, declared a dividend on their capital stock to their stockholders, on the 23d of December, 1869, as part of their earnings, incomes and gains made and accrued between July 1st, 1869, and December 1st, 1869, and that the dividend was declared payable to the stockholders on and after the 17th of January, 1870. The plea further avers that a return thereof was afterwards made to the assessor of internal revenue of the United States, and a tax of five per cent. of the amount of the dividend was assessed by him upon the plaintiffs, which was due and payable on or before March 31, 1870; that notice of the assessment was duly given, and a demand for payment was made

[1] [5 Am. Law Rev. 383, contains only a partial report.]

[2] [Reversed in 17 Wall. (84 U. S.) 294.]

upon the plaintiffs by the district collector; that the tax was not paid in response to the demand, whereupon the defendants who were the collector and deputy collectors, on the 5th of May, 1870, made a distress for the tax, together with five per centum additional thereto, and the interest accrued thereon, and that this was the supposed trespass, etc.

It is a plea of justification; and, in order to determine its sufficiency or insufficiency, it is necessary to inquire whether there was any legal warrant for assessing and collecting such a tax. If there was, it is conceded it must be found in the internal revenue act of congress of June 30, 1864 [13 Stat. 223], as amended by its supplements. The primary question then, is, whether that act authorizes the levy and collection of a tax upon dividends declared by railroad companies in 1869 but declared to be payable at a time after December 31st of that year, and therefore not receivable by the stockholders until in the year 1870.

It is of course essential to the inquiry, that it be determined whether the tax upon railroad dividends was, by the act of 1864, made a permanent tax, or whether it was of temporary duration, like the income tax upon other gains and profits. I have no doubt that the tax upon dividends made by such companies, and upon the interest payable by them, described in the 122d section, is a part of the five per cent. tax imposed upon all incomes by the 116th section. By the 116th, as amended by the act of 1867 [14 Stat. 471], it was enacted that there should be levied, collected and paid annually upon the gains, profits and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends or salaries, or from any profession, trade employment, vocation carried on in the United States or elsewhere, or from any source whatever, a tax of five per centum on the amount so derived over one thousand dollars. The same section declared that the tax therein provided for should be assessed, collected and paid upon the gains, profits, or income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said duty. What that time was directed to be, as well as the duration of the tax, was defined by the 119th section, which enacted as follows: "That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April in each year, until and including the year 1870, and no longer." It is noticeable that the language of the 116th section is very comprehensive. It extends to income of every description, whether derived from labor or property; and it particularly mentions that derived from interest and dividends, adding the words "or from any source whatever." It is true, that in the provisions made by congress for estimating or ascertaining the gains, profits and income of any person, there are certain apparent exceptions. The 117th section, as amended by the act of 1867, required that there should be included in the estimate, inter alia, the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same if divided, whether divided or otherwise, "except the amount of income received from institutions, or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same, and except that portion of the salary or pay received for services in the civil, military or naval, or other service of the United States, including senators, representatives and delegates in congress, from which the tax has been deducted." But these exceptions recognize the dividends and interest received from such companies, and the gains from the salaries or pay of the United States officers, as a part of the tax-payer's income. They are obviously introduced as a guide to the return of income, which the next following section requires to be made to the assistant assessor, and because a special mode of collecting the tax on such dividends, interest and salaries was intended to be provided.

It is indispensable to a correct understanding of the statute that all its sections relating to the same subject be read and considered together. Those numbered from 116 to 123, inclusive, are all classified under the title "Income," and they manifestly relate to the same subject. Together they constitute a system devised to impose and collect a tax upon income or gains from any source whatever. The subject of the tax is one and the same, though consisting of numerous constituents. But the mode of assessment and of collection is different as applied to the constituents of income. Of a portion of his gains the tax-payer is required to make a return to the assistant assessor, and himself pay the tax on that portion to the district collector. But a different mode of collection is prescribed for the tax upon the dividends of banking, trust and insurance companies by the 120th section of the act, and by the 123d section, for the tax upon dividends declared and paid, and upon accumulated profits made, and upon interest on permanent loans by railroad, canal, turnpike, or slackwater navigation companies. Still, the tax is upon the individuals whose gains such dividends and interest are, and it is a tax at the same rate as that collected from other income; but the corporations are made the agents of the government to collect it. Still another mode is prescribed by the 123d section for collecting the tax upon that part of the tax-payer's gains which consists of salaries received from the federal government, or of payments for his services as an officer of the United States. That, the disbursing

officers are required to deduct at the same rate per cent.

It is very obvious to me that these are only variant modes of collecting the tax on income imposed by the 116th section of the act. These portions of income were not required to be included in the general estimate, or in the return made to the assistant assessor, because their amount was as certainly ascertainable to the corporations or officers required to collect it, as it could be by any return of the tax-payer himself. Such a construction is demanded alike by the letter and the general spirit of the act. There is nothing to warrant the belief that congress intended to impose a burden upon income derived from one species of property greater or longer continued than that imposed upon income from other property, or that they intended to discriminate against federal officers, and compel them to pay a tax on their salaries, after taxes upon all other salaries had ceased. The dividends received by a shareholder of a railroad company, or a canal, turnpike, or slackwater navigation company, or of a banking, trust, or insurance company, are, in every sense, as much his income as are the dividends he may receive from any other company; for example, a bridge or a manufacturing corporation. So is the interest received for loans to a railroad company as truly income of the bondholder as is the interest received by him on permanent loans to any other corporation, or to natural persons. Was it the intention of congress to enact that one who lent his money to a telegraph company, or to a mining or manufacturing company, should be exempt from a tax upon his interest received after December 31, 1869; but that one who lent to a canal or railroad company should continue to pay the tax indefinitely and for all time? Is such a reasonable construction of the act of 1864? And again: the salary of an officer of the United States is his income as certainly as the salary received by another from a corporation is his. Was it designed to tax one and exempt the other? To my mind the act shows no intent to make such discriminations. I must regard the 120th, 121st, 122d, and 123d sections, not as imposing a distinct tax upon the subjects mentioned in them, but as having only the purpose to prescribe a peculiar mode of securing the collection of a portion of the tax previously imposed by the 116th section. And such, I think, has been, in effect, the construction adopted by the supreme court. In Jackson v. Northern Cent. R. Co. [Case No. 7,142], a case tried in the circuit court of the United States for the district of Maryland, the primary question was, whether the tax on interest payable by railroad companies was chargeable against non-resident aliens, and it was ruled by the chief justice that it was not. The ruling was based upon the position, that the tax on such interest was the same as that imposed by the 116th section, viz., a part of the income tax, and that as the 116th section did not include non-resident aliens, the tax on interest spoken of in the 122d was not chargeable against them,—the deduction of five per cent. being only a mode of collecting the income tax. This decision was subsequently affirmed in the supreme court—[Northern Cent. R. Co. v. Jackson] 7 Wall. [74 U. S.] 262—and the language of the court was as follows: "The decision was based mainly upon the ground, that, looking at the several provisions bearing upon the question, and giving to them a reasonable construction, it was believed not to be the intent of congress to impose an income tax on non-resident aliens; that they were not only included in the description of persons upon whom the tax was imposed, but were impliedly excluded by confining it to residents of the United States and citizens residing abroad (an exclusion only found in the 116th section), and that the deduction from the prescribed income of the interest on these railroad bonds, when paid by the companies, was regarded as simply a mode of collecting this part of the income tax. We concur in this view." I understand this case as determining several things: 1st. That the 116th and 122d sections of the act of 1864 are parts of one system, devised for income taxation. 2d. That the tax on railroad dividends, and on interest of railroad indebtedness, is not a different tax from that imposed upon income generally. And 3d. That the 122d section was intended merely to provide a special mode of collection for a part of the tax.

Accepting, then, the conclusion, that the tax on railroad dividends, &c., is only a part of the tax on income generally, imposed by the 116th section, and that the purpose of the 123d was not to impose a distinct tax, but to designate collectors and provide a special mode of collection, I proceed to consider what is the effect of the limitation clause in the 119th section. I have already quoted it; I quote it again for convenience: "The taxes on incomes herein imposed shall be levied on the 1st day of May, and be due and payable on or before the 30th day of June in each year, until and including the year 1870, and no longer." Whatever else this clause may mean it manifestly embraces, in terms, taxes on all income from any source,—income upon which the act imposed a tax. It excepts none. It does not speak of taxes on income, a return of which is required to be made by the tax-payer, but its language is, "taxes on income herein imposed." The 119th section imposes no tax. The reference, must, therefore, be to taxes on income imposed by other sections of the act,—to all of them, as well those on railroad dividends, &c., as those on dividends made by telegraph companies, or gains received from any other source.

The clause also manifests a clear intent, that the income to which it refers should not be subject to a tax, unless derived or received prior to January 1st, 1870. This ap-

pears clearly when construed in connection with the 116th section, as it must be. The section enacted, as has already been noticed, that the tax therein provided for, including the tax on income from any source whatever, should be assessed, collected and paid upon the gains, profits and income for the year ending the 31st day of December next preceding the time for levying, collecting and paying said tax. This provision must be assumed to have been in the mind of congress when the 119th section was framed. Therefore, though the last was required to be levied on the 1st of March, 1870, it was designed to be a tax on the income of 1869; for unless the time for the levy had been fixed in 1870, a large portion of the income of 1869—probably much the largest portion—would have escaped the tax entirely. Then the provision that the taxes on income should be levied on the first day of May in each year, until and including the year 1870, and no longer, must mean that the income of 1870 should not be subject to taxation. If the income referred to was all income, as I have shown it was, in terms, it is difficult to avoid the conclusion, that the act of congress authorizes no tax upon any income accrued, derived or received from any source during the present year. The only doubt I entertain in regard to the soundness of this interpretation is raised by the fact that the limitation mentioned in the 119th section is applied to the time of the levy, and that no express mention is made of taxes on railroad dividends, &c.; but, upon reflection, I think such express mention would have been superfluous, except, perhaps, to solve a doubt, which does not appear to have been in the mind of congress. It seems to me that light is thrown upon the subject, by observing what must have been the course of thought in the legislative mind when the system of income taxation was devised and expressed in the statute. The first thought was that of an annual tax upon all annual income. That was embodied in the 116th section. Next arose the inquiry, whether the tax should be upon the income of the current year, or upon that of the year next preceding its collection. That was answered in the same section. Obviously, the inquiry then arose: How shall the income be ascertained? And, for that, provision was made in the 117th and 118th sections. Then followed the 119th, which provided for three things: "1st. At what time in each year the levy should be made and the tax become payable. 2d. How long the tax should continue. And, 3d. How it should be collected. Then followed some special provisions, not imposing any new or distinct tax, but in aid of the collection of the tax previously imposed. It seems to have occurred to congress, that, as to a portion of income, mainly dividends, interest on funded debt of large corporations, and federal salaries, the machinery of a return to the district assistant assessor was unnecessary; that the amount of such income was more readily and more certainly ascertainable in another way; and that the collection of the tax might more easily be made by the institutions that had the income in hand than by the district collectors. Hence the provision made in the 120th, 121st, 122d and 123d sections, intended to direct peculiar and exceptional modes of collection, and nothing more. It is true, they compelled the payment of the tax before the expiration of the year in which it was received; and in that respect, as well as in the mode prescribed for collection, they distinguished between the kinds of income specified and income generally. But the act guarded against gross inequality by authorizing a deduction of the income upon which the tax had been paid from the estimate returned to the assessor.

Upon the whole, in view of these considerations, I am of opinion that, except as to the time and mode of collection, congress had no intention of placing the tax on those species of income, mentioned in the 120th, 121st, 122d and 123d sections, on any different footing from the tax on all other income, and that the statute does not impose upon it a burden greater or longer continued than is laid upon income generally. And I am confirmed in my opinion by the conviction that it allows a reasonable construction to the act of congress. If I am wrong in my conclusions, if a tax upon railroad dividends, made payable to the stockholders in 1870, or upon interest upon railroad debt falling due in 1870, may be charged and collected under the act, then the tax is grossly unequal, and that part of a person's income which consists of such dividends is subjected to a burden from which other income is exempt. Under the act of 1864 a tax has been levied upon all incomes, including those from dividends and interest of railroad companies in every year from 1864 to 1869, inclusive. Six of these annual taxes have been laid. I refer now only to those levied under the act of 1864. And the tax upon such portions of each annual income as consist of railroad dividends has been paid by the companies, and presumably charged to the stockholders. If it has not been thus paid, that income has been returned to the assistant assessor, and charged by him; for, as directed by the 117th section, only that income from dividends and interest was allowed to be deducted from the general aggregates which had been assessed, and the tax upon which had been paid by the institutions from which it was derived. Income from railroad dividends has, therefore, paid six annual income taxes, and no more have been assessed against other income. It is not to be presumed, in the absence of a clearly expressed contrary intent, that a discrimination was intended.

[3] [But I may not overlook the later act of congress, passed July 14th, 1870 [16 Stat.

[3] [From 3 Chi. Leg. News, 1.]

256], the 17th section of which enacts "that sections 120–123 of the act of June 30th, 1864, entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' as amended by the act of July 13th, 1866 [14 Stat. 98], and the act of March 2d, 1867, shall be construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further taxes shall be levied and assessed under said section." This was doubtless intended as a legislative construction of the sections of the act designated. I shall not pause to inquire how far the law-making power can determine authoritatively the meaning of an existing statute. The construction or interpretation of a statute would seem to be, ordinarily, a judicial, rather than a legislative, function. I know that acts declaratory of the meaning of former acts are not uncommon. They are always to be regarded with great respect, as expressive of legislative opinion. And, so far as they can operate upon subsequent transactions, they are of binding force and unobjectionable. But it is well settled that they cannot operate to disturb rights vested or acquired before their enactment, or to impose penalties for acts done before their passage,—acts lawful when they were done. It is always presumed that the legislature had no intention to give them such an effect.] [3]

Now, if the income tax imposed by the act of 1864, and its supplements, expired with the 31st of December, 1869, (except that the law provided for the collection of that portion of the tax on the income of 1869 which had not been paid) if the act of 1864 did not prescribe a tax upon dividends made and interest paid by railroad companies after December 31, 1869, as I have endeavored to show, it was not the duty of these plaintiffs to pay to the district collector five per cent. of the dividend made by them, declared payable January 17, 1870, and they had no authority to detain any portion of it from their stockholders. It was their right, as well as their duty, to pay over the entire dividend to the stockholders who had then acquired a vested right in it. And the plea of the defendants does not aver that the whole dividend was not at once thus paid over. Then the distress, which the plea attempts to justify, was made to enforce the performance of a duty that has no existence. It was substantially an attempt to enforce the penalty upon the plaintiffs for an omission to do that which they had no right to do,—a penalty equal to the amount of a five per cent. tax with an additional five per cent. thereon. It is to be remembered, that the tax is levied upon the shareholders, and the company is merely the government agent to collect it. Its liability to a distress, if any there be, arose out of an unlawful failure to collect the tax and pay it over. But the failure was not unlawful at the time. Surely, it will not be maintained that the declaratory act of 1870 can be regarded as operating retrospectively to make the act or omission of the plaintiffs unlawful, and punishable as an offence, when the act or omission was innocent at the time when it occurred. Were it conceded that the construction given by congress is binding in all cases where it would not disturb vested rights, or operate practically as an ex post facto law, it is not to be presumed that it was intended for application to such a case as the present. Of course, I am not to be understood as maintaining that in July, 1870, when the declaratory act was passed, that congress had not power to impose a tax upon any income that had been received before that time. What I mean to say is, that it is not to be admitted congress intended by that act to subject any institution to a penalty for not having, before its passage, collected a tax which had not been imposed.

Is, then, a dividend declared December 22d, 1869, but declared to be payable January 17, 1870, income of 1869, or of 1870, within the meaning of the act of congress? I think it must be income of the latter year. True, it was earned by the company in 1869, but it was not available to the stockholder. The act speaks of income derived from any kind of property, &c. It seems to contemplate a tax upon income received, or receivable,—something out of which the tax can be paid. If it were not so, the tax might be exacted for that which never came, and never could come, into the hands of the tax-payer. The language of the 122d section is also significant. In speaking of the companies therein mentioned it declares, they "shall be subject to, and pay a duty of, five per cent. on the amount of all such interest, or coupons, dividends, or profits, whenever the same shall be payable." In other words, the duty arises when the dividend is payable. And such is the construction that has been given to the act, in accordance with which the taxes have been collected. Prior to the act of 1864 there was a tax on the dividends at the rate of three per cent.; and when, by that act, the rate was raised to five per cent., the commissioner of internal revenue issued a circular, dated July 1st, 1864, declaring that "all dividends payable on and after July 1st, no matter when declared, are subject to the duty of five per centum." I am not aware that any different construction of the act has ever prevailed. My opinion, therefore, is, that the dividends declared by the plaintiffs must be regarded as income of the stockholders for the year in which it became payable. It follows that the assessor was without authority to assess a tax upon it, and that the plea of the defendants does not justify the distress they made to enforce its payment by the plaintiffs, together with the payment of a five per cent. additional penalty.

[3] [From 3 Chi. Leg. News, 1.]

Judgment on the demurrer is, therefore, directed against the defendants.

[The judgment of this court was reversed by the supreme court, where it was carried on writ of error. 17 Wall. (84 U. S.) 294.]

PHILADELPHIA & R. R. CO. (CAMBLOS v.). See Case No. 2,331.

PHILADELPHIA & R. R. CO. (DINSMORE v.). See Case No. 3,921.

PHILADELPHIA & R. R. CO. (JEHNER v.). See Case No. 7,255.

PHILADELPHIA & R. R. CO. v. The J. H. GAUTIER. See Case No. 7,319.

Case No. 11,088.

PHILADELPHIA & R. R. CO. v. KENNEY.

[30 Leg. Int. 281; 9 Phila. 403; 5 Leg. Op. 137; 18 Int. Rev. Rec. 92.]

Circuit Court, E. D. Pennsylvania. Aug. 21, 1873.[1]

INCOME TAX—CORPORATION DIVIDENDS.

Dividends declared and payable by railroad companies during the last five months of 1870, are not liable to taxation by the United States. A seizure by collector of United States revenue is illegal.

[Cited in Metropolitan R. Co. v. Slack, Case No. 9,506.]

At law.

McKENNAN, Circuit Judge. This is an action of trespass vi et armis for the alleged illegal seizure and detention of the goods and chattels of the plaintiff, mentioned in the declaration. The defendant alleges in his plea that he was justified in making this seizure, because, he says, the plaintiff, on the last day of November, 1870, declared a dividend of $1,570,580.01, on its capital stock, as part of its earnings, income and gains, made and accrued between the 1st day of July, 1870, and the 30th day of November, 1870, which was made payable to its stockholders on the 27th day of December, 1870; that the plaintiff thereby became liable to pay to the United States, a tax of 2½ per cent. on this dividend, amounting to $33,469.75, which was duly entered by the assessor of internal revenue upon the list made out by him according to law, a certified copy of which he furnished the defendant as collector; and that upon the default of the plaintiff, in performance of the duty imposed upon him by law, he made the seizure complained of. To this plea the plaintiff has demurred generally.

Assuming that the authority under which the defendant acted is sufficiently set out in the plea, two questions are presented by the demurrer, upon which the decision of the cause depends. First. Is the action of trespass an appropriate remedy for the alleged wrong? Second. Was the tax imposed upon the plaintiff authorized by law?

An executive or ministerial officer, who acts under the authority of a tribunal of general jurisdiction, is not responsible for an excessive or illegal exercise of its powers, but where a special or limited jurisdiction only is possessed, such officer is bound to see that he acts within the scope of the legal powers of the tribunal which commands him. This is the rule in England, by which the accountability of ministerial officers is determined. Thus in the Case of Marshalsea, 10 Coke, 76, Sir Edward Coke says: "If the court of common pleas, in a plea of debt, doth award a capias against a duke, earl, &c., which, by the law, doth not lie against them, and the same appeareth in the writ itself, yet, if the sheriff arrest them by force of the capias, although that the writ be against law, notwithstanding, inasmuch as the court hath jurisdiction of the cause, the sheriff is excused." And so the law has ever since been held by the English courts. But in the United States the scope of the rule has been extended, so that it is applied broadly to the protection of ministerial officers, who execute the mandates of legally constituted tribunals of every rank or character, having either a general or special jurisdiction of the subject matter to which the process relates. Beach v. Furman, 9 Johns. 230, is a conspicuous illustration of this. It was an action of trespass against a constable for seizing and selling the property of a woman under a warrant commanding him to levy of her goods and chattels, a penalty imposed by law for refusal to work on the highways, from which duty women were expressly exempted. The court, Kent, C. J., says: "Now, the overseer of the highways was the person to designate, in the first instance, and to deliver to the commissioners the names of the persons liable to be assessed, and he was also the officer to adjudge what persons were in default, and to demand the warrant. In the exercise of this authority the overseer may have returned the names of persons not liable to assessment, and he may have adjudged persons in default who were not in default. * * * It would be against the obvious principles of justice and policy to make the ministerial officers act, in a case like this, at their peril, when they have no right to judge and are required to act. They are only responsible as trespassers when they act under the authority of a person who had no jurisdiction in the case, or when they exercise that authority irregularly." In Savacool v. Boughton, 5 Wend. 170, Mr. Justice Marcy discusses the subject fully, and shows that the doctrine of Beach v. Furman is in harmony with the leading American cases and with the principles of justice and reason.

The same rule is settled as the law of Pennsylvania by the repeated decisions of its supreme court. Moore v. Alleghany City, 6 Har. [18 Pa.] 55; Cunningham v. Mitchel, 67 Pa. St. 81. In the last of these cases, Mr. Justice Agnew says: "In the case of public

[1] [Reversed in 154 U. S. 616.]

officers, an inferior acting within the scope of his warrant, when apparently regular, is always protected, unless the authority issuing it was without jurisdiction. It has been a question how far this authority extends, when the superior authority acts irregularly and illegally. But now the doctrine appears to be settled, as it should be, that even in such case the inferior has to look only to his warrant." Although there is an apparent inconsistency in the cases arising from the application rather than the statement of the rule, as in Thurston v. Martin [Case No. 14,018], and others, the discussion must be considered as ended by the recent judgments of the supreme court of the United States, in accordance with the doctrine of the cases above referred to. "It is well settled now," say the court, in Erskine v. Hohnback, 14 Wall. [81 U. S.] 616, "that if the officer or tribunal possess jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued." This was reaffirmed in Hafin v. Mason [15 Wall. (82 U. S.) 671], and it was held that the duties of a collector of internal revenue in the enforcement of a tax are purely ministerial, and that the assessment certified to him is his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject matter, constitutes his protection. The rule by which the liability of ministerial officers is to be determined is thus clearly defined, and firmly established. They are not accountable for the erroneous judgment of the tribunal, whose mandate they are to enforce, or even for an excessive or illegal exercise of its powers. Where they are bound to act they are responsible only for their own errors. But the protection afforded them is not without limit or qualification. It is an essential condition that the tribunal, whose order is executed, should have jurisdiction of the subject matter of its judgment. This is distinctly held in all the cases. If payment of a tax is enforced, there must be legal authority to impose it, and this the executive officer must see to at his peril.

The distinction between the said assumption of power to impose a tax, where a ministerial officer will not be protected, and an illegal exercise of it, where he will, is well illustrated in Moore v. Alleghany City, supra. "Were the authorities of Alleghany destitute of the power to levy taxes, or limited to the assessment of persons only, an attempt, in the first case, to assess and collect the tax, and, in the second, to extend the assessment to property, might be deemed so utterly nugatory as to afford its officer no protection. But possessing the right to levy and collect a tax for city purposes from persons and property, a mistake of the class of persons, or the species of property subject to it, will not amount to usurpation." The decisive inquiry, then, in this case, is, was the imposition of the tax collected from the plaintiff authorized by law? If it was, the assessment by the assessor and the list certified and delivered by him to the defendant, as collector, constituted a complete justification of the alleged trespass. If it was not, the defendant is not protected by the process under which he acted.

By the 122d section of the act of congress of June 30th, 1864 (15 Stat. 284), a duty of five per cent. was imposed upon interest on bonds issued, on dividends declared, and on undistributed profits earned by railroad and other corporations, which duty the officers of said corporations were required to return to the assessor and pay to the commissioner within thirty days after said interest and dividends became due and payable, and they were authorized to retain the duty so paid out of the interest and dividends due to bond and stockholders. This is the only act, prior to July, 1870, which imposed a tax on interest and dividends payable by railroad companies. On the 14th of July, 1870, an act was passed by congress (16 Stat. 261) the 17th section of which repeals the 122d and other sections of the act of 1864, by providing that, after the 1st day of August, 1870, no further taxes shall be levied or assessed under them. It is plain, therefore, that the tax described in the plea could not be assessed and collected under the act of 1864, and that, unless it was authorized by the act of 1870, there is no warrant anywhere for its assessment. The 15th section of the latter act is the only part of it for which this effect can be claimed, and it enacts: "That there shall be levied and collected for and during the year 1871, a tax of two and one-half per centum on the amount of all interest or coupons paid on bonds or other evidences of the debt issued and payable in one or more years after date by any of the corporations in this section hereinafter enumerated, and on the amount of all dividends, earnings, income or gains hereafter declared by any bank * * * railroad company, &c., * * * whenever and wherever the same shall be payable * * * and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent or other fund, and every such corporation having paid the tax aforesaid is hereby authorized to deduct and withhold from any payment on account of in-

terest, coupons and dividends an amount equal to tax of two and one-half per centum on the same."

The word "levied" in the beginning of the section, is evidently employed as convertible with assessed or imposed, so that the import of the enactment is, that interest, dividends, and surplus earnings shall be subjected to a tax of two and one-half per cent. for and during the year 1871. The plainly expressed meaning of the section would, therefore, seem to be, that the tax to be levied was a tax for the year 1871, and not for the whole or any part of any previous year, and that it was to be imposed upon the enumerated subjects during and within the year 1871, and not during or within any other year. Interpreting the words of the section then, according to their ordinary sense, interest falling due, and dividends declared and payable within the last five months of 1870, were excluded from the operation of the tax.

But it is urged that the phrase "hereafter declared," applied to dividends, subject to the tax, dividends declared and payable before 1871. There is certainly no ground, either in the import of these words or in their collocation in the law, for extending their qualifying effect to interest or undivided profits. Only dividends are properly spoken of as declared; not so either interest or undivided earnings, and to apply the term to them would be both inappropriate and unmeaning. It must be taken as referring exclusively to dividends, and interest and undivided earnings must be considered as affected by the unqualified import of the clause which makes them taxable for and during the year 1871. Nor is there any better reason for interpreting this phrase to describe only dividends declared after August 1st, 1870. It is not found in the same section with that date, and while, ex vi termini, it applies to the date of the passage of the act, this obvious reference cannot be changed by the exigencies of a mere arbitrary construction. But were these words used in any other sense than as referring to a period occurring after the passage of the act, and for and during the year 1871, as they naturally import, and not with intent to impose a tax upon dividends exceptionally? To preserve the congruity of legislative action, and to harmonise the several sections of the act of 1870 itself, they must be thus interpreted. From the origin of the system of internal revenue taxation, through the whole course of legislation on the subject, interest on corporate indebtedness, dividends of profits and undivided earnings were treated as closely related if not inseparable subjects of taxation. They were associated in the same section, the same tax was imposed upon them, and the same mode provided for its return and collection; and this relation was preserved in their relief together from the five per cent. tax, by the repeal of the 122d section of the act of 1864. They are indeed but a single subject, because they are the product of the inseparable exercise of corporate franchises, and are only nominally distinguishable by being set apart for different classes of recipients. They were therefore uniformly dealt with as cognate subjects of taxation. Now to hold that dividends were intended to be taxed, and that interest and undivided profits were not, ought to be the result of an unequivocal declaration of congress to that effect. Aside from this there is no reason for such a conclusion by construction. But if anything in the act is plain, it is that the tax upon interest and undivided profits was limited in its operation to the 1st of August, 1870, and that the new tax was not to be imposed upon them during the remainder of that year or until the year 1871. Now the same limitation is expressly applicable to the taxation of dividends, and the new tax to be levied upon them is also declared to be for the year 1871. A discriminating construction by which they would be subjected to the new tax before 1871, would then not only disregard the analogies of former legislation, but it would necessarily characterise a tax, expressly declared to be "for and during the year 1871," as a tax for and during five months of the year 1870.

The 16th section of the act of 1870, directs the mode and time of making a return of the income and profits subject to taxation under the 15th section. It requires a return to be made to the assessor of the district or his assistant "of the amount of income and profits and taxes as aforesaid * * * on or before the tenth day of the month following that in which any dividends or sums of money became due or payable as aforesaid," and the act of July 13th, 1866, § 11 [14 Stat. 150], requires the payment of the tax on or before the last day of the month. Under these provisions it is the obvious duty of corporations to return the dividends and sums of money due by them, and to pay the tax to which they are liable within the periods designated. If they are not bound to do so, it can only be for the reason that the dividends declared and the sums due by them are not subject to taxation. Now the tax imposed by the 15th section was not to be "levied or collected" until the year 1871. If no tax was to be levied or demandable until the year 1871, it is plain that the provisions in relation to the return and payment of the tax imposed are inapplicable to dividends declared and payable in 1870; and if no provision is made for the return and assessment of dividends then declared, as in other cases, is not the conclusion irresistible that they were not intended to be placed in the category of subjects upon which a tax was imposed? Whatever signification, then, the words "hereafter declared," as applied to dividends, may have, they cannot be interpreted to subject dividends to a discriminating tax, against the uniform course of pre-

vious legislation and the clear meaning of the preceding words, which limit the tax imposed to the year 1871, and to subjects properly classified as belonging to that period. Even if they can be regarded as casting doubt upon the meaning of the law, that doubt must be resolved in favor of the citizen. The exercise of the power of taxation is not to be affirmed upon conjectural or arbitrary inferences. No burden is to be taken as imposed upon the citizen which the government has not clearly made it his duty to assume. Nor can any portion of his property be exacted for any purpose, except in pursuance of an unambiguous mandate.

Whatever degree of liberality, therefore, may be allowable in the construction of statutes relating to the revenue of the government, there is neither reason nor justice in expanding them, by a strain upon the ordinary import of their words, to give effect to a hypothetical legislative intention. It results, then, that dividends declared and payable by railroad companies during the last five months of 1870, were not subject to taxation; that the tax described in the plea was assessed without authority of law, and that the seizure of the plaintiff's property was without justification. Judgment upon the demurrer must therefore be entered for the plaintiff.

[The judgment of this court was reversed by the supreme court, where it was carried on writ of error. 154 U. S. 616, 14 Sup. Ct. 1196.]

Case No. 11,089.

PHILADELPHIA & R. R. CO. v. MORRISON et al.

[21 Leg. Int. 372; [1] 5 Phila. 515; 6 Leg. & Ins. Rep. 178; 12 Pittsb. Leg. J. 186.]

Circuit Court, E. D. Pennsylvania. Nov., 1864.

LEGAL TENDER—SATISFACTION OF GROUND RENTS—ACT OF FEB. 25, 1862.

The principal of a ground rent is not a debt within the meaning of the act of congress, 25th February, 1862 [12 Stat. 345].

This was a bill to compel the defendants [Charles Morrison and others] to extinguish ground rents on receipt of the principal monies in United States notes. The constitutionality of the law, and its application to this case were the points raised. The first was not decided.

Before GRIER, Circuit Justice, and CADWALADER, District Judge.

CADWALADER, District Judge. The act of congress of 25th February, 1862, authorizing an issue, on the credit of the United States, of notes to a certain amount payable to bearer at the treasury, enacts that they shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except as is therein provided. The first question is whether congress can constitutionally compel the receipt of such paper as money in private transactions. The second question is whether the enactment, if constitutional, applies to such extinguishment money of a ground rent as is the subject of this proceeding. On the second point I do not intend to express an opinion. I own some ground rents; and although not, therefore, disqualified from sitting in the cause, may, perhaps, on this point, be less disinterested than the circuit judge. We seem to differ at present in opinion upon the first point, though there has not, as yet, been a full interchange of our views upon it. The organization of the court enables either judge sitting alone to adjudicate a case. I will, therefore, in order to enable the circuit judge to decide this case on the second point, withdraw from the bench. Before doing so, however, as he has made some remarks upon the first point, I will state my opinion upon it with my reasons. The money in a country is composed of its own coins and of those imported coins of which its laws permit the circulation, either at their actual value or at a prescribed exchangeable value. A nation's coins are portable metallic substances in pieces whose composition, weight, impression and exchangeable value are ascertained by law. The purpose of their coinage is to impart a standard value to them. Through this they constitute money, properly so called. They have an actual value which, as tested by foreign exchanges, approximates their prescribed value, or differs from it, according to their pureness or alloy. Motives of national policy, and considerations of national self-respect tend to check, if they do not altogether prevent, such abuses of sovereign power as would regulate the latter value arbitrarily.

The notes in question may be designated as bills of credit of the United States. They might, for some purposes perhaps, be called paper money of the national government. But they represent money only as they circulate upon the credit which may be given to the national faith pledged for their payment. Paper money, so called, has, in itself, no value measurable with reference to any standard of material or weight. The unqualified use of the phrase "paper money," therefore, never can be accurate. It is, in its occasional use, which results, perhaps, from the infirmity of language, applied, in a restricted sense, to those negotiable public or private securities, which, as representatives of money, pass by delivery from hand to hand. But negotiable securities for money, though national faith is pledged for its payment, are not, in the language of constitutional law or of general public law, in the language of the jurisprudence of continental Europe or of the common law of England, or in the language of commerce, actual money. It is true that negotiable paper securities, public or private,

[1] [Reprinted from 21 Leg. Int. 372, by permission.]

which circulate, whether at a discount or not, resemble money in respect of their circulation. The resemblance, in this respect, is in proportion to the facility of their exchangeableness, and in the inverse proportion of any discount at which they may pass. But such resemblance ought not to be considered as independent of the available resources for their payment in coin or its equivalent. The resemblance, though they should even be readily exchangeable at their full nominal value in money, cannot make them specifically money. They have not, like the coins, a corporeal value independent of that which is inscribed on them. The similarity, therefore, does not justify their designation as money. Counsel, in arguing that paper securities may be money, have cited remarks of Lord Mansfield and some other judges, who, in administering the common law on commercial principles, have had occasion to decide questions upon transfers of title in bank notes by delivery. The same principles have, as rules of decision, been applied in like manner to questions upon the transfer of exchequer bills or treasury notes and other negotiable public securities, and also to bills of exchange and promissory notes of private associations and of individuals. Such paper may sometimes for purposes relative to transfers of title to it, and perhaps for some other qualified purposes, be called money. Lord Mansfield, with such a relation of his words, did say that bank notes are as much money as the current coin used in common payments. But he had, in the context, said that they are treated as money—as cash—in the ordinary course and transaction of business, by the general sense of mankind which gives them the credit and currency of money to all intents and purposes. He did not consider them as money to any other intents or purposes than those of credit and currency which he thus mentioned. For all purposes of this kind they may have their exchangeable value. But it cannot be an intrinsic material exchangeable value like that of actual money. Therefore, when stricter legal precision of language was afterwards thought necessary, the notes, bills or drafts which were the subjects of such decisions were judicially called "representatives of money." 4 Barn. & Adol. 6, 9. This was a more accurate form of expression. If, in deciding a case like the present, incidental remarks of English judges in discussing such ordinary questions of civil jurisprudence, must be thus considered, the adoption by Coke and Blackstone of the maxim nullum simile est idem should perhaps not be forgotten. The use of the phrase "paper money" can, however, derive no proper sanction from English authorities. An action for money had and received cannot be maintained in England, by an owner of bank notes to recover their value from a wrongful holder of them "unless money has been received for them," or they have been treated, between the parties, "as money." On the same question, whether bank notes are dealt with as money, the familiar case of a tender in them depends. If they are objected to, it is a bad tender, though otherwise it is a sufficient one. The British statute of 29th August, 1833, renewing the incorporation of the Bank of England, made its notes a legal tender so long as it should continue to pay them on demand in legal coin, but not even thus a legal tender by the bank itself or any of its branches.

The qualification thus implied in the use of the phrase "paper money" is more important as to national than as to private negotiable securities. For default as to the latter there may be judicial redress. But if the former should not be paid from the treasury, the nation or its government cannot be sued. This difference was judicially considered in ascertaining the extent of the constitutional prohibition of the issue of bills of credit by the states. The result of the decisions is that the prohibition applies only to negotiable paper so issued upon the credit of a state that there is no other debtor. The notes of a bank incorporated by a state, with no other stockholder than the state, and no capital stock except the proceeds of sale of bonds of the state, and managed wholly by directors elected by the legislature of the state, are not within the prohibition, because the bank may be sued, and its property taken in execution under a judgment. In one of the cases the credit of the state was pledged for the ultimate redemption of the notes of such a bank, and the state could, under a law in force, be sued. But these distinctions were disregarded, because the promise to pay the notes was primarily that of the bank, and because the law authorizing suits against the state might be repealed at pleasure, and moreover if a judgment could be obtained, payment of it was not enforceable by execution against the state. The supreme court thought the notes of this bank altogether different from bills of credit; saying, "A bill of credit emanates from the sovereignty of the state. It rests for its currency on the faith of the state pledged by a public law. The state cannot be sued ordinarily on such a bill, nor payment exacted against its will. There is no fund or property which the holder of the bill can reach by judicial process." [Darrington v. Bank of Alabama] 13 How. [54 U. S.] 17. See [Briscoe v. Bank of Commonwealth of Kentucky] 11 Pet. [36 U. S.] 313, 314; [Woodruff v. Trapnall] 10 How. [51 U. S.] 205; [Curran v. State of Arkansas] 15 How. [56 U. S.] 317, 318.

The qualified partial resemblance of the notes in question to money would be increased to the utmost extent possible by an effective law compelling the receipt of them as money for all purposes whatsoever. But such a law, if it could be constitutionally enacted, would not make them actual money. The bills of credit emitted by the United States during the War of Independence, declared the bearer entitled to receive Spanish milled dollars, or their value in gold or silver. The congress de-

clared that whoever should refuse to receive the bills in exchange for any property as gold and silver, should be deemed an enemy, and that the paper ought to be a tender in payment of all private and public debts. The congress, though it did not claim the power to enforce these declarations, recommended the enactment of tender laws by the states for the purpose; and, in the early part of the war, this recommendation was carried into effect by the states as far as its purposes could be effectuated by legislation. The articles of confederation usually designated as of the year 1778 were written in 1777. They contained a provision pledging the faith of the United States for the payment of the bills of credit. These articles did not go into operation till the year 1781. The bills of credit were, in the meantime, so depreciated that, as Judge Story says, "In the course of the year 1780, they" had "quietly died in the hands of their possessors." The states, had, in March, 1780, been required to bring in the bills of credit at forty dollars for one silver dollar; and congress had, "in the most pressing manner," recommended to the state legislatures the repeal of "all laws making the paper bills of the United States a legal tender, equal to gold and silver." See Resolutions of Congress; 3 Story, Const. c. 33; Preamble Act of Pennsylvania, 21 June, 1781 [2 Smith's Laws, 1]. The present constitution provided that all debts contracted and engagements entered into before its adoption should be as valid against the United States under it as under the confederation. The paper money to the amount of between seventy-eight and eighty millions of dollars was supposed to be outstanding at the adoption of the constitution; but two millions of dollars only was the estimated amount requireable in order to cover this liability of the United States. An act of the first congress under the constitution, for the liquidation of the public debt by certificates of a new loan, according to the specie value, provided for such liquidation of these bills of credit at the rate of one hundred dollars for one dollar in specie. Act Aug. 4, 1790, § 3 [1 Stat. 139]. Thus, said Judge Story, was a paper currency which had been declared "equal to gold and silver, suffered to perish in the hands of persons compelled to take it; and the very enormity of the wrong made the ground of the abandonment of every attempt to redress it." He added that "some apology, if not some justification," might "be found in the eventful transactions and sufferings of those times," but that "the history of paper money, without any adequate funds pledged to redeem it, and resting merely upon the pledge of the national faith has been, in all ages, and in all nations, the same;" and that "it has constantly become more and more depreciated; and, in some instances, has ceased, from this cause, to have any circulation whatsoever, whether issued by the irresistible edict of a despot, or by the more alluring order of a republican congress." The qualification implied in such uses of the phrase "paper money" requires no further explanation.

A law compelling the receipt of national bills of credit as money in payment of debts, would not give to them the greatest possible resemblance to money, because there are other uses of money. This case has, however, been argued as if the first point was whether the receipt of the notes in question in payment of debts can be compelled, or, in more constitutional phraseology, whether congress can make them a legal tender for this purpose. I will, therefore, consider the question whether congress has the constitutional power to make such paper a legal tender in payment of debts. A negative answer must of course exclude all implication of the more extended power. The constitution confers upon congress power to borrow money on the credit of the United States, to coin money, regulate its value and that of foreign coin, and fix the standard of weights and measures; and prohibits the states from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. Of the powers thus taken away from the states, the only one expressly conferred upon the national government is that of coining money. There is no direct grant of any power to make bills of credit of the United States a tender in payment of debts; and the omission must have been intentional. But the constitution expressly authorizes congress to make all laws necessary and proper for carrying into execution the legislative and other powers of government which are granted. The decision of the present question depends upon the extent and application of this incidental power of legislation. In ascertaining its extent, the language conferring it has been judicially contrasted with that of a prohibitory constitutional provision, which is not here important otherwise than as it contains the phrase "absolutely necessary for executing" certain laws of the states. From this use of the word "absolutely" in the latter clause of the constitution, and the omission of such qualification of the word "necessary," in the clause conferring the former incidental power of legislation, the conclusion deduced has been that this incidental power enables congress to enact not only laws absolutely necessary, but likewise any laws, not inappropriate, which may be relatively necessary, as means of executing the powers directly granted. But this does not authorize an assumption, through such legislation, of any distinct and independent power,—or of any specific incidental power which, had the intention to grant it existed, would have been expressly mentioned. In determining the application of the incidental power of legislation, the ninth and tenth amendments of the constitution must be considered. The ninth provides that the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained

by the people; the tenth provides that the powers not delegated by the constitution, to the United States, nor prohibited by it to the states, are reserved to the states respectively or to the people. These two amendments, whether their words are to be understood as restrictive or declaratory, preclude everything like attribution of implied residuary powers of sovereignty, or ulterior inherent rights of nationality, to the government of the United States. Therefore the constitution confers no legislative powers except those directly granted, and those which may be appropriate as incidental means of executing them.

As a means of executing the constitutional power to borrow money on the credit of the United States, a security declaring the national faith pledged for the amount of money, or credit, received, is, however, proper, and is, relatively speaking, necessary. Congress may regulate the form of the securities. They may be negotiable notes of the United States; and such notes may be called bills of credit. That they are so called, that the constitution does not expressly authorize their emission by that name, and that it prohibits the emission of such paper in any form by a state, cannot preclude their issue by the United States for this purpose of pledging the national faith. The notes in question are therefore lawfully issued, and may lawfully circulate. Congress can, of course, regulate the exchangeable value of such paper in transactions of many kinds of, with, or under, the national government itself; and may make it receivable as money in such transactions. The notes may be thus accredited so as to circulate, with no compulsion, as money, in ordinary times at no discount, in transactions of private business. But in times of national trouble, and consequent fiscal embarrassment, this cannot be, with reason, expected. The treasury notes issued by the United States under congressional authorization did not, in the years 1814 and 1815, circulate except at discounts which were variable and sometimes great. The country was then at war. There was a hostile blockade of the sea coast with occasional invasions on land. The banks of the states were insolvent, that is to say, had suspended payments in coin. But they refused to receive the treasury notes as money. These notes were, as Judge Story says, depreciated before the peace to about half of their nominal value. The British exchequer bills of those days, which were negotiable by delivery, and were "to be current and pass in any of the public revenues, aids, taxes or supplies, or at the receipt of" the treasury, did not, even after the general pacification, circulate without great variations in the rates of their market values.

The present question of compelling the receipt of the notes as money at their nominal amount in transactions in which the government issuing them has no concern, is of course different. This question cannot be stated accurately without a previous inquiry whether a law authorizing their original issue is an appropriate means of executing any constitutional power other than that of borrowing on the national credit, to which their emission has been hitherto referred. This power is the only constitutional authority for emitting them. In the distribution of powers of national government, such an authority, if conferred, should be classed among those which concern fiscal subjects. Its primary purposes and relations are exclusively fiscal. Relations of the subjects of it may afterwards become commercial. But, if a general authority to regulate commerce within the United States had been conferred upon congress by the constitution, the authority would not have been understood to include such a power as incidental. The constitution has, however, conferred no such general authority. The authority conferred by it is only to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. This, if we exclude commerce with Indian tribes, applies only to foreign and inter-state commerce, and not to internal commerce of the states. Foreign exchanges, of course, cannot be regulated by any law concerning the paper in question, or any paper securities whatever. Commerce with foreign nations would therefore have been out of the question, if the words of the act of congress had not limited, as they do, its application to debts within the United States. As to such debts, the act, if it could even be considered as a regulation of commerce, would have no specific or distinct applicability to commerce between states.

There an be no implication of a constitutional power enabling the United States to make their bills of credit a tender in payment of debts from the constitutional prohibition of the states to do so. The tenth amendment is, however, invoked in support of an argument that the constitutional powers of the national government should be deemed co-extensive with all powers of which the constitution prohibits the exercise by the several states. This amendment and the ninth have already been quoted. Nothing in the series of amendments which includes them can lend force to such an argument. They are not grants of power but restrictions of it; and neither powers nor enlargements of power can through implication result from them. Chief Justice Marshall, in reviewing their history, said: "The great revolution which established the constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised

in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments." [Barron v. Mayor, etc., of Baltimore] 7 Pet. [32 U. S.] 250. See [Livingston v. Moore] Id. 551, 552; [Fox v. State of Ohio] 5 How. [46 U. S.] 434; [Withers v. Buckley] 20 How. [61 U. S.] 89–91. That the amendments were thus intended for security against usurpations of the national government only, and not against encroachments of the state governments, may be considered a truism. But recurrence to historical facts which explain constitutional truisms, cannot be too frequent, if they are in danger of being overlooked in calamitous times, or of being crowded out of memory by any succession of appalling events.

The power to borrow on the national credit being thus the sole source of authority to issue bills of credit, the question to be considered is whether a law to make them a legal tender is constitutional under that power. Here it may be proper to recur to the threefold constitutional prohibition of the states to coin money, emit bills of credit or make any thing but coin a tender, and the twofold constitutional omission, as to the United States, of express power to emit bills of credit or to make them a tender, though an express power to coin money is conferred. The prohibitions to the states do not impliedly preclude an exercise by the United States of so much of the prohibited powers as may be appropriate and incidental to powers directly conferred upon congress. Thus, we have seen that bills of credit may be issued in order to pledge the national faith for the payment of money borrowed, and that they may be made receivable as equivalents of money in business of the national government. But the prohibitions and omissions determine the meaning of the constitution so as preclude enlargements and extensions of these limited incidental powers to the character and magnitude of distinct independent powers. In these respects, moreover, the phraseology of the constitution shows, convincingly that power to make bills of credit, a tender would have been expressly conferred if it had been intended to authorize the national government to make them a tender in transactions not with itself.

When the constitution was framed, reasons for withholding the grant of such a distinct independent power pressed with saddening force in the organization of a government about to liquidate an immense existing debt of this kind, at the rate of one for forty, if not one for a hundred. The difficulties of inducing an adoption of the constitution probably could not have been overcome, if the state conventions to which it was submitted had understood it as conferring any such independent power. The twofold omission of express power to issue bills of credit or to make them a tender must, at all events, preclude an implication of either power as incidental to the other. Moreover, that each subject is mentioned in the constitution, prohibitorily, but not otherwise, cannot be overlooked when the existence or extent of any merely incidental power is to be considered. This being premised, what is the argument for the constitutionality of the enactment in question, under the power to borrow on the national credit? The only argument which can be conceived would outstretch the webs of constructive enlargement of the just proportions of the constitution. It would first be necessary to demonstrate that, if the constitution had contained an express or direct grant of power to emit bills of credit, congress would have had an incidental power to make them a tender. Whether this could have been established will not require consideration, because the constitution contains no such express grant of power to emit bills. Assuming this hypothetical position established, the next position would be that though the power to emit them is not expressly granted, yet, as it exists incidentally to that of borrowing on the national credit, the secondarily incidental power of making them a tender is included. If the constitutional prohibitions, and those omissions of grants of power which have been considered, were altogether disregarded, this argument could not prevail. If the conversion, by mere implication, of an incidental into a distinct independent power is inadmissible, such a reduplicated conversion by successive implications must be more objectionable.

I am, therefore, of opinion that the enactment is unconstitutional.

Judge CADWALADER having withdrawn from the court, the judgment was pronounced by Judge GRIER.

GRIER, Circuit Justice. Coined money, in modern times, forms but a very small portion of the current money used in commercial transactions. Paper money representing credit has long been used as current and lawful money. But no one could be compelled to accept the promise of a bank to pay money, instead of the coin itself. The notes of the Bank of the United States, issued under the authority of the government, were current money and lawful money, because issued by such authority, but were never made a legal tender for the payment of debts. A contract made in the United States for the payment of a certain number of dollars would be construed as meaning, not Prussian dollars or Spanish milled dollars, but lawful coin of the United States; the addition of the description "lawful money of the United States" is entirely superfluous and does not change the nature of the obligation.

The statutes of congress always make a distinction between lawful or current money and that which shall be a tender for payment of debts. Hence, we find that when such is the intention, the language is, "And shall be a legal tender," &c. Some coins of the government are a legal tender below a certain amount, but not beyond. Thus, by act of 9th February, 1793 [1 Stat. 299], after the expiration of three years all foreign coins except Spanish milled dollars shall cease to be a legal tender. By act of April, 1806 [2 Stat. 374], "foreign gold and silver coins shall pass current as money, within the United States," and be a legal tender for the payment of all debts, &c., at the several and respective rates following, &c. Again by act of 28th June, 1834 [4 Stat. 700], "The following gold coin shall pass as current money, and be receivable in all payments by weight at the following rates," &c.

Hence we find that in all cases where other money than the coinage of the United States is ordered to be received as current or lawful money, the statute carefully provides the rate and conditions under which they are made a legal tender for payment of debts. It is clear, therefore, that congress has always observed the distinction between current and lawful money, which may be received in payment of debts, if the creditor sees fit to accept it, and that which he may be compelled to accept as a legal tender. It is clear also that if congress make any other thing than their own coin a legal tender it may define the cases in which it may be used as such. Thus in the act authorizing the national banks, their notes are made a legal tender for certain debts due to the government for taxes, &c., but not for debts due from one citizen to another. The treasury notes are made lawful or current money, "and a legal tender for debts," &c., as between individuals. As this is the first act in which this high prerogative of sovereignty has been exercised, it should be construed strictly. It is doubtful in policy and dangerous as a precedent.

The only question then is whether this case comes within the letter of the statute. Is the money which may be paid to extinguish a ground rent within the category of the act? Is it a debt? The owner of the land is not bound to pay it. The owner of the rent cannot compel him to pay it. There is no obligation as between the parties. It cannot be converted into an obligation by the election of one of the parties without the consent of the other. A man may execute his bond to me voluntarily, but unless I accept it he does not become my debtor. These ground rents, in the nature of a rent service, are somewhat peculiar to Pennsylvania, and little known in other states. But the supreme court of the state has very clearly settled and determined their nature. The cases are too well known to the legal profession to need quotation. "A rent service (says the court in Bosler v. Kuhn, 8 Watts & S. 186) is not a debt, and a covenant to pay it is not a covenant to pay a debt. The annual payments spring into existence, and for the first time become debts, when they are demandable."

I am of opinion, therefore, that the tender offered by the bill in this case is not authorized by the statute, and that the respondents cannot be compelled to extinguish their estate in the land, by such a tender as that now made. The bill must therefore be dismissed.

Case No. 11,090.

PHILADELPHIA & R. R. CO. v. NORTHAM.

[2 Ben. 1.] [1]

District Court, S. D. New York. Nov., 1867.

BILL OF LADING—DEMURRAGE—USAGE—INTEREST.

1. Where a bill of lading specified that the vessel was bound "for Catharine street, East river, New York," and also contained a clause as follows: "demurrage $10 a day after four days," and, on the arrival of the vessel at Catharine street, it was not possible to discharge her there, owing to the wharf being out of repair, and the consignee thereupon ordered her to go to Dover street, and she went and was unable to discharge her cargo, owing to there being so many vessels there that she could not get a berth, until thirteen days had elapsed; and where another bill of lading between the same parties described the boat as "bound for New York, instructions at New Brunswick," and had a similar provision as to demurrage, and the consignee sent her instructions at New Brunswick to go to Dover street, whither she went and was detained for the same cause for sixteen days; and the owners of the boats sued the consignee for demurrage, and he set up that, by usage, the clause as to demurrage meant that the boat should only be entitled to demurrage, if detained more than four days after she had got a berth: *Held*, that where the consignee of a cargo requires it to be taken to a particular place, he ought to be held liable for any delay caused at that place, for which the vessel cannot be shown to be directly chargeable.

[Cited in The Glover, Case No. 5,488; Robbins v. Welsh, Id. 11,887; Crawford v. Mellor, 1 Fed. 640; Fish v. One Hundred and Fifty Tons of Brown Stone, 20 Fed. 202; Melloy v. Lehigh & W. Coal Co., 37 Fed. 379; McLeod v. Sixteen Hundred Tons of Nitrate of Soda, 55 Fed. 530.]

2. No usage ought to be allowed to vary a plain contract for demurrage, under such circumstances.

3. The consignee, therefore, was bound to pay demurrage after four days from the arrival of the vessel at the specified place of delivery, with interest on it from the day when it was demanded.

This was a libel [by the Philadelphia & Reading Railroad Company against William L. Northam] to recover freight and demurrage on two cargoes of coal, shipped from Philadelphia to New York, on board of canal boats belonging to the libellants, one by boat No. 58, and the other by boat No. 75, under bills of lading

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

signed therefor by the masters of the boats. In the case of No. 58, the boat was described in the bill of lading as "bound for Catharine street, East river, New York;" the quantity of coal was 204 tons; and the bill of lading engaged to deliver the coal to the respondent, he paying freight at $1.60 per ton, and "demurrage $10 per day after four days." In the case of No. 75, the boat was described in the bill of lading as "bound for New York, instructions at New Brunswick;" the quantity of coal was 215 tons; and the bill of lading engaged to deliver the coal to W. J. Harlan or his assigns (the respondent being the assignee), he or they paying freight at the rate of $1.60 per ton, "demurrage $10 per day after four lay days." No. 58 arrived at Catharine street, and her arrival was duly reported on the same day by her captain to the respondent, who ordered her to go to Dover street, where she was detained in all for thirteen lay days after her arrival was so reported. The libellants claimed nine days' demurrage. The detention was caused by her being obliged to wait her turn at Dover street for a berth to discharge her cargo. No. 75 received instructions at New Brunswick from the respondent to go to Dover street, New York, and went there, and her arrival was reported to the respondent, and she was thereafter detained there, waiting for a berth and discharging, for sixteen lay days, for which the libellants claimed twelve days' demurrage. The answer set up that, when No. 58 arrived at Catharine street, the pier there could not be used to discharge cargoes, because it had been closed by the public authorities as out of repair; that for the mutual benefit of both parties, and by agreement, the boat was taken to Dover street and discharged; that she was discharged as soon after she arrived at Dover street as a berth could be obtained; that she was fully discharged within three days after she obtained a berth; that, by an established and well known custom, the lay days referred to in the bill of lading did not begin to run till the boat had obtained a berth; and that the captain of the boat did not offer to deliver the coal till he had obtained a berth. The answer also set up that No. 75 was instructed at New Brunswick to go to Dover street; that she commenced discharging as soon after she arrived there as she could obtain a berth, and was fully discharged within three days thereafter; that the custom before mentioned existed; and that the captain of the boat did not offer to deliver the coal till he had procured a berth.

Benedict, Tracy & Benedict, for libellants.
C. Morris, for respondent.

BLATCHFORD, District Judge. In regard to No. 58, she was bound by the contract to go to Catharine street. She went there and was then ordered by the respondent to go to Dover street, and she then went there. Undoubtedly, the respondent ordered her to the place where he thought she could be most quickly discharged. But, by the contract, the whole duty of the libellants was discharged in taking the cargo to Catharine street, and notifying the respondent of its arrival, and awaiting his orders. This was done. The plain interpretation of the provision of the contract, "demurrage $10 per day, after four days," is demurrage $10 per day, after four days from the time the vessel arrives at Catharine street with the cargo, and her captain notifies the respondent of his arrival. So, too, No. 75 was bound to go to the place where she should receive instructions at New Brunswick to go, and it being shown that she was at New Brunswick instructed to go to Dover street, the contract stands as if Dover street had been originally inserted in it as the place of destination. Her arrival at Dover street having been notified by her captain, the same observations apply as in the case of No. 58.

The proof as to a custom or usage, that the words, "after four days," and "after four lay days," mean, "after four lay days from and after the time when the boat gets a berth, so that she can commence discharging her cargo," does not establish any such custom or usage. The burden of proving such a custom is on the respondent, and he has failed to make out any such custom. Besides, I do not think the evidence as to such a custom has any reference to bills of lading like those in this case, where, by the terms of the contract, the cargo is to be delivered at a particular place. It might, perhaps, apply to a contract where the cargo was deliverable generally at New York. The usage, if made out and applied to bills of lading like those in this case, would throw on the owner of the vessel the loss by delay in getting a berth, when he had no discretion as to the selection of one, but was bound to deliver at a particular dock. This would be unreasonable. Where the contract is for delivery generally at New York, there ought to be a propriety in throwing on the owner of the vessel the burden of finding a place to discharge the cargo, and in holding that the days allowed to discharge it, by the contract, did not begin to run till the place had been found, so that the consignee could actually receive the cargo, and in allowing evidence of a custom to that effect. But, where the consignee of the cargo requires it to be taken to a particular place, he ought to be held liable for any delay caused at that place, with which the vessel cannot be shown to be directly chargeable, and no usage ought to be allowed to vary a plain contract to that effect.

In the present case, it is shown, in regard to No. 58, that the respondent was notified, two days before the boat arrived at Catharine street, that it would be impossible for her to discharge there because of the condition of the dock, and that there was then abundant time for him to have sent instructions to the

boat at New Brunswick, ordering her to go to Dover street, and that, if he had done so at that time, instead of waiting until she arrived at Catharine street, she would have got a berth at Dover street several days sooner than she did, and probably, on the evidence, soon enough to have caused no delay beyond the four days after her arrival at Dover street, and thus there would have been no claim for demurrage. Therefore, in any aspect of the case, the respondent would be chargeable with the delay in discharging No. 58.

The libellants are entitled to a decree for $90 demurrage on No. 58, being for nine days, at $10 per day, and for $120 demurrage on No. 75, being for 12 days, at $10 per day, with interest thereon from the date when a demand was made for it.

PHILADELPHIA & T. R. CO. (ATKINSON v.). See Case No. 615.

Case No. 11,091.

In re PHILADELPHIA AXLE WORKS.

[1 Wkly. Notes Cas. 126.]

District Court, E. D. Pennsylvania. Dec. 17, 1874.

AMENDED BANKRUPT ACT—HOW PROPORTION IN NUMBER AND VALUE OF PETITIONING CREDITORS COMPUTED.

A petition in bankruptcy having been filed against the above corporation, an answer was filed by them denying that the requisite proportion in number and value of their creditors had joined in said petition. Whereupon the court referred the question to the register (Davis) to ascertain and report summarily whether the requisite proportion in number and amount of said creditors had joined in the petition. The register reported that the requisite proportion in number and amount had so joined.

Exceptions were filed to said report: 1. Because the register had computed in said proportion Gordon, Monges & Co., who had first signed the petition, but subsequently filed a petition praying that they might be allowed to withdraw. 2. Because certain creditors who had joined in the petition had not filed proofs of debt. 3. Because the register had excluded from the computation, as to both number and amount, all creditors whose debts did not exceed $250.

S. W. Pettit and R. C. McMurtrie, for exceptions.

S. Davis Page, H. S. Hagert, and Henry M. Dechert, for petitioning creditors, cited In re Hymes [Case No. 6,986].

THE COURT held—1. That a creditor, having once joined in the petition, cannot withdraw.

2. That it was not necessary for each creditor joining in the petition to file the proof of his debt; it was required only of the first five signers to do so.

3. That in the computation as to the requisite proportion in number, all creditors under $250 are to be excluded.

Order of adjudication.

As to the first ruling of the court, see In re Heffron [Case No. 6,321].

PHILADELPHIA BUTCHERS' ICE CO. (SHEPPARD v.). See Case No. 12,757.

PHILADELPHIA FIRE EXTINGUISHER CO. (NORTHWESTERN FIRE EXTINGUISHER CO. v.). See Case No. 10,337.

PHILADELPHIA INS. CO. (CRUDER v.). See Case No. 3,453.

PHILADELPHIA MUT. INS. CO. (HOWELL v.). See Case No. 6,781.

PHILADELPHIA SAV. FUND (ALLEN v.). See Case No. 234.

PHILADELPHIA STEAM NAV. CO. v. The DELAWARE. See Case No. 3,763.

PHILADELPHIA TRUST, SAFE DEPOSIT & INS. CO. (CORN EXCH. NAT. BANK v.). See Case No. 3,244.

PHILADELPHIA, W. & B. R. CO. (DUBOIS v.). See Case No. 4,109.

PHILADELPHIA, W. & B. R. CO. (MINOT v.). See Case No. 9,645.

PHILADELPHIA, W. & B. R. CO. (PHILADELPHIA & HAVRE DE GRACE STEAM TOW-BOAT CO. v.). See Case No. 11,085.

Case No. 11,091a.

The PHILAH.

[5 Adm. Rec. 693.]

District Court, S. D. Florida. June 8, 1857.

SALVAGE—COMPENSATION—SAVING BOTH VESSEL AND CARGO—VALUE OF PROPERTY SAVED.

[1. Greater compensation should be awarded for saving vessel and cargo from imminent peril of total loss than for saving the cargo alone.]

[2. Other things being equal, the ratio of the salvage award to the value of the property saved should be less when such value is large than when it is small.]

[This was a libel for salvage by Michael McNamara and others against the bark Philah and cargo.]

S. R. Mallory, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This bark, laden with cotton and tobacco, and bound on a voyage from New Orleans to Gottenberg, on the night of the 6th of May last ran ashore upon a reef known as "Flap Jack Reef," near the Tortugas Islands. At daylight the master sounded around his vessel, and prepared to run out his anchors. Soon after libellants arrived and offered their assistance, which was declined by the master, who hoped to be able to heave his vessel off at high water. He ran out his anchors and tried faithfully to heave his

vessel off during two tides, or twenty four hours, but without any success. At the end of this time his vessel had sprung a leak. She had three feet of water in her. She lay in nine and ten feet water, drawing fourteen. The wind was blowing fresh on the reef, and the master had no further hopes of saving his vessel and cargo, without assistance. He accepted the assistance of the libellants. They lightened the vessel of one hundred and seventy bales of cotton. Carried out one of their own anchors, and heaved the vessel off, which, however, leaked so badly as to require sixteen of the salvors to continue constantly at the pumps, until their arrival in this port on the ninth. It appears from the report of surveyors, that the bark was much injured on the reef, having lost nearly her entire keel and sustained other serious injuries. A hole, about four by six inches in size, had been cut through the planks of the ship by the rocks into which mud had worked, so as in part to fill it. Under these circumstances, it is very clear, that the master could not have saved this ship or cargo, and that the libellants have saved them from total loss. And the principle applies, that where a stranded ship has been saved from imminent peril as well as the cargo by energy and exertions of salvors, the salvage ought to be greater, other things being equal, than where the vessel is lost and the cargo only saved. There are three reasons for this rule. First. Where the vessel is lost there is usually a large loss of property, and owners and underwriters cannot so well afford to pay a large sum of money for saving the residue. Second. When the vessel is lost there is a less sum to award salvage out of. Third. The rule makes it the interest of the salvors to exert themselves to save the ship. I regard the salvors, therefore, as standing, in the present case, in the highest mark of merit except perhaps cases of derelict.

The course of argument adopted by the libellants' advocate on the hearing makes it very proper for the court, in the present case, to advert to the principles, or some of them, upon which salvages are determined in this court, and to fortify the opinion delivered in the case of The Courier A. R. [Case No. 3,283], with some authorities not there referred to. The rule of fixed proportions, or of giving one uniform proportion of the value in all cases for salvage is unjust and impolitic in itself, for where the value is small the salvage would be insufficient to pay for the work and labor, unless the rate or proportion fixed was high, as one quarter, or a third or a half, and then the salvage would be unreasonably high, where the value was large. If you alter the proportion or rate according to differences of value, then you virtually discard all ideas of a proportion, and fix the amount of salvage upon other considerations which, when so fixed, may be, and often is, expressed, in the decrees of the courts, in the form of a proportion. And such, I think, is the law in England and the United States. "The maritime laws of England," says Sir Edward Simpson, "fix no certain proportion in cases of salvage, but are governed by circumstances of danger, hazard, trouble and expenses of saving. An eighth or tenth, except in cases of extreme hazard, is as much as is usually allowed. In some cases of extreme hazard, one third of the value, or one fourth, or one sixth or one ninth, or a sum of money only, on account of salvage, is given." The H. M. S. Thetis, 3 Hagg. Adm. 62. "The rates of simple proportion graduate at large intervals, while the estimate of services, labor and enterprise requires to be made as minutely as possible under an infinite variety of particulars, and may, therefore, be better done by the allowance of precise sums." The Oscar, 2 Hagg. Adm. 260. "The principle of giving specific proportions of the property saved, is an inconvenient rule in itself, and must lead to error, unless checked by proper attention to the adequacy of the remuneration so assigned according to the circumstances of the particular case." The Vesta, Id. 194. "The allowance of a specific proportion of the property saved has not been of late years much practiced in England, or, so far as cases are reported, in this country." Hennessey v. The Versailles [Case No. 6,365]. "Where the salvage is below an eighth, it is usual to adjudge a compensation in numero." [The Adventure] 8 Cranch [12 U. S.] 221. In The Huntress the district court [Case No. 6,912] had decided a quarter of the value of the property saved. On appeal the circuit court [Id. 11,971] reversed the decision, noticed the particular facts of the case, and the number of the salvors, and gave a "liberal remuneration" and assigned to each salvor a specific sum. In the case of The Brig Spes [unreported] and in the case of The Champion [Id. 2,582a], two cases of salvage services rendered by pilots in towing the vessels into port, lately decided in the district court of New York, Betts, Judge, the court is reported to have said: "That a proper compensation for the labor, exposure, and cost incurred by them is the foundation upon which their reward must be computed, and that twenty dollars an hour is such compensation." In one case, the value was $30,000. The value in the other is not reported. In both, the salvors were paid by the hour. Where the value of the property is small, and the hazard is great, the allowance is always in greater proportion. On the other hand, where the value is large and the services are highly meritorious, the proportion is less. Tyson v. Prior [Case No. 14,319]. "The court gives a smaller proportion where the property is large, a larger where it is small, and a moderate proportion where it is of vast extent." The Blendenhall, 1 Dod. 414–423. Now, if the proportions vary in this manner,—and they must vary, for you would not give the same amount to a salvor for pointing out a channel that you would for bringing in a derelict,—if salvage is a compensation, a remuneration, as it is constantly called; if

specific proportions are inconvenient, if precise sums are better, if specific proportions lead to error unless checked by the proper attention to the adequacy of the remuneration, if, where the salvage is below an eighth a sum in numero is given, or a sum of money only on account of salvage,—what is all this, but an utter disclaimer of all idea of graduating salvages according to any scale of proportions? An utter and entire disregard of rates or proportions? It is an easy matter, and would not require much intelligence nor the exercise of much judgment to award a quarter, a third or a half in the cases as they occur, without considering very much what the salvage would amount to, or what compensation it would really give. Such decision Cleirac calls a "judicium rusticum" (Bearse v. Three Hundred and Forty Pigs of Copper [Case No. 1,193]), and is just such as the courts of England and the United States have constantly condemned while they have acted on the principle of decreeing a liberal remuneration for the enterprize, hazard, labor, skill of the salvors—increasing the remuneration where the value is large, and vice versa but not according to any definite scale or rates of increase or decrease. Such increase being given with the increased value, not only because it affords the court an opportunity of doing what in many cases it cannot do, i. e. of giving an adequate remuneration. However great the value, the salvage is to be simply an adequate remuneration. 1 Hagg. Adm. 246; 3 Hagg. Adm. 93, 221. In Hand v. The Elvira [Case No. 6,015], Judge Hopkinson, after an elaborate exposition of the whole law of salvage, says: "If the salvor has afforded his assistance in a proper spirit, he will be satisfied with a just and fair remuneration for the labor, hazard, and expense, he has encountered in the service, and it is only a proper spirit that we should seek or desire to satisfy. To this measure of compensation the judge, governed by a liberal policy, will add a reasonable encouragement, which the generous and humane will hardly need to prompt men to exertions to relieve their fellow men in danger and distress. But we must remember, that the policy of the law is not to provoke or satisfy the appetite of avarice, but to hold out an inducement, to such as require it to make extraordinary efforts to save those, who may be encompassed with perils beyond their own strength to subdue." And what does our supreme court mean, when it says, that where the salvage is below an eighth, it is usual to adjudge a compensation in numero; and the high court of admiralty, when it speaks of a sum of money being on account of salvage? I think they mean to say, that in very many cases, where the value of the property is large and the services are inconsiderable, that an adequate remuneration in a round sum is given the salvor, without a very special regard to the precise value of the property saved, though the magnitude of the value is not wholly lost sight of. The importance of the value, in such cases, as an ingredient in fixing the salvage, diminishes as the value augments, and the labor and trouble of the salvor diminishes. There are numerous cases in the books, where salvage services have been remunerated with but very little regard to the value of the property involved, so far as the reports show. Touching the manner in which the value of the property is ascertained in salvage causes, it may be remarked, that an appraisement is very rarely resorted to in the English admiralty courts, or in the American courts, so far as the cases are reported. By the practice in the English admiralty, the salvors allege, in their act or petition, or in a separate affidavit, what they consider the value to be, and the owners or claimants state what it is, under oath. With this statement the salvors are usually satisfied. If not, they sue out a commission of appraisement at the peril of paying costs. In the case of The Persian, 1 W. Rob. Adm. 328, the owners stated the value to be £1,800, the salvors sued out a commission of appraisement, and the commissioners returned the value to be £1,780. The court said: "In cases of salvage, unless there be a very great disparity between the value stated on the part of the owners and the actual value of the property, the court is greatly disposed to discountenance the measure of taking out a commission of appraisement. Whenever such a commission is taken out, and it ultimately appears that the party taking out the commission has done so in error, the court will enforce the rule, that the party so proceeding shall pay the costs which may be occasioned to the other party." I think the English rule upon this subject ought to prevail in this court, as it is in harmony with the rules of our admiralty courts and with good sense, and that the libellants ought to state in their libel what the property consists of, and their estimates of its value, and the claimant, in like manner, ought to respond under oath, and, unless there is a very great disparity between the values as stated by the respective parties, an appraisement ought not to be granted. Nor ought it to be granted where the value is known and admitted to be very large and the services are inconsiderable; for in such a case, an adequate remuneration can be made by the court without a knowledge of the precise value, and the interest of the salvor in any increased value or of the owner in any increased salvage, upon the principle above stated, becomes so attenuated and minute as to be no longer practically appreciable, de minimis non curat lex. Nor when, the quantity and quality being known, the value may be ascertained by calculation; nor in brief, in any case where it is unnecessary to a just and legal decision of the cause.

To return to the case in hand, the principle

of an adequate remuneration, rather than a proportion being established, it is proper to take into consideration all the circumstances of the case, the value of the property and its peril, risk, labor, and enterprize of the salvors, their character and number, their occupations in life, the size and value of their vessels, the policy of the law in giving salvages, that policy as applicable to this coast, how far and to what extent the necessities of commerce require that persons should be encouraged to engage in the business, as a business, of saving wrecked property, the adequacy of the shares of the several salvors, as a remuneration, in any sum proposed to be given as the total salvage, and other pertinent considerations. This case, in its principal features of peril to the property, its value, the risk, labor, and number of the salvors, is like many others decided in this court. In The Ann Hood [unreported] the value was $61,306; salvage, $18,498; men, 66; shares, $123. The M. Hawes [unreported], value, $42,800; salvage, $12,840; men, 66; shares, $97. The Emily Taylor [unreported], value, $81,168; salvage, $16,233; men, 63; shares, $128,—in The Emporium [unreported], $150; in The Alleghany [unreported], $180; and in The Mississippi [Case No. 9,650], valued at $100,000, the shares were $188,—being the largest shares known in the history of the court. These cases all rank in the highest class of merit, and the salvages are among the largest decreed by this court. Vide other cases collected in The John and Albert [Id. 7,333]; The Pilgrim [Id. 11,166]; and The Crown [Id. 3,450], lately decided. In the present case, the ship has been sold for $1,701.39, and the cargo has been valued at $68,685.77, making the total value $70,387.16. Four large wrecking vessels and one smaller one having an aggregate tonnage of two hundred and twenty six tons, and thirty six men, were employed in rendering the salvage services. I think one quarter of the net value is a reasonable salvage. It will make the total salvage not far from $17,000, and the men's shares between $170 and $180.

The facts and circumstances of this case being fully heard and understood, and mature deliberation had, it is now ordered, adjudged, and decreed, that the libellants have and recover in full compensation for their services in saving the said bark and cargo from total loss, the one quarter of the net value thereof, after first deducting the costs and expenses of this suit, the wharfage, storage, labor bills, in storing and landing the same, the merchants' commissions, the master's compensation for his services in taking care of the ship and cargo in this port, and reshipping the cargo,—and that it be referred to the clerk to ascertain and report the aforesaid costs and charges, and to apportion the salvage herein allowed and the costs and charges properly apportionable between the bark and cargo, and show the amount of salvage and expenses to be paid by each,—and that upon the confirmation by the court of his report a final decree be entered in the premises.

And afterwards, on the 15th of June, 1857, aforesaid, the judge made and filed in the said clerk's office his final order, and decree, in the case, in the words and figures following, to wit:

The clerk having reported to the court the costs, expenses and charges upon the bark and cargo, in pursuance of the decree heretofore pronounced in this case, whereby it appears that the total salvage, costs, and charges, including seamen's wages, upon the ship amount to $1,272.01; that the ship sold for $1,701.39, leaving a balance in court to be returned to the master of $429.38. And that the total salvage, costs, and charges upon the cargo amount to $20,433.56; that there has been sold of the cargo, damaged cotton and tobacco amounting to $5,371.41, leaving as a balance still to be paid on account of the cargo $15,062.15,—it is now ordered and decreed, that the libellants recover for their salvage the sum of $16,614.80, being the one quarter of the value of the ship and cargo, after deducting the costs and charges; that the master pay to the marshal the further sum of $15,062.15, on account of the salvage, costs and charges upon the cargo, and that, upon the payment thereof, he restore said cargo to Captain Spofford on account of whom it may concern; that the clerk return to Captain Spofford the sum of $429.38 on account of the residue of the proceeds of the sale of said bark; that the clerk also pay to the several persons entitled thereto the bills of costs and charges allowed by the court.

PHILBROOK (VOSE v.). See Case No. 17,010.

PHILIP DE PEYSTER, The (MORGAN v.). See Case No. 9,805.

Case No. 11,092.

PHILIPS et al. v. CRAMMOND et al.

[2 Wash. C. C. 441.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

TRUSTS—INVESTMENT OF FUNDS HELD IN FIDUCIARY CAPACITY—INVESTMENT OF PARTNERSHIP FUNDS—RESULTING TRUST—EVIDENCE.

1. The general principle of equity is, that if a receiver, executor, factor, or trustee, lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money may follow the same, and consider

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

the purchase as made for his use, and the purchaser as his trustee.

[Cited in Hutchins v. Heywood, 50 N. H. 498; Jackson v. Cleveland, 15 Mich. 103; McLaughlin v. Fulton, 104 Pa. St. 170; Sadler's Appeal, 87 Pa. St. 159; Zundell v. Gess (Tex. Sup.) 9 S. W. 880.]

2. A resulting trust will arise, where lands have been purchased by one partner, and paid for out of the funds of the partnership.

[Cited in Sherwood v. St. Paul & C. Ry. Co., 21 Minn. 130.]

3. The confession of the party in his answer to a bill, or in writing under his hand, that the money laid out belonged to the person, is sufficient evidence thereof.

4. The person entitled to the resulting trust is not obliged to take the land, and to consider the purchaser as his trustee; but he may elect to take the money, and refuse the property.

[Cited in King v. Hamilton, 16 Ill. 197; Moffatt v. Shepard, 2 Pin. 68.]

5. Equity will not raise a use by implication, for a person who by law cannot hold it.

[Cited in Taylor v. Benham, 5 How. (46 U. S.) 270.]

6. Where the equity of each party is equal, the court will not deprive one party of the advantage he may have gained, by obtaining a legal estate in property, which was promised as a security for a debt due to each.

[Cited in Mathis v. Stufflebeam, 94 Ill. 483.]

[This was a proceeding by Thomas Philips & Co. against William Crammond, Willing, and others, creditors of Crammond and Samuel Mifflin.]

This case was argued in April or May, 1809, when the commissioner of the court was directed to state the accounts between the plaintiffs and Crammond, at certain periods, and also the manner in which the entries, respecting the estate called Sedgeley, the estate on Spruce street, and the vessels, were made on the books of Philips, Crammond, & Co., kept by Crammond. The report was made, and excepted to, but not argued, or deemed important. The court now pronounced an opinion and decree in the case.

WASHINGTON, Circuit Justice. It appears from the bill and answers in this cause, that some time in the year 1789, a commercial house was formed and established in Philadelphia, between the complainants, of Manchester in England, and the defendant, Crammond, in this city, in which the latter was to be one-third interested, and was to manage the affairs of the concern. This co-partnership continued until December, 1801, when it was dissolved. During its continuance, viz. in January 1795, Crammond, with the consent of his partners, purchased a lot of ground in Philadelphia, on Spruce street, and built thereon a dwelling-house and ware-houses, for the use, and with the funds of the partnership, but took the conveyance in his own name. As to this property there is no dispute, it being admitted to be partnership property when purchased, and a declaration of trust to the complainants having been since made. On the 28th of March 1799, Crammond purchased a piece of ground on the Schuylkill, containing about twenty-eight acres, upon which he built a house for a country seat, and in other respects improved the same at considerable expense, to which he gave the name of Sedgeley. The purchase money for this property, and what was expended in improving it, was also drawn from the partnership funds, and the conveyance was made to Crammond alone. The first payment was made in the autumn of the same year. There were also a number of vessels employed in carrying on the trade of this concern, the whole of which were held in the name of Crammond, and as his separate property, though purchased and paid for out of the joint funds. It would appear that this company carried on their trade with various success, but that for some time before the dissolution, their losses were considerable, insomuch, that upon the final settlement which took place in December 1801, Crammond was found to be debtor to the house in a considerable sum. Previous to this settlement, and as early as the 11th of September preceding, Crammond, by letter to the complainants, informed them that he had, on that day, executed a deed of trust to them for all the real estate in his name, stating, that it belonged to them, and that the complainants had then in their hands sufficient proof that the property was theirs. On the 30th of December 1801, he executed a declaration of trust, in favour of the complainants, of the Spruce street property only, nor was any conveyance or declaration of trust at any time made in their favour, in respect to Sedgeley. He afterwards agreed to hold this latter estate as a tenant to the complainants, at a certain rent. He has always, since that time, acknowledged that Sedgeley belonged to the complainants, and in his answer he confesses the same, and that it was purchased and improved with the partnership funds. After the dissolution of the partnership, Crammond carried on business in his own name, and on his own account, until May 1805; when he stopped payment, and executed to three others of the defendants, a deed of assignment of all his real and personal estate, for the benefit of his separate creditors. Some time after this, Sedgeley was levied upon by the marshal of this court, to satisfy an execution issued upon a judgment obtained by the United States against William Crammond, and was sold and conveyed to the remaining defendant, Samuel Mifflin, who, in his answer, states that he is not bound to pay the purchase money, unless it shall appear, by due course of law, that the said estate was the property of Crammond, at the time the judgment was obtained. It appears, that during the partnership of Philips, Crammond, & Co., the accounts of the concern, under the management of Crammond, were annually transmitted by him to the complainants, upon which the profit and loss were ascertained, and

Crammond's proportion of profit was carried to his credit, and remained with the concern, as so much of his capital brought into the partnership stock.

By the report of the commissioner of this court, it appears, that on the books of the company kept by Crammond, an account was opened with each vessel purchased by him with the partnership funds, in which she was debited with the purchase money, and with her expenses and interest on such expenditures, and was credited with her earnings, and that upon the final disposition of such vessel, her account was closed, and the balance carried to the debit or credit of William Crammond. That in the same accounts, the Spruce street property is designated as "the estate on Spruce street," and the advances made on account of it are not charged with interest. That the accounts, as to this estate, are regularly continued in these books after the dissolution, and Crammond is individually debited and credited with sums expended by, or received from him on account of that estate, and is, at different times, before and after the dissolution, charged with the rent thereof. The Sedgeley estate, on the other hand, is in the same accounts called, "William Crammond's estate, Sedgeley," and in the balance sheet of 1800, sent to the complainants, amongst the debts owing to Philips, Crammond, & Co., Crammond is charged for sundry ships, and for the estate, called Sedgeley. The advances made for this estate, are charged with interest, and the account is balanced on the books, on the 31st of December 1801, with 43,096 dollars, against the estate, as to which no further entry is made until the 31st of December 1806, when rent for the same, for the four preceding years, is charged to Crammond, by whom all the intervening expenditures were paid.

Upon this state of the case, the question is, whether the prayer of the bill, which is for a conveyance of the Spruce street and Sedgeley estates, ought to be granted? Their right to the Spruce street estate being admitted by the defendants, and rightly so in the opinion of the court, a decree in favour of the complainants, as to that, will of course be made. The merits of the claim, as to Sedgeley, stand upon different ground; and the first question, as to that, is, whether under all the circumstances of this case, a trust resulted to Philips, Crammond, & Co., out of whose funds that property was purchased and improved? The general principle is, that if a receiver, executor, factor, or trustee, lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money, which has been thus invested, may follow the same, and consider the purchase as made for his use, and the purchaser a trustee for him. Upon the same principle, I conceive that a resulting trust would arise to a partnership concern in lands purchased by one of the partners, and paid for out of the joint funds. As to the proof of the fact upon which this equity will arise, it seems to be settled, that if the purchaser confess in his answer, or in writing, under his hand, that the money so laid out, was the money of the person claiming the benefit of the purchase, it is sufficient to establish a resulting trust. Some of the cases, indeed, have gone farther, but it is unnecessary, in this case, for the court to go farther, as that fact is confessed by Crammond, in his answer, and is acknowledged in one of his letters. But this species of resulting trust is open to certain qualifications, amongst which it is proper to notice the following, viz.: that the person whose money was invested in the purchase, is not obliged to take the land, and to consider the purchaser as his trustee, but may elect to treat him as his debtor, and to claim the money instead of the property. As a consequence of this, and because the claim to a resulting trust is merely that of an equity, founded upon the presumptive intention of the parties, that equity may be rebutted, even by parol evidence, and circumstances to defeat it. If, for instance, the person for whose benefit the trust would otherwise be created, declares that the purchase was not made for him, or if both parties treat it as a purchase for the use of him to whom the conveyance is made, no resulting trust will arise.

This qualification of the doctrine seems to be decisive of the present case. Nothing can be more clear, than that the property in question was purchased and improved for the sole and separate use of William Crammond, and that his partners so understood and assented to it. The circumstances to establish these facts are conclusive. The nature of the property—a country seat, improved at an immense expense, in the vicinity of the place at which the purchaser alone resided, capable of affording to him an elegant luxury, but totally useless and unproductive to the concern, and out of the view and scope of the business in which the house was engaged. In the accounts kept by William Crammond, this estate is constantly designated as his, and he is made debtor to the partnership for all the advances made on account of it, and is charged with interest upon the same. The vessels, which it is admitted belonged separately to Crammond, though purchased with the partnership funds, are treated in the same manner. No rent was paid by Crammond for Sedgeley, or even charged, until long after the dissolution of the partnership, and when, it is probable, the ruined circumstances of Crammond suggested it as a prudent measure, to consider this estate as being held by him in trust for his former partners. These circumstances are greatly strengthened by contrasting the manner in which the Spruce street estate was treated

by the parties, with that observed in relation to Sedgeley. That consisted of houses adapted to the commercial purposes of the concern, and was so used. In the accounts, it is described as the estate on Spruce street. No interest is charged to Crammond upon the sum paid for it, but on the contrary, he is debited and credited with the different sums expended or received by him on account of the estate, and for rent after the dissolution of the partnership. The reason of all this is obvious; for this property was purchased with the approbation of the complainants, for the joint use of the concern, whereas it is not pretended in the bill, or in the answer of Crammond, that Sedgeley was purchased for any but the use of the purchaser.

But there is another reason why a resulting trust could not arise to the complainants, which is, that at the time the purchase money for Sedgeley was paid, the complainants were aliens, and incapable of holding real estate in Pennsylvania. The act of the 11th of February 1789, permitting aliens to purchase and to hold real estates, expired some time in the year 1797, prior to the time when this purchase was made. The act of the 11th of April 1799, goes no farther than to save the rights, intermediately acquired by aliens, under any bona fide contract, patent, or deed. But since it is unquestionable, that the payment of the money can alone create a resulting trust, which, in this case, was not done until after the conveyance was made to Crammond, the purchase in March 1799, cannot be considered as a contract made for the benefit of the partnership, within the words or intention of this law. This being the case, equity will not, by implication, raise a use for a person, who, by law, is incapable of holding.

If, then, the complainants' claim cannot be supported upon the ground of a resulting trust, are they entitled to call for a specific execution of the agreement of Crammond to stand seised of Sedgeley to their use, supposing the objection of alienage out of the way? This agreement is in writing, and being made upon a valuable consideration, there would be no difficulty in decreeing a conveyance by William Crammond, if the question were only between him and the complainants. But the claim of the trustees for the general creditors of Crammond is interposed, and they being also purchasers for a valuable consideration, they have equal equity with the complainants. It is true, that the equity of the complainants is prior to that of the trustees, and would of course prevail against them, if the question were, which of them is entitled to call for the legal estate? Or if the complainants had lent their money, on a promise by Crammond to give a mortgage for its security, or to convey the property absolutely to them, they would have had superior equity, and the court would have considered the latter as trustees for them. But in this case, the promise made to the complainants, and the conveyance actually made to the trustees, both being in consideration of pre-existing debts, the equity of each is equal, and this court will not take from the trustees the legal advantage, which their vigilance has conferred upon them.

Nothing need be said as to the title of Mifflin, or, indeed, can be decided upon the evidence in this cause. If the right of the trustees be better than that of the complainants, the latter cannot succeed.

Decree, that Crammond convey the Spruce street property to the complainants, and that the trustees release all their right and claim on the same. Bill to be dismissed, as to Sedgeley, but without costs.

Case No. 11,093.

PHILIPS v. ERWIN.

[1 Overt. 235.]

Circuit Court, D. North Carolina. June, 1807.

PUBLIC LANDS—VALIDITY OF GRANT—SIGNATURE—NORTH CAROLINA STATUTE—NOV., 1771, C. 1, § 15; 1783, C. 2, § 15.

[The governor's act in signing and affixing the state seal to a land grant, makes it operative without countersignature by the secretary of state.]

[Cited in Le Roy v. Clayton, Case No. 8,268.]

The defendant relied principally upon the statute of limitations, and produced a grant which had not been countersigned by the secretary. It was objected that this was no grant, as it wanted one of the essential requisites of a grant, the countersignature of the secretary of state. Nov. 1777, c. 1, § 15; 1783, c. 2, § 15.

PER CURIAM. This is a good grant, notwithstanding the secretary has omitted to countersign it. The grant is authentic, and passes the interest of the state, when the governor puts his signature and the seal of the state. The act, as to the countersignature by the secretary and recording the same, is directory, and, should the secretary neglect to do his duty, it should not operate to the prejudice of the grantee in making his grant void.[1] Suppose a person takes a deed to a register of a county who returns it as registered, when in truth it was not. This neglect shall not injure the owner of the deed. In fact, it must be considered as registered from the time it is left with the register, the owner having performed all the law required of him.

[1] See Hardin, 348, 508; 3 Bin. 30, 32; Taylor v. Quarles [unreported] S. C. U. S. 1812, MSS.

Case No. 11,094.

PHILIPS v. HATCH.

[1 Dill. 571; 3 Am. Law T. Rep. U. S. Cts. 191; 4 West. Jur. 399.] [1]

Circuit Court, D. Iowa. 1871.

REBELLION—DURATION—CONTRACTS.

1. From the nature of the question, which is regarded as political and not judicial; from the fair implication of the acts of congress; and from the uncertainty and confusion which would ensue from any other rule, *held*, that in contemplation of law, the late Rebellion continued in existence, in the state of Texas, until it was declared to be at an end, by the president in his proclamation of August 20, 1866 (14 Stat. 814); and that the courts would not inquire as a matter of fact in each case when the Rebellion terminated, or hostilities ceased, but would be governed in determining it by the decision of the political department of the government.

[Cited in U. S. v. One Thousand Five Hundred Bales of Cotton, Case No. 15,958.]

2. A contract made without any license or authority from the government, during the pendency of the Rebellion, between a resident of a state in insurrection and a state which "maintained a loyal adhesion to the Union" is void, both by the doctrines of international or public law, applicable to the late civil conflict, and by force of express legislative declaration.

[Cited in Williams v. Mobile Sav. Bank, Case No. 17,729; Brown v. Hiatt, Id. 2,011.]

[Cited in Rice v. Shook, 27 Ark. 137.]

3. Even after the war has terminated, the defendant in an action founded upon such a contract may plead the illegality thereof as a defence.

4. The principles of public law applicable to a state of war inter gentes have in general, in the absence of conflicting congressional legislation, been applied to legal questions arising out of the civil war between the United States and the so-called Confederate government.

5. Various statutes of congress, and proclamations of the president, relating to the status of the insurrectionary states, cited and commented on by Dillon, Circuit Judge.

The questions in the case arise on a demurrer to the answer. The plaintiff, in his petition alleges, that at the time of bringing his action, and at the time when the contract in suit was entered into, he was a citizen of the state of Texas, and that the defendant was, at said times, a citizen of the state of Iowa. The contract declared on is a promissory note made by the defendant to the plaintiff, and purports on its face to have been made in the "state of Texas," in the "county of Montgomery," therein, on the first day of January, 1866. The note contains a recital that it is secured by a deed of trust; and the petition contains an averment that the deed of trust has been executed and the property sold, and the proceeds of the sale (which was made out of court under a power contained in the instrument) credited on the note. To recover the balance, after allowing the credit, this action is brought. Among other defences, not necessary to be specially mentioned, the defendant pleads, in substance, the following: That at the time of the making of the note sued on, the plaintiff was a citizen and inhabitant of the state of Texas, and the defendant was a citizen and resident of the state of Iowa. The answer refers to the act of congress, of July 13, 1861 [12 Stat. 255], and the proclamations of the president hereafter mentioned, and alleges that the president did declare the state of Texas and the inhabitants thereof to be in actual rebellion against the United States, and that such rebellion continued to exist until the 20th day of August, 1866, when, by proclamation of the president, the state of rebellion theretofore existing in the state of Texas was declared to be suppressed. The answer also alleges that the plaintiff was a rebel, and gave aid and comfort to the enemies of the United States in armed rebellion during the time aforesaid; that he never took the oath of allegiance; and never received any permit to carry on trade or commercial intercourse from the proper or constituted authorities of the United States; wherefore, the defendant says the contract in suit is null and void, and he prays judgment accordingly. The plaintiff demurs, assigning as a ground therefor, that the facts pleaded do not, in law, make the note void.

[2] [Certain acts of congress and proclamations of the president of the United States, bearing upon the controversy may be here conveniently referred to. On the 19th day of April, 1861, the president issued his proclamation declaring that he had set on foot a blockade of the ports of certain states, including the state of Texas, because of the existence therein of an insurrection against the government of the United States. 12 Stat. 1258. On the 13th day of July, 1861 (12 Stat. 255, 257, § 5), the congress of the United States passed an important act, by which it was provided that the president, in certain cases, may declare the inhabitants of a state, or any section or portion thereof, to be in a state of insurrection "and thereupon," it is enacted, "all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States shall cease and be unlawful, so long as such condition of hostility shall continue; and all goods, etc., coming from such state or section into the other parts of the United States, and all proceeding to such state or section, by land or water, shall * * * be forfeited to the United States." Then follows a proviso that the president may, in his discretion, license and permit intercourse "to be conducted and carried on only in pursuance of rules and regulations prescribed by the secretary of the treasury." Pursuant to this act of congress, the president by his proclamation of the 16th day of August, 1861 (12 Stat. 1262), declared the state of Texas, with others, to be in a

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 3 Am. Law T. Rep. U. S. Cts. 191, contains only a partial report.]

[2] [From 4 West. Jur. 399.]

state of insurrection, and also proclaimed all unlicensed commercial intercourse to be unlawful. The power given to the president by the 5th section of the act of July 13, 1861, above cited, to license trade, was subsequently repealed except in certain cases. 13 Stat. 377, § 9. And see proclamation of April 2, 1863, repealing exceptions in the proclamation of August 16, 1861 (13 Stat. 730). By the act of July 17, 1862 (12 Stat. 589), it is provided that any person, in the states named, engaged in the rebellion, or aiding it, who fails, for 60 days after public warning or proclamation by the president, to cease to aid the rebellion and return to his allegiance, shall forfeit his property to the United States, the same being considered and "condemned as enemies' property" (sections 6 and 7). On the 2d of April, 1866, the president issued his proclamation, "declaring that the insurrection which heretofore existed in the states of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Mississippi, and Florida is at an end, and is henceforth to be so regarded." 14 Stat. 811. It will be noticed that the state of Texas was not included in this proclamation, but it was included in the like proclamation of August 20, 1866. 14 Stat. 814. This last proclamation recites in terms that the insurrection in Texas was not suppressed at the date of the former proclamation (April 2, 1866), and it is then (August 20, 1866), declared "to be at an end, and to be henceforth so regarded," in the said state of Texas, as in the other states named in the proclamation of April 2, 1866. On the 13th of June, 1865 (13 Stat. 763), the president issued his proclamation declaring that restrictions on trade east of the Mississippi river, with certain exceptions, be removed. On the 17th of June, 1865 (13 Stat. 765), the president issued his proclamation appointing a provisional governor for Texas, but containing no declaration of removal of restrictions on trade and intercourse therein, which had before been declared.] [2]

Withrow & Wright, for demurrer.
Nourse & Kauffman, opposed.

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

DILLON, Circuit Judge. The contract which is here sought to be enforced was made between a citizen and resident of the state of Iowa, and a citizen and resident of the state of Texas, within the latter state, after the proclamation of the president was issued, declaring that state to be in rebellion against the United States, and before his proclamation declaring the insurrection therein to be suppressed and at an end. It appears from other portions of the record that the consideration of the note declared on was a sale by the plaintiff and a purchase by the defendant, through an attorney in fact who signed the defendant's name to the note, of certain property, and that the note was secured by a deed of trust, and the property sold in pursuance of a power of sale contained in that instrument. The question made by the demurrer is, whether a note executed under these circumstances is valid and enforceable in the courts of the United States after the rebellion or civil war referred to in the answer is at end.

The first point necessary to be noticed is, when is the rebellion or civil war in Texas to be considered as having ended? It is a well known historical fact, which it is supposed the court may judicially notice, that the armies of the Rebellion surrendered to the force of the United States government early in the year 1865. General Lee surrendered to General Grant, April 9, 1865. Johnston surrendered April 26, 1865, and Kirby Smith, May 26, 1865,—dates, it will be observed, prior to the date of the note in suit. It is maintained by the plaintiff that the war was at an end before the note was made, and hence it is not governed, in any event, by rules of law applicable to contracts made pending a war between citizens of the opposing belligerents.

On the other hand, it is maintained by the defendant that it is not competent for the courts to inquire when as a matter of fact the Rebellion terminated, but that the courts must follow and be governed in this respect by the decisions of the political departments of the government, and if so then the Rebellion was in existence in the state of Texas until the president declared it to be at an end, which was on the 20th day of August, 1866, posterior to the date of the note, which is the foundation of the present action.

By the act of July 13, 1861 (12 Stat. 255), the president was made the judge of what states or portions of states were in insurrection, and he was authorized to declare that fact by proclamation. The act provides that "thereupon all commercial intercourse * * shall cease and be unlawful so long as such condition of hostility shall continue." The president's proclamation of August 16, 1861 (12 Stat. 1262), declared that commercial intercourse between the two sections "is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed."

In the opinion of the president, the Rebellion, in the state of Texas, had not ceased when he issued his proclamation of April 2, 1866 (14 Stat. 811), and it was not until the 20th day of August, 1866, that the president officially declared it to be at an end, and to be henceforth so regarded. Since the president, and not the courts, was empowered to decide when a state was in condition of insurrection, it would seem a fair implication from the act, in the absence of a contrary provision by congress on the subject, that the president, and not the courts, should determine how long the condition of hostility

[2] [From 4 West. Jur. 399.]

continued which rendered unlicensed intercourse unlawful.

If the date fixed by the president's proclamation does not govern, then that proclamation is, in this respect, wholly nugatory, and there is no certain guide for the courts to determine when the Rebellion is to be considered at an end. From the nature of the question, which is political and not judicial; from the fair implication of the act of July 13, 1861; from the confusion and uncertainty which would ensue from adopting any other rule, it is the opinion of the court that in the contemplation of law, the Rebellion in the state of Texas must be considered as being in existence until the president declared it to be at an end in the proclamation of the 20th day of August, 1866. This view receives no little support from the judgment of the supreme court in the recent case of U. S. v. Anderson, 9 Wall. [76 U. S.] 56, which holds, that within the meaning of the abandoned and captured property act of March 12, 1863, the Rebellion was not suppressed until August 20, 1866. Congress has also recognized the date fixed in the proclamation of August 20, 1866, as that at which the Rebellion closed. Act March 2, 1867, 14 Stat. 422, § 2; U. S. v. Anderson, supra.

The contract in suit then, is to be regarded as having been made during the existence of the Rebellion, and between a resident of a state in insurrection and a resident of a state which, in the language of the abovementioned proclamation of August 16, 1861, "maintained a loyal adhesion to the Union and the constitution." Being so made, is it valid or void? The late civil conflict, in view of the peculiar organization of this government, composed of states united into a national union, and in view of the de facto organization of a portion of these states into a confederacy, which raised and maintained for four years large armies, whose dominion was marked by lines of bayonets and bristling fortifications, within which the laws and authority of the national government were practically overthrown, presented legal questions as to its nature and effect, equally novel and difficult.

Were the rules and doctrines of international law at all applicable to this conflict, or were the questions arising out of it to be wholly determined by the municipal law? This general question first came before the supreme court in the Prize Cases, 2 Black [67 U. S.] 635, 1862. It has since been frequently before that tribunal. See The Venice, 2 Wall. [69 U. S.] 258; Mrs. Alexander's Cotton, Id. 404; The Hampton, 5 Wall. [72 U. S.] 372; The William Bagley, Id. 377; The Onachita Cotton, 6 Wall. [73 U. S.] 521; Hanger v. Abbott, Id. 532; Coppell v. Hall, 7 Wall. [74 U. S.] 542; McKee v. U. S., 8 Wall. [75 U. S.] 163; The Grapeshot, 9 Wall. [76 U. S.] 129.

These cases all apply, or declare to be applicable, to the Rebellion, the general doctrines of public law which govern in wars between independent nations. Of course, the authority of congress to modify these doctrines as applied to states in insurrection and the inhabitants thereof would not, probably, be disputed. In determining questions arising out of the Rebellion, the courts of the United States will first inquire what legislation has the congress of the United States enacted respecting such questions. If any, the courts will be governed by it so far as it is within the constitutional competency of congress. If none, then the general rules and doctrines of international law will be resorted to by the courts to determine the rights of the parties. What exceptions to the application of these rules and doctrines, arising out of the peculiar nature of our government and of the war, must necessarily, or should properly be made, cannot well be determined in advance.

Whether the question of the right of the parties to make the contract in suit be decided by the principles of public law applicable to a state of war inter gentes, or by the provisions of the act of congress, the result is the same.

In the Prize Cases [supra], Mr. Justice Nelson thus states some of the consequences resulting from a state of war between two countries: "The people of the two countries immediately become the enemies of each other; all intercourse, commercial or otherwise, unlawful; all contracts existing at the commencement of the war suspended, and all made during its existence utterly void."

There is no dispute among publicists, jurists, or courts, respecting the soundness of the proposition that all commercial intercourse, and all contracts between the subjects or citizens of different powers, or opposing belligerents, are wholly invalid. This principle of public law is vindicated by such masterly reasoning, and fortified with so much authority and research by Chancellor Kent, in his celebrated judgment in Griswold v. Waddington, 16 Johns. 438, that it is not necessary to do more than to refer to it. See, also, Kent, Comm. 67; Hall. Int. Law, 356; Billgerry v. Branch [19 Grat. 393]; Willison v. Patteson, 7 Taunt. 439; S. C., 1 Moore, C. P. 133; Ex parte Boussmaker, 13 Ves. 71; Flindt v. Waters, 15 East, 260; The Hoop, 1 C. Rob. Adm. 196, 200; Potts v. Bell, 8 Term R. 556; The Rapid, 8 Cranch [12 U. S.] 155; The Prize Cases, 2 Black [67 U. S.] 635.

But in the case at bar it is not necessary to resort to the general doctrine of public law, for the making the contract was forbidden by the abovementioned act of congress of July 13, 1861, prohibiting all unlicensed intercourse between the inhabitants of states and sections in insurrection, and the rest of the United States. Speaking of this act, Mr. Justice Davis, delivering in a recent case the opinion of the supreme court of the United States, says: "It is a familiar principle of public law that unlicensed business intercourse with an enemy during time of war is not permitted. Congress, therefore, in recognition of this

principle, when it declared, on the 13th day of July, 1861, that commercial intercourse between the seceding states and the rest of the United States should cease and be unlawful after the proclamation of the president that a state of insurrection existed, authorized the president in his discretion, to license trade. But in so far as it was licensed it was to be conducted in accordance with regulations prescribed by the secretary of the treasury. The president proclaimed the fact of insurrection, and provided for limited commercial intercourse, and the secretary of the treasury fixed the manner in which the intercourse should be carried on." McKee v. U. S., 8 Wall. [75 U. S.] 163, 166.

So, in reference to the effect of the act of July 13, 1861, and the proclamation of August 16, of the same year, Mr. Justice Swayne says that thereby "commercial intercourse between the inhabitants of territory in insurrection and those of territory not in insurrection, except under the license of the president, and according to regulations prescribed by the secretary of the treasury, was entirely prohibited." The Onachita Cotton, 6 Wall. [73 U. S.] 521, 531. See, also, U. S. v. Lane, 8 Wall. [75 U. S.] 184; Coppell v. Hall, 7 Wall. [74 U. S.] 542. In the case last cited, which was one arising out of the Rebellion, the court remarks: "The payment of money by a subject of one of the belligerents in the country of the other is condemned, and all contracts looking to that end are illegal and void."

It is also settled that even after the war has terminated the defendant in an action founded upon a contract made in violation of the rule of law which forbids the making of a contract with an enemy, may set up the illegality of the transaction as a defence. Hanger v. Abbott, 6 Wall. [73 U. S.] 532, 535, per Clifford, J.; Willison v. Patteson, 7 Taunt. 439.

It is, therefore, the opinion of the court that the answer is sufficient, and the demurrer thereto is overruled.

Demurrer overruled.

See Brown v. Hiatt [Case No. 2,011]; Levy v. Stewart, 11 Wall. [78 U. S.] 244.

Case No. 11,095.

PHILIPS v. JANNEY.

[1 Cranch, C. C. 502.] [1]

Circuit Court, District of Columbia. July Term, 1808.

BILLS AND NOTES—NOTICE OF PROTEST—FOREIGN MAIL IN TIME OF WAR—DUPLICATE NOTICE.

It is not sufficient notice to the defendant of the dishonor of a bill payable in London to inclose the bill and protest in a letter to the defendant in this country, and put the letter into the mail of a British packet, in time of war between England and France, without following it by a duplicate protest, &c., in reasonable time; the original protest not having been received.

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

Assumpsit by the indorsee against the indorser of a foreign bill of exchange, payable in London, for two hundred pounds sterling, accepted by the drawees, and protested for non-payment. The bill and protest were inclosed in a letter from the plaintiff to the defendant, giving notice of the demand and non-payment, dated November 5th, 1803, addressed to the defendant in Alexandria, and put in the mail for the British packet, which sailed from England on the 16th of November, 1803, which was the first packet for the United States after the protest, and which arrived safely at New York, of which arrival the plaintiff had notice. There was then war between England and France. The usual mode of conveyance was by these packets, which sailed once a month for some port of the United States, where the foreign letters were to be put into the mail of the United States, for particular transmission to their respective places of address; or by some private ship regularly trading to Alexandria. The plaintiff offered evidence that the most regular mercantile houses usually preferred the conveyance by packet, notwithstanding the war. That it is usual for foreign merchants to send duplicates of protests to their correspondents and sometimes triplicates, before they hear of the receipt of any of them, but not after hearing of the arrival of the ship which carried the original protest. It appeared that the original protest was never received by the defendant; but in December, 1805, or beginning of 1806, he was informed of the protest by the plaintiff's agent; and on the 4th of December, 1806, was informed of the dishonor of the bill, by another letter from the plaintiff, dated September 3d, 1806, which inclosed a copy of the protest, and the second bill of the same set. That the drawer of the bill died insolvent, in August, 1805, but was in good credit when he drew the bill, and if the bill and protest which was sent in November, 1803, had been duly received by the defendant, the drawer might have paid the bill or secured payment of it. The defendant refused to pay the bill. The prior indorsers are still solvent, and received notice of the dishonor of the bill from the defendant immediately after he received the duplicate protest in 1806.

Upon this state of facts the plaintiff's counsel, C. Lee, prayed the court to instruct the jury, that the defendant was liable to pay the amount of the bill; contending that the plaintiff used due and reasonable diligence in giving notice to the defendant.

Mr. Swann, for defendant, contended that there should have been actual notice in reasonable time; that the plaintiff ought to have continued to send duplicates, &c., till the receipt of some one of them was acknowledged; and that a neutral vessel would have been a safer conveyance than a British packet in time of war.

THE COURT (nem. con.) refused to give

the instruction. A bill of exceptions was taken; but a writ of error was never prosecuted.

Case No. 11,096.

PHILIPS v. LEDLEY.

[1 Wash. C. C. 226.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

MARITIME LIENS—REPAIRS—AUTHORITY OF MASTER—MORTGAGEE NOT IN POSSESSION—EARNINGS—ENROLMENT—REGISTRY AND LICENSE.

1. The master of a vessel, from the necessity of the case, may bind his owners for repairs; unless it appears, that some other person has authority to manage the concern, in the particular instance; and that this was known to the creditor.

[Cited in The Joseph Cunard, Case No. 7,535; Hill v. The Golden Gate, Id. 6,491.]

[Cited in brief in Winsor v. Maddock, 64 Pa. St. 234.]

2. The mortgagee of a vessel, before possession delivered, is not responsible for repairs made by the mortgagor; nor is he entitled to the earnings of the vessel.

[Cited in brief in Munro v. Merchants' Bank, 93 Mass. (11 Allen) 220.]

3. By the law of the United States, relating to the registering and enrolment of vessels, the inaccurate recital of the certificate of registry, in a bill of sale, does not, as in England, avoid the sale; but merely deprives the vessel of her American character.

4. If a registered vessel is assigned to a foreigner, she is only deprived of her American character.

5. The sale of a licensed vessel to a foreigner, is not void; but the vessel is liable to forfeiture.

This was indebitatus assumpsit, for work and labour done and performed by plaintiff, as ship carpenter, on the sloop Industry, the property of the defendant. The material facts were; that the defendant, before the repairs were made, sold the sloop to one Vasy; and the contract, which was in writing, stated, that "J. C. Ledley, (the person now sued as defendant,) doth bargain and agree with J. Vasy, for the sloop Industry, for 380 dollars; payable one half on delivery of the vessel, and the remainder in three months. The said Ledley holds the enrolment, till the balance of the money is paid." Vasy paid down 20 dollars, and in about sixteen days afterwards received possession of the vessel, and then completed the first payment. He also stated in evidence, that he carried with him, on his first voyage, the license and enrolment, but no change was made in the name. Vasy brought the vessel to Philadelphia, and employed the plaintiff to repair her; informing him that he had purchased her from the defendant. The repairs being made, to the amount of 632 dollars, Vasy gave his note for the amount, payable at one hundred and ten days, and then went on a trip to Baltimore, where he left her, and returned to Philadelphia. The note having become due, and he being unable to pay it, he was sued, judgment recovered, and being thrown into jail, he took the benefit of the insolvent law, and the plaintiff was appointed one of his assignees. Vasy sold the sloop to one Paul, who, at considerable expense, brought her to Philadelphia, and consented that she should be sold, and after paying these expenses, the residue should be applied to the discharge of so much of the original purchase money, as was yet due the defendant. She was sold for 400 dollars. It appeared from the plaintiff's books, that he had charged these repairs to Vasy, for the sloop Industry. The plaintiff, not being able to receive payment from Vasy, brought this suit.

The court informed the counsel, that the only question was, whether, under the circumstances of this case, (about which there was no dispute,) the plaintiff could recover against Ledley, the defendant; and suggested, that the case should be argued as a point of law. The counsel on both sides assenting, Smith, counsel for defendant, moved for a nonsuit. He contended—First. That the defendant at no time was responsible for these repairs, and relied on the cases of Jackson v. Vernon, 1 H. Bl. 114, and Chinnery v. Blackburne, Id. 117, note, to show, that even the mortgagee of a vessel, out of possession, is neither entitled to the earnings of the vessel, nor liable for repairs or expenses. That perhaps it might be contended, that under the 32d section of the act of 18th February, 1793 (2 [Folwell's Ed.] 193 [1 Stat. 316]), the sale to Vasy, who, it is admitted, was then an alien, by producing forfeiture of the vessel, prevented the title from ever passing out of the defendant. But in answer to this, the title passed to, and remained in the vendee, until the forfeiture was completed by conviction, and therefore, in respect to his acts, he was to all the world the owner. But, if the sale produced the forfeiture, then the right vested in the United States, and on that ground the defendant could not be made answerable. Second. The plaintiff, by resorting to Vasy, looking to him, taking his note, and suing him, discharged Ledley, if he ever was liable. 2 Strange, 817; Abb. Shipp. 85. The plaintiff lost his lien on the vessel, which the law of Pennsylvania gave him, because he suffered her to make one voyage to sea.

M. & S. Levy, for plaintiff, contended; that the sale to Vasy passed neither a legal nor equitable title to the vessel. The contract was nothing more than an agreement to sell, on condition the whole purchase money was paid; not an equitable estate, because the purchase money was never paid. Ledley, therefore, continued the owner; and to show his liability, although the contract was not made with him, they relied on the

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

case of Westerdell v. Dale, 7 Term R. 306. Cited, also [Scottin v. Stanley] 1 Dall. [1 U. S.] 129; [Farrel v. M'Clea] Id. 392; [Murgatroyd v. Crawford] 3 Dall. [3 U. S.] 491.

The court stopped Mr. Milner, who was about the reply.

WASHINGTON, Circuit Justice. This is an action of indebitatus assumpsit against defendant, in common form, for repairs done to his vessel, at his request. To support it, the plaintiff must prove the assumpsit of the defendant, either expressly, or by such an implication as the law will raise; that is, that the work was done, at the request of the defendant, or of some other person who had authority to bind him, either express or implied, from the nature of the transaction. The principle upon which the master may bind his owners for repairs, &c. results from the general authority with which, from the necessity of the case, he is clothed; and which nothing but proof that some other person was intrusted to manage the concern, in the particular instance, and this known to the creditor, can defeat. The cases of Chinnery v. Blackburne, 1 H. Bl. 117, note, and Jackson v. Vernon [Id. 114] support, to the full extent, this doctrine. For a mortgagee of a vessel, even before possession delivered, has the legal title; and yet he is not responsible for any repairs, nor entitled to any of the earnings of the vessel. If this be the case as to a mortgagee, the argument is a fortiori, in the case of an absolute vendee in possession, whatever defect there may be in his title. The question always must be, with whom was the contract made, and on whose credit?

The case of Westerdell v. Dale [7 Term R. 306] is not apposite to this. For there, Dale and Wharton were partners in the vessel; and, of course, both had an authority to bind the other. The insufficient recital of the certificate, in the conveyance from Dale to Wharton of his half, rendered the whole a nullity, under the particular provisions of the navigation laws of England; and of course, Wharton still retained the authority, once vested in him, to bind his partner. But in this case, Vasy never had authority to bind the defendant, before the purchase; and the sale could not, in its nature, communicate such a power to him. The difference between the law of England on this point, and the law of the United States, is striking. The inaccurate recital of the certificate, avoids the deed there: here, it only deprives the vessel of the privileges of an American bottom. If a sea vessel is assigned to a foreigner, the consequence is the same. If a coasting vessel, the sale is not void; but the vessel is liable to forfeiture only. In this case, the sale was absolute, not conditional or executory; and was perfected by delivery of possession. The agreement that Ledley should retain the enrolment, created a lien on that paper; but the title to the vessel itself, passed by the sale. In this case, however, it appears that both the license and enrolment were delivered up. Nonsuit directed.

PHILIPS (POTE v.). See Case No. 11,316.

PHILIPS v. WILSON. See Case No. 11,109.

PHILLIBAUM (HOLTZAPPLE v.). See Case No. 6,648.

PHILLIP BEST BREWING CO. (GOTTFRIED v.). See Case No. 5,633.

Case No. 11,097.

In re PHILLIPS.

[10 Int. Rev. Rec. 107; 2 Am. Law T. Rep. U. S. Cts. 154; 1 Chi. Leg. News, 449; 16 Pittsb. Leg. J. 189.]

District Court, D. Virginia. Sept., 1869.

INTERNAL REVENUE — SUMMONS OF ASSESSOR — WHEN OBJECTIONS TO SHOULD BE TAKEN — REFUSAL OF WITNESS TO ANSWER — WHEN IMPROPER.

1. Witness was summoned and appeared for examination before an assessor under section 14 of the act of 1864, as amended, and refused to answer questions propounded touching the falsity or verity of certain tax returns of tobacco manufacturers. He was thereupon attached as for contempt, upon application of the assessor, and on a motion for his discharge, *held*, the power conferred upon the assessor and exercised by him in the premises is constitutional. The questions were pertinent and proper, and the witness must answer.

[Cited in Re Platt, Case No. 11,212.]

2. It is no defence that the answers would tend to criminate witness, inasmuch as no disclosures or admissions so made can be used against him in criminal or quasi criminal prosecutions, under the act of February 25, 1868.

[Cited in U. S. v. McCarthy, 18 Fed. 89.]

At law.

UNDERWOOD, District Judge. In this case the respondent, Phillips, was summoned to appear before the assessor of the Second district of Virginia, to answer interrogatories respecting the monthly returns of certain tobacco manufacturers which, in the opinion of said assessor, were false and fraudulent; the summons having been issued pursuant to the provisions of section 14, Act of March, 1865 [13 Stat. 469], amended July 13, 1866 [14 Stat. 98]. To some of the interrogatories propounded by the assessor, the said Phillips, who duly appeared in response to the summons, declined to make answer, whereupon the assessor applied to the district judge for an attachment, which was granted, and the said Phillips, having been brought before the judge, and a hearing having been had, the respondent asked to be discharged from arrest upon three grounds: (1) Because of alleged defects in the assessor's summons, in that it did not state any particular case or subject-matter with respect to which the respondent was required to testify. (2) Because the interrogatories which he declined to answer were not such as the assessor

could legally propound. (3) Because answers to said interrogatories, if given, would expose and subject him to a criminal prosecution.

The statute does not prescribe a form for the summons to be issued in cases like this. The form adopted in this case is perhaps open to exception, because of its omission to specify the case or subject-matter with respect to which the testimony was required. Had the respondent, on that ground, declined to appear in obedience to the summons, or having appeared, had he declined to answer any interrogatory until the subject of inquiry had been made known to him, and the subject of inquiry had then been withheld, the objections to the summons, now urged, would have come with force. But the respondent appeared before the assessor, in obedience to the summons, the subject-matter of the inquiry was made known to him as appears by the record, and he still refused to answer; not, however, because of any insufficiency in the summons. It would be sacrificing substance to form to allow the objections to the summons under such circumstances now to prevail. The interrogatories which the respondent refused to answer were interrogatories as to his transactions in tobacco with the several parties whose returns were believed to be fraudulent. The answers, if given, would have tended directly either to falsify or to verify the said returns. The interrogatories were therefore relevant and pertinent to the subject-matter of inquiry. The subject-matter of inquiry, too, was clearly within the assessor's jurisdiction. In the exercise of its power to lay and collect taxes, congress may employ whatever means are necessary and proper for its effective exercise, provided the means employed are not prohibited by the constitution. The objection that the inquiries are inquisitorial in their character is too vague, and would apply with equal force to the income tax, and in fact to nearly all the taxes which are imposed by the government. It would, if allowed, defeat all efforts to detect every tobacco and whiskey conspiracy to defraud the treasury, and the government would be compelled to surrender to its worst and most unscrupulous enemies.

The proceedings authorized by section 14 are clearly "necessary and proper" for the end to be attained, and they conflict with no provision of the constitution. The assessor was, therefore, in the exercise of a jurisdiction or authority lawfully conferred; the interrogatories propounded were such as appertained to its regular and legitimate exercise; the answers were properly required, and should have been given. The act of congress of February 25, 1868 [15 Stat. 37]—the "Act for the protection in certain cases of persons making disclosures as parties or testifying as witnesses"—prohibits the disclosures and admissions of such persons from being used against them, before any court of the United States, in any criminal or quasi-criminal prosecution, and I consider that act as embracing disclosures and admissions in proceedings like the present. That being so, the respondent, by any answers which he may give to the interrogatories, cannot thereby be subjected to a criminal prosecution, since his answers cannot be used against him. If it be said that although his answers cannot themselves be used against him, they may nevertheless point to other information not otherwise to be obtained, which, when obtained, may be used and successfully used against him, it is, to my mind, a sufficient reply to quote the court of appeals of New York, (People v. Hackley, 24 N. Y. 83): "But neither the law nor the constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transaction should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law."

The refusal, therefore, of the respondent to answer the interrogatories is not sustained by any sufficient ground, and his discharge from arrest is conditioned upon his answering the same fully.

Case No. 11,098.

In re PHILLIPS.

[14 N. B. R. 219;[1] 3 Month. Jur. 457; 8 Chi. Leg. News, 409; 22 Int. Rev. Rec. 306.]

District Court, W. D. Michigan. May 8, 1876.

NOTARIES—REQUISITES OF OFFICIAL SEAL—PRESUMPTION—IMPRESSION UPON WAX.

1. The requisites of a notarial seal are determined by the law of the locality from which the official derives his authority.

2. An official seal is an impression on the paper directly, or on wax or wafer attached thereto, made by the official, as and for his seal.

3. In the absence of express legislation, an official seal need not contain the name of the official.

4. It is the seal, and not its composition or character of words and devices which raises the presumption of official character of which the courts take judicial notice.

5. The presumption is, that a seal is the official seal of the person it purports to be, and who subscribed the jurat.

6. Any impression made upon sealing-wax or wafer adhering to the paper, without any device or words indicative of the particular official, is entitled to judicial sanction as evidence of the official character of the individual who signs the jurat.

[In the matter of the bankruptcy of William W. Phillips.] In the matter of the proof of debt of Chase, Isherwood & Co.

WITHEY, District Judge. Chase, Isherwood & Co., of Ohio, proved their claim against the bankrupt estate before a notary public of Lucas county, Ohio, who subscribed the jurat "A. E. Scott, Notary Public, Lucas

[1] [Reprinted from 14 N. B. R. 219, by permission.]

Co., Ohio." On the paper containing his certificate is impressed a seal, containing the words "Notarial Seal, Lucas Co., Ohio," in the center of which seal is distinctly seen a device of some kind impressed upon the paper. We are referred to, but cannot follow the judgment in, Re Nebe [Case No. 10,073], where it was decided by Mr. Register Clark, of the Eastern district, and approved by Judge Longyear, that a proof of debt before a notary public of Wayne county, Michigan, authenticated by his signature and a seal impressed on the paper, containing the words "Notary Public, Wayne Co., Michigan," was defective and insufficient, because the name of the notary was not on the seal, and impressed upon the paper. Reference was made in that case to Gage v. Railroad Co., 11 Iowa, 310, 314, in support of the conclusions reached. The certificate and seal in the Iowa case were those of a commissioner for the state of Iowa, residing in New York. He certified to an affidavit made before him, and authenticated it by his signature and a seal, in the body of which the name of the state, "Iowa," was written with a pen, and not impressed. The authenticated seal in the Iowa case was partly impressed and partly in writing, which fact alone would render the seal not entitled to credit as evidence, for the Iowa Code requires the commissioner's seal to be impressed on the paper, or on wax or wafer thereon. It also requires the seal of a notary public to have his name and the words "Notarial Seal, Iowa," thereon, so as to impress the same upon his certificates. That case, therefore, while undoubtedly rightly decided, comes far short of authority for the rejection of the seal as evidence in the case of Chase, Isherwood & Co.'s claim.

The generally received doctrine is that a notarial seal proves itself. Starting out with this fundamental rule, the question is presented, what is it that determines the character or make-up of a notary's or other official's seal? We answer, it is determined by the law of the locality from which the official derives his authority; or, if there is no law prescribing what the seal shall be, resort must be had to the common law to ascertain. So far as we can learn, the laws of Ohio do not prescribe what the seal shall be, or, at least, do not require that the name of the notary shall be thereon, as the laws of Michigan do not. At an early date, a seal was an impression on wax, according to Lord Coke. 3 Inst. 169. Signets and rings were used from very ancient times to make impressions in wax, as seals. Afterwards an impression upon wax, wafer, or other tenacious substance capable of being impressed, was held sufficient as a seal. 5 Johns. 230. A plate of metal, on which is engraved the arms or device of a public official, has long been used. More recently, machines which stamp the paper and impress the seal thereon, without wax, wafer, or other substance to receive the stamp, are held sufficient as to public official seals. Pillow v. Roberts, 13 How. [54 U. S.] 472. Where has it ever been held in common-law courts that an official's seal must contain his name? We fail to find one in the absence of express legislation. An official seal, then, is the impression on the paper directly, or on wax or wafer attached thereto, made by the official as and for his seal. But how are courts to know that it is his seal unless it contains his name, not written, but impressed on the document? The seal of a notary public is taken judicial notice of, the world over. We venture to affirm that the presumption in favor of an official seal does not arise from the name impressed on the paper; on the contrary, it is the seal which authenticates, not the particular name, word, or device on it. This is in harmony with the common-law idea of a seal, viz., the impression, and had its origin in those days when the great men and official dignitaries of earth could not write their names, and so had to sign by the signet, ring, cross, etc. Hence the seal impression placed upon a document by a notary public, signifies authentication of his official character. It is the seal, and not its composition or characters of words and devices, which raises the presumption of official character, of which courts take judicial notice. Accordingly, it has been held sufficient, when the words and devices have been so far obliterated and defaced from a seal that nothing certain could be made out as to its particular character, if enough remained to show satisfactorily that the document had been sealed. Again, where, owing to defacement or obliteration, the question is raised as to a seal having been impressed, the fact has been referred to a jury for a verdict. Follett v. Rose [Case No. 4,900]; Orr v. Lacy [Id. 10,589]. Suppose, then, this was the case of a partially obscured or defaced seal, or one whose impression was so imperfect that the words and character upon it could not be made out; the only question would be, was it sealed, and not whether the name of the notary appeared. Our opinion is, that the seal in this case, of which we take judicial notice, is evidence of the notarial character of Scott; the presumption being that it is the official seal of the person it purports to be, and who subscribes the jurat. We even think any impression made upon sealing-wax or wafer adhering to the paper, without any device or words indicative of the particular official, would be equally entitled to judicial sanction as evidence of the notarial or official character of the individual signing his name as "Notary Public, Lucas Co., Ohio." The register is directed to allow the proof of claim. The clerk will certify this opinion to the register.

PHILLIPS v. The BLANCHE PAGE. See Case No. 1,523.

PHILLIPS (BORLAND v.). See Case No. 1,661.

PHILLIPS (BURRILL v.). See Case No. 2,200.

Case No. 11,099.

PHILLIPS v. COMBSTOCK.

[4 McLean, 525;[3] 2 Robb, Pat. Cas. 724.]

Circuit Court, D. Indiana. May Term, 1849.

PLEADING—TIME FOR FILING SPECIAL PLEA—CONTINUANCE—GENERAL ISSUE.

1. A special plea or notice must be filed thirty days before the term, in a patent case, or the plaintiff will be entitled to a continuance.

2. The option to file the general issue and give notice, does not take away the right to set up the special matter in a plea.

At law.

Mr. Baird, for plaintiff.

Mr. Judah, for defendant.

OPINION OF THE COURT. This is an action for the violation of a patent-right. The defendant filed a special plea, setting up that the right was not in the plaintiff; a previous discovery; and that the right was of no value. And a question was raised whether a special plea could be filed, or whether the plaintiff was not bound to plead the general issue and give notice as authorized by the statute. The court held that a special plea may be filed. That a right to plead the general issue, and give notice by the statute, was an enlargement of the defendant's mode of defence, but that it did not take away his right to plead specially. But the court held also, that as the plea was not put in thirty days before the term, the plaintiff was entitled to a continuance. The statute provides that the notice under the general issue shall be filed thirty days before the term. This entitles the plaintiff to the thirty days whether the matter be set up by a plea or notice.

Case No. 11,100.

PHILLIPS et al. v. DETROIT.

[4 Ban. & A. 347; 17 O. G. 191; Merw. Pat. Inv. 206; 4 Cin. Law Bul. 385.][1]

Circuit Court, E. D. Michigan. June, 1879.[2]

PATENTS—PATENTABILITY—WOODEN BLOCK PAVEMENT—UTILITY—NOVELTY.

1. A pavement consisting of blocks of wood cut from the trunks or branches of trees in their natural form, the bark only being removed, laid vertically upon a bed of gravel or sand, which is also used as a filling to keep the blocks in position, is not patentable.

2. While the fact, that a device is useful and has superseded others previously employed for analogous purposes, is proper to be considered and, in some cases, is decisive, it does not, of itself, establish the fact of patentability.

3. Letters patent No. 121,544, granted to Robert C. Phillips, December 5th, 1871, for improvement in wooden pavements, *held* void for want of novelty and invention.

[This was a bill in equity by Robert C. Phillips, Eugene Robinson, and Jesse H. Farwell against the city of Detroit, to restrain the infringement of letters patent No. 121,544, granted to Phillips December 5, 1871, for improvement in wooden pavements. In a suit for the violation of a preliminary injunction the members of the board of public works of the city of Detroit were fined for the willful violation of the injunction. Case No. 11,101. It is now heard for final decree.]

Geo. H. Lothrop and E. W. Kittridge, for complainants.

F. A. Baker, D. C. Holbrook, and L. L. Bond, for defendant.

BROWN, District Judge. I have felt much embarrassed in the consideration of this case by the decision of Judge Emmons sustaining the validity of this patent in a suit brought by the complainants against the city of Cincinnati. Upon a motion for a preliminary injunction, this decision was accepted as practically conclusive, and a writ was granted without much examination into the merits. I have hesitated whether I ought not now to treat his determination as decisive of the case, upon the grounds stated by Judge Emmons himself in Goodyear Dental Vulcanite Co. v. Willis [Case No. 5,603]. But, as three most important exhibits, claimed to be in anticipation of complainants' patent, have been introduced in this case which were not before the circuit judge at Cincinnati, it is proper at least that their bearing upon the validity of the patent should be considered. It is, perhaps, true that if the case had been an original one I should have reached the conclusion that the patent was invalid from the disclaimer in the specification itself; but it is at least possible that the circuit judge might have reached a different conclusion, in that case, if these exhibits had been laid before him. It is difficult for me to determine the exact point, whether the new testimony itself would authorize a different conclusion, and, if the case is to be reconsidered at all, I think the only satisfactory way is to consider it de novo upon the whole testimony. The magnitude of the interests involved renders it more than probable that the case will be appealed. The defendant is abundantly able to respond to any decree that can be obtained against it, and, upon the whole, it has seemed to me better that the record should go to the supreme court with a candid statement of my own views, rather than an apology for deciding against them.

The real question in this case is not whether this patent might have been valid if wooden blocks, in their natural state, laid vertically, had never before been used, nor yet whether any of the prior patents are in terms anticipatory of this, but whether, considering the state of the art in 1869, as evidenced by the various exhibits here offered, there is any in-

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

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 4 Cin. Law Bul. 385, and Merw. Pat. Inv. 206, contain only partial reports.]

[2] [Affirmed in 111 U. S. 604, 4 Sup. Ct. 580.]

vention in the result embodied in this patent. Invention has been justly described as a mental process, but it is often exceedingly difficult to draw the line between those devices which are the result of thought, ingenuity and labor, and the products of such judgment or skill as a mechanic ordinarily makes use of in the performance of his daily work, and which are confessedly not patentable.

Great stress is laid in this case upon the superiority of this pavement over any other heretofore used, and it is claimed as almost, if not quite, decisive of the right of complainants to their patent. While the value and utility of a device and the fact that it has superseded others previously employed for analogous uses is undoubtedly entitled to weight in considering the question of patentability (Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486), it is, after all, a somewhat uncertain criterion. If the device be, in fact, novel, it furnishes an additional reason why the inventor should receive the reward of his ingenuity; but, if it involved no exercise of the inventive faculty, its very utility is an aggravation of the wrong done by the patentees in seizing and appropriating that which properly belongs to the public. If, for example, a person should succeed in obtaining a patent for painting the names of streets upon the gas-lamps, it would be a very insufficient answer to the defence of non-patentability to say that it was a very useful device and one which had superseded the ancient method of painting the names upon the walls of the corner houses.

The patent under consideration is of the simplest description. It consists of blocks of wood cut from the trunks or branches of trees in their natural form, the bark only being removed, laid vertically upon a bed of gravel or sand, which is also used as a filling-in to keep the blocks in position. The result is a smooth pavement of greater durability than any other wooden pavement known.

All the pavements to which my attention has been called consist of three distinct parts: First. A superstructure of stone or wood, in blocks of different shapes and sizes; sometimes, if of wood, connected by pegs or dowel-pins, but oftener laid separately. In some cases the wood is treated by dipping it in tar, asphalt or other material to keep out the water. These preparations, however, have been found to increase the tendency to dry-rot caused by the inability of the sap to escape. Second. A foundation of sand, gravel, broken stone or brick. In some instances, as in the Nicholson pavement, a board is laid between the superstructure and the foundation. Third. A filling of sand or gravel, fibres of wood or concrete, sometimes mixed with tar, asphalt, or pitch, and sometimes not.

For a long time, it was supposed that the durability of wooden pavements was increased by saturating the blocks in tar or asphalt; but that theory seems to be now exploded, and the special excellence of the Phillips pavement is attributed to the entire omission of these preparations.

Comparing this pavement with the various antedating devices, we find that it differs from the cobble-stone or bowlder pavement only in the substitution of wood in its natural form for stone. If wooden blocks in their natural form had never been used, undoubtedly this change would be patentable, for an entirely different result is produced; but, it being conceded that wooden blocks have been used before, and used for paving purposes, it is, at least, questionable whether this is not a mere change of material, and, therefore, falling within the rule laid down in Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248. There is undoubtedly another result produced by the change of wood for stone, but it can hardly be called a new result, since the same result had previously been produced by the use of like wooden blocks. The fact that cobble-stones are ordinarily somewhat rounded and touch each other only in the centre, and that the wooden blocks are of uniform thickness, is only saying that the natural shape of wooden blocks differs somewhat from the natural shape of cobble-stone; but it does not change the fact that, in both cases, the blocks are laid in their natural form. I do not, however, put my decision upon this ground.

While it is true that none of the patents offered in evidence exhibit the exact combination of complainants', there are several which approximate very closely to it, so closely that I think the variation in complainants' is a matter of judgment rather than of invention.

The English patent to Parkin of 1839 provides for blocks of wood of any convenient figure, with the grain either vertical or inclined, and, among the drawings annexed to his patent, is one showing the blocks in their natural form. The foundation is of sand, ashes, or saw-dust, saturated with tar or bituminous substances, the filling of sand, pulverized chalk, brick-dust or other earthy matter united with pitch or other bituminous substances or suitable cement. Practically, the only difference between this patent and complainants' consists in the saturation of the sand used for the filling and the foundation with pitch, tar or other bituminous substances.

The patent to Stead of 1839 includes wooden blocks so shaped and placed as to support each other in a close and compact manner, always having the fibres in a vertical position. "The blocks which I use for the improved paving are cut transversely out of fir or other suitable timber, or they may be composed of deal-plank ends or small portions of timber firmly cemented together to any of the required figures hereinafter described." The foundation is to be "suitably prepared by the use of the well-known means." It seems quite clear that this would include a foundation of sand or broken stone, which has been used for such purpose from

time immemorial. The spaces between the blocks may be filled with wooden pieces suited to their shape or with cement or asphalt or they may be left open if not too large. Figure 16 of his drawing shows a pavement of blocks in their natural form, differing from complainants' only in the filling.

The patent to Reynolds of 1841 describes a pavement constructed of pieces of the trunks of trees, cut into suitable lengths, as from three to ten inches, and placed with their fibres vertical side by side, in their natural state, without being cut or hewn into any particular shapes. The interstices between these blocks are to be filled up with a compound mass of fibres of wood and concrete or asphalt. The foundation is not specifically described. This patent also differs from complainants' only in the filling.

The patent of Fontaine Moreau of 1844 contemplates the use of blocks cut from any log of wood conforming to the shape of the trees, laid vertically upon a layer of sand, and filled in with bricks, rubber, asphalt, cement, marine glue, bituminous and other similar substances, covered by a bed or layer of sand.

All of these patents proceed upon the theory that there is some virtue in the bituminous substance used in the filling, either for the purpose of adhesion or rendering the pavement impervious to water. Complainants claim that the unadulterated sand used by them is equally efficacious as a locking for the blocks, and that the percolation of water through the sand is not injurious to the pavement. Whether there is really any such porosity in the sand as to carry off any perceptible amount of water from the surface is somewhat problematical. One of complainants' witnesses makes the pavement substantially water-tight, and says there is no difficulty in making it practically impervious to water, and thereby preserving it, while the expert, Henry, makes the preservation of the pavement dependent upon the free circulation of the water to and from the blocks by means of the sand filling. I think it will be found, in practice, to make very little difference whether tar be added to the filling or not, so long as the blocks themselves are not dipped in it or otherwise saturated with it.

Granting, then, that both elements of this patent are old, that sand unmixed with other substances is almost uniformly used as the filling and foundation of every stone pavement, and that round blocks of wood laid vertically have been used with a filling of sand mixed with asphalt, tar or pitch, it remains to consider whether the mere omission of these bituminous substances in the filling is patentable. In the Parkin patent, pitch is mentioned as the other element of the compound; in the Reynolds patent, concrete or asphalt; in the Stead patent, asphalt; in the Fontaine Moreau patent, asphalt, cement, glue, or bitumen; but in none of them is the proportion in which these substances shall be used in any manner stated or indicated. This is left entirely to the judgment of the paver, who may use it in such quantity as to render the filling absolutely impervious to water, or may diminish it so much (as he would be likely to do if he were an economical or dishonest contractor) as to make it of no perceptible effect. If, in his judgment, he may use a very small quantity, it seems to be equally a matter of judgment to omit it altogether.

It is conceded that the round block may be used in any other combination without infringing complainants' patent. The street may be graded, the blocks laid upon the solid earth, and the interstices left open to be filled by the gradual accumulation of the streets, as suggested in the Stead patent of 1839, or they may be filled with the earth scraped from the surface to make the solid road-bed, and still there is no infringement. But, suppose the street itself is pure sand, as in Grand Haven, or gravel, as in Ann Arbor, would it be an infringement to do precisely the same thing? If complainants' theory be sound, then the use of round blocks, which would infringe their patent in one place, would not infringe it in another; and, in towns, where the natural substratum was sand or gravel, earth of some description would have to be imported from abroad for the filling and foundation, to avoid an infringement. The question of infringement ought not to depend upon the accidents of the soil upon which the round blocks are laid.

There is proof that a pavement precisely like that of complainants' was laid and, apparently, is still used in London, Ontario; but it is admitted that the mere use of complainants' device in a foreign country, without its being patented or described in any printed publication, is not sufficient to anticipate his patent. There is no sufficient proof in this case of the use of the round blocks with a sand filling and foundation, in this country, although blocks of octagonal or sexagonal form set closely together, and therefore more liable to decay, have long been used upon a similar foundation. This, however, would not be sufficient to anticipate complainants' patent.

But, as I have before observed, this patent seems to me fatally defective in that the variations made from previous patents do not involve the exercise of the inventive faculty—in other words, that, considering the state of the art in 1869, a simple combination of round blocks with a sand filling and foundation was not patentable within the meaning of the law. A decree will therefore be entered, dismissing the bill.

[On appeal to the supreme court, the decree of this court was affirmed. 111 U. S. 604, 4 Sup. Ct. 580.

[For another case involving this patent, see note to Phillips v. City of Detroit, Case No. 11,101.]

Case No. 11,101.

PHILLIPS et al. v. DETROIT.

[2 Flip. 92; 3 Ban. & A. 150; 16 O. G. 627.] [1]

Circuit Court, E. D. Michigan. Nov. 6, 1877.

INJUNCTION—AGAINST MUNICIPAL CORPORATION—WHO BOUND—BOARD OF PUBLIC WORKS—PATENTS—INFRINGEMENT—WOODEN PAVEMENTS.

1. The members of the board of public works of a city are bound by an injunction against the city, of which they have notice, notwithstanding they are not parties to the suit nor the writ, and the same is not actually served upon them.

2. It is no excuse for the violation of a preliminary injunction in a patent case that the patent is invalid or the writ improvidently granted. If the court has jurisdiction to issue the writ it must be obeyed until it is dissolved.

[Cited in Roemer v. Newman, 19 Fed. 98; Bate Refrigerating Co. v. Gillett, 30 Fed. 685.]

3. A wooden pavement patented is infringed by the use of blocks cut from trees or saplings in their natural form, though a narrow segment is cut off from one side of each block.

4. Where a preliminary injunction in a patent case is violated the respondents will not be required to pay the patentee the amount of his royalty where they were acting in an official capacity, deriving no personal benefit from the infringement, especially if there be any reason to believe they acted in good faith.

[This was a bill in equity by Robert C. Phillips, Eugene Robinson, and Jesse H. Farwell against the city of Detroit to restrain the infringement of letters patent No. 121,544, granted to Phillips December 5, 1871, for improvement in wooden pavements. Heard on a charge of violation of a preliminary injunction.]

George H. Lothrop, for complainants.

D. C. Holbrook, for defendant.

BROWN, District Judge. The defense that the members of the board of public works were not parties to this bill, and were not served with the writ, was disposed of adversely to them upon the preliminary argument of this motion. We then held, and such we understand to be the law, that an injunction against a corporation is binding upon all persons acting for or on behalf of the corporation who have notice of the writ and of its contents, whether they be actually served with it or not. In Wellesley v. Earl of Mornington, 11 Beav. 180, 181, an injunction was issued against the defendant, but it did not extend in terms to "his servants and agents." A motion having been made to commit his agent for a breach of the injunction, it was held irregular; but it was afterward decided that if he had knowledge of the writ he might be committed for the contempt, although not for the breach of the injunction. See, also, People v. Sturtevant, 9 N. Y. 263, 267; Bank Com'rs v. City Bank of Buffalo [6 Paige, 497]; 1 Barb. Ch. Prac. 633; High, Inj. §§ 853, 854, 862, 863; Safford v. People, 85 Ill. 558.

As respondents in the first allegation of their affidavit admit they had notice of the injunction, I think they are bound to obedience of the writ, and it only remains to determine whether they have been guilty of a violation. The authorities are full and conclusive to the point, and, indeed, it was admitted upon the argument that respondents were not entitled to claim in defense that the patent was invalid or the writ improvidently granted. People v. Sturtevant, 9 N. Y. 263; Sullivan v. Judah, 4 Paige, 444; Russell v. East Anglian Ry. Co., 1 Eng. Law & Eq. 101; High, Inj. § 873. The patent has been upheld by the decisions of at least two courts before the commencement of this suit, a fact which is, in ordinary cases, sufficient to authorize a preliminary injunction. If, in the meantime, respondents had become satisfied that it was invalid, the proper procedure was to make a showing of this fact and apply for a dissolution. If the court had jurisdiction to issue the writ, it should be obeyed until it is dissolved. I should feel no hesitation, however, in passing upon the validity of this patent, so far as any defenses may exist which were not brought to the attention of the circuit judge upon the original hearing.

Had respondents simply carried out the contracts made by them for paving the streets in question, I should have felt little difficulty in holding them innocent of any violation of this writ. The claim of the complainants' patent is in the following words: "What I do claim as my invention, and desire to secure by letters patent, is a wooden pavement composed of blocks of any desired wood, cut from the trunks or branches of trees or saplings, of any desired length, in their natural form, the bark only being removed, placed with their fibres vertical, upon a bed of broken stone and gravel or sand, or either of them, the spaces between the blocks being filled with gravel or sand, the whole made compact by ramming, rolling, or other proper method, as herein shown and described."

In his specification he says distinctly that he does not claim, broadly, the use of wooden blocks in the state in which they are cut from the tree or branches, nor the foundation of stone or gravel, nor the filling of the spaces between the blocks with sand or gravel, separately considered. In other words, he claims a combination, but not the separate elements of the combination.

A party may lawfully use wooden blocks in their natural form, or the foundation or filling of stone or gravel, but he cannot use them both without being guilty of an infringement. The specifications of the contracts made by respondents called for the use of "blocks, stripped of bark, of irregular or octagon shape, sawed from cedar timber," a material departure from the wooden

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

blocks cut "in their natural form," as specified in complainants' claim. This was evidently the theory of the city counselor, who, in his affidavit, states that after the service of the injunction he advised the board of public works "that no more pavement which they had been laying, known as the round cedar-block pavement, could be laid while said injunction remained in force; that thereupon it was proposed to split and divide the round cedar blocks, and make them into irregular shapes, and not use the block in its natural form;" and that he advised the board that such use would not be an infringement of the complainants' patent; and the printed forms of contract which had been previously used, and which provided for blocks of a "round cylindrical shape," were changed so as to require the use of blocks of irregular and octagon shape.

The difficulty is, that while his advice was followed in making the contracts, it was disregarded in laying the pavements. The actual block laid was cut from the trunks and branches of trees or saplings in its natural form, precisely as is claimed in complainants' patent, except that a segment of from half an inch to one and a half inches in thickness was split from one side of each block. I regard this as plainly a subterfuge. The slicing off of this strip did not materially change the forms of the blocks, and was of no possible utility in laying the pavement. It was, perhaps, intended to be a compliance with the advice of the city counselor that the blocks must be split and used in an irregular shape in order to avoid the patent. But nothing is better settled in the law of patents than that identity is not affected by colorable differences, that regard is had to substance and not form, the inquiry being whether the infringing machine is the same in principle as that patented. Curt. Pat. 309; Seymour v. Osborne, 11 Wall. [78 U. S.] 516.

I do not think the affidavit of the respondents exonerates them from a participation in this infringement. They swear that the inspectors were instructed by them that the blocks must not be used nor laid in their natural form; that such blocks must be split and their form made irregular, and that no round block in its natural form must be accepted, and that the patent of complainants must not be infringed; that whenever they discovered blocks in the natural form being used they ordered them taken up; and that if any pavement was laid in violation of the injunction, it was so laid contrary to their directions.

It is, however, the duty of the board of public works to supervise the grading and paving of all streets. 3 Sess. Laws 1873, p. 178, § 8. In their affidavit they admit they reported to the common council that the contracts had been performed and the work accepted, but claim they did so upon the report of the inspectors having charge of the work that the same was done according to the several contracts therefor, and that if the contractors laid the pavement in such manner as to violate the injunction, it was done without their knowledge, and that the acceptance of such pavement was not a violation on their part of the injunction, when the same was laid without their knowledge and consent. But their affidavit is not inconsistent with a knowledge upon their part that the only alteration of the wooden blocks consisted in splitting off the strip, as above specified. This was a nominal compliance with their instruction not to use the block in its natural form, but to split it, and possibly they may have considered that this was sufficient to avoid the patent; but if they accepted anything less than the literal performance of the contract, requiring the blocks to be cut in an irregular or octagon shape, they did so at the peril of violating this injunction.

In view of their duties, in connection with the paving of the public streets, to supervise the work and to report the completion of the contract to the council, and also in view of the fact that in the performance of these duties they could scarcely have been ignorant of the manner in which these pavements were being laid, I must hold them chargeable with knowledge of and participation in the violation of this injunction committed, in the use of this evasive block. To render them liable it is not necessary they should have actually committed the breach in person; but if they were present, aiding and abetting the commission of the act, prompted it to be done by other persons, or, having charge of a public work like this, permitted their contractors to depart from the letter of the contract, and accepted the report of the inspectors with approval of work so done, they are liable for an infringement and guilty of disobedience to the writ. High, Inj. § 861; Blood v. Martin, 21 Ga. 127; Stimpson v. Putnam, 41 Vt. 238; St. John's College v. Carter, 4 Mylne & C. 497. Even if the city counselor had advised the use of this particular block, (which he does not seem to have done,) or respondents had acted conscientiously and in good faith, it would be no justification, though the court might consider these facts in fixing the penalty. High, Inj. §§ 849, 851.

I do not regard the fact that the complainants, Farwell & Robinson, may have been interested in paving certain streets, as estopping them from setting up a violation of the injunction by respondents in paving other streets. They would undoubtedly have a right to take a contract directly for the paving of Woodward avenue, for instance, without thereby assenting that other parties should pave Jefferson avenue with their pavement. Indeed, the very object of this, as of all other patents, is to enable the patentee to maintain a monopoly of laying his pavement during the life of the patent. The estoppel would extend no farther than to

prevent them claiming an infringement in respect to the particular streets which they were interested in paving. They make no claim for either of these streets.

Complainants' counsel insists with great earnestness that, instead of imposing a fine upon respondents for a violation of this injunction, the court should require them to pay to complainants a sum sufficient to indemnify them for the actual loss or injury that has been produced by the infringement, viz.: their usual royalty of sixteen cents per square yard. Without determining whether the court has power to make this order in the absence of a statute to that effect, (although the authorities would seem to sustain complainants' view upon this point,) it is clearly a matter of discretion. I think the penalty should not be imposed in this case, for the following reasons:

1. While the violation of the injunction was willful in the eye of the law—i. e., intentional—it was not willful in any odious acceptation of the term. The respondents were acting in an official capacity in the discharge of a public duty, and derived no personal benefit whatever from the infringement. They may possibly have believed that they were following the advice of the city counselor, and were not, in fact, violating the injunction.

2. The complainants will derive no benefit from the immediate payment of the royalty. The city is amply responsible for any decree they may finally recover, and interest will follow upon the ascertainment of the amount.

3. If this order were made respondents would be obliged to pay sixteen cents per yard royalty upon eighteen thousand three hundred and twenty-nine yards of pavement already laid, and fifteen thousand one hundred and eighty-one yards contracted for but not laid, making thirty-three thousand five hundred and ten yards, at sixteen cents, $5,361.60. This sum would have to be paid by the respondents personally, with no definite assurance that they would be reimbursed by the city. It seems entirely clear that complainants should not call upon this court to order the payment of this large amount.

4. The patent may in the end be held invalid, in which case the complainants will have received a large amount of money to which they were not justly entitled, and the city be driven to long and doubtful litigation to recover it back. I find no patent case where this course has been pursued for violation of a preliminary injunction.

Respondents, however, being guilty of a violation of this injunction, will be required to pay a fine of fifty dollars each, together with the costs of this motion, and a counsel fee of fifty dollars, and to stand committed till the terms of this order are complied with.

NOTE. Subsequent to this decision Judge Brown ruled that the patent issued to Robert C. Phillips, No. 121,544, was void for want of novelty and invention. [Case No. 11,100.] Judge Emmons had sustained the validity of this patent in a suit brought by complainants against the city of Cincinnati. There were produced before the first named judge, as he states, three most important exhibits, which claimed to be in anticipation of complainants' patent, and that were not before Judge Emmons.

[An appeal was taken to the supreme court, where the decree rendered in Case No. 11,100 was affirmed. 111 U. S. 604, 4 Sup. Ct. 580.]

PHILLIPS v. HATCH. See Case No. 11,094.

Case No. 11,102.

PHILLIPS v. INSURANCE CO. OF PENNSYLVANIA.

[1 Jour. Jur. (1821) 250.]

Circuit Court, Pennsylvania.[1]

VALUATION OF FOREIGN COIN—PRIVATE CONTRACTS—USAGE—MARINE INSURANCE—CARGO INVOICED IN RUPEES.

[1. The act of March 2, 1799, § 61, fixing the value of the rupee at 55½ cents, was only for the purposes of ascertaining the amount of customs duties, and had no effect in determining the value of the rupee in respect to contracts between private parties, as in case of the insurance of a cargo invoiced in rupees.]

[2. Where it was alleged that, in effecting insurance upon cargoes from India, it was the custom of merchants to contract in reference to the valuation of the rupee fixed by the act of congress for purposes of customs duties, *held*, that the burden was upon the party alleging the custom to show that the other party as well as himself contracted in reference to it, or, if this was not actually true, to show that the custom was so general and notorious that both parties must have had it in mind.]

[3. In determining the amount to be paid for loss of a cargo from Calcutta which was invoiced in rupees, the rupee should be estimated at its actual value in Calcutta when the cargo was purchased.]

Construction of the act of congress, 2d March, 1799, in relation to foreign coins.

Usage of merchants.

This was an action of covenant on an open policy of insurance for twenty-one thousand dollars on goods on board the ship Nancy from Calcutta to New York. There was no dispute as to the ownership or loss. The only question was as to the amount of the plaintiff's interest on board. The plaintiff's invoice at Calcutta was 199,925 sicca rupees; 9 an. 2 p. There had been previously insured at other offices 91,591 dollars 25 cents. The plaintiff's point was, that in estimating the amount of the invoice the rupee should be calculated at 55½ cents, which left 19,367 dollars 43 cents uncovered by the previous policies and insured at the defendants' office. The defendants contended that a rupee should be estimated only at 47½ cents, at which rate only 3353 dollars 12 cents were to be paid. The insurance was effected on the 26th December, 1800, at which time the plaintiff gave his note

[1] [District and date not given.]

at seven months for 2100 dollars, the premium on the whole sum of 21,000 dollars at ten per cent. The abandonment, proof of loss, &c., were made in January, 1801. The defendants then refused to pay more than 3353 dollars 12 cents, alleging short property, as above stated. On 29th July, the plaintiff's note for the premium became due, and was paid at the Bank of Pennsylvania, where it had been deposited for collection, and the amount was carried to the credit of the defendants on the books of the bank. To show that the rupee ought to be estimated at 55½ cents, the plaintiff relied upon: 1. The act of congress of March 2, 1799, § 61,—4 Laws [Folwell's Ed.] 379 [1 Stat. 673],—fixing the value of the rupee at 55½ cents. 2. The custom and understanding of merchants, who had always taken that to be the rule, and had made their estimates accordingly in effecting insurances. In support of this position they produced as witnesses several eminent merchants engaged in the India trade, who testified that in making their insurances so as to cover their risks, they had estimated the rupee at 55½ cents, considering the value to be fixed by the act of congress, and this they believed to be the general understanding among merchants, and the guide by which they had been regulated in calculating the amount they were to insure. The witnesses stated that they had paid premiums upon the calculation of that estimate of the rupee, and if a lower one was now established, the insured in numerous policies would have claims to a large amount for return premium. Only one case, however, was adduced in which a loss had been paid at 55½ cents, and this was the case of the ship Lewis, insured at Baltimore, and done without objection. In the case of The Mermaid, the Insurance Company of North America refused to settle upon an estimate of 55½ cents to the rupee, but offered 55, which was accepted by the agent of the insured, he thinking it better, as he said, to take that than to have a controversy. The loss in the case of The Washington [unreported], in 1797, was compromised at 52½. The case of The India [unreported], in 1800, was upon a return premium, and the rupee, in that case, was estimated at 55½ cents. The witnesses all testified that they considered 55½ cents as an estimate above the real value of the rupee, but as the government had adopted it, they had adopted it also. Representations had been made to congress by the merchants, and it was now reduced to 50 cents; but this was since the insurance in question. 3. The cost of the rupee at Bengal to the plaintiff at the time he purchased his cargo. The supercargo stated in his deposition that a great part of the cargo at Calcutta was purchased with the avails of bills of exchange drawn by the captain upon London at six months' sight, at the rate of 2s. 8d. sterling the rupee, and that goods could not be purchased at that time upon better terms for cash than for those bills. 4. That the defendants, by receiving the whole premium, after knowing that its amount was founded upon the calculation of 55½ cents to the rupee, had affirmed and adopted that estimate, and were thereby concluded from objecting to it.

The defendants contended that, the policy being open, they were bound to pay only the real value of the goods at the place of shipment; and, that value being expressed in rupees, the mode of ascertaining it in dollars was by comparing the value of one in exchange for the other at Calcutta. They therefore called several witnesses who proved that the average exchange of rupees and dollars at Calcutta, for several years, had been from 210 to 214 rupees for 100 dollars, making the rupee worth from 46½ to 47½ cents. They further testified that rupees were raised when bills of exchange on Europe were given for them. By an assay of a sicca rupee at the mint, its real value was found to be 47 cents 3 mills.

In answer to the plaintiff's positions they argued: 1. That the act of congress fixed the value of the rupee only in estimating ad valorem duties, leaving it, as to all other purposes, untouched. 2. That no such uniform practice was proved as amounted to a custom binding on the parties, nor such a general understanding as to render it a part of the contract by an implied adoption of it by the parties. To show that the defendants had not acted upon it, they proved that in August, 1800, the insured on the cargo of the ship George Barclay claimed from them a return premium, on account of short property, and the office, ascertaining that the rupees had cost but 47½ cents, allowed the claim, and returned a part of the premium accordingly. The policies on the ship Richmond, in 1798, were valued, and the rupee fixed at 52½ cents. 3. That they ought not to be involved in the inquiry of what the rupee cost the particular merchant. This cost varies from a variety of circumstances, as whether he buys with ready money, or on credit, with cash, or bills, and, if with bills, the length of sight, the credit of the drawer, the balance of exchange between the place of drawing and that drawn upon, &c. With these the insurer has nothing to do. The fair current market price of rupees in exchange for dollars at the time of shipment ought to be the rule. 4. They denied that the receipt of the premium affirmed the plaintiff's estimate of the rupee. The premium is supposed to be paid when the insurance is effected, there being a receipt for it in the body of the policy; and when, for the convenience of the merchant, notes are taken, they are always deposited in bank for collection, and payment received as a matter of course, without any prejudice to either of the parties. It might as well be said that the plaintiff, by paying the premium, admitted himself to be our debtor at the time, and is now estopped from saying we were then his.

The plaintiff's counsel, in reply, contended that, if the value of the rupee was to be estimated by its exchange for dollars, the expense

of carrying the dollars to India was fairly to be reckoned a part of the cost of the rupees, so that if the insurance on dollars be ten per cent., and the freight fifteen, a dollar in India, in exchange for rupees, ought to be reckoned at 125 cents, and then 100 dollars for 212 rupees make the rupees higher than 58 cents.

Tilghman & Ingersoll, for plaintiff.
Rawle & Lewis, for defendant.

TILGHMAN, Chief Judge. Insurance is, as has been frequently declared, a contract of indemnity. The insurer undertakes that, if the goods insured are lost by any of the risks insured against, he will pay the insured the value of those goods at the time and place of shipment; and this value is generally to be ascertained by the invoice. In this case the invoice is in rupees. To ascertain, therefore, the value of the cargo, the value of the rupee must be ascertained. This is the point in dispute. The plaintiff contends that the rupee should be valued at 55½ cents. He endeavors to support his position, 1st. By the act of congress. 2d. By the custom of merchants; or at least a general usage and understanding among them. 3d. The actual cost of the rupee to him, which he contends was also its current value at Bengal at the time of the purchase of the cargo.

1. It is the opinion of the court, that the act of congress does not affect the present question between these parties. That act was intended to fix the value of foreign coins, only for the purpose of ascertaining the amount of duties.

2. No custom, strictly speaking, is proved, or much relied on. But the testimony of several merchants is adduced to show under what opinion as to the value of the rupee they effected insurances and paid premiums. They founded this opinion, not on what they imagined was the true value of the rupee, but under an idea that it was regulated by the act of congress, and this they say they believe to have been the general understanding. But it is not brought home to the defendants that they ever acted upon this principle. On the contrary, in August, 1800, but four months before this policy was underwritten, they actually returned premium for short property, calculating the rupee only at 47½ cents. In order to make this understanding obligatory on the defendants in this case, knowledge of it ought to be brought home to them. It is not enough that the plaintiff understood it so; the defendants must have acted upon the same principles, thereby impliedly, though not expressly, incorporating it into, and making it a part of, the contract. When men enter into a contract, it is presumed that they proceed upon the general principles of law. It is not competent for one of the parties to vary the operation of law in relation to the particular contract by alleging that he was governed by other principles, or acted in reference to a certain usage or understanding prevailing among a certain class of men. The other party must have acted upon the same grounds, otherwise the general principles and intendment of law will prevail. The party, therefore, setting up an usage or understanding varying the effect of a contract from what it would be by the general operation of law, must show that both parties acted in reference to it, or, if not actually proved, it must appear to have been so general and notorious as to warrant the conclusion that both contracted on that ground, with the knowledge and adoption of it. This has not been done in the present case, and of course this ground does not avail the plaintiff.

3. The actual cost of the rupee to this particular party cannot certainly be obligatory upon the defendants, or otherwise affect the case than as evidence of its current value at the time.

The real question then is what is the value of a rupee in Bengal, or rather what was it when the goods in question were purchased. This is a matter of fact, and peculiarly a mercantile question. The jury must decide it from the evidence. Testimony has been given of the value of the rupee upon an assay at the mint, of its value in India in comparison with dollars, and of its value there in comparison with sterling money, in purchase of bills of exchange. The comparative value between rupees and dollars, so far as fineness and weight of coin is considered, is eternally the same, and is accurately ascertained by the mint assay; and that would be the proper guide if its value here were the question. But as the question is the commercial value of the rupee in Bengal, where it seems to be an article of commerce and subject to some fluctuation, the mint assay is not conclusive in this case. The comparative commercial value in India between dollars and rupees is probably not very different from the real intrinsic value, judging either from the testimony or the nature of the subject; and there appears to be no objection to taking this comparison as the guide. The comparison with bills seems to be more fluctuating, and dependent in a degree upon circumstances by which the insurer cannot be affected. It affords, therefore, in general, not so safe a guide. Though in this particular case, if the jury give full credit to the supercargo, there was no difference in the price of rupees when purchased with dollars and with bills. The law and the evidence being before the jury, they will estimate the value accordingly.

It is the opinion of the court, however, that the expense of carrying the dollars from this country to Bengal is not to be taken at all into the calculation; otherwise the subject would be involved in endless questions. Neither was the receipt of the premium such an affirmance of the plaintiff's estimate of the value of the rupee, as to preclude the defendants from now controverting it. The defendants had given notice to the plaintiff that they objected to pay the whole amount of the policy, on the ground of short property. The point in dispute was fully understood. Dur-

ing the controversy the note falls due. Being in bank, it is paid in the ordinary course of business, without being intended by either party to affect the matter in dispute, and in point of law it does not affect it.

The jury found for the plaintiff his whole demand, grounding themselves, as was understood, on the testimony of the supercargo, or more probably because it was an insurance case.

PHILLIPS (KING v.). See Case No. 7,802.

Case No. 11,103.

PHILLIPS et al. v. LOWNDES.

[1 Cranch, C. C. 283.] [1]

Circuit Court, District of Columbia. Dec. Term, 1805.

EXECUTION—COUNTERMANDED AT REQUEST OF DEFENDANT—NEW EXECUTION.

When an execution is countermanded at the request of the defendant and for his accommodation, the plaintiff may have a new execution, after the year and day, without scire facias.

The plaintiffs had obtained judgment against the defendant at July term, 1804. A ca. sa. was issued, November 8, 1804, which was countermanded by the plaintiffs, and a fieri facias issued on the 21st November, 1804, which was also countermanded. On the 29th of December, 1805, Mr. Swann, for the plaintiffs, applied to the clerk for a new execution, which the clerk declined to issue, as the year and day had elapsed since the issuing of the last.

Mr. Swann now moved the court to instruct the clerk to issue a new execution, and in support of the motion filed an affidavit that the delay was at the defendant's request, and for his accommodation, and cited the case of Michell v. Cue, 2 Burrows, 660.

Upon the authority of which case, THE COURT permitted the plaintiff to take out his execution, leaving it open to a motion to quash, at its return. THE COURT also examined the following authorities: 2 Show. 235; Carth. 283; Comb. 232; 2 Just. Inst. 471; Co. Litt. 290b; 2 Leon. 77, 78, 87; 3 Leon. 259; 4 Leon. 44; 1 Sid. 59; 1 Keb. 159; 6 Mod. 288.

Case No. 11,104.

PHILLIPS v. M'CALL et al.

[4 Wash. C. C. 141.] [2]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1821.

SALVAGE—WHAT IS SALVAGE SERVICE—CAPTURE—SHIPWRECK.

1. What is, and what is not a service, which will or will not entitle those who are engaged in it to salvage.

2. Effect of capture on the contract between the owners, and the master and crew of the captured vessel.

3. The duties of the master and crew in case of capture and shipwreck.

This is an appeal from a pro forma decree of the district court, which dismissed the libel of the appellant, surgeon on board the Mercury, for salvage.

The libel sets forth, that the ship sailed from Philadelphia to Calcutta in the year 1809, where she took in a valuable cargo, and on her return voyage, was, on the 8th of May, 1810, when near the island of Madagascar, captured as prize by a French national frigate. That all the officers of the Mercury, the master, the carpenter, the two supercargoes, and the libellant excepted, and the whole of the crew, with the exception of three ordinary seamen and one boy, were taken out of her, and were replaced by a prize master, two midshipmen and a crew of nineteen men, and she was ordered to proceed to the Isle of France for adjudication, under the Berlin and Milan decrees. Three attempts were made by the prisoners to retake the ship, in which the libellant took an active part. On the 21st of May, when about ten leagues from the Isle of France, the captors discovered a British frigate in chase of them, and fearing they would be overhauled, they determined to burn the prize, and to endeavour to reach the Isle of Bourbon, in their boats. The captain of the Mercury, the two supercargoes and the libellant, in as forcible a manner as possible, by declaring that at every risk they would resist an attempt to burn the ship, and by their resolution and interference, prevented the same from being executed. The near approach of the British frigate induced the prize master to propose to give up the ship to the master and the other persons, on condition that he, the master, the two supercargoes and the libellant, would execute an agreement in writing, binding themselves to reserve one half of the proceeds of the cargo for the captors, should the ship arrive in safety at any port. This offer was accepted, and the agreement having been executed as required, the prize-master and crew left the ship in the long boat. The libel then states the safe arrival of the ship at St. Helena, in fifty-four days after she was restored, after a tempestuous and dangerous navigation, rendered peculiarly laborious on account of the few hands left on board; the libellant performing, during the whole time, the duties of a seaman. Having obtained an addition to their crew at St. Helena, the ship proceeded on her voyage, and arrived in safety with her cargo at Philadelphia. The libel then states, that the libellant forbore to interpose a claim for salvage, after his arrival at Philadelphia, in consequence of assurances of aid and benefits given to him by many of the owners of the cargo. Early in the year 1811, the libellant went to Canton, and returned to the United States in the year 1815. The libel

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

[2] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the supreme court of the United States, under the supervision of Richard Peters, Jr., Esq.]

concludes with the usual prayer that the court will decree him a reasonable compensation, by way of salvage, for his services in assisting to save the ship and cargo.

The answer of the owners denies that any plan was concerted, or efforts made, to regain the possession of the ship from the captors, as charged in the libel; and that if any such was thought of, it was abandoned by its authors. The answer further states that the ship and cargo were voluntarily abandoned by the captors in consequence of the appearance of the British frigate; it admits the ransom of the ship and cargo, by the agreement stated in the libel, but denies that the libellant contributed, in any degree, to prevent the ship from being burnt by the captors, but that the same was effected by the persuasions of the supercargoes. The respondents allege, that from the arrival of the vessel at Philadelphia, for the space of more than five years, the libellant never asserted claim, or ever solicited any additional compensation for extraordinary services; and they deny that any assurances of aid and benefit were given to him by the owners, on account of such services; that a sum of money was bestowed by the owners and others concerned, upon the captain and crew, for their extraordinary services in navigating the vessel, and that a piece of plate was on the same account presented to the libellant and the supercargoes, and accepted by them, without the intimation, by either of them, of a wish to receive a pecuniary compensation. That an ample indemnity was given against the ransom bill, to the persons who executed the same, with which, and the recompense above mentioned, the libellants and the other persons on board have acquiesced, until the institution of this suit. That if a right of salvage ever did exist, it ought, after so great a length of time, after the absence and death of the witnesses, and the settlement of the concerns of the ship and cargo, to be considered as having been abandoned.

It was proved by the deposition of the captain of the Mercury, that the French captors took from the ship thirteen of her crew, including the officers (the witness excepted); and put on board nineteen men and three midshipmen from the prize ship, and ordered her for the Isle of France. That afterwards, upon the approach of the British frigate, the captors threatened to burn the prize, and to make off to the Isle of Bourbon, about three miles distant, in the long boat. The witness, the libellant, and the supercargoes, declared that they would remain by the ship, and be burned in her; that no other resistance was, or could have been made, as the prize crew were all on deck, so the prisoners dared not make any show of force. The only circumstance which induced the captors to give up the ship was the acquiescence of the witness, the supercargoes and the libellant (who remonstrated strongly against the threatened destruction of so valuable a cargo) in the offer made by the captors, that they should sign a ransom bill, agreeing to reserve for the captors one half of the cargo at any port where the cargo might be sold. As soon as this agreement was signed, the captors left the ship in the long boat. This witness speaks of the plans formed by himself, the libellant, and the supercargoes to retake the ship; but that they were discovered each time, and were unable to execute their designs. He further states that the force left on board for the navigation of the ship, at the time they were abandoned by the captors, consisted of four inexperienced coloured men, the carpenter and boy, exclusive of the witness, the libellant and the supercargoes, and two of the prize crew, who concealed themselves on board until after the captors had left them, one of whom was very serviceable; that they were exposed to violent storms on the voyage to St. Helena, and to great and incessant labour and fatigue. In respect to the particular services rendered by the libellant, the witness states that he could not, and did not stir about, never went aloft but for his own amusement, and did no duty of any sort, except to hold the glass, and now and then to jog at the pump, and that seldom. Sometimes he helped to pull the ropes on deck, but not often, though he generally did it when he was asked; all the severe duty fell on the witness and crew, the supercargoes and libellant doing comparatively nothing, except that Mr. Bispham sometimes steered.

It was further proved that after the libellant left the United States for Canton in July, 1811, the underwriters sent to his mother's house, where he had resided, a piece of silver plate as a compliment, with an inscription commemorative of his services in assisting to rescue the Mercury and her cargo from the French captors, and in the subsequent navigation of the ship.

C. J. Ingersoll, for appellant.
Binney & Sergeant, for appellee.

WASHINGTON, Circuit Justice. The advocates for the appellant have relied upon two grounds, on one or both of which, they have endeavoured to maintain the claim for salvage. The first is the management and address by which the possession of the vessel and cargo was obtained from the captors; the second, the labor and peril encountered by the libellant in her subsequent navigation to Philadelphia.

1. The address practised for the purpose of recovering possession of the ship was, as the captain has related the transaction, almost entirely of a negative character; for he swears, that the only circumstance which induced the captors to restore the ship was the acquiescence of himself, the two supercargoes, and the libellant, in the offer made by the captors that they should sign a ransom bill, agreeing to reserve for the captors one half of the cargo at any port where it

might be sold; and as soon as this agreement was signed, the captors left the ship in the long boat. It is true they remonstrated against the threatened destruction of so valuable a cargo, and even went so far as to declare the desperate resolution of remaining on board, and participating in the fate of the ship. Whether the captors placed much confidence in the sincerity which dictated this heroic threat of self devotion, or cared very much whether it were carried into execution or not, is more than I can say. But one thing is perfectly clear, that if they felt a wish to prevent it, it was entirely in their power to do so, as the captain swears that no other resistance was, or could have been made, as the prize crew were all on deck, and the prisoners dared not to make any show of force. I strongly suspect, therefore, that the captors were as little influenced in their conduct by the threat, as they were by the remonstrances of those persons, and that, looking exclusively to their own interest, they thought it would be better to secure one half of the cargo, than to hazard the loss of the whole by a re-capture. I pass over the plans which were formed by these persons to retake the ship, with this observation, that as they were not successful, and indeed they were not even evidenced by any overt act, they had no other merit than that of good intentions. The only question then is, whether the signing of the ransom bill can be considered as a salvage service performed by any of the parties to it? That the owners derived a benefit from the act, may readily be admitted; but where is the merit which can entitle the signers of that instrument to a reward? They recovered their liberty, preserved the half of their own property on board, and had possession of the ship and cargo for their complete indemnification. Tranter v. Watson, 2 Ld. Raym. 931; Yates v. Hall, 1 Term R. 73. The ransom bill does not oblige them to pay a gross sum, which by any accident might exceed the value of the cargo; but merely stipulates that the proceeds of one half of the cargo should be reserved for the captors, in case of safe arrival at some port in the United States.

The argument most relied upon by the libellant's counsel was, that the capture put an end to the contract between the owners, and the officers and crew of the vessel; and, consequently, that their subsequent acts to save the property were merely voluntary, and not enforced by any duty which bound them to the owners. I admit the effect of a capture to be, to a certain extent, such as is contended for; but I cannot as easily yield my assent to the conclusion which the counsel would draw from this admission. Wiggins v. Ingleton, 2 Ld. Raym. 1211. It is strictly true, that capture, so long as it continues, puts an end to the claim for wages; but if the ship be recaptured, and performs the voyage, by which she earns freight, the right to full wages is revived. So, if the vessel be taken in by the original captors for adjudication, the master and crew cannot, without a breach of duty, abandon the ship to her fate. The master, in particular, although his duties, as such, ceased by the capture, continues, by intendment of law arising out of the necessity of the case, the agent of the owners, and in that character duties are imposed upon him which he is not at liberty to decline; and although his claim to wages is defeated, he is nevertheless entitled to a reasonable compensation for his services as agent, even although the vessel should be condemned. Abb. Shipp. 285; Bergstrom v. Mills, 3 Esp. 36; Smith v. Gilbert, 4 Day, 105. As to the seamen, it has been decided by the judge of this district, that they are bound to await the sentence of the court in the first instance, and if the ship be acquitted, to rejoin her, in which case they will be entitled to full wages upon the termination of the voyage. The Elizabeth [Case No. 1,657]. If, instead of a recapture or acquittal, the vessel is ransomed, the owner is considered as a purchaser, and the right to antecedent wages is gone. Wiggins v. Ingleton, 2 Ld. Raym. 1211; Yates v. Hall, 1 Durn. & E. [1 Term R.] 79.

In like manner shipwreck puts an end to the contract between the owners, and the master and crew, so far as it concerns their claim to wages; and yet the latter cannot, without a breach of duty, abandon the property, as if they were entire strangers to the owner, and aliens to his interest. On the contrary, it is the duty of the master, to whose care the safety of the ship and cargo were confided, to employ all his courage, skill, and industry in their protection and preservation; and of the seamen, to use their best endeavours to save what they can of the merchandize; and, in proportion to their success, they will be entitled to wages out of what is saved, or to a reasonable compensation for their labour and exertions to save the property. Abb. Shipp. 277; 2 Marsh. Ins. 527. But I can find no authority in support of a dictum by Abbot (Shipp. 278) that the seamen are entitled, as well as other persons, to a compensation by way of salvage. By the Laws of Oleron, the master is bound to allow them a reasonable consideration for preserving a part of the cargo, so as to enable them to return to their own country; and it is pretty clear, that the allowance made to the seamen by the different ancient ordinances, is not as salvage, but as a reasonable compensation for their labour and exertion in saving the whole or part of the cargo, or as wages for their past services.

Upon the whole, it would seem, that, although the contract between the owner, and the master and crew is put an end to by capture or shipwreck, in respect to wages, the latter are not discharged from certain obligations in respect to the safety of the property. If the master, acting for the bene-

fit of his owner, can regain possession of the ship by a ransom, or by a purchase after capture and condemnation, he has full authority to do so, and, in the exercise of such authority, he is strictly within the line of his duty. If, by such acts, or by personal labour in case of shipwreck, the master and crew render a service to the owner, it is not a meritorious service; their conduct on such occasions being such, and such only, as the owner had a right to expect from them.

As to the physician or surgeon, although he is not, strictly speaking, an officer or seaman, he is a member of the family, placed on board by the owner, engaged in the service of the ship, and bound by contract to perform certain duties; and although he might not have violated any positive obligation which the nature of his employment imposed upon him, by refusing to sign the ransom bill, his signing it was, nevertheless, an act which the owners had a right to expect from him, particularly as he assumed thereby no possible risk, either to his person or property. If such an act could possibly be exalted into a salvage service, it is much to be wondered at that this is the first attempt which has been made to obtain a reward for having rendered it. We find cases of suits brought upon ransom bills, and by hostages, to compel the owner to discharge them, or to enforce agreements made with them by the master, to induce them to become hostages; but I have met with no case, where even an hostage, who had suffered a long confinement, in consequence of the ransom, and of a voluntary act of his own, has set up a claim for a reward, beyond what may have been promised him by the master. If the libellant is not entitled to salvage, on account of his conduct, up to the time when the ship and cargo were ransomed and restored to the master; the second inquiry will be, is he so entitled because of the assistance which he afterwards afforded in navigating the ship to the United States?

Whatever may have been the legal effect of the capture, while it continued, upon the contract between the owners, and the officers and crew of the vessel, it must be admitted, that all their rights and duties revived after she was restored; and I hold it to be quite immaterial to the present question, whether the old contract was revived, or whether the officers and crew were to be considered as impliedly entering into a new contract with the owners, to complete the voyage to the United States. In the case of The Harmony [Case No. 2,871], the learned judge of the district court decided, that the contract with the master and crew was merely suspended by the capture.

Mr. Buller, in the case of Yates v. Hall, 1 Durn. & E. [1 Term R.] 79, states the rule of law to be, that by capture, the wages are lost; and he considers the ransom as a new purchase of the vessel and cargo, the consequence of which would be, that the claim to subsequent wages would rest upon an implied new contract for the residue of the voyage. But however this may be, it seems quite clear, that the relation of the master and crew to the ship, and their duties, are precisely the same as they were previous to the capture. No extremity of labour or of peril in the navigation of the ship, can entitle them to a reward beyond their wages, because the nature of the service in which they engage exposes them to extraordinary peril and labour, in particular emergencies; and they contract to encounter them in consideration of the wages stipulated to be paid them. They have, therefore, no merit in making such exertions, because they do no more than what their duty requires of them; besides which, as their wages depend upon the arrival of the vessel, and her earning freight, they have an interest in making them. If the vessel should be attacked by pirates, or by an enemy, by means of which, or of some pestilential disorder, two-thirds of the crew should be swept away, it surely could not be contended that the increased peril and labour to which the survivors would thereby be exposed in navigating the vessel, would entitle them to an extra reward, in the nature of salvage.

I am aware of no case, in which such a claim has been upheld. Salvage, in the case of rescue, proceeds upon the ground before mentioned, that the contract was put an end to by the capture; and consequently the service rendered, besides being voluntary, and ultra the duty which the rescuers owed to the owners, is one of very extraordinary merit, in which human life was jeoparded. In the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, Tool, one of the crew of the vessel saved, was allowed salvage, upon the ground that he was discharged from his contract as a seaman, by the abandonment of the vessel by the master and the rest of the crew; and consequently, "those principles of policy," to use the language of the chief justice, "which deny to the mariners of the ship salvage for saving the ship, however great the peril may be, do not apply to this mariner." In Newman v. Walters, 3 Bos. & P. 612, the passenger was allowed salvage, because, by assuming the responsibility, and performing the duties of the master, he went beyond what his duty required of him; and Lord Alvanley observes, that if the mate had performed the same service, he would not have been entitled to salvage. The claim of a pilot to salvage, for safely conducting the ship into port, is placed by Sir William Scott (The Joseph Harvey, 1 C. Rob. Adm. 307), and by Lord Alvanley (Newman v. Walters), upon the same ground, namely, services performed beyond what his duty as pilot required of him.

It was insisted in this case, that the libellant was not bound to perform the duties of a seaman, being employed exclusively for another purpose. But I conceive that what

Lord Alvanley says, in respect to the duty of a passenger, who is bound by no contract to remain with the ship, but may leave her whenever he pleases, applies, a fortiori, to the libellant, who was so bound, and who could not, without a breach of his contract, have abandoned the ship. The observation alluded to is, "that a passenger who is found on board in time of danger, is bound to do works of necessity, for the preservation of the lives of all on board." Now in this case, the services of the libellant were necessary for the common safety; or they were not. In the first case, it was his duty to render them, and he must seek his reward in the conviction that he faithfully discharged that duty. In the other branch of the alternative, he rendered no beneficial service for which he ought to be rewarded. But if it were necessary to estimate the quantum of service performed by the libellant, which, for the above reasons it is not, he would be found to be totally destitute of merit. It appears from Captain O'Connor's testimony, that his services rather fell short, than exceeded what he had the ability to render; and which, therefore, his duty required him to render. My opinion being that the libellant never had a well founded claim to salvage; there is no need to decide, whether it was abandoned by his acceptance of the piece of plate, and his forbearing for so many years to prefer his claim. I shall affirm the decree of the district court with costs.

Case No. 11,105.

PHILLIPS et al. v. MARINER.

[5 Biss. 26.] [1]

Circuit Court, D. Wisconsin. April, 1856.

PLEADING IN EQUITY—BILL OF REVIEW—DECREE NOT EXECUTED.

Where on bill of foreclosure by the holder of two notes secured by mortgage, neither the bill nor decree accounted nor provided for the third note, a bill of review will lie by the defendants, even though the decree has not been executed.

[This was a bill in equity by Benjamin F. Phillips and others against Samuel S. Mariner. Heard on demurrer.]

MILLER, District Judge. Bill of review of a decree of sale upon mortgage given by Phillips to Gordon to secure three notes payable to Gordon or bearer. The decree was for the payment of two of the notes without any mention of the third—and the land, as described in the bill was in range 8, and in the decree in range 14. These are the principal objections to the decree. The bill sets forth that Chase, Perlieu, A. Grignon and Robert Grignon have or claim to have some interest in the land. The bill was taken as confessed against all the defendants. There was an appearance merely for Phillips. The bill of review is drawn in the names of all the defendants in the original bill, and is sworn to by the mortgagor Phillips.

To this bill the defendant Mariner has interposed a demurrer and a plea. The demurrer has been argued and submitted, and is now to be passed upon.

The first objection made to this bill, that the decree was not executed by the defendant, nor the amount paid, was disposed of upon the motion to dismiss the bill. A decree of foreclosure of a mortgage, and of a sale of mortgaged premises, is to be considered as the final decree; and the proceedings on the decree are a mode of enforcing the rights of the creditor. The original decree of foreclosure is final upon the merits of the controversy. Proceedings subsequent are a mode of enforcing a decree similar to an execution at law. It is not essential that the decree should be complied with, as, for instance, making a deed. In this case I thought the bill of review might be sustained upon the same principle as in the case of an execution executed. Massie v. Graham [Fed. Cas. No. 9,263]; Wiser v. Blachly, 2 Johns. Ch. 488; Story, Eq. Pl. § 833.

The decree was not taken by consent expressed. It was made upon the bill taken as confessed, or upon default. So this objection fails.

The next objection is that the decree cannot be revised upon the application of the party not injured by it, and that the holder of the third note is not such a party.

It is true that an appeal or bill of review cannot be sustained by a party not affected by a decree, or not a party of record. The bill sets forth that Phillips made and delivered to Gordon two notes for $800 each, payable in July, 1851, and 1852, and that the mortgage was given to secure $2,400 according to the condition of three certain promissory notes of same date therewith. The first two of said notes are the notes hereinbefore described. The decree is for the two notes and interest, but no mention is made of the third, or whether it has been paid or not; now if these notes were delivered to the plaintiff as alleged in the bill, by the maker, he would know what became of the third note. This suit and decree are for two-thirds of the mortgage debt. If Mariner is the holder of the third note, it probably is satisfied by this decree. But if he is not the holder, it may be outstanding unsatisfied, and may be claimed as a lien upon this land as against the other defendants, as terre tenants. Those defendants are parties to this bill of review and are proper parties. A final decree cannot be made in equity until all the parties in interest are brought before the court. Marshall v. Beverley, 5 Wheat. [18 U. S.] 313. To obviate this difficulty in the courts of the United States, the bill should suggest the reason for not making other parties. In a suit demanding specific performance, all the co-heirs must

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

be made parties or be accounted for. Morgan v. Morgan, 2 Wheat. [15 U. S.] 290. It is a general rule in equity, that all persons materially interested in the matter of the bill as plaintiffs or defendants ought to be made parties to it, however numerous they may be. In Finley v. U. S. Bank, 11 Wheat. [24 U. S.] 304, a subsequent mortgagee obtained a decree by written consent of the defendant without informing the court of a previous mortgage. The court remark: It cannot be doubted that Coleman (the first mortgagee) ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the case until he was introduced into it. But this fact was kept out of view until the decree was pronounced, the sale made, the money paid to the creditor and the report of his proceedings returned by the marshal. If the manner in which the sale was made and the money directed to be paid (to the plaintiff) be unusual and exceptionable, it was done by consent, and the error is not imputable to the court. The only question presented to the judges by this petition (which was a petition of the prior mortgagee to be made a party) was whether a decree completely executed by a sale of the property and payment of the purchase money should be set aside and the suit reinstated for the purpose of introducing a party who ought regularly to have been an original defendant, but who was not shown by any proceedings in the cause "to be concerned in interest until the decree was made and executed." If such a proceeding were "admissible in any case, * * * it must be where the mischief resulting from a rejection of the petition would be irremediable." In that case Coleman, the first mortgagee, was not affected by the decree. In the case under consideration the court has notice, by the bill, of the third note included in the mortgage, and by the decree that the amount of that note is not therein included. If the fact had been brought directly to the notice of the court, the complainants would be required to account for the third note in some way, or the decree would have ordered a portion of the proceeds of sale to it. If that note is not in the hands of the plaintiff Mariner, the land still remains subject to that proportion of the incumbrance created by the mortgage. Stevenson v. Black, Saxt. [1 N. J. Eq.] 338; Betz v. Heebner, 1 Pen. & W. 280; Langdon v. Keith, 9 Vt. 299.

A suit was brought by the assignee of a mortgage without making the mortgagee a party. A decree was entered for the plaintiff which was reversed with costs, with leave to amend. Morgan v. Magoffin, 2 Bibb, 395. The decree in this case for the amount of two notes without reference to the third is an error of record which should be corrected. If the decree had directed a portion of the proceeds of sale to be applied to payment of the third note, it might have stood, for that note is entitled to its proportionate share of the proceeds. Instead of that Mariner, the original plaintiff, has received all. See Donley v. Hays, 17 Serg. & R. 400, and cases cited in the opinion. It is the duty of the court to avoid multiplicity of suits and to prevent irreparable injury, and for these reasons the bill should be maintained.

NOTE. If a bill of review is improperly filed, the proper practice for the defendant is to move to strike it from the files; a demurrer admits that it is properly filed. Griggs v. Gear, 3 Gilman, 2.

As to when bills of review will lie, consult 2 Daniell, Ch. Pl. & Prac. 1576 et seq; Story, Eq. Pl. § 404.

A bill of review cannot be sustained upon the ground that the court decided wrongly upon the evidence. Webb v. Pell, 3 Paige, 368; Manigault v. Deas, 1 Bailey, Eq. 283; Turner v. Berry, 3 Gilman, 541; Evans v. Clement, 14 Ill. 206; Garrett v. Moss, 22 Ill. 363. And the error must be apparent upon the face of the decree, and the evidence will not be looked into. Story, Eq. Pl. § 405; Dexter v. Arnold [Case No. 3,856]; Greenwich Bank v. Loomis, 2 Sandf. 70; Smith, Ch. Prac. 51. Mere error in the decree will not suffice. Adams, Eq. 417.

Before a bill of review can be filed, the original decree must, ordinarily, be performed. 2 Daniell, Ch. Pl. & Prac. 1582; Story, Eq. Pl. § 406; Wiser v. Blachly, 2 Johns. Ch. 488; Griggs v. Gear, 3 Gilman, 16; Horner v. Zimmerman, 45 Ill. 14; Smith, Ch. Prac. 53; Adams, Eq. 417. The only exception to this rule is, where, on account of the insolvency of the parties to whom the money is to be paid, or other good reason specially shown, the rights of complainant would be lost by performance of the decree; but in such case, the special reason must be shown in the bill, and leave of the court first obtained to file the bill without performance of the decree. See cases above cited.

And even if the time for the payment of the money under the original decree had not arrived at the time of filing the bill of review, it must be paid when the time does arrive, or the bill will be dismissed on motion. 2 Barb. Ch. Prac. 96; Partridge v. Usborne, 5 Russ. 196, 251; Welf. Eq. Pl. 90.

On a bill of review, the court will only consider the law upon the facts as furnished by the original decree; it will not perform the functions of an appellate court. Evans v. Clement, 14 Ill. 208; Story, Eq. Pl. § 407.

If a party neglects to make his defense at law, a court of equity will not relieve him. More v. Bagley, Breese, 94; Beaugenon v. Turcotte, Id. 167; Hubbard v. Hobson, Id. 190; Richardson v. Prevo, Id. 216; Duncan v. Ingles, Id. 277; Armstrong v. Caldwell, 2 Scam. 418; McDaniel v. James, 23 Ill. 407; Finch v. Martin, 19 Ill. 105; Thompson v. Morris (Ill. Sup. 1873) 5 Chi. Leg. News, 363.

PHILLIPS (MILTENBERGER v.). See Case No. 9,621.

PHILLIPS (PICKERING v.). See Case No. 11,122.

PHILLIPS (RANDALL v.). See Case No. 11,555.

PHILLIPS (RIDYARD v.). See Case No. 11,820.

Case No. 11,105a.

PHILLIPS v. RUSSELL.

[Hempst. 62.] [1]

Superior Court, Territory of Arkansas. Oct., 1828.

PRACTICE AT LAW—ERROR CORAM NOBIS—FOR WHAT LIES.

1. A writ of error coram nobis may be brought in the same court where the judgment was given, when the error assigned is not for any fault in the court, but for some defect in the execution of the process, or for some default of the ministerial officers.

2. It lies to set aside an erroneous execution.

Error coram nobis by Sylvanus Phillips against William Russell.

Before JOHNSON, ESKRIDGE, and BATES, JJ.

JOHNSON, Circuit Justice. This is a writ of error coram nobis, sued out by the plaintiff, to reverse a judgment and quash an execution thereon for error in fact, which judgment was obtained by the defendant against the plaintiff in this court. Upon application for one of the judges of this court in vacation, an order was made by the judge, commanding the clerk to issue a writ of error, with a supersedeas as to the execution. The clerk, upon the application of the plaintiff, issued a writ of error coram nobis, with a supersedeas to the judgment, as well as the execution. We have no doubt that the execution was erroneous and illegal, and that the order of the judge for a supersedeas to quash it, was correct. This has not been controverted in the argument, and the only inquiry now is, whether the plaintiff or the defendant shall pay the costs of this proceeding. The plaintiff undoubtedly had a right to the writ of error, with a supersedeas to set aside and quash the erroneous execution. This is well settled by the most approved authorities. Serjeant Williams, in his notes to 2 Saund. 101, says: "Error may be brought in the same court where judgment was given, when the error assigned is not for any fault in the court, but for some defect in the execution of the process, or through the default of the clerks." 2 Tidd, Prac. 1056. In 2 Sell. Prac. 484, the doctrine is thus laid down: "Error lies either in the same court where judgment was obtained, or in a superior court. It lies in the same court where judgment was given, when the error was not for any fault in the court, but for some defect in the process of the cause, other than in the judgment, or for default in adjudging execution, or for misprision of the clerk, or for error in fact." Dewitt v. Post, 11 Johns. 460; 1 Bibb, 351; 2 Bibb, 569; 3 Bibb, 291; 2 A. K. Marsh. 319; 3 A. K. Marsh. 561; 2 Litt. [Ky.] 163; 3 Litt. [Ky.] 1; 5 Litt. [Ky.] 56.[2]

From these authorities it is clear that a writ of error coram nobis lies in cases like the present; and if the plaintiff had not sued out a writ of error, with a supersedeas to the judgment, but had limited and restricted it to the execution, as ordered by the judge, he would unquestionably be entitled to recover the costs; but instead of conforming to the order of the judge, he has sued out a writ of error, with a supersedeas to the judgment, as well as the execution. Here was manifest error, and the supersedeas to the judgment has, during the present term, been set aside and discharged. Upon a proceeding so manifestly erroneous, on the part of the plaintiff, we think it only reasonable that he should be subjected to the costs.

It has been attempted to separate and distinguish the supersedeas from the writ of error; but they cannot be so separated or distinguished, for in truth the latter was a mere nullity without the former, and at common law the writ of error, from the time of its allowance, operated as a supersedeas. 2 Tidd, Prac. 1071; 2 East, 439; 1 Salk. 321. Execution quashed, and defendant to recover his costs; but the clerk is directed to tax no costs in his own favor against either party, as all the errors complained of originated with himself. Adjudged accordingly.

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

[2] As to this subject, see, also, 2 Dunl. Adm. Prac. 1125; 2 Paine & D. Prac. 446; 2 Tidd, Prac. 1191; 3 Bac. Abr. tit. "Error" (I) 6, p. 366; 3 How. Prac. 259; 6 Wend. 50; Tidd, Prac. Append. 346.

Case No. 11,106.

PHILLIPS v. The THOMAS SCATTERGOOD.

[Gilp. 1.] [1]

District Court, E. D. Pennsylvania. Dec. 5, 1828.

SEAMEN—MASTER'S WAGES—WHEN CONTRACT TERMINATED—MARITIME LIENS—BY STATE LAW—PREFERENCES.

1. The master's wages are a personal charge on the owner, and give no claim on the vessel.

[Cited in The Larch, Case No. 8,085; Packard v. The Louisa, Id. 10,652.]

2. A contract for wages on a voyage is fulfilled and terminated on the discharge of the cargo at the last port of delivery.

3. Payment and receipt, on the final discharge of the cargo, is the usual and sufficient evidence of the termination of a seaman's contract for wages.

4. A seaman, whose wages have been paid up to the termination of a voyage, but who afterwards remains on board of the vessel, moored at the wharf, has no claim for services which a court of admiralty will enforce.

[Cited in Scott v. The Morning Glory, Case No. 12,542; Packard v. The Louisa, Id. 10,652. Cited in brief in The May Queen, Id. 9,360. Cited in M'Dermott v. The S. G. Owens, Id. 8,748; The John T. Moore, Id. 7,430; Roberts v. The Windemere, 2 Fed. 725; The Trenton, 4 Fed. 662; The Erinagh, 7 Fed. 235; The Murphy Tugs, 28 Fed. 432.]

5. Workmen and materialmen, having a lien on a vessel, under the provisions of a state law, may enforce it by a suit in rem in the admiralty.

[Cited in The Richard Busteed, Case No. 11,764.]

[1] [Reported by Henry D. Gilpin, Esq.]

6. Workmen and materialmen, having a lien on a vessel which has been taken in execution and sold under a judgment in favour of the United States, are entitled to payment out of the fund in preference to the United States.

[Cited in Re Hambright, Case No. 5,973.]

On the 13th May, 1828, suit was brought by the United States of America against Henry Toland and John C. Smith, on a custom house bond for the payment of duties. On the 19th May, judgment was rendered for the United States, and on the 30th May, a writ of fieri facias issued. On the 15th November following, the marshal made return, "that in pursuance of the said writ he had levied upon and taken in execution a ship called 'The Thomas Scattergood,' and, after due and timely notice, sold the same for the sum of four thousand eight hundred dollars, which sum he had then in court." On the same day, John Phillips, lately master of the said vessel; A. Chardon, Robert Gardner, and William Egan, who alleged that they had done work on board; James S. Collins, lately chief mate; Michael and J. Brown, who had done riggers' work; and William Ker, who had supplied varnish for the vessel, severally filed their petitions and accounts, praying that the sums of money due to them respectively, might be paid out of the funds brought into court by the marshal, as the proceeds of the sale of the said vessel, under the execution just returned by him.

H. Hubbell, for petitioners.

Dist. Atty. Ingersoll, for the United States.

HOPKINSON, District Judge. The ship Thomas Scattergood, on her return to the port of Philadelphia, from a voyage to Canton, was taken in execution under a writ of fieri facias for a debt due to the United States. The ship arrived at Philadelphia on or about the 23d April, 1828, was seized by the marshal on the 30th May, and in due course of law, sold. The proceeds of the sale are now in the hands of the marshal, subject to the order of the court. The petitioners, above named, have respectively filed their claims, and ask for payment from this fund in preference to the United States; and their right to this payment is now to be decided. The first is an account presented by Captain J. Phillips for his wages, as master of the ship, amounting to five hundred and seven dollars. No evidence has been offered in proof of this account; but as it is entirely clear that the master's wages are a personal charge on the owner, and give no claim upon the ship, it may be dismissed without further remark. The petitioners, A. Chardon, Robert Gardner, and William Egan, have put into the possession of the court nothing by which the nature of their several claims can be ascertained; they exhibit only orders from Captain Phillips on the owners of the ship, for their respective debts "for work on board the ship;" but as to what the work was, and when or where it was done, no information is given, either by the petition, the account filed, the order, or any other evidence or document. No opinion can, therefore, be given by the court upon these claims; except that, in their present defective state, they must be dismissed.

The claim which has been most strenuously urged, as new and undecided, and in relation to which the most difficulty exists, is that of James S. Collins. It consists of a demand of wages from the 24th April, 1828, to the 14th June, of the same year, amounting to fifty-nine dollars and thirty-three cents, and a further charge of thirty dollars for boarding during the same period. In the petition filed, Collins alleges that he was first officer of the ship Thomas Scattergood, on her late voyage from Philadelphia to Canton in China, and back again; that he has only received his wages, as such first officer, to the 23d April, 1828; and that there is still due to him, he never having been discharged from the said situation until the 14th June following, the sum of fifty-nine dollars and thirty-three cents, as wages, and thirty dollars laid out for his own maintenance. In the affidavit of John Collins, annexed to the petition, it is stated, that the petitioner remained in charge of the ship after the discharge of her cargo; that is, from the 24th April, 1828, until the 14th June following: and that he had the entire care of the ship during that period, and maintained himself. It appears by the same affidavit that there was a watchman on board the ship, but who placed him there, or by whom he was paid, does not appear. The petitioner does not allege that he either employed or placed this watchman, and makes no charge for his services. It seems, therefore, not to be absolutely certain that the vessel was in the care or charge of the petitioner; at least not entirely so, another person being there as a watchman (and one would seem to be sufficient) under some authority, and paid by somebody. How are we assured that the care of the vessel, whatever it was, assumed by the petitioner, was not a mere voluntary service, unrequired by any body interested in her? Neither his petition, nor any of his proofs, alleges that he was retained by the owners, or by any body, to take care of the ship; but merely that he had not been discharged from his situation of first officer. James Morrel, the second witness of the petitioner, says that he was paid his wages, upon the return of the ship to port, until her discharge on the 23d April; but whether he was afterwards retained or discharged by the owners, the witness does not know. We see that the importance of proving how, and by whom, the petitioner was engaged in this service, was not overlooked, but the attempt failed. If it were necessary to scrutinise this claim closely, we could not fail to remark, that, for a portion of the time for which the petitioner claims to have had the entire care of the ship, she was actually in the custody of the marshal under his execution.

The case of the petitioner appears to be this. He was the first officer of the ship Thomas Scattergood on a voyage from Philadelphia to Canton, and back again. The ship returned to the port of Philadelphia, her cargo was discharged, and the petitioner was fully paid his wages to the time of her discharge. He afterwards remained in the ship, then lying at the wharf in Philadelphia, for the purpose, as he alleges, of taking care of her, and he now claims wages for this service as a continuation of his duties as the first officer of the ship. If it was part of his duty under that contract, and in performance of it, there would be no difficulty in saying that he has the same remedies for the recovery of wages for this service, as for that performed in the course of the voyage; and consequently that the body of the ship, or the proceeds of her sale, would be answerable for the debt. But it seems to be very clear that this is not the case. What was the original contract? For labour and service on a voyage from Philadelphia to Canton and back to Philadelphia. On the return of the ship to Philadelphia, the voyage was completed, and the contract was certainly fulfilled and terminated on the discharge of the cargo. The owners of the ship, the other party to the contract, had no further claim on the petitioner for any duty or service under the contract; and, of course, he had no further claim upon them or their ship. The rights of the parties, in this respect, must be mutual and reciprocal; it cannot be, that the contract was ended and extinct as to one of the parties, and continued in full force and life as to the other. By our act of congress, every seaman has a right to sue for his wages as soon as the voyage is ended and the cargo discharged at the last port of delivery: and this right could be given only on the ground that when the voyage is ended, and the cargo discharged, the contract is fulfilled. In this case the voyage was ended: the petitioner received his wages to the time of the discharge of the cargo, and his relation with the ship as a seaman on board of her, under his original contract, ceased. No formal act of discharge was required; the payment and receipt of the wages, is the usual and sufficient evidence of the termination of this relation. If the petitioner afterwards remained in the ship to watch her, or for any other purpose, it was a new service, and under a new contract, express or implied, or a mere volunteer act without any contract. No express contract is either proved or alleged; and the petitioner has his strongest case conceded when it is agreed that the service raises a good consideration for a debt, and a contract may be implied or presumed from it.

This brings the case to the question, whether this is such a contract as may be enforced in the admiralty, and gives the claimant a lien on the ship for payment. It is a contract neither made at sea, nor for a service to be performed at sea; both were in the port of Philadelphia, within the body of the county of Philadelphia. The ship was safely moored at the wharf, she had returned to the possession of the owners, the service had no agency in bringing her in, she had ceased to earn freight. The contract between the owners and the seamen had expired; the relation and rights created by that contract were dissolved. It is true that the same parties might make a new contract, but they could not extend the old one beyond its legal limits, nor give to the new one a character and privileges which the law denies to it. The place and subject matter of a contract decide its maritime character, and not the will of the parties. Is there an instance, in which a contract, made on land, for a service to be rendered on land, having no connection with any voyage performed or to be performed, has been deemed, by the general admiralty law, a case of admiralty jurisdiction, giving a lien on the ship? The meritorious service of the petitioner, if such it was, and the hardship of the case, have been strongly pressed in his behalf; but they must not be permitted to unsettle established principles, or to remove the land-marks of judicial jurisdiction. He should have been more careful to know by whom he was to be compensated before he gave his labour. Even now his remedy remains against his employer, perhaps against those to whom the service was rendered. Our inquiry is, whether the ship is answerable for it. The case of Ross v. Walker, 2 Wils. 264, is directly in point. A pilot was sent for to Gravesend to come on board the ship Oxford, being in sea reach, who accordingly went on board of her there, and piloted her from thence to her moorings at Deptford. For his wages due him on that account he instituted a suit in the court of admiralty. A prohibition was moved for, on the suggestion that both the contract and the work done were within the body of the county. The court say, "We are much inclined to favour the pilot, (who is a most necessary mariner) if we could do it without breaking through the rules of law, because it would be for the benefit of trade, and save great expense to these poor men; but there is no instance to be found where the contract was at land, and to do work on board within the body of some county, that the common law courts have ever permitted the admiralty to have jurisdiction." That the petitioner had formerly been the mate of this ship, on a voyage that was ended, can make no difference in the case, which stands precisely as it would have done, if a third person had been engaged in this service, or if he had for the first time come on board the vessel. In the case of North v. The Eagle [Case No. 10,309] it is declared that "when contracts are made between the owner of a vessel, with the carpenters and others, to perform a service on land, or within the body of a county, the admiralty

has no jurisdiction." So in the case of Pritchard v. The Lady Horatia [Id. 11,438]. The counsel for the petitioner has relied on a supposed analogy of his claim to that of a wharfinger, and on the principles of the case of Woolf v. The Oder [Id. 18,027]. As to wharfage, it is said by the court, in the case of Gardner v. The New Jersey [Id. 5,233], that "wharfage has been allowed out of proceeds, as the wharfinger might detain the ship until payment." This reason does not apply to the petitioner. In the case of Woolf v. The Oder [supra] the voyage was broken up, without any fault of the seamen, by a seizure for the debt of the owner, and, so far, by his default; and the seamen, by the exercise of a reasonable and just discretion in the court, were allowed their wages to the time of seizure, with an additional month's pay for their disappointment as well as to enable them to return to their homes, or obtain other employment. There is nothing in the circumstances or principles of this case, to assimilate it to that before the court. The claim of James S. Collins is therefore dismissed, not without the reluctance which attends the refusal of a demand probably meritorious and just, but which seeks satisfaction in the wrong place.

The claim of Michael and J. Brown, for riggers' work done to the ship, and of William Ker, for varnish used on her, stand on different ground from those already disposed of, and require a separate consideration. Judge Winchester, after a learned argument in the case of Stevens v. The Sandwich [Case No. 13,409], comes to the conclusion that "a ship carpenter, by the maritime law has a lien on the ship, for repairs in port." Judge Peters, in the case of Gardner v. The New Jersey [supra], says that as the laws of Pennsylvania provide for shipwrights and materialmen, he has "generally referred the parties, exhibiting such claims, to the state jurisdiction, wishing to avoid all collisions and conflicts in such cases." Judge Bee, in the case of North v. The Brig Eagle [supra], already quoted, seems to limit the admiralty jurisdiction to supplies, &c. furnished to a foreign vessel in a neutral port. In that of Pritchard v. The Lady Horatia [supra], which was a suit instituted against the vessel for work done, and materials found by shipwrights, the vessel being foreign, and her owners residing abroad, though there was a consignee here, who had funds of the owners arising from the sale of the cargo; Judge Bee decided that "this being a transaction on land, the vessel not being on a voyage, but unladen and the cargo sold; and the owners being represented on the spot, by their consignee, who has in his hands ample funds arising from the sale of the cargo; no such invincible necessity exists, as the laws of all commercial countries seem to require, in order to vest jurisdiction in the admiralty." In the opinion given by Judge Story in the case of The Jerusalem [Case No. 7,294], decided in 1815, he has bestowed his accustomed learning and powers of investigation upon this subject. He adverts to the distinction between the question of jurisdiction and that of lien. He has no doubt of the jurisdiction of the admiralty over suits in favour of material men; the subject matter making it a maritime contract, and over all such the admiralty rightfully possessing jurisdiction. On the question for repairs to a ship, he holds that in cases of foreign ships, or of ships in foreign ports, a lien is created by the maritime law; but, he adds "whether, in a case of a domestic ship, material men have a lien for supplies and repairs furnished at the port where the owner resides, I give no opinion; there are great authorities on both sides of the question." In the case of The Aurora, 1 Wheat. [14 U. S.] 96, decided in 1816, the same judge, delivering the judgment of the supreme court, says "it is undoubtedly true, that material men, and others, who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the admiralty to enforce that right;" and the general tenor of his opinion seems to limit this right to foreign ships, although not so expressly decided. We are however relieved from all embarrassment, in the case before us, by the decision of the supreme court in the case of The General Smith, 4 Wheat. [17 U. S.] 438, in which it is said that "where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit in rem in the admiralty to enforce his right. But in respect to repairs and necessaries, in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied unless it is recognised by that law." In a note to the same case it is said that "this lien, existing by the local law, may be enforced by a suit in rem in the admiralty."

By an act of the legislature of Pennsylvania, passed on the 27th March, 1784 [2 Smith, Laws, 95], "Ships and vessels of all kinds, built, repaired and fitted within this state, are declared to be liable and chargeable for all debts contracted by the masters or owners thereof, for or by reason of any work done or materials found or provided, for, upon, or concerning the building, repairing, fitting, furnishing and equipping such ship, in preference to any, and before any other debts due and owing from the owners thereof."

Upon the provisions therefore of this municipal law, and the principles laid down by the supreme court, in the case cited, it is ordered that, out of the funds in the hands of the marshal proceeding from the sale of the ship Thomas Scattergood, there be paid

to Michael and J. Brown fifty-three dollars and forty-four cents, and to William Ker, ten dollars and seventy-five cents.

PHILLIPS (THOMPSON v.). See Case No. 13,974.

Case No. 11,107.

PHILLIPS et al. v. The UNITED STATES.

[33 Hunt, Mer. Mag. 456.]

District Court, D. Connecticut. Nov. 23, 1854.

SALVAGE—WHAT ARE SALVAGE SERVICES—TOWAGE BY TUG—COMPENSATION.

[1. If the services of the tug in towing the vessel result in extricating her from a position of impending peril, the service is to be regarded as a salvage service, although the tug was summoned by a mere signal for towage, and not by a signal of distress.]

[2. Where a ship, worth, with her cargo, some $60,000, after springing a leak, came to anchor in a storm at the Southwest Spit, above Sandy Hook, and was towed thence by two tugs into New York harbor, and run upon a mud bottom at the dock, the services being little more arduous than an ordinary towage, *held*, that $1,000 should be allowed.]

This libel is filed [by Isaac C. Phillips and others] to recover a salvage compensation for services rendered to the ship United States, by the steam tugs Hercules and Underwriter. The ship, worth from $10,000 to $15,000, and having on board a cargo of about a thousand tons of railroad iron, worth about $45,000, while bound into the port of New York, about 2 or 3 o'clock p. m. on the 11th of March, 1853, ran on the outer middle shoal, about three miles from Sandy Hook. There were seventeen or eighteen feet of water on the shoal, and the ship, drawing about nineteen feet, was carried over the shoal by force of the sea and the wind, which was blowing a gale from the northeast. Soon after, she had a signal for a pilot, and was spoken by one, but the sea was so rough that he could not then board her. He therefore directed the captain of the ship to follow his boat, and he would lead him into deep water. This direction was followed till the ship arrived near the point of the Hook, when the pilot was enabled to board her, and she then proceeded under his direction as far as the Southwest Spit. She could then proceed no further up the harbor, as the wind was dead ahead.

When the pilot went on board, the ship, which was an old one, from thumping over the outer middle, was leaking badly, the necessary hands being at the pumps; and after her arrival at the Southwest Spit, the captain and the pilot consulted for her safety, and thereupon the pilot ordered a signal set forth for the steam tug Hercules, which, having that day towed down a schooner from New York, to lighten the ship Atlanta, which was ashore outside of the Hook, was then about two miles from the ship in the lower bay, looking for business in her ordinary occupation of towing vessels up and down the harbor. The evidence was contradictory as to whether the signal was an ordinary one for a tow, or a signal of distress. The Hercules came, in obedience to the signal, and took hold of the ship between 4 and 5 p. m., and the captain of the ship told the captain of the Hercules that the ship was leaking badly, and that the water was gaining on them. The Hercules not being able to tow her with as much dispatch as was desired, a signal was set from the ship for the Underwriter, which had also gone down in search of business. The Underwriter immediately obeyed the signal, and the two tugs brought the ship in safety up the harbor (although from the leak she settled one or two feet while coming up), and ran her upon a mud bottom in the Atlantic Dock, between 9 and 10 o'clock at night. This was on Friday, and by the following Wednesday she filled with water. The usual price paid to a steam tug for towing a vessel up from the lower bay varies from $25 to $100, according to the state of the weather and the difficulties of the case.

Cutting & Betts, for libellants.
Stoughton & Donohue, for claimants.

HELD BY THE COURT (INGERSOLL, District Judge): That the weight of evidence is that the signal set was not a signal of distress, but a signal for a tow. In obeying this signal, the tugs went to her aid, expecting and agreeing to engage in the business which the signal indicated. But, although the tugs started for the ship with the view to render a towage service merely, yet if the ship, when the tugs came to her assistance, was, in point of fact, in a condition where loss or serious damage was reasonably to be apprehended from her leaky condition, in connection with the boisterous state of the weather,—if she was encountering a threatened or impending peril, from which she was rescued by the tugs,—then, although the signal set by the ship was only one for a tow, and although when the tugs started for the ship, in obedience to the signal, they understood that they were wanted only for a towage service, they would be entitled to be compensated for a salvage service; for where a ship or its lading is saved from impending peril by the service of any persons, upon whom there is no obligation to render the service, then such service is to be compensated as a salvage service.

A mere towage service is confined to vessels which have received no damage which puts them in peril of loss. A mere towage compensation is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be,

without having encountered any damage or accident. And if a towage engagement merely lead to the rescue of a ship from an imminent danger, it should be remunerated as salvage. 3 Hagg. Adm. 428.

That the court does not find as a fact that the ship and cargo would have been lost, or greatly damaged, if she had not been rescued by the tugs, but does find that there was danger of such loss, or great damage, and that the ship was rescued from that peril by the tugs, and the compensation which the libellants are entitled to receive for their services, must be a salvage compensation.

That there was but little, if any, more labor and peril incurred by the tugs than would have been incurred in such weather, in performing a towage service; that they manifested promptitude in obeying the signal, but were not diverted from their proper and usual employment, but were engaged in it; that the libellants have experienced but trifling injury or loss by the service which they have rendered, no more than probably would have been sustained if the ship had not by her leaky condition been exposed to impending peril, and that under all the circumstances the case demands only a moderate compensation.

Decree, therefore, that the libellants recover the sum of $1,000, to be divided equally between the two tugs.

Case No. 11,108.

PHILLIPS v. UNITED STATES.

[See Case No. 11,107.]

PHILLIPS (WILCOCKS v.). See Case No. 17,639.

PHILLIPS (WILLETT v.). See Case No. 17,683.

Case No. 11,109.

PHILLIPS v. WILSON.

[1 Wash. C. C. 470.] [1]

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

EJECTMENT—TITLE UNDER LAND WARRANT—SURVEY—LINES.

1. If the warrant for lands be uncertain, or if it be certain, and is laid in another place, and before the survey is made, no third person has acquired a title to the land on which the warrant is laid; every objection to a title so derived is done away.

2. The survey gives notice to all subsequent purchasers, and it is only such who can complain. Such a survey could not affect the title of a person, who in the meantime had acquired an incipient title to the land, either by warrant or settlement.

3. If the surveyor has warrants to the amount of the lands surveyed, and he includes the whole in one survey, marking the boundaries of the different surveys, it is nothing to third persons how the warrants are appropriated, before the map of the survey is returned to the surveyor general.

4. Quere.—What would be the effect of a settlement upon the title to lands comprehended in another and adjoining survey, where the lines of the land claimed by the settlement, had not been run out, so as to take part of the lands so adjoining the settlement?

This ejectment is to recover 400 acres of land, lying north and west of the Ohio, Allegheny and Conewango. The plaintiff's title was founded on an application for this land, on the 25th of April, 1793, by one Megee (in the name of R. Thompson), who sold to Wells and Morris; a warrant in the name of Richard Wells, for 400 acres, lying between Big and Little Beaver creeks, to include his improvement; and a survey dated in March, 1795. The purchase money was paid the 12th June, 1794, and the warrant was entered, with the deputy surveyor of the district, in August, 1794. In 1800, a small additional sum was paid. In May, 1795, a connected plat of this, together with a number of other adjoining tracts, surveyed at the same time, on other warrants, for Wells and Morris and the Population Company, was returned by the surveyor, according to law, to the surveyor general's office. It appeared in evidence, that at the time when these several warrants, all for 400 acres each, were surveyed, the deputy did not appropriate the several tracts to the respective warrants; but after surveying and plotting them in a general map, the surveyor general made the appropriation, and allotted the warrant of Richard Wells to the land in question, which was proved to be in possession of the defendant. It was proven, that Megee had made improvements at a considerable distance from the land in dispute; but that none were made on this land, either by him or Wells, at the time the warrant issued, or for a long time afterwards. The plaintiff [lessee of Phillips] deduced a title regularly derived from Wells. It appeared in evidence, that according to common usage in this state, and the practice of the land office, the name of the person appearing on the list of applications, is always considered at the land office, as merely nominal, and is struck out at the instance of the real applicant, whenever he sells to a third person; and the name of such third person is inserted in his stead. This was done in the present instance. That it is also the general and uniform custom, that when the purchase money is paid, the warrant issues, and bears date as of the day of the application. The danger of making settlements on this part of the country, from 1793 to 1796, was admitted by the defendant's counsel, as proved in the cases of Huidekoper v. Burrus [Case No. 6,848]; evidence was also given by the plaintiff, that during that period, there were no settlements in this country, except

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

in the neighbourhood of forts; and that no prudent man would have attempted it.

The defendant claimed by virtue of a settlement right in one Guy, from whom he deduced a title; and he relied upon a number of depositions to prove, that in 1793, 1794, 1795, and 1796, he was seen upon the land, or about thirty or forty rods from it, on a tract claimed by, and surveyed for the Population Company (for on this point there was some contrariety in the evidence, the weight of it being in favour of his improvement being on the adjoining tract); that he raised and covered in a cabin, girdled trees, had his bed clothes there, &c. Some of the witnesses stated, that he resided there, and seemed to be keeping possession. It was proved, however, by other witnesses, that he lived with his family on the south side of the Ohio, during all this time, where he built a mill. No satisfactory evidence was given of any thing like a permanent settlement, until 1796, if so soon. The objections to the plaintiff's title were: 1st. That the purchase money not having been fully paid up, till 1800, the warrant could not legally issue till then, and of course the survey was unauthorized. But if the subsequent payment could legalize it, it could only do so from the time the money was paid; before which, it is admitted, an actual settlement had been made by the defendant. The 3d section of the act of 3d April, 1792, declares, that the warrant may be granted to the applicant, he paying the purchase money and fees of office, which implies a condition; besides which, the 10th section declares that no warrant shall issue till the purchase money is paid. 2d. That the warrant is too uncertain; or, if not so, that, by calling for Megee's improvement, it called for a tract far removed from the one in dispute; and, therefore, could not be surveyed on the land in controversy: and, further, that the tract should, on the survey, have been appropriated to the warrant, and not left to the chamber operation of the surveyor. 3d. That improvement rights, though unaccompanied with actual settlement, are protected against warrants, in which the land is not particularly described, by the act of the 22d April, 1794 [3 Smith's Laws, 70]. It was contended, that it appeared upon the evidence, that Guy had made an actual settlement, within the meaning of the act of 1792, before this land was surveyed; that all objection to Guy's not having surveyed his settlement right, was answered by the evidence, which proved, that, at the time the surveyor was surveying the warrants of Wells and Morris, Guy applied to him to survey his settlement right, and that he refused to do it. For the plaintiff, it was contended: First, that not even an improvement of any sort was made by Guy on this land, till 1796, but, on an adjoining tract; and that after the survey for Wells, he could not extend his right, even if it had been accompanied with an actual settlement upon this land. Secondly, it is plain, from the evidence, that an actual settlement, within the principles laid down in the case of Balfour's Lessee v. Mead [Case No. 808], was not made, either upon this or the adjoining tract, till long after the survey of the warrant, and the return of the connected plat of the lands, surveyed in March, 1795.

Ingersoll & Tilghman, for plaintiff.

Levy & Rodney, for defendant.

WASHINGTON, Circuit Justice. The first objection to the plaintiff's title, is, that the warrant issued before the payment of the purchase money. Without giving any opinion how the law would be, if such were the case, it is sufficient to state, that though the warrant bears date when the application was filed, agreeable to the uniform custom of the land office, in fact it issued on the day when the purchase money was paid; and the small sum paid in 1800, was only the interest which accrued between the date of the application and the issuing of the warrant; and, consequently, the case does not come within the provisions of either of the sections of the act of 1792, which were relied upon.

2d. The uncertainty, the mislocation, and the improper appropriation of the tract to the warrant, are objected. All of these may be considered at once, for all have been determined in the case of Huideköper v. Burrus [Case No. 6,848]. If the warrant be uncertain; or, if it be certain, and is laid in another place, and before the survey is made, no third person has acquired a title to the land on which the warrant is laid; every objection is done away. The survey gives notice to all subsequent purchasers, and it is such only who can complain. As to the state, it is perfectly immaterial where the warrant is surveyed; but, such survey could not oust out a person, who, in the meantime, had acquired an incipient title to the land surveyed, either by warrant or settlement. As to the not surveying each separate warrant on the land to which it is to attach, at the time of the survey, if the surveyor has warrants to the amount of the land surveyed, and he comprehends the whole in one inclusive survey, marking the boundaries of the different surveys; it is nothing to third persons, how the owner of the several warrants may appropriate, on the connected map, each warrant to its respective tract, before the map is returned to the surveyor general. Whether these objections are to be considered as cured from the day of the survey, which, in this case, was in March, 1795, or on the day when the connected plat was returned, two months after, it is not, in this case, material to decide; because, if an actual settlement was not made, on or before the first period, it is not pretended that it was made between the first and the latter period. But we do not mean to intimate an opinion, that the latter is the true time.

3d. The only observation necessary to make upon this objection is, that the law of April, 1794, does not apply to this case. This law applies to cases where the purchase money was not paid before the 15th of June, 1794; and the indescriptive warrants, which it is said shall not, by virtue of this act, affect the title of those who have made improvements, are such warrants as are permitted to be surveyed under this act. The warrant in question is not of this description, because it was paid for on the 12th of June, 1794. The great question, then, depends upon the defendant's title; and it is to be considered, whether the defendant, or the person under whom he claims, made an actual settlement within the meaning of the act of April, 1792, or at any time before March or May, 1795. What constitutes such a settlement, is a point of law, and was fully laid down in the case of Balfour's Lessee v. Mead [supra], which has been read to the jury. Whether such a settlement was made, is a matter of fact for the jury to decide. To disprove such a settlement, the plaintiff relies upon the state of the country, which, from 1793 to 1796, forbade any person to make such a settlement, and the general evidence given, that no such settlements were made within that time. That Guy was a resident with his family, during that period, on the south of the Ohio, and that he only ventured out at times to the cabin he had raised, for temporary purposes to make sugar; or under a false, but common opinion, that improvements, without an intention to settle, would give a right.

The plaintiff's counsel have also insisted, that, even if an actual settlement was made, it was not on this land; and that, therefore, the defendant cannot now run into this land, which was surveyed in March, 1795. There is some contradiction in the evidence, as to this fact; but, if proved, as contended for by the plaintiff, it would become an important question, whether the settler can extend the limits of his 400 acre settlement right, into an adjoining survey, if he has failed to lay off his lands before such survey is made. Without deciding the point, it may be sufficient to observe, by the way, that, if he may do so, he has it in his power to make his settlement protect not merely 400 acres, but three or four times as much, from appropriation; by extending his limits north, south, west, or east, as his fancy or caprice may lead him; and thus either prevent others from surveying in his neighbourhood, or afterwards disturb their possessions. This would seem a very unreasonable thing; but this case seems to keep clear of this objection, as he applied to the surveyor to mark the bounds of his settlement right, at the time he was surveying these warrants. I know not what more he could do; and, I am inclined to think, it would be unreasonable to make him suffer, because the surveyor refused to comply with the request, provided he was such a settler, as was entitled to call upon the surveyor to perform this duty; for, if he was not, then there was an end of the controversy: and this brings us to the important part of the cause. Was he such a settler, in March, 1795? If, upon the evidence, you are of opinion he was not, then your verdict must be for the plaintiff; if he was, then it must be for the defendant.

The jury found for the plaintiff.

PHILLIPS & COLBY CONST. CO. (SEYMOUR v.). See Case No. 12,689.

PHILLIPS COUNTY (BORO v.). See Case No. 1,663.

PHILPOT (GRUNNINGER v.). See Cases Nos. 5,852 and 5,853.

Case No. 11,110.

The PHOEBE v. DIGNUM.

[1 Wash. C. C. 48.] [1]

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

SEAMEN—WAGES—FORFEITURE—ENTRY IN LOG BOOK—WHEN TO BE MADE.

To entitle the owner of a vessel to the forfeiture of the wages of a seaman, absenting himself from the vessel more than forty-eight hours, the entry of the absence of the seaman must be made on the log book, on the day on which the seaman so absented himself.

[Cited in Douglass v. Eyre, Case No. 4,032; Knagg v. Goldsmith, Id. 7,872; The Martha, Id. 9,144; The Sarah Jane, Id. 12,348; The Quintero, Id. 11,517.]

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

This was an appeal from a sentence of the district court, decreeing to the appellee his wages as a seaman on board said schooner, on a voyage from Philadelphia to Jamaica, and back. The answer of the owners and captain admitted, that the libellant had entered as a mariner for that voyage; but insisted that he had, whilst at Jamaica, absented himself from the vessel, without the consent and against the will of the captain, for four days, which, under the act of congress, amounted to a forfeiture of his wages up to the time of such absence. The sentence of the district court was given upon the libel and answer. [Case unreported.]

BY THE COURT. Absence for more than forty-eight hours from the vessel, without leave of the master or officer commanding on board, is a forfeiture of all the wages due to that time; provided the officer having charge of the log book, shall make an entry therein of the name of such seaman, on the day on which he shall so absent himself. The reason of this is obvious; if no such entry be made, it repels any presumption that such

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

consent took place, or that the forfeiture was intended to be waived. If no such entry be made, it is to be presumed that the absence was not injurious, and was not objected to. As it does not appear in this case any such entry was made, the appellee is entitled to his wages, and therefore, let the sentence be affirmed, with costs.

Case No. 11,111.

The PHOENIX.

[3 Blatchf. 273.] [1]

Circuit Court, S. D. New York. May 21, 1855.

COLLISION — BACKING INTO BERTH — STEADYING LINE—MAIN YARD SQUARED.

1. It is the duty of vessels lying in slips, in the port of New York, to brace up their yards, or top-lift them, during the night, and not leave them squared.

[Cited in The Avid, Case No. 678.]

2. Where a steamboat, in backing into her berth, in a slip in New York, in the night, became so wedged in as to make it necessary, to enable her to enter, to remove a lighter, which was fastened to a ship on the opposite side of the slip, and which lay between the steamboat and the ship: *Held*, that the hands on the steamboat, after the hands on the ship had failed, on being called on to remove the lighter, had a right to remove her themselves, and that there was no fault in their so doing, even though the removal of the lighter caused the main yard of the ship, which was squared, to come in contact with the smoke-pipes of the steamboat, as she backed, and broke them down.

3. The ship was in fault in leaving her main yard squared.

4. As the steamboat attempted to back in among a crowd of vessels, without having out a line by which to steady her, she was also in fault.

5. Under these circumstances, the loss was divided.

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

This was a libel in rem, filed in the district court by Joseph W. Hancox, master of the steamboat Hero, against the ship Phœnix, to recover damages for an injury that occurred to the former in a slip on the North river, in the city of New York. The district court made a decree dividing the loss, on the ground that both vessels were in fault. [Case unreported.] The claimant appealed to this court.

Dennis McMahon, for libellant.
Charles Donohue, for claimant.

NELSON, Circuit Justice. The Hero was in the act of backing into the slip, to reach her berth on the south side of it, and which was the north side of pier No. 43, and next the foot of Spring street. There were two vessels lying at the entrance of the slip, on the same side of the pier. The Phœnix lay opposite, on the south side of pier No. 44, heading into the slip. There was also a lighter lying along side of the Phœnix, under her starboard bow. The entrance into the slip was thus contracted, making the manœuvres of the Hero somewhat difficult, in backing into her berth between the vessels, especially as the night was very dark. She became wedged in between the lighter and the vessels below; and, after the fastenings of the lighter had been slackened, and she had been moved further into the slip, so that the Hero could move, the main yard of the Phœnix came in contact with the smoke-pipes of the Hero, breaking them down, and smashing her wheel-house, besides doing other damage.

The ground of the complaint in the libel is, that the hands on board of the Phœnix improperly neglected to brace her yards, especially the main yard, which extended some ten or twelve feet over the side of the vessel, and occasioned the damage that occurred. The claimant denies that there was any negligence in not bracing the yards of the Phœnix, and also charges that the damage was occasioned by the mismanagement of the steamboat in backing into the slip.

There is some small contrariety in the evidence as to whether or not the main yard of the Phœnix was squared at the time the Hero attempted to back into the slip; and, also, as to whether or not the hands on board of the Hero, who were engaged in slackening the fastenings of the lighter and moving her, had not braced the yards of the Phœnix themselves, before the accident occurred. But the decided preponderance is in favor of the allegation that the yards were not braced but squared, and had been left in that situation by the hands on board of the Phœnix.

It is insisted on the part of the claimant, that it is customary for vessels lying in slips around this port to leave their yards squared during the night as well as during the day, and hence, that no negligence is properly chargeable for the omission to brace them up, or top-lift them. I think the weight of the evidence in the case is the other way. It is true that Schultz, one of the harbor-masters, says, that it is common for vessels to lie with their yards squared—more common than to lie with them braced or top-lifted. Whether he means while lying in slips in the night time, is not stated. And yet he admits that it is not a prudent thing for vessels to lie with their yards squared. Admitting this to be so, his duty as harbor-master should lead him to correct this practice of vessels, if, as he supposes, it prevails. Story, one of the port-wardens, says, that when vessels lie in slips where boats are continually coming in and going out, the custom is for them to brace their yards up, and that, when yards are squared, is where vessels lie at the wharves. Mount, a dock-master, on complaint being made to him against the Phœnix, gave orders to the mate on board, the day before the accident, that he must keep his yards braced sharp up

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

during the night time, while lying in the slip, because, when squared, they interfered with the steamboats that were continually passing in and out of it, by unnecessarily obstructing the passage. There can be no doubt about the duty of the Phœnix, after this direction by the dock-master, however it may have been before. In my judgment, the duty was equally obligatory without the direction, and should be generally observed by vessels lying in slips around the harbor, and should be enforced by the officers appointed to superintend and regulate the shipping lying within it.

It is said that the hands on board of the Hero had no right to interfere with the lighter, and that, if she had not been removed, the collision would not have happened, as the steamboat could not have backed far enough into the slip to have brought her smoke-pipes in contact with the main yard. I do not think so. After having called upon the hands of the Phœnix to change the position of the lighter, and they had refused to do so, those on board of the Hero were justified, under the circumstances, in making the change themselves. The crowded condition of the shipping at the docks and wharves around the harbor, must, of necessity, justify slight interferences of this description, for the convenience and accommodation of the business and commerce of the city. Undoubtedly, where it is practicable, a dock-master or harbor-master should be called in to enforce a proper spirit of accommodation. This could not be reasonably required under the circumstances of the present case; and no harm was done to the lighter.

I am satisfied, therefore, that the Phœnix was in fault, and would be responsible for the damage sustained, were it not that the hands on board of the steamboat were also in fault, for attempting to back into the slip among the crowd of vessels, without getting a line out to steady her. The want of this may have contributed to the accident, and, for this reason, the court below, adopting the rule where both vessels are in fault, divided the loss. I concur in this view, and shall therefore affirm the decree, with costs in this court.

PHOENIX, The (JONES v.). See Case No. 7,480.

PHOENIX CHEMICAL WORKS (NELSON v.). See Case No. 10,113.

PHOENIX FIRE INS. CO. (CADY v.). See Case No. 2,284.

PHOENIX INS. CO. (ALLISON v.). See Case No. 252.

PHOENIX INS. CO. v. The ATLAS. See Case No. 634

PHOENIX INS. CO. (BLAGG v.). See Cases Nos. 1,477 and 1,478.

PHOENIX INS. CO. (CLEMENT v.). See Cases Nos. 2,881 and 2,882.

PHOENIX INS. CO. (COPELAND v.). See Case No. 3,210.

PHOENIX INS. CO. (COSTER v.). See Case No. 3,264.

PHOENIX INS. CO. (DAVIDSON v.). See Case No. 3,607.

Case No. 11,112.

PHOENIX INS. CO. v. ERIE & W. TRANSP. CO.

[10 Biss. 18;[1] 12 Chi. Leg. News, 89.]

District Court, E. D. Wisconsin. Nov., 1879.[2]

ADMIRALTY JURISDICTION—MARITIME SERVICE—BILL OF LADING—INSURANCE—STIPULATIONS—NEGLIGENCE.

1. The true test of what constitutes a maritime contract or service is whether it is to be substantially performed or rendered on navigable waters.

2. A contract was made for the shipment of grain from Chicago, by which it was agreed that the Anchor Line of propellers should carry the grain to Erie and there deliver it to the elevator company, as the agent of the consignee, for transhipment by rail to certain inland points in Pennsylvania. The bills of lading denoted a rate of freight charged for a continuous transportation service from the point of shipment to the inland points named, and provided that only that carrier should be liable for loss in whose actual custody the grain might be at the time of loss. *Held*, that in the case of loss while the grain was in the course of water transit, the court of admiralty had jurisdiction of an action against the propeller company.

3. A common carrier may, by contract with the shipper of goods, secure to itself, in case of any damage or loss to the goods, for which the carrier is liable, the benefit of any insurance to be effected by the shippers.

4. In such case the payment of a loss by the insurer to the shippers does not give the former any right of action against the carrier.

5. It was stipulated in bills of lading that the carrier should not be liable for loss by perils of navigation, and that in case of loss for which the carrier should be liable, he should have the benefit of insurance effected by the shippers. A loss occurred, the proximate cause of which was a peril of navigation, but the remote cause was the negligence of the carrier. The insurer having paid the loss to the shippers, it was *held* he was not subrogated to their rights against the carrier, and could maintain no action against the latter.

[Cited in The Hadji, 20 Fed. 877; The Roanoke, 8 C. C. A. 67, 59 Fed. 165.]

[Cited in Jackson Co. v. Boynston Mut. Ins. Co., 139 Mass. 511, 2 N. E. 103.]

This was a libel to recover for the loss of certain shipments of grain delivered on board the propeller Merchant, July 24, 1874, at Chicago, to be transported, so far as it was to be carried on the Lakes, to Erie, Pennsylvania.

At the time stated, libellant was a corporation of the state of New York, authorized to transact a general lake and inland insurance business. Respondent was a corporation of the state of Pennsylvania, authorized to carry

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

[2] [Affirmed by circuit court. Case unreported. Decree of circuit court affirmed by supreme court in 117 U. S. 312, 6 Sup. Ct. 750, 1176.]

on the business of lake transportation, and was the proprietor of a line of propellers running between Erie and Lake ports, designated as the "Anchor Line," one of which boats was the propeller Merchant.

On said 24th day of July, 1874, the Merchant received on board, at Chicago, 16,325.34 bushels of corn consigned to A. M. Wright & Co.; 800 bushels of corn consigned to Elmendorf & Co.; and 689.02 bushels of oats and 370.30 bushels of corn consigned to Gilbert Wolcott & Co. Bills of lading were issued for and on account of these several shipments, the parts of which acknowledging receipt of the grain, were as follows:

"Received, Chicago, July 24, of A. M. Wright & Co., the following packages (contents unknown), in apparent good condition: 16,325.34 bushels corn; order A. M. Wright & Co., Liverpool, Eng. Notify American Steamship Co., Philadelphia, Pa. Pro. Merchant."

"Received, Chicago, July 24, 1874, of Elmendorf & Co., the following packages (contents unknown), in apparent good condition; 400 bushels corn; order Elmendorf & Co. Notify Abm. Whitenack, Bound Brook, N. J. 400 bushels corn; order same. Notify same. Notify Wilkinson, Geddes & Co., Newark, N. J."

"Received, Chicago, July 24, 1874, of Gilbert Wolcott & Co., the following packages (contents unknown), in apparent good condition: 689.02 bushels white oats, 370.30 bushels No. 2 corn; order Gilbert Wolcott & Co. Notify Louis Buehler, Tamaqua, Pa. Pro. Merchant."

Material parts of the heading of these bills of lading were as follows: "Anchor Line. Lake and Rail via Erie and the Anchor Line Steamers from all Lake Michigan Ports. The Erie & Western Transportation Company is the proprietor of the 'Anchor Line,' which issues this bill of lading, and is a corporation of the state of Pennsylvania, having a real capital. The 'Anchor Line' is the authorized and exclusive agent of the Pennsylvania Railroad Co. for its lake business via the Philadelphia & Erie Railroad and connections. It offers to the public a line of first class propellers between the city of Erie and Lake ports. Responsible through bills of lading and the shortest lake and rail line to the East."

In the bill of lading, issued to Wright & Co., was the clause: "Rates from Chicago to Philadelphia, 16c. per bus.;" in that issued to Elmendorf & Co., "rates from Chicago to Bound Brook and Newark, 17c. per bus.;" and in that issued to Gilbert Wolcott & Co., was the clause, "rates from Chicago to Tamaqua, Pa., corn 17c., oats 11c. bush."

Each of these bills contained these further clauses:

"That the said Anchor Line and the steamboats, railroad companies and forwarding lines with which it connects, and which receive said property, shall not be liable * * * for loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals. And where grain is shipped in bulk, the said Anchor Line is hereby authorized to deliver the same to the elevator company at Erie, as the agent of the owner or consignee, for transhipment (but without further charge to such owner or consignee) into the cars of the connecting railroad companies or forwarding lines, and when so transhipped in bulk, the said Anchor Line and the said connecting railroad company or carrier shall be, and is, in consideration of so receiving the same for carriage, hereby exempted and released from all liability for loss either in quantity or weight, and shall be entitled to all the other exemptions herein contained.

"It is further stipulated and agreed, that in case of any loss, detriment or damage done to or sustained by any of the property hereby receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

On the day of shipment, the libellant through its agent in Chicago, made an insurance on the consignment to Wright & Co. of $8,000, on that to Elmendorf & Co. of $520, and on that to Gilbert Wolcott & Co. of $700.

The Merchant, laden with the grain covered by these bills of lading, left the port of Chicago July 24th, and proceeded on her voyage to Erie. Having reached a point about ten miles south of Milwaukee, she was on the next day, at about nine o'clock in the morning, stranded in a fog on the west shore of Lake Michigan. By reason of this event, there was a total loss to the shippers of these several shipments of grain. Notices of abandonment were given to the insurance company, and on claim made, libellant paid to the several shippers the amounts of insurance on their respective shipments as and for a total loss.

The libel alleged that these shipments of grain were placed on board the Merchant, to be carried to Erie and there delivered for the shippers for transhipment; that the loss did not occur by reason of fire, collision, or the dangers of navigation, but was occasioned by the unseaworthiness of the vessel, and unskillfulness, carelessness and negligence in her conduct and management while on her voyage; and that by payment of the insurance on said shipments, libellant became subrogated to all the rights, interests and rights of action of the assured against the carrier. It was also alleged that these shipments of grain were in fact wholly lost, except about 5,188 bushels, which quantity was brought into the port of Milwaukee in a perishable condition,

and unfit for transhipment, and was sold by respondent for $1,037.60.

The suit being in personam, and the respondent being a corporation of another state, service was obtained by process of attachment levied upon a vessel of the Anchor Line found within the jurisdiction of the court, as authorized by the rules in admiralty.

The answer put the libellant upon proof of various allegations in the libel, and denied that the loss was occasioned by unseaworthiness of the propeller, or the unskillfulness, mismanagement, carelessness or negligence of respondent, or of any of its officers, agents or servants.

It was alleged that the propeller was seaworthy, and that the loss occurred by a peril of navigation, without any fault of the vessel, or any fault, negligence or want of skill on the part of those in charge of her.

As an affirmative defence it was alleged that at the time of the loss, the grain covered by the bills of lading was in the actual custody of the respondent, which was the carrier thereof, and that if any liability arose on account of the loss (which was denied), respondent was the company and carrier alone answerable therefor, and therefore, that by the provisions of the bills of lading, respondent became entitled to the full benefit of the insurance on the grain; and so, that no action could be maintained by libellant against respondent, on account of the loss.

A further defence interposed was that the court had no jurisdiction of the subject-matter of this action; and the ground of this defence was that by the bills of lading the grain in question was to be transported by respondent by boat, railroad companies and forwarding lines to points and places in the states of Pennsylvania and New Jersey, viz.: Philadelphia, Tamaqua, Bound Brook and Newark; that it was understood and agreed by the parties that part of the transportation should be performed on land and by means of railroad cars, and that, therefore, the alleged causes of action set out in the libel were not causes of admiralty jurisdiction.

Van Dyke & Van Dyke and N. J. Emmons, for libellant.

W. P. Lynde and George P. Hibbard, for respondent.

DYER, District Judge. Upon the issues made by the pleadings, three questions arise, which were very fully and ably argued at the bar [as the principal questions in the case]:[3]

1. Has the court jurisdiction of the subject-matter of this action?

2. If the court has jurisdiction, and the case is to be considered on its merits, was the loss occasioned solely by a peril of navigation, or by the unseaworthiness of the vessel or the negligence and unskillfulness of those in charge of her, either in connection with, or in the absence of such peril?

3. Is the respondent entitled to the benefit of the insurance in this case?

First. Upon the question of jurisdiction, the claim of the respondent is, that the bills of lading were through contracts to carry the grain from Chicago to the several points inland, in Pennsylvania and New Jersey, by means of steamboats and railroads; that they were contracts made on land, to be performed on land by means of land carriage, in consideration of a single, entire through freight, which would be earned only on performance of the contracts, and that the contracts were, therefore, not maritime. It is true that the bills of lading denote a rate of freight for a continuous transportation service from the point of shipment to inland points in the states named; and to that extent they may be characterized as through contracts.

It is true, also, that part of this service was to be by rail, but the service to be performed by the Anchor Line was to be exclusively on water. The contracts were, that this line would carry the grain to Erie, and there deliver it to the elevator company.

As the agent of the consignee for transhipment, this line, as the bills of lading indicate, was but the agent of the connecting railways, and it would seem that the contracts for carriage beyond Erie were made by respondent as such agent. Furthermore, the bills of lading expressly provide that of the several connecting carriers, only the one upon whose line a loss might happen, should be responsible therefor; consequently for a loss while the grain should be in course of land transit, the respondent would not be liable. The loss in this case happened while the property was in course of water transit between the points expressly designated in respondent's contracts, and was therefore a loss which, by the express terms of the contracts, the connecting carriers could not be made answerable. Although a single through freight was charged, the distinct and independent service to be rendered by respondent, or its line, was the carriage of the grain by water on one of its boats, from Chicago to Erie, and its service actually ended at that point; and although, under the contracts, the shippers might compel the connecting carriers to receive the grain and transport it to the points of consignment, it does not follow that the obligation of the respondent was to carry the grain further than to Erie, and there deliver it for transhipment. The provision in the bills of lading as to responsibility for loss, makes the contracts of carriage several with each carrier as to liability. The Pennsylvania Railway Company would not be liable for loss happening while the grain was in transit between Chicago and Erie, and respondent would not be liable for loss occurring while transportation service was being rendered between Erie and Philadelphia, Tamaqua, Bound Brook and Newark. The obligation of the railway company to receive the grain and transport it to inland points would arise from the fact that its authorized agent, the

[3] [From 12 Chi. Leg. News, 89.]

Anchor Line, had contracted in its behalf that it would so do, on delivery of the grain at Erie. The undertaking of respondent was not to carry the grain to inland points, because its liability as a carrier was restricted to its own route.

The point was made upon the argument that the contracts specify that the grain was to be transported until it had "reached the point named in this bill of lading." The provision, however, is not that the transportation service shall be wholly rendered by the Anchor Line, but the language is, "to be transported by the Anchor Line, and the steamboats, railroad companies and forwarding lines with which it connects, until 'the property' shall have reached the point named in this bill of lading."

Various illustrations were put by the learned counsel for respondent as tests of admiralty jurisdiction. They are more ingenious than sound. A contract to build a ship is not a maritime contract. A contract for her towage is. It is supposed that a contract is made to build a ship in Milwaukee and to tow her to Detroit, and there deliver her for a whole sum, and it is asked if a court of admiralty would have jurisdiction of a cause of action founded upon a breach of the contract to tow the ship to the place of delivery. Concede, for the purposes of the illustration, that it would not, and if not, the reason is obvious, namely, that the towage service in such a case would be the mere incident of the principal thing, which would be the building of the ship, and of this principal subject-matter of the contract a court of admiralty would have no cognizance. Again, it is supposed that a railroad company has contracted to carry property from New York to St. Louis, and that by the negligence of servants upon a steam ferry boat belonging to the company upon the Detroit river, the property should be damaged, it is asked, whether an action in personam in admiralty could be maintained against the carrier. Again the answer is that if not, it would be because the transhipment or transfer by ferry would be merely incidental to the carriage of the property by land from New York to St. Louis, and no substantial part of the service was to be performed otherwise than on land.

The true test of a maritime contract or a maritime service is whether it is to be substantially performed or rendered on navigable waters. If it is, then it is of maritime character, and the court of admiralty has jurisdiction. If it is not, then jurisdiction is disclaimed. That a very substantial part of the service to be performed under these contracts was to be performed upon navigable waters is not to be disputed. The loss happened upon these waters, while such service was being rendered, and under the construction of the contracts before given, and by virtue of the principle last stated, I cannot doubt that a court of admiralty has jurisdiction of the subject-matter of this suit.

Second. To what was the stranding of the propeller attributable? Did it arise solely from a peril of navigation, or was there co-operating negligence? (Upon a review of the facts which this question involved, it was held by the court that there was negligence on the part of the master and mariners who were navigating the vessel at the time, and that although a peril of navigation was the proximate cause of the loss, the remote cause was such negligence.)

The last, and more difficult and interesting question remains to be considered, namely: Is the respondent entitled to the benefit of the insurance in this case?

The various grounds upon which libellant urges its right to recover are:

1. That the loss in question was occasioned by the negligence of the carrier; that therefore the shippers had a right of action against the carrier, notwithstanding the stipulations in the bills of lading limiting its liability; that the insurance company having paid the amount of the losses to the shippers, became subrogated to their rights, and may therefore maintain its action against the carrier for the amount so paid, and the carrier cannot avail itself of the clause in the bills of lading giving to it the benefit of the insurance, the loss having resulted from its own negligence.

2. That it is not proven that the shippers affirmatively assented to the limitations of liability and special provisions contained in the bills of lading, and hence that such limitations and provisions are not part of the contract of shipment.

3. That the clause in the bills of lading limiting liability, including the provision in question, are wholly void, because of a statute of the state of Illinois [4]—where the contracts were made—which makes it unlawful for a common carrier to limit its common law liability safely to deliver property, by any stipulation or limitation expressed in the receipt given for such property.

The principal propositions urged in reply by respondent are:

1. That it clearly appears from the proofs, that the bills of lading, with all the clauses and stipulations which they contain, constituted the contracts between the carrier and the shipper under which the grain was shipped.

2. That the statute of Illinois referred to does not apply to bills of lading issued on account of shipments as in this case, and that in any event it is not controlling upon this court, the question involved being one of general commercial law.

3. That the stipulation giving to the carrier the benefit of insurance is valid, even though the carrier can not relieve itself from the consequence of its own negligence; that whether the losses in question arose from negligence or not, after the insurance company made payment to the shippers, they, the shippers, had no right of action against the carrier; that therefore there was no right to

[4] Rev. St. Ill. c. 27.

which libellant could be subrogated, and as a consequence, that no action will lie against respondent; in other words, that the stipulation in question displaced or destroyed the right, which might otherwise exist, of the insurance company on payment of the insurance, to proceed against the carrier for reimbursement.

Without going at large into the proofs upon the question, it will suffice to say that I think the bills of lading should be regarded as the contracts between the shippers and carrier under which the grain was shipped. It is true that the decisions in Illinois enunciate a very strict rule in relation to proof of affirmative assent to special conditions in such contracts,—a rule much stricter than is laid down by the supreme court of this state and some other courts.

But the proofs here are very satisfactory as to the shippers' understanding and knowledge of the character and contents of these bills of lading, and as to their acceptance of them with such knowledge of their character. The case is much stronger in that regard upon the facts, than Michigan Cent. R. Co. v. Mineral Springs Manuf'g Co., 16 Wall. 318, in which it was held that an unsigned general notice, printed on the back of a receipt, does not amount to a special contract limiting common law liability, though the receipt with such notice on it may have been taken without dissent. In this state it has been held that when such a contract is in the custody of the shipper, its due delivery and his assent to its terms, are to be presumed, and that the burden is upon him to obviate these presumptions by proof. But it is not, I think, necessary to go thus far in order to sustain these bills of lading as contracts assented to by the shippers. By affirmative evidence it is sufficiently shown that they were understood and accepted as contracts under which the shipments were made; and what transpired between the shippers and the agent of the carrier prior to the delivery of the grain on board, and the execution of the bills of lading, was evidently understood by the parties as only the usual preliminary negotiations and understanding in relation to the shipments, which were to be followed by consummated contracts in the form of bills of lading.

There has been much controversy in the courts as to the power of a common carrier to limit its common law liability by special contract. Since the cases of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, and York Co. v. Central R. Co., 3 Wall. [70 U. S.] 107, the question, dealt with independently of statutory regulation, has not been an open one in the federal courts; and the right of the carrier to restrict or diminish his general liability by special contract, has been re-affirmed in Michigan Cent. R. Co. v. Mineral Springs Manuf'g Co., 16 Wall. [83 U. S.] 318, and in Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174.

It is equally well settled that a common carrier cannot lawfully stipulate for exemption from responsibility for the misconduct or negligence of himself or his servants. New York Cent. R. Co. v. Lockwood, 17 Wall. [84 U. S.] 357; Bank of Kentucky v. Adams Exp. Co., supra.

Upon finding the fact of negligence in navigating the vessel, it follows, therefore, in the case at the bar, that the owners of the cargo could have recovered against the carrier, notwithstanding the limitations of liability expressed in the bills of lading.

An insurer of goods lost while in course of transportation by a common carrier is entitled, after payment of the loss, to recover what he has paid by suit against the carrier. No right, in the absence of special contract to the contrary, is better established. The legal principles upon which this right rests are most clearly stated in Hall v. Railroad Cos., 13 Wall. [80 U. S.] 370, by Mr. Justice Strong, who says: "It is too well settled by the authorities to admit of question, that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner."

In Hart v. Western R. Corp., 13 Metc. (Mass.) 105, Chief Justice Shaw states the principle as follows: "Now, when the owner, who prima facie stands to the whole risk and suffers the whole loss, has engaged another person to be at the particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common

benefit, to the assurer. It is one and the same loss for which he has claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss pro tanto, by a deduction from and growing out of, a legal provision attached to, and intrinsic in, the subject insured. The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company, by his right at law, or to the insurance company, in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the cestui que trust may sue in the name of the trustee, and his equitable interest will be protected."

Now, were it not for the stipulation contained in the bills of lading, giving to the carrier the benefit of the insurance, there would be no question of libellant's right to recover. And the precise point of inquiry is, what is the effect of that stipulation?

The perils insured against were generally "of the seas," and after enumerating various specific perils, such as fires, enemies, jettisons, pirates and the like, the policy provides that the insurance company "takes upon itself all other perils, losses and misfortunes that * * * shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof."

The question under consideration was to great extent argued by the learned counsel for libellant, upon the theory that to give to the carrier the benefit of the provision relating to insurance, would be to give effect to the limitation of its common law liability for the grain and its safe delivery contained in the bills of lading, even as against the carrier's own negligence. I do not perceive a necessary connection between the clause in the bills of lading limiting liability for safe delivery of the cargo, and the clause giving to the carrier the benefit of the insurance, nor that it follows that because the former cannot exonerate itself from liability for negligence, the latter clause may not be held valid. To give the carrier the benefit of the insurance it must be liable to the shipper for the loss. Liability must exist as a pre-requisite to a claim to the insurance. The agreement is, that if the carrier shall be liable for the loss, then he shall have the benefit of the insurance. And if it be correct to say that the validity of the stipulation relative to insurance is not dependent upon the validity of the clause which attempts to limit liability for the property, or, in other words, that the effect of the stipulation relating to insurance is not to defeat the obligation of the carrier to indemnify the owner against loss occasioned by its negligence, then it would seem that the Illinois statute does not bear upon the right of the carrier to contract with the shipper for the benefit of the insurance.

That statute provides: "Whenever any property is received by a common carrier to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." [5]

As will be observed, the prohibition here is against any limitation of common law liability safely to deliver the property; but this does not involve the right to stipulate for the benefit of the insurance in case of loss and liability. These clauses in the bills of lading are to be read as the application to them of legal principles requires, and so reading them, the provisions would in terms be that the carrier "shall not be liable * * * for loss or damage by fire, collision or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals," unless such loss or damage shall be occasioned by the negligence of said Anchor Line, its agents or servants. And, "in case of any loss, detriment or damage done to or sustained by any of the property hereby receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred * * * the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

Admitting, then, that the loss of the cargo resulted remotely from the negligence of the carrier, the question recurs, can that part of the contract which gives to the carrier the benefit of the insurance be enforced as a valid agreement? In the absence of such agreement, on payment of the whole loss by the insurer, the insured would hold their claim against the carrier in trust for the insurer. And if the agreement be valid, I think it follows that on payment of the loss by the carrier, the insured would hold their claim against the insurer in trust for the carrier; and further with this agreement in force, on payment of the loss by the insurer, the insured would have no right to go against the carrier, because the loss

[5] Rev. Stat. Ill. c. 27.

would be satisfied with moneys to which the carrier, as between it and the insured, would be entitled. It is settled by controlling authority that a common carrier has an insurable interest in the goods he carries, and can contract for the benefit of insurance effected by the owner. Van Natta v. Mutual Security Ins. Co., 2 Sandf. 490; Chase v. Washington Mut. Ins. Co., 12 Barb. 595; Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 177; 2 Pars. Ins. 200.

In Savage v. Corn Exchange Ins. Co., 36 N. Y. 655, it was held that, a common carrier being bound to make safe delivery of goods at the place of destination, such obligation, together with his claim for advances and freight, gives him an insurable interest to the extent of the fair value of the property insured. Coming, then, directly to the point in issue, a test of the validity of this stipulation would seem to be, could the carrier recover for a loss happening confessedly through his negligence, upon a contract of insurance, insuring against perils of the sea? Upon this question, counsel for libellant lay down the proposition that negligence of a carrier or ship owner, if it can be insured against at all, must be made the subject-matter of express contract which cannot admit of a reasonable doubt. Formerly, this was a vexed question in the courts, but it is now fully and firmly settled by both English and American decisions, that a loss whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriter, although the remote cause may be traced to the negligence of the master and mariners. Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 222; Columbia Ins. Co. v. Lawrence, 10 Pet. 507; General Mut. Ins. Co. v. Sherwood, 14 How. [55 U. S.] 351; Copeland v. New England Marine Ins. Co., 2 Metc. (Mass.) 432; and cases cited in these decisions.

In the case of General Mut. Ins. Co. v. Sherwood, 14 How. [55 U. S.] 351, it was held that damages decreed by a court of admiralty to be a lien on the vessel insured, by reason of a collision produced by the negligence of those who navigated the vessel, cannot be recovered under a policy insuring against the usual perils and including barratry. The facts were peculiar. The plaintiffs in the action were the owners of a brig. Through the negligence of the master and mariners of the brig, another vessel was injured. In proceedings on the part of the injured vessel, the brig and her owners were adjudged liable for the damages, and the decree pronounced the collision to have occurred in consequence of the negligence. On payment of the decree, the owners of the brig sued the insurance company on a time policy, and set up the facts, expressly alleging the negligence as the reason why they had paid the damages, and it was held they could not recover. It was therefore not the case of the insurers going behind the cause of loss and defending, by showing that this cause was produced by negligence, which Mr. Justice Curtiss says could not be done, but it was the case of the insured himself going behind the collision and showing, as the sole reason why he had paid the loss, the negligence of his own servants and agents.

In Copeland v. New England Marine Ins. Co., 2 Metc. (Mass.) 432, Chief Justice Shaw, in a very exhaustive opinion, containing a lengthy review of the authorities, held that "a vessel which is insured on a voyage out and home, and which departs with officers and a crew competent for the voyage, does not become unseaworthy by reason of the master's becoming incompetent, at the foreign port, to command the vessel; and if the vessel sails from such port under his command, and is lost on the homeward passage, the underwriters are not discharged, although the loss may have been caused by the master's incapacity. And although, in such case of the master's incompetency, it is the duty of the mate to take command of the vessel, and although he has a right to resort to all lawful means to establish himself in the command, yet if from want of judgment, or even from culpable negligence, he omits so to do, and the vessel sails under the master's command, and is stranded, the underwriters are not discharged." And in the opinion there is this enunciation of the law which is specially pertinent: "It is very clear in this case, that the immediate cause of the loss, was standing in the night time, which is one of the perils insured against, and the case supposed is, that this was occasioned by the default of the mate in not assuming the command. The default must consist, either in a want of judgment in perceiving and determining that the master had become so deranged or incapacitated as to authorize and require him to interpose, or in negligence in the performance of his duty, when the case occurred. Such a case may occur in every voyage, and must be considered as one of the contingencies incident to navigation. It may often present questions of great difficulty, in acting on which, mistakes, on the part of the officer second in command, may occur. But we cannot perceive why the duty of the mate was not of a purely official and professional character, growing out of his powers and the relation in which he stood as an officer, and not devolving on him as the agent of the owners, in any other sense than that in which pilots and all other officers and mariners are their agents. They are vested with certain powers to be exercised for the use and benefit of owners, freighters, underwriters, and all others who are directly or remotely interested in the vessel and voyage. I cannot distinguish the negligence of the mate, in the case supposed, from his failure in the performance of any other duty as a nautical man. Suppose a case of a loss by stranding, and it could be satisfactorily proved, that if, in a particular

emergency, sail had been made or taken in, if an anchor had been carried out or the vessel put on another tack, the disaster might have been avoided, it would indicate a similar mistake of judgment or neglect of duty on the part of the commanding officer as that in the case supposed. In both cases, it is a mistake or neglect of his peculiar and appropriate duty as an officer and seaman. For the performance of these duties, we are of opinion that the owners, as between themselves and the underwriters, are not responsible. A contrary doctrine would lead to questions of great difficulty, involving numerous questions of fact of very difficult proof, as to the skill and seamanship of all the nautical measures taken in the whole conduct of the voyage. Besides, these mistakes of judgment and instances of negligence are incident to navigation, and constitute a part of the perils that attend it; and they can no more be restrained, prevented, or guarded against, by the owners, than by the underwriters. The most cautious foresight can only enable owners to provide a competent crew of officers and seamen at the commencement of the voyage. What reasons, then, are there of justice or policy, what considerations growing out of the nature of this contract, or the relations of the parties, which should prevent the owners from insuring themselves against this peril?"

Stranding is a peril of the sea. In the case at bar, the stranding of the vessel was the proximate cause of the loss. The remote cause was the negligence of the master and mariners in navigating the vessel. The law being as stated, it follows, that if the case were that of insurance in favor of the carrier against the perils of the sea, the insurer could not go behind the proximate cause of the loss and defeat a recovery by showing the negligence of the master and crew of the vessel. We have, then, this state of case: The carrier made itself liable for the loss of the cargo by a peril of the sea, if negligence co-operated in causing the loss. The owners of the cargo contracted with the carrier that if loss should occur for which liability arose, the carrier should have the benefit of any insurance on the property. The shippers then contracted for insurance against the usual perils. There was a loss for which the carrier was primarily liable to the shippers. The proximate cause of the loss was a peril of the sea. It was a loss, therefore, which the carrier could directly insure against, and the fact that its remote cause was negligence would not relieve the insurer. Why could not the carrier secure, by the indirect way of a contract with the shippers, in case of its liability for a loss, the benefit of their insurance, if it could by direct contract with the insurer have obtained indemnity against loss caused proximately by a peril insured against, but remotely by its own negligence? If it be said that the rights of the insurance company ought not to be affected by a contract between the shipper and the carrier, I think it may be answered that the company put itself in privity with such contract by its contract of insurance while the property was in transit; and that it dealt with the insured property, subject to the terms of the bills of lading, which gave to the carrier the benefit of the insurance in case of loss for which the carrier should be liable. The case does not show that any fraud was intended by the carrier in making this stipulation with the shippers. The agent of the insurance company was also the agent of the carrier, and the same person issued the certificate of insurance and made the contracts of shipment with the shippers. And in the light of all the facts and the legal principles which I have endeavored to state, I cannot bring my mind to any other conclusion than that this was a lawful and valid contract. If this be so, then upon receiving payment for their losses from the insurer, the right of the insured to proceed against the carrier was determined, and no such right remained to which the insurer could be subrogated, because necessarily the insurer must take the rights of the owners of the cargo subject to all agreements and equities between the insured and the carrier. Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173.

In the case last cited, the court of appeals of New York held that a common carrier may, by contract with the owners, secure to himself, in case of damage or loss to the goods for which the carrier would be liable, the benefit of any insurance to be effected by the owner, and that this abandonment to the insurer against marine perils, of goods damaged during their transportation, under such a contract, and payment of the loss does not give to the insurer any right of action against the carrier.

This case was much criticised upon the argument, but I do not see why, upon principle, it is not sound. It is true that the case did not present the element of negligence on the part of the carrier, and the court alludes to this fact in the opinion; but I think only for the purpose of calling attention to the point that not even primary liability of the carrier for the loss of the goods was in that case shown. But a careful reading of the opinion, I think, shows that even though such liability were established by direct proof of negligence, it was the view of the court that the contract was valid; for, after alluding to the absence of the element of negligence, the opinion proceeds: "But it is enough that the plaintiffs took the rights of the owner of the goods subject to all agreements and equities between the insured and defendants; and that the contract between them, being valid, protects the latter against a recovery by the plaintiff."

In conclusion, I must hold that the provision in the bills of lading giving to the carrier the benefit of insurance on the property was valid, and that no right of subrogation

accrued to libellant, since the insured, on payment to them of the insurance, had no right of action against the carrier.

[On appeal to the circuit court this decision was affirmed. Case unreported. An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 117 U. S. 312, 6 Sup. Ct. 1176.]

PHOENIX INS. CO. (HALLET v.). See Case No. 5,958.

PHOENIX INS. CO. (HURTIN v.). See Case No. 6,941.

PHOENIX INS. CO. (HYDE v.). See Case No. 6,973.

PHOENIX INS. CO. (IDE v.). See Case No. 7,001.

PHOENIX INS. CO. (JOHNSON v.). See Case No. 7,405.

PHOENIX INS. CO. (McKIM v.). See Case No. 8,862.

PHOENIX INS. CO. (SCHOLLENBERGER v.). See Case No. 12,476.

PHOENIX INS. CO. (VALE v.). See Case No. 16,811.

PHOENIX INS. CO. (VAN AVERY v.). See Case No. 16,829.

PHOENIX IRON CO. (KEYSTONE BRIDGE CO. v.). See Case No. 7,751.

PHOENIX MUT. LIFE INS. CO. (BROOKS v.). See Case No. 1,960.

PHOENIX MUT. LIFE INS. CO. (CONVER v.). See Case No. 3,143.

PHOENIX MUT. LIFE INS. CO. (SINCLAIR v.). See Case No. 12,896.

PHOENIX MUT. LIFE INS. CO. (WATTS v.). See Case No. 17,294.

PHOENIX MUT. LIFE INS. CO. (WHITCOMB v.). See Case No. 17,530.

PIATT (BROWN v.). See Case No. 2,026.

Case No. 11,113.

PIATT et al. v. McCULLOUGH.

[1 McLean, 69.] [1]

Circuit Court, D. Ohio. Dec. Term, 1829.

ATTORNEY AND CLIENT—PRESUMPTION OF AUTHORITY—EXECUTOR—SALE OF LAND—DEFECTIVE TITLE—WILLS—EXECUTION—POWERS.

1. An application may be made by an executor or administrator to the court of common pleas, by attorney, for a sale of real estate.

2. A schedule of the debts must be exhibited, &c. but the application for the sale may be by motion or in writing.

3. Where these proceedings have been carried on by an attorney, the court will presume the sanction of the executor or administrator, unless the contrary appear.

[Cited in Wall v. Bissell, 125 U. S. 390, 8 Sup. Ct. 983.]

4. The court have no power to order a sale except on the application of the executor or administrator.

5. Unless a will is required to be sealed, it is good without seal.

6. Cannot require an instrument to contain any requisites, to its validity, which the statute does not require.

7. A power of attorney not under seal, will not authorize the attorney to execute a deed.

8. A court of chancery will never aid a defective power; but it will relieve from a defective execution of a power.

[Cited in Snow v. Perkins, 2 Mich. 238. Cited in brief in Ferre v. Board of Foreign Missions, 53 Vt. 166.]

9. A bona fide purchaser at an executor's sale of land, where the consideration has been paid, may apply to chancery for a title.

10. The payment of the consideration, the possession and improvement of the property, in such a case, will rebut any presumption, from lapse of time, that there has been an abandonment of the contract.

[This was a bill in equity by the heirs of Piatt and others against the heirs of McCullough.]

Caswell & Starr, for complainants.
Mr. Hammond, for defendants.

OPINION OF THE COURT. This bill is brought to perfect a title arising under a sale of lot 42, in the city of Cincinnati, by an order of court, on the application of the executor of the last will and testament of the ancestor of the defendants. The relief prayed for is resisted on the following grounds: (1) The will not being sealed, is void. (2) It has never been proved. (3) Letters testamentary were never granted. (4) The sale being invalid, equity will not aid. The will bears date the 7th of March, 1803, and was signed, though not sealed, by the testator. He died the same year.

The ordinance of 1787 for the government of the territory north-west of the River Ohio, regulates the descent of real and personal property, which provision was to remain in force until altered by the legislature of the district. And it provides, "that until the governor and judges shall adopt laws as therein after mentioned, estates in the said territory may be devised or bequeathed, by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age) and attested by three witnesses." On the 1st October, 1795, a "law concerning the probate of wills, written or nuncupative," adopted by the governor and judges from Pennsylvania, took effect. This law provides, "all wills in writing or whereby any lands, tenements, or hereditaments, have been, are, or shall be devised (being proved by two or more credible witnesses upon their solemn oath or affirmation, or by other legal proof in the territory, &c.) shall be good and available in law for the granting, conveying and assuring of the lands or hereditaments thereby given or devised, as well as the goods and chattels thereby bequeathed." This act was in force when the will under consideration was executed, and the ques-

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

tion is presented whether a seal which the ordinance renders essential to the validity of such an instrument, is required under this law. It is contended that the act of 1795 refers wholly to the proof of wills, and does not dispense with the regulation of the ordinance, which requires a will to be signed and sealed by the testator, and that he shall be of full age. By looking into the act of '95 it will be found not to relate wholly to the proof of wills, but was designed to regulate the manner in which they may be made. In the third section it is provided in what manner a verbal will may be made, and how it shall be proved. The first section not only provides how a will in writing shall be proved, but declares that such a bequest shall be valid, both as to real and personal property. This act, therefore, covers the whole ground. It was not designed as amendatory to the ordinance, if indeed it were competent for the governor and judges to amend it.

This provision of the ordinance was designed to be temporary, and was to be abrogated so soon as the governor and judges should adopt laws on the subject. The law of descents was intended to be more permanent, for it was to remain in force until altered by the legislature of the district. The adopted law was a substitute for the provision in the ordinance in relation to wills, and the argument that this construction cannot be given to the act, because its provisions do not extend to all the requisites of the ordinance, is believed not to be sound. Why adopt a law in substitution of the ordinance, if all the provisions of the latter must be retained? The governor and judges had only power to adopt laws from other states, not to legislate. They could not annex a repealing clause, and thereby give a construction as to the extent of the adopted act. But when the power of selection was exercised, the selected law became the law of the territory, and, consequently annulled the temporary regulation of the ordinance on the same subject. The act of '95 requires a will to be in writing, but a seal is not necessary to its validity. Such has been the uniform construction of this law, in the state of Pennsylvania. Such construction is presumed to have been known to the governor and judges at the time the law was adopted. And if this were not the case, the decisions of the courts of Pennsylvania would be adverted to, as the highest authority in settling the construction of this statute. But the language of the act on this point is too plain to admit of doubt. It would do violence to all known rules of construction to annex any forms to an instrument, as essential to its validity, which are not specially required by the statute. As this act has been found to contain adequate provisions to regulate the making, as well as the proof, of wills in the state of Pennsylvania, no very strong argument can be drawn, from its presumed defects, as applicable to the territory. The power to make a will is not touched by this law; it remained where the law had before placed it.

Has the will been sufficiently proved? is the next point for consideration. It appears that the 21st of November, 1803, before two associate judges proof of the execution of the will was attempted to be made. The three witnesses to the will appeared and being sworn stated, that they saw the testator sign, publish and declare the instrument of writing referred to, to be his last will and testament, and that he was of sound mind and memory at the time, and that they subscribed their names as witnesses. Afterwards "on the 7th March, 1804, the witnesses named in the will appeared in open court (three associate judges being present) and were duly sworn as above, that they 'see' (the word used) the testator sign the will as his act and deed," &c. And on the same day the court accepted the renunciation of D. Zeigler, one of the executors named in the will. The will, it seems, was recorded as the law requires; and Reeder, the acting executor, commenced his duties under it.

It is objected that two judges before whom the will was at first attempted to be proved, did not constitute a court for that purpose; as the presence of three judges is necessary. This will not be contested. But it is farther urged that the subsequent proceedings on the 7th March, 1804, do not amount to a probate of the will. That there is no adjudication upon the proof, no establishment of the will. And that there is no room for presumption, as the record shows all that was done. That the record of the proceedings the 7th March as well as on the 21st November, is extremely informal must be admitted. In the certificate of the 7th, there is a reference to the previous proceedings before the two judges, where it is stated, "that the witnesses were sworn as above, and that they saw the testator sign" &c. Taking the whole proceedings together these facts are established. That the witnesses to the will were examined in open court, touching its execution. That one of the executors named in the will relinquished his right of acting under it. That it was recorded as the law requires, and that the acting executor proceeded to discharge his duties, which is shown by his exhibits to the court, who recognized him in his capacity of executor.

These facts can leave no doubt upon the mind, however informal the record may be, that the will was proved to the satisfaction of the court, and ordered to be recorded, and that the rights of the acting executor were fully recognized. This question it must be recollected arises incidentally, and is not made between the heirs and the executor, and, under the circumstances, may not this court presume that all the essential requisites of the law were complied with by the court of probate, though the record be informal? There is nothing to rebut this presumption. All the facts go to strengthen it.

Has not the doctrine of presumption been carried much farther than this, in presuming the existence of matters of record in support of titles under sheriff's sales? If the will had not been satisfactorily proved, could it have been recorded? Would the court have suffered one of the persons named as executor to relinquish his right of acting before the proof of the instrument? Without such proof would they have recognized the acting executor in that capacity? These answers must all be in the negative, and they present a state of facts totally incompatible with any other presumption than the one which is drawn. This court are therefore sustained in the conclusion that the will was proved to the satisfaction of the court of probate, which had exclusive jurisdiction over the subject.

The next objection to be considered is, that letters testamentary were never granted. It is contended that the letters testamentary form the foundation of the executor's authority, and that without them he cannot act. That the fact of his having so acted, cannot be sufficient, and that the grant of letters must be shown by record evidence. The right of the executor to act, it is insisted on the other side, is derived from the will after it has been legally proved and not from any investment of power by the court distinct from the will, and that the letters testamentary are evidence of this right, and also of his having been qualified. If the letters were essential may not their existence be presumed? Or rather does not such a presumption necessarily arise from the other facts in the case. The will has been proved; one of the persons named as executor refuses to act, the other person named takes upon himself the duties of the office, and is recognized in his official character by the court. Could these facts exist, if the court had not granted to Reeder whatever was necessary to authorize him to act as executor? It is not necessary that the letters testamentary should be recorded, and if, in technical language, an award of such letters cannot be found on the record, the proceedings show facts which could not exist, unless such an award had been made, though the entry has been omitted by the clerk, the existence of the letters therefore may well be presumed. Indeed it is enough to establish the authority of the executor, to show that the court in various official acts recognized him as acting in that capacity.

The objections to the sale will be next examined. These are: (1) That personal application to the court for the order of sale was not made by the executor, nor was the sale made by him. (2) That time was given for the payment of the purchase money by Meek, who could have no authority to act in the case. (3) That Wade, who executed the deed to the purchaser as the attorney of the executor, being authorized to act by an instrument not under seal, could not make a valid deed. (4) That the object of the bill being, to aid a defective power, and not a power defectively executed, it must be dismissed.

Before these objections are examined, it may be proper to consider the ground assumed by the complainants' counsel, which is, that between the heirs and an innocent purchaser for a valuable consideration, the court cannot, for any purpose look behind the order of sale. The counsel consider this order as a judgment of the court, which cannot be incidentally touched or examined, but must stand in full force until reversed or opened in the modes provided by law. The court of common pleas, it is contended, have exclusive jurisdiction of the subject; and if the grounds of their judgment in making the order, be examined so as to affect the title of purchasers under the sale, there would be no security in such titles. That with equal propriety may the merits of a judgment, in a case at common law, be collaterally examined and rights acquired under it destroyed. Whilst the correctness of this doctrine is admitted to some extent, it is believed to be laid down in broader terms than can be sustained. It is true that the court of common pleas have exclusive jurisdiction in ordering sales of real estates of deceased persons for the payment of debts; but they can only exercise this jurisdiction in certain cases. If an individual representing himself to be an executor or administrator, when he was not so, should apply to the court and obtain an order for the sale of lands, a purchaser at such a sale could derive no valid title. The power to sell is not derived alone from the order of court, though without such order no sale can be made. The capacity of an executor or administrator must be coupled with the power conferred by the court; and this power must be exercised in pursuance of the statute, to make a legal transfer of the estate. An estate thus sold, divests the heir at law, and transfers to the purchaser all the interest in the land which the deceased had free from the claims of creditors. It is, therefore, essential to show that the court of common pleas had jurisdiction of the case, by exhibiting proof of the capacity in which the person acted, who procured the order of sale, and by whom the sale was made. It is not enough that he be designated in the order, by way of description, as executor or administrator. Such an order, in some respects, if not in all, is considered as a less solemn act of the court than a formal judgment. So far, however, as the judgment of the court is exercised, in deciding upon the propriety of the sale, from the exhibits made, it must be considered as conclusive in a case like the present, although it may afterwards appear that there was personal property sufficient to pay the debts.

The twenty-second section of the act of 1808, which defines the duties of executors

and administrators, provides, "that when it shall appear to the executors of any last will and testament that the personal estate of their testator, is not sufficient to pay and satisfy the demands against said estate, they shall make known the same to the court of common pleas, in convenient time; who, upon satisfactory proof thereof, shall grant to the executor power to proceed and settle up said estate, by selling any or all the real estate of their testator; in the same manner, and under the restrictions, as is provided in the case of intestate estates." In the thirty-second section of the same act it is provided, "that when it shall be made to appear to the satisfaction of the court, that it is necessary to sell real property for the discharge of debts, &c. they shall appoint three disinterested men to view the lands, tenements or hereditaments, to be sold, and return to the court under oath a statement of the value thereof; after which the court shall direct the executor or executors, &c. to proceed to sell, either the whole or a part, as they may think proper, of such real estate, after giving notice of the time and place of sale, &c. and such lands shall be sold to the best advantage, either for cash or on a limited credit."

By the record it appears, that in December term, 1809, of the court of common pleas, a petition was presented, setting forth that the personal property of McCullough's estate was insufficient to pay the debts, and praying that certain lots in the town of Cincinnati might be ordered to be sold, according to the statute. The petition purported to be by the acting executor of the estate, though it was signed by Alexander A. Meek, his attorney in fact. With this petition was exhibited a schedule showing a large amount of debts due by the estate. The petition being read and heard, was granted by the court. And afterwards, "in the term of April, 1810, on motion to the court and an account exhibited for the sale of lot 42, to satisfy demands against the estate of McCullough, deceased, the court grant an order for the sale of said lot 42, containing four acres; and the court appoint three appraisers, &c. who afterwards returned an appraisement under oath; which fixed the value of lot 42 at one hundred dollars."

It is objected that the power to sell in this case was derived exclusively under the statute, that it being a naked power, not coupled with an interest, must be executed in person and not by an attorney. Several cases are cited to sustain this position. 12 Mass. 504; 4 Johns. Ch. 368; Sugd. Powers, 175; 3 East, 410; 1 Ohio, 232; 2 Ohio, 126, 131, 392. The case in 12 Mass. arose under the statute of 1783, in that state, which authorises the courts to grant licenses to executors, &c. to sell the estate of deceased persons, &c. The court in that case on application of the administratrix, ordered a sale of the real estate of the deceased to be made by a third person. A sale by such person was decided to be void, as the statute did not authorize such appointment. The principle decided in 4 Johns. Ch. is, "that where a power is given to two executors in the will to sell certain lots of land, if, under the circumstances of the times, they should deem it prudent, a sale cannot be made by one of them, though the other authorized his co-executor to act in the case by a power of attorney." This was a case in which the testator reposed a special trust and confidence, in the discretion of both the executors named, and this trust the court decided could not be executed by one of them. In Sugden it is laid down: "Where a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another for, 'delegatus non potest delegare.' Therefore, where a power of sale is given to trustees or executors, they cannot sell by attorney." The case cited from 3 East was where in a marriage settlement there was a proviso, that it should be lawful for the tenant in tail, by deed or instrument in writing, attested by three witnesses, and to be enrolled with the consent in writing of certain trustees to revoke the old, and declare new uses; held that a deed of revocation executed by him and all the trustees in person, except one, and the consent of that one being given by means of a general power of attorney, before made by him to the settler, to consent to any such deed, as he might think proper to make, by virtue of which the deed for and in the name of such trustee was executed, is bad, though duly enrolled. In 1 Ohio, the court decided that a power given by will to executors, to sell land may be executed by one, if the other refuse to act under the will. And that an executor under such a power must sell for money only. The case cited in the 2d of Ohio, denies the right of an administrator with the will annexed in the state of Virginia, to sell lands in this state, under the will, although the administrator was authorized to sell lands by the statute of Virginia.

The cases cited and the whole current of authorities on the subject, go to show, not that the donee of a power cannot in any case execute a deed of appointment by attorney, or any other act, but that he cannot do so where, by the nature of his appointment, a special confidence is reposed in his discretion. In the nature of things he cannot transfer to another this discretion; it can only be exercised by himself, in pursuance of the confidence reposed in him. Had the power to sell the lot in question been derived from the will depending upon the exercise of the discretion of the executor, it would be clear that he could not discharge this duty by attorney. But what is the nature of the agency exercised by Meek, for the executor, in applying

for the order of sale. It is proved that he was a practising attorney in the court at the time he made the application, and it was made in the name of the acting executor. But it is not a matter of course that a rule is ordered, when applied for. An exhibit of the debts due by the estate must be made, and the court on examination determine whether a sale of the real estate is proper and necessary. The interests of the persons concerned depend upon the exercise of a sound discretion by the court, and not by the executor. He is the mere instrument of the law, in presenting the case for the consideration of the court. Here his power ceases until the court shall act. Unless they shall be satisfied on a full examination of the case, that the interests of the heirs as well as the creditors, would be promoted by a sale, the order is not made. If it be made, the land is valued and the sale is directed under certain restrictions. Can this order be applied for by an attorney of the court in the name of the executor. Must the executor apply in person, or is it essential that he should sign a petition to the court. Is any thing more than his sanction to the application required, and will not this be presumed until the contrary appear, where a regular officer of the court makes the application. The circumstance of Meek's having signed the petition as the attorney in fact of the executor, cannot divest him of the other character in which he had a right to act. Is it not the daily practice of courts of probate to recognize the right of an attorney, to appear in the settlement of estates. Are they not heard as to the sufficiency of vouchers on charges made against the estate, or payments made by the executor, on a motion to enlarge the time for a final settlement of legacies, and in short on every question which can arise in the discharge of the duties of an executor or administrator. The law has prescribed no form in which this application shall be made. Where the personal property is insufficient to pay the debts of the estate, the executor is required to make known the same to the court of common pleas, in convenient time, which, upon satisfactory proof thereof, shall grant to the executor power to sell, &c. The proof consists in a schedule of the debts, showing the demands against the estate, and the only means through which they can be paid. This exhibit may be introduced as well by motion, stating the facts, as by a formal petition or application in writing. Whatever may be the mode of application, it may be made by a counsellor of the court under the sanction of the executor, and this sanction will always be presumed, until the contrary appear. More especially would this presumption arise in behalf of an innocent purchaser at the sale, for a full and valuable consideration. Meek, it appears, was the husband of the only daughter of the deceased, to whom one third of the personal property was bequeathed, but no part of the realty; consequently, it is urged he must have been interested in having the land sold, for the payment of debts. Fraud, it is said, will never be presumed; and, in this case, there is no evidence to impeach the conduct of the attorney. It appears to have been fair and upright.

Proof is adduced showing the fact of the indebtment of the estate, as represented by the schedule when the order of sale was applied for. If fraud were alleged and proved in the obtainment of the order of sale, it would become a question whether it would affect the title of an innocent purchaser at the sale, without notice. Rights innocently acquired, under judgments or decrees fraudulently obtained, are protected. The order of sale being made by the court, and the appraisers who had been appointed having returned their valuation, there were three things to be done to make a legal sale. There was notice to be given, as the statute required; the sale, and the deed to the purchaser to be made. The fact of public notice having been given, seems not to be disputed, and it is admitted that a crier might be appointed to make the sale. The lot was sold, in pursuance of the notice, to the highest and best bidder, for a sum greatly beyond the appraisement. From the time the order for a sale was made until it was actually effected, what act was necessary to be done by the executor which could not be done by his attorney? The order for the valuation was the act of the court. Any one might transmit a copy of this order to the persons appointed, and it became their duty, which was performed, to examine the property and return their appraisement under oath. Notice of sale was given, in pursuance of the statute; a crier sold the lot, and Irwin became the purchaser. There is proof that the executors expressly sanctioned these proceedings. The law gave him no discretion in the case, except that of selling on a credit, where it was believed to be most advantageous to the estate. But it is objected, that time was given by Meek for the payment of the purchase money. It does appear that a short time was given for the payment of the purchase money, on one of the principal creditors of the estate agreeing to wait the same time for the payment of his demand. This arrangement then was the same thing to the estate as if the purchase money had been paid down. It has been paid, and the estate has derived the full benefit of the payment; and there is no pretence that the lot was sold for less than its full value. Is it essential to the validity of such a sale, that the executor should be present when the property was knocked down? The law points out the manner of the sale, and the crier is employed to proclaim the property, in the usual way. There is nothing to be done which depends upon the discretion of the executor, the terms of the sale being fixed, and although in this case Meek under-

took to vary the terms, so as to give a short time for the payment of the money, on such conditions as were as advantageous to the estate as if the money had been paid down; and nearly twenty years having elapsed, the court, on so slight a circumstance, in no way affecting the interest of the parties, or in opposition to the spirit of the statute, cannot declare the sale invalid. The deed executed by Wade to the purchaser was inoperative, because the power of attorney from the executor, under which he acted, was without a seal. This point being clear, it is unnecessary to examine what the effect of the deed would have been, if the attorney had acted under a legal power.

The last objection remains to be considered. It is contended that this is a case where chancery is called to aid a defective power, and not to relieve against accident, or a power defectively executed. No principle is better established than that a court of equity can never interpose its aid in a case where there is a defect of power. It is the province of chancery to carry bona fide contracts into effect, not to make them. Where there is a want of power in either of the contracting parties, over the subject matter of the contract, it can never be specifically enforced by a court of equity. The obligation of a contract must be reciprocal, and its terms must be understood. If therefore, in this case, there was a defect of power in the executor, to transfer the property in question, to the purchaser at the sale, the bill must be dismissed. The deed made by Wade, being inoperative, the case must stand, as it would have stood, had no attempt been made by the executor, after the sale, to execute a conveyance. Irwin, the purchaser, took possession of the lot, and afterwards conveyed it to Longworth, who conveyed it to Maddock, and he to the complainants. A continued possession under the first purchase has been enjoyed, and very valuable improvements have been made on the premises. The present value of the lot, including the improvements, is great. Many years since, the executor deceased; and the question is now presented, whether chancery will aid a purchase, after a lapse of nearly twenty years, made under the circumstances of this case; and standing upon a sale, the consideration having been paid.

The question is not whether the court can aid the defective power of Meek, but whether, if the executor were living, they would decree a conveyance from him, and he being dead, whether they will decree a release from the heirs. Suppose a bill against the executor had been filed shortly after the sale, could relief have been given? What objection could have been made by the executor? The order for the sale had been obtained by his sanction; the lot had been valued and legal notice given, and it was sold, in the usual mode, for a sum exceeding the valuation, and the money paid. All these steps were taken, if not in the presence of the executor, under his sanction. Could he have objected, or could any one have objected, that the proceedings were illegal, because the sale was made by an agent, and that such a delegation of power could not be made? To what act of the agent could the objection apply? Not to the notice, for that was legally given. Not to the appraisement, for that required no agency. Not to the crier, for it is admitted that a crier might properly be employed to make the sale. A deputy sheriff, who has no right to delegate his authority, may employ an auctioneer to make a sale, as every other officer may do. The objection could not apply to any unfairness in the transaction, or to inadequacy of price. It must have rested, if made at all, on the simple fact, that a short time was given for the payment of the purchase money, without the least prejudice to the estate, and that even this proceeding had been sanctioned by the executor. The purchase money being paid and appropriated to the benefit of the estate, would have obviated this objection, if indeed it could have been considered, at any time, of any force. Suppose Irwin, the purchaser, had refused to pay the purchase money, can any doubt exist that the executor could have recovered it by suit? Could any of the objections urged against the power, or the mode of its execution, have been set up in that case in bar of a recovery? Surely not. And is not the obligation reciprocal? Is it not binding as well on the executor as on the purchaser? Has lapse of time, or the decease of the executor, weakened the right of the purchaser; or interposed a bar to his relief? The continued possession and improvement of the property and the payment of the consideration, forbid any presumption of abandonment of the contract by the purchaser. He has, in fact, been guilty of no laches. By his purchase he is possessed of all the equitable right which McCullough had in the property, at his decease. And this right is exempt from all the claims of the creditors of the estate. In making the sale, the executor acted as the instrument of the law, which constituted him an agent of the estate. He transferred by the sale no right of his own, but the interest which the deceased in his life time, possessed in the property. When, therefore, by mistake or accident, the executor fails to transfer the legal right, no doubt can be entertained that chancery may, by requiring a release from the heirs of their legal right to the property, and they have only a mere legal right, do justice to the purchaser. This will not be aiding a defective power, but carrying into effect a contract fairly made, and which imposed on the parties reciprocal obligations.

THE COURT will decree a release from the defendants, to the premises in question. Costs to be paid by defendants.

Case No. 11,114.

PIATT v. OLIVER et al.

[1 McLean, 295.]

Circuit Court, D. Ohio. Dec. Term, 1837.

CONTRACTS — AGAINST PUBLIC POLICY — FRAUD — PLEADING IN EQUITY — PLEAS IN BAR — FORM.

1. A contract made in fraud of the law, or against public policy, is void.

[Cited in brief in Breslin v. Brown, 24 Ohio St. 568. Cited in Richardson v. Buhl, 77 Mich. 661, 43 N. W. 1102.]

2. An agreement between two or more persons not to bid at a sheriff's sale, against each other, and that one shall purchase for the benefit of all, *held* to be void.

[Cited in Hill v. Smith, Case No. 6,499.]

[Cited in Loyd v. Malone, 23 Ill. 48; Phippen v. Stickney, 3 Metc. (Mass.) 387.]

3. But sales on execution may well be distinguished from voluntary sales; and especially sales of public lands, made at public auction by the United States. That an association of individuals cannot purchase at such sales, is a novel doctrine.

[Cited in James v. Fulcrod, 5 Tex. 512.]

4. A plea in bar to a bill, must be full and complete, to every part of the bill, and the fraud charged must be denied by an answer filed in support of the plea. And if the plea does not set up a bar to every equitable allegation in the bill, it will be set aside. In this respect the rule is the same in chancery as at law.

5. The defendants in their answers may insist on the same matters, as might be, or have been, pleaded in bar.

6. Pleas in bar, which seek to avoid the equity of the case, are not to be favored. Great strictness in their form and substance is required.

In equity.

Swan & Fox, for complainant.

Wright & Worthington, for defendants.

OPINION OF THE COURT.[1] The complainant represents that about the 20th July, 1817, he, John H. Piatt (then living, but since deceased), William M. Worthington, and Gorham A. Worth, being the equitable owners of river lots, numbers one, two, eighty-six, and eighty-seven, in the United States, reserve of twelve miles square, on the Miami of Lake Erie: And that Martin Baum, Jesse Hunt, now deceased, Jacob Burnet, William C. Schenck, William Barr, William Oliver, and Andrew Mack, being owners in equity of numbers three and four, in the same reserve; it was agreed between them that the said several tracts, containing nine hundred and seventy-three acres of land, should be the common property of the several parties; that is, the one undivided half should be held and owned by the persons first named; and the other half by the persons named secondly. That it was agreed the parties should pay of the purchase money unpaid, as the same should become due to the United States, according to their respective interests. That the certificates of purchase were transferred to Martin Baum, as a trustee, to hold the land for the benefit of all concerned; which trust he accepted and continued to act under it until his decease. That afterwards the parties agreed to lay out a town on said land, which was named Port Lawrence, and laid off the same into lots, streets, &c. And for the purpose of carrying their plan into effect Martin Baum, in his capacity of trustee as aforesaid, appointed the said William Oliver an agent for said parties interested, to act for them, and gave to him a letter of instruction, dated 14th August, 1817. That said Oliver at the same time executed a bond in the penalty of $20,000, conditioned for the faithful performance of the duties of such agency. That the parties first named in July, 1817, purchased at public sale, at the rate of two dollars per acre, and paid the first payment of fifty cents per acre thereon, viz: the south-east, the north and south-west quarters of section number three, township three, in the same reserve; the certificates of which were assigned to said Baum in trust, for the purpose of paying the balance due thereon, and to hold the same for the benefit only, of the parties first named aforesaid. That part of the land above stated was purchased at very high prices—as high as $70 per acre; and from reducing the public lands by congress, and the general embarrassment in the West, the price of land was greatly reduced; and it was determined by the parties to relinquish a part of the land to the United States, under the act of March, 1821, and the act amendatory thereto, of the 27th September, 1821. That the tracts of land, numbered one and two, were relinquished by Micajah T. Williams, who was appointed an agent for this purpose by Baum, and who had purchased a part of the interest of the said Oliver. And the amount of monies paid thereon being the sum of four thousand eight hundred and seventeen dollars and fifty cents, was applied as follows: Six hundred and eighty-six dollars and seventeen cents, being half the amount of purchase money due on lots 3, 4, 86, 87, by the parties first named; and $1248 as a final payment for the same parties on the five quarter sections entered by first parties. The balance of the said half of the sum of $4817 50 being $474 60 has not been paid over or accounted for. That the above land was relinquished with the intention of buying it again when it should be offered for sale, for the benefit of the parties originally interested. And in the year 1827 a public sale was directed, by the president, and among others the said tracts, one and two. At this sale the complainant and Martin Baum, trustee, attended to purchase said lands, and would have purchased them, for the benefit of the parties aforesaid; but on the day of sale, they were not offered, by the order of the president. Said tracts were situated adjoining the southern boundary of the Michigan territory, and over which the said territory exercised jurisdiction; and the trustees of the university of Michigan located them,

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

under a law authorizing the location of lands by the university. Immediately after this selection was made, Baum, as trustee, remonstrated against it, and authorized the defendant, William Oliver, as agent of the parties interested, to negotiate with the trustees for an exchange of the land thus selected, if congress should approve of the same; and by an act of 30th January, 1830, the trustees on the 7th February, 1831, did relinquish to the said Oliver, as assignee of Martin Baum, trustee, their right to the said lands. And on the 14th March, 1831, while acting as agent, secured a patent for said tracts of land, one and two, from the United States, in his own name. That said Oliver transferred the certificates of said quarter sections so purchased by the complainant and the persons first named, without their knowledge or consent, to obtain the title of the two lots aforesaid. The above quarter sections were the south-west quarter of section three, township three, and south-east quarter and north-west and south-west quarters of section three, township three, in said reserve.

The said Oliver in the aforesaid transactions acted in his capacity of agent, under the authority from Baum the trustee. And the complainant charges that Oliver afterwards purchased a part of the lands of the university, which he transferred to it, and in the settlement of the account should be compelled to account for the same. That Oliver claims to hold the lots of land, patented to him in his own name, as his individual property, and has sold a part of the land to Micajah T. Williams, and is selling other parts, and threatens to sell the whole, &c. That Oliver and Williams disclaim the agency, and are acting in the disposition of the lands for their own interests. An injunction is prayed to stay sales, and that the said Oliver shall account, &c., and convey for the benefit of his principals the lands above stated.

Micajah T. Williams, as to so much of the bill as sets up a claim to said lots number one, two, three, four, eighty-six, and eighty-seven, or to any part of them, or the proceeds thereof, pleads in bar, that on the third Tuesday of July, in the year of our Lord eighteen hundred and seventeen, the United States were the owners in fee simple, and that the president by proclamation offered the above with other tracts of land for sale at public auction, at Wooster, in Ohio, on the said third Tuesday of July. That previous to the day of sale, the two companies named in the bill were formed with the intention of purchasing said tracts for speculation. That one of said companies consisted of Robert Piatt, John H. Piatt, William M. Worthington, and Gorham A. Worth; that the other company consisted of Martin Baum, Jesse Hunt, Jacob Burnet, William C. Schenck, William Barr, William Oliver, and Andrew Mack. That on the day of sale the companies were represented by their agents, (to wit), the first named company by Robert Piatt, and the other by William Oliver, William C. Schenck, and Andrew Mack; and before the sale the lots one, two, three, four, eighty-six, and eighty-seven, were selected by the agents of both companies, to purchase; and this being discovered, the two companies entered into an illegal combination not to bid against each other, so that the lots could be purchased at less than their value; and that the purchase so made should be made for the joint benefit of both companies. That in pursuance of this arrangement the purchase was made of the lots at less than they would have sold for, had no such illegal combination been entered into, and the certificates of purchase were made out in the name of Martin Baum, and this the said Williams pleads in bar to any relief, &c. And he further pleads in bar, that an attachment issued against the said Martin Baum, Robert Piatt, William M. Worthington and Gorham A. Worth, by the name of George A. Worth, and a judgment was rendered thereon against them by the justices of Monroe county court, for the county of Monroe, in the territory of Michigan, in October term, 1825; and an execution, or other final process was duly issued thereon, the said three quarter sections and all the right of the persons above named was duly seized and sold, and conveyed in due form of law to one Charles Noble, for the value thereof paid, and thereupon afterwards, on the twenty-second day of August, 1828, Noble conveyed the same to William Oliver, which was long after the termination of his agency aforesaid. That Oliver obtained a patent for the three quarters in his own name, and he afterwards conveyed them to the Michigan University, and without notice of any other right, &c.

The defendant Oliver filed a plea similar to the above, and denied the allegations of fraud.

The main question raised by the plea has been elaborately discussed. And it is contended if the agreement not to bid against each other was void, it being against public policy, that all the other transactions connected with such an agreement, or growing out of it are also void. In 3 Story's Laws, 1595 [3 Stat. 318], the act provides for the survey and sale of the public lands, under which the sale in question was made. There can be no doubt that any contract made in fraud of the law, or against public policy, is void. And this doctrine is well established in the authorities which have been cited. And it is equally well established that equity will never aid a party by carrying into effect such a contract. But, whether the agreement set forth in the plea is in violation of public policy or in fraud of the law, is the matter in controversy between the parties. In 3 Johns. Cas. 29, the court decided that a note given on consideration of forbearance to bid at a public auction was fraudulent and void, as against public policy. The note was given to the plaintiff in the judgment on which the

sale took place, promising to pay him one hundred and fifty dollars in addition to his judgment, not to bid at the sale. And in 6 Johns. 194, the court held an agreement void between A and B who agreed not to bid against each other; a suit being brought for the profits, by A against B who purchased. And in 13 Johns. 112, at a sheriff's sale, two agreed not to bid against each other; the agreement was held to be void. So in 4 Cow. 732, an agreement not to bid against each other, and that one should purchase for the benefit of both, was ruled to be void. And in 4 Johns. Ch. 254, the plaintiff in an execution made a contract not to bid, and the property was sacrificed, the contract was decided to be void. In Dev. 126, it was held that a deed was void in an action of ejectment, given in pursuance of an agreement between two persons, not to bid against each other on a sheriff's sale, and that one should purchase, for the benefit of both. And in 1 Story, Eq. 290, 293, the principle is laid down that where persons agree not to bid against each other at a public auction, the agreement is void. And in 2 Ohio, 504, the court held that an agreement that one individual should purchase land sold at public auction, for the tax due thereon, in behalf of a company was void, it being against public policy. And in Doug. 450, where the plaintiffs were suttlers to furnish hay, &c. agreed among themselves not to furnish, but to receive the money, being in fraud of the government, was void. And to the same effect are the cases in [Hannay v. Eve] 3 Cranch [7 U. S.] 242, 247, 248; [Brown v. Gilman] 4 Wheat. [17 U. S.] 258; [Sharpless v. Welsh] 4 Dall. [4 U. S.] 279; 1 Bin. 110; 3 Page, Ch. 154; 3 Madd. 66; 3 Mer. 468; 5 Johns. Ch. 327; 1 Hopk. Ch. 11; 16 Johns. 438; 2 Wils. 350; [Bartle v. Coleman] 4 Pet. [29 U. S.] 184.

The above cases are generally founded upon fraud, and most, if not all of them were decided under the authority of the cases in 6 Vern. 642, and Cowp. 395. And some of them are not strictly in accordance with the principle laid down in Sugd. Vend. 18, and in 3 Ves. 620, 625, note; 11 Serg. & R. 86; 2 Hammond, 182; 12 Ves. 477; 2 Brown, Ch. 326; 1 Jac. & W. 390; 4 Cow. 732, 734. But as it regards the present plea it is not necessary to decide this main point in the case. It may not, however, be improper to remark, that some of the cases cited carry the doctrine, of avoiding contracts, as against public policy, to its utmost limit. And indeed it may well be doubted whether sound policy requires the doctrine to be extended as in some other cases it has been done. To hold that individuals may not associate together for the purpose of purchasing lands of the United States, at a public sale, would be a novel doctrine, and contrary to what has been generally practised by purchasers, and that under the sanction of the government. And it by no means follows, that such associations, when entered into fairly, purchase lands lower than individuals. The exorbitant price the land sold for at the sale is proof of this. Before the present sytem of land sales was adopted, it was the practice of the government to sell large tracts of the public lands to associated individuals at reduced prices. And since the present system, it is doubtful whether there has ever been a public sale at which private associations did not purchase more or less. Arrangements are often made not to bid against an individual, who may have settled on and improved the land he wishes to purchase; and this has been no ground of complaint by the government. On the contrary, by numerous acts, congress have secured to such settlers preemption rights.

Congress have guarded against a sacrifice of the public lands, by fixing a limit, below which they shall not be sold; and at which, after the public sale, they may be entered. It may well be a matter of doubt whether these sales, being voluntary by the government, and made on a national scale and under regulations adapted to prevent frauds, come under the same rule as sales on execution. The policy of the government is not more to sell at a high price, than to afford an equal and fair opportunity to all who are desirous of purchasing, to purchase. And whether an individual shall bid against a company or not, seems in no respect to defeat the object of the government. If the competition be open and fair, there can be no ground of complaint by bidders, and none by the government. Where puffers are employed by the seller of property, in order to deceive bidders, and sell at an exorbitant price, or where property under execution is to be sold, for an individual to buy off bidders, in order to purchase the property at less than its value, is fraudulent, may be admitted; but these cases, both as it regards the circumstances and the question of policy, are distinguishable from the case under consideration. The plea no where alleges that the tracts of land were purchased by the company at less than their value; but the allegation is, that they were sold for less than they would have sold for, if the combination to purchase had not been formed. Now this is a fact which cannot be traversed, as it is not ascertainable by evidence, and on which an issue could be taken. The presumption is strong that the land was sold for more than its value, from the price at which it was struck off; and from the fact that it was afterwards relinquished to the United States by the purchasers. But the decision of this point, as before remarked, is not necessary to dispose of the plea, and it will not now be decided.

The matters set up in the plea must be a complete bar to the equity of the bill. The rule is the same, in this respect, in equity as at law. If there is any matter of equity in the bill to which the plea does not set up a bar, and which is not denied by way of answer, the plea must be set aside. 5 Madd. 47,

203, 260; 4 Johns. Ch. 693; 11 Equity Dig. 406; Chit. Eq. Dig. 806; 3 Equity Dig. 178; [Milligan v. Milledge] 3 Cranch [7 U. S.] 220; 1 Vern. 185. The bill assumes two grounds on which the equitable interposition of this court is asked: First, the public sale and the transactions growing out of it; and secondly, the three quarter sections purchased by the complainant and his associates, constituting the company first named, and which the bill alleges were transferred to Baum as trustee, for the exclusive benefit of the original purchasers. That these quarter sections were transferred without their consent or knowledge to the Michigan university, by the defendant, Oliver, in exchange for lots one and two; for which he obtained a patent in his own name. From the allegations of the bill, these quarter sections were wholly disconnected with the public sale objected to in the plea, and they are so treated in the plea. In bar of the right thus asserted, the defendants plead that an attachment was issued against the individuals composing the first company from the county court in Monroe county, in the territory of Michigan; by virtue of which these tracts of land were seized and sold to Noble, who afterwards conveyed the same to the defendant, Oliver. There is no denial in the plea that Oliver acted as agent in negotiating and effecting the exchange of lands with the university. No averment that the county court in Monroe county had jurisdiction over the lands, by the process of attachment, or that the proceedings thereon and the sale were regular. No exhibition of the record, nor any averment that the proceedings were valid. This is the more singular, as the legal proceedings took place, as stated in the plea, in the territory of Michigan; while the bill avers, as the truth is, that the land is situated in the state of Ohio. And it is asserted that the defendant, Oliver, was the plaintiff in the attachment, which fact connected with the subsequent proceedings, would seem to call for explanation. A presumption arises in favor of judicial proceedings of a court of general jurisdiction. But that presumption does not arise in this case, because the land is alleged to be in Ohio, which was sold under an attachment in the Michigan territory. Now if there were any facts going to give jurisdiction to the court in Monroe, they should have been specially alleged in order that the court might consider them; but the plea is general, and seems to take for granted that a judicial proceeding in a foreign jurisdiction, may dispose of land in Ohio. Suppose the same facts in regard to these quarter sections had been averred in a declaration, how would the plea in bar, now set up, be considered.

The plaintiffs allege that the defendant, while acting as agent, transferred and disposed of three quarter sections of land of great value, and refuses to account for the same. And the defendant pleads in bar that an attachment issued in Michigan territory, which was levied on the land, though situated within the state of Ohio; and under such attachment, the land had been sold; and that the purchaser had conveyed the same to the defendant. Is it an answer to the declaration? There is no denial of the agency—no affirmation that the judicial proceedings were before a court which had jurisdiction over the land. In 3 P. Wms., the bill charged fraud, and the defendant pleaded the statute of limitations, and denied the matters of fraud; but as there were some circumstances not fully denied, the defendant was ruled to answer. And in 3 Atk. 70, the bill charged that since the death of the intestate, the administratrix promised to pay as soon as she had effects. The administratrix pleaded the statute, and that she made no such promise; the plea was held to be too general. And in the same book (page 815) the defendant put in a plea of purchase for a valuable consideration without notice; but as the instances of notice charged in the bill were particular and special, it was held that a general denial was not good. That the denial must be as special and particular as charged.

These cases show that courts do not favor a plea in bar, which does not always present the merits of the case. And that where matters in bar are attempted to be set up, they must cover the whole equity of the bill; not by implication, but by express allegation. And if this be the rule, it is clear this plea is defective in not answering to the bill, the material allegations respecting the sale of the three quarter sections; and the averment in regard to the judicial proceedings has neither the necessary form nor substance, to constitute a bar. But the most conclusive objection to the plea is, that it is not accompanied by an answer, in support of the plea, denying the fraud charged in the bill, and other facts which show an equity in the complainant. This ground alone is fatal to the plea. 6 Ves. 594; 2 Ves. & B. 364; Mit. Eq. Pl. 298, 299; 2 Atk. 241; 1 Sim. & S. 568; 5 Brown, Parl. Cas. 561; 15 Ves. 397; Story, Eq. Pl. 497; 4 Sim. 161; 7 Johns. Ch. 214.

The overruling of the plea will not deprive the defendants from insisting on the same grounds in their answer, and in this mode the merits of the case may be more fully presented to the court. On the ground that the plea is defective it is set aside, and the defendants are ruled to answer the bill.

NOTE. Judge Burnet's name is used in the proceedings of this case; but it is understood that he has no interest in the controversy, and has taken no agency in the management of the suit.

[Subsequently, the defendants having answered, the cause came on for final hearing. An opinion was rendered in favor of complainants, but the case was referred to the master for an account of sales, money received, etc., in order to enable the court to enter final decree. Case No. 11,115. Upon reargument of the case this opinion was confirmed. Id. 11,116. After the case had been recommitted several times to the master, and reports filed by him, a final decree in conformity with the opinions above in Cases Nos. 11,115 and 11,116 was en-

tered. From this decree the respondents appealed to the supreme court. Mr. Justice Story delivered the opinion of the court, affirming the decree. 3 How. (44 U. S.) 333.]

Case No. 11,115.

PIATT v. OLIVER et al.

[2 McLean, 267.] [1]

Circuit Court, D. Ohio. Dec. Term, 1840.[2]

PUBLIC LANDS — ASSOCIATION TO PURCHASE AT SALE — EXECUTION SALE — EQUITY OF REDEMPTION — PLEADING IN EQUITY — PARTIES — TRUSTS.

1. Where a complainant files a bill, claiming for himself and others certain tracts of land purchased in partnership, to sustain the suit it is enough to show that the land was purchased by the partnership funds, without specifying the amount contributed by each partner.

2. A contract made in fraud of the law, which grows out of, or is connected with, an immoral act, will not be enforced.

[Cited in Tufts v. Tufts, Case No. 14,233.]

[Cited in Richardson v. Buhl, 77 Mich. 661, 43 N. W. 1111; Daniels v. Stevens, 19 Ohio, 244.]

3. An agreement not to bid against each other at a sale on execution is against public policy, and consequently invalid.

4. But on a sale of public lands, it is not unlawful for individuals to associate together to purchase for their joint interest.

[Cited in M'Elroy v. Swope, 47 Fed. 386.]

5. Such an association is unobjectionable, where there was no fraud, and especially where a high price was given for the land purchased.

6. A doubt may well be entertained whether a rule which, in this respect, applies to sales of chattels on execution, can apply to a public sale of lands by the United States. Great numbers attend these sales, general notice of them being required. And such restrictions are imposed as are deemed necessary to protect the public interest. They are made, too, on a national scale.

7. The reason of the rule, which forbids associations for the purpose of purchasing, &c., does not apply.

8. In this case there was no agreement not to bid against each other, but that certain tracts should be bought at the sale by the joint company.

9. That one of the parties, who had acted as agent, should shelter himself from responsibility under such circumstances, instead of promoting, would defeat the great ends of justice.

10. The transaction was sanctioned by the government in issuing certificates of purchase, and afterwards by the relief given under a special law.

11. No judgment of a state or territory can affect lands beyond the jurisdiction of such state or territory.

12. The jurisdiction of the territory of Michigan extended south to the northern boundary of Ohio as first run, and until such boundary was altered with the assent of congress.

13. This alteration of the line with the assent of congress, which extended the jurisdiction of Ohio north, cannot affect titles to real estate acquired by judicial proceedings in Michigan, within the territory over which the jurisdiction was thus changed.

14. An agency, as against the individual, may be proved by his acts and declarations. The intent with which certain acts are done may be inferred from the facts connected with the circumstances.

[Cited in brief in Bradstreet v. Everson, 72 Pa. St. 124.]

15. When a judgment is used as evidence, its regularity cannot be inquired into.

[Cited in U. S. v. Walsh, 22 Fed. 648.]

[Cited in Holland v. Jones, 9 Ind. 496.]

16. At common law an equity of redemption is not liable to be sold on execution, nor by attachment.

[Cited in Hill v. Smith, Case No. 6,499.]

17. It is made liable in some states by statute. In the territory of Michigan, an equity, vested in an agent for certain purposes by the cestui que trusts, the fee being in the government, cannot be levied on and sold by an attachment against the agent.

18. A purchaser at the sale on the attachment, under such circumstances, can acquire no right. And an assignment by the trustee to the purchaser, being for no other consideration than the sale by attachment, can convey no interest. The proceedings on the attachment being invalid, the assignment, as a consequence of those proceedings, must be equally invalid.

19. This matter is properly examinable in equity. And although on the assignment of the certificate of purchase, patents may have been obtained by the assignee, his right may still be inquired into.

20. The assignee of an equity takes it generally subject to all equities. This is especially the case, where the assignee had a full knowledge of the interest assigned.

21. All persons materially interested in the subject matter of the suit must, if within the jurisdiction of the court, be made parties.

22. There are some cases where a trustee may sue, without naming the cestui que trusts, but the cestui que trusts must be named, where the object is to divest them of title.

23. In general, the cestui que trusts must be made parties.

24. If the demand existed on the trust fund before the trust was created, a suit may be sustained against the trustee only.

25. Where the parties are so numerous as not to be inserted conveniently in the record, suit may be maintained in the names of a part for the whole.

26. In a proceeding in equity, to foreclose a mortgage given by the trustee, the cestui que trusts are necessary parties. And a sale of the premises, where the cestui que trusts are not made parties, does not bind their interests.

27. The assignment of the certificates of purchase for the land sold under the mortgage by the trustee, by which the purchaser, as assignee, obtained patents, being made under the mortgage sale, cannot bind those who were not parties to the suit.

[Cited in Sheldon v. Sheldon, 3 Wis. 708.]

28. After the execution of the mortgage, the trustee had no power to sell.

29. It is a well established principle in equity, that the act of a trustee shall not prejudice his cestui que trust. If a trustee purchase the estate of his principal, the sale, as a matter of course, is set aside unless ratified.

30. If a trustee purchase land with the trust fund, and take the conveyance in his own name, in equity the land is held as a resulting trust.

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

[2] [Affirmed in 3 How. (44 U. S.) 333.]

31. Whatever acts are done by the trustee, are presumed to be done for the benefit of the cestui que trusts, and not for the benefit of the trustee.

32. Wherever the trust fund is converted into another species of property, if its identity can be traced, it is liable in its new form to the cestui que trust. In such a case the cestui que trust may exercise his option either to take the property or pursue some other remedy. This doctrine applies to all persons who act in a fiduciary character.

33. An individual who has an interest in certain real estate, for the management and sale of which a trustee is appointed, must be presumed to know the nature of his title and the acts of the trustee. He cannot, having purchased the estate from the trustee, set himself up as an innocent purchaser without notice.

34. The statute of limitations does not run against an established trust.

[See Miles v. Thorne, 38 Cal. 335.]

35. Nor will lapse of time, except under extraordinary circumstances, operate in a case of trust.

In equity.

'OPINION OF THE COURT. At December term, 1837 [Case No. 11,114], this case was before the court on pleas in bar, filed by the defendants, Oliver and Williams. These pleas were overruled, and answers being filed, the case now stands on its merits. In the summer of 1817, the complainant, in connexion with John H. Piatt, William M. Worthington, and Gorham A. Worth, formed an association to purchase lands of the United States, at a public sale, which was shortly to take place at Wooster, in this state—and the complainant was appointed the agent of the company, to attend the sale for that purpose. Another association, consisting of Martin Baum, Jesse Hunt, Jacob Burnet, William C. Schenck, William Barr, William Oliver and Andrew Mack, was formed for the same object—and William Oliver and William C. Schenck were appointed its agents to attend the sale. Before the sale took place, it was discovered that both companies were desirous of purchasing the same tracts of land, and the agents agreed that they would purchase tracts one, two, three and four, at, and including the mouth of Swan creek, in the United States reserve, at the foot of the rapids of the Miami; and, also, numbers eighty six and eighty seven, on the other side of the river, opposite the mouth of Swan creek, for the joint benefit of both companies; each company to have one-half of the lands purchased, and to pay at the same rate. Numbers eighty six and eighty seven were bid off by Oliver, and the certificates of purchase issued to him. The other tracts were bid off by the complainant, and the certificates of purchase were issued in the names of the association represented by him. At the same sale, the complainant, in behalf of his company, purchased the northwest quarter of section two, township three, the southwest quarter of the same section, the northwest quarter of section three, township three, and, also, the southeast and southwest quarters of the same section, in said reserve; and one fourth of the purchase money on each tract being paid, certificates of purchase were made out in the names of the company. And the other agents purchased for their company, at the same sale, other tracts of land. On the return of the agents to Cincinnati, their acts were ratified by both companies. One company was designated the Piatt Company, the other the Baum Company; and the union of both, in regard to the lands jointly purchased, was called the Port Lawrence Company. The joint, or Port Lawrence Company, having made their purchase with the view of laying out a town, to be called Port Lawrence, appointed Baum a trustee, and authorized him to sell lots, and do other things in relation to his agency, for the benefit of the company. On the 14th of August, 1817, Baum appointed Oliver his attorney, to sell lots in the town to be laid out, receive the money, and give certificates of sale, in the nature of title bonds, to the purchasers; and he, in association with William C. Schenck, was authorized to lay out the town. Baum, and, also, the proprietors, gave to Oliver a letter of instructions in relation to the plan of the town, the sale of the lots, &c. By the conditions of sale, one fourth of the purchase money was to be paid down, and the residue in three equal annual payments. At the sale of lots, the sum of eight hundred and fifty five dollars and thirty three cents was received by Schenck, for which he was to be accountable to Baum. At the sale, Oliver purchased lots 223 and 224, an undivided half of which he afterwards conveyed to Baum, and they erected a warehouse and other improvements on them. In August, 1818, he sold one half of his interest in the Port Lawrence Company to William Steele and William Lytle; and in March, 1819, he sold the residue of his interest to Micajah T. Williams, one of the defendants, and his partner Embre. By the reduction of the price of the public lands, and the pressure of the times, the Port Lawrence Company were under the necessity of relinquishing to the United States tracts one and two, having agreed to pay for the same about twenty thousand dollars; and of appropriating the money paid on them to the payment in full of the residue of the tracts purchased by them, and by the Baum and Piatt Companies respectively. In pursuance of this object, the five quarter sections purchased by the Piatt Company were assigned to Baum, the 17th September, 1821; and, on the same day, tracts numbered one, two, eighty six and eighty seven, purchased in the name of the Piatt Company for the Port Lawrence Company; and, also, tracts three and four, purchased by Oliver for the same company, were assigned to Baum. It is al-

ledged that these tracts had been previously assigned to Baum, of which there is no evidence.

On the 27th September, 1821, Baum, through his agent, Micajah T. Williams, one of the defendants, relinquished, to the United States, tracts one and two. On these tracts there had been paid the sum of four thousand eight hundred seventeen dollars and fifty five cents. Thirteen hundred seventy two dollars and thirty four cents of this sum were applied to complete the payments on tracts three, four, eighty six and eighty seven, the residue of the tracts purchased at the sale by the Port Lawrence Company. From the relinquished tracts, there still remained three thousand four hundred forty five dollars and twenty one cents. Of this sum, one half belonged to the Piatt Company. Twelve hundred and forty eight dollars were applied to complete the payment on the five quarter sections, which left a balance of four hundred seventy four dollars and sixty cents still due to the Piatt Company; but which was applied in payment of lands held by the Baum Company. After the relinquishment of the tracts on which the town had been laid out, the purchasers of town lots claimed a return of the money paid by them, with interest, and, also, damages for their improvements. On the 10th September, 1822, Baum gave to Oliver a certificate which stated there was due him, by the Port Lawrence Company, the sum of two hundred thirteen dollars and two cents, which he refunded to purchasers of lots, by the request of the company, "it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth and William M. Worthington." And on the 27th August, 1823, Oliver having made out an account against the Port Lawrence Company, for money paid by him to purchasers of lots, and services rendered as agent, Baum admitted his account, amounting to the sum of eighteen hundred thirty five dollars and forty seven cents; to secure the payment of which, Baum executed to him a mortgage on tracts three, four, eighty six and eighty seven. The payment was to be made, with interest, on or before the first of January, 1824. The 7th October, 1825, Oliver caused an attachment to be issued by the clerk of Monroe county, in the Michigan Territory, against Baum and the members of the Piatt Company, on the certificate of indebtment given by Baum. This attachment was levied on four of the five quarter sections owned by the Piatt Company, and such proceedings were had on the attachment, as to obtain an order of sale of the property attached; three of the quarters were sold, by the auditors appointed, for the sum of two hundred forty one dollars and sixty cents, to Noble, the agent of Oliver. Noble, shortly afterwards, conveyed these tracts to his principal. A bill to foreclose the mortgage given to Oliver, was filed by him in the supreme court of Michigan, the 13th of October, 1825. And a final decree having been obtained, the mortgaged premises were sold, by the assistant register of the chancery court, to Oliver, the 1st September, 1828, for six hundred eighteen dollars and fifty six cents.

By the act of 20th May, 1826 [4 Stat. 180], the secretary of the treasury was authorized to select, for the benefit of the University of the Michigan Territory, a certain number of acres of the public lands within the territory, and he selected tracts one and two, which had been relinquished. In the summer of 1828, as appears from the report of the committee of the trustees of the university, Oliver, as the agent of Baum and others, proposed to exchange certain lands owned by Baum, in the vicinity of Port Lawrence, or any of the public lands subject to entry, for tracts one and two, on which the town of Port Lawrence had been laid out. A law of congress was passed, authorizing the exchange, the 13th January, 1830 [Id. 370]. Previous to this, Baum assigned to Oliver the final certificates for the tracts he purchased under the attachment, and, also, under the decree of foreclosure; and one of the quarter sections levied on by the attachment, but not sold under it, in payment of the balance of the judgment on the attachment, which enabled Oliver to obtain patents for the same in his own name. And on his conveying to the university tracts numbered three and four, except ten acres reserved of number three, and the northwest quarter of section two, town. three, and, also, the northwest and southwest quarters of section three, town. three, he received an assignment from the university of their right to tracts one and two, for which patents were issued in the name of Oliver. After the exchange was effected, Baum, and the defendant Williams, each purchased an interest of one third in tracts one and two, eighty six and eighty seven. After Baum's death, in 1832, Oliver purchased his interest from his heirs. And the 1st December, 1832, Oliver conveyed to Williams an undivided half of the ten acres reserved in number three. On the 23d May, 1834, he conveyed to him an undivided half of tracts eighty six and eighty seven, except sixty acres which had been sold to Prentice and Fromley; and on the ——— day of November, he conveyed to him "one undivided half of lots one and two, on which Port Lawrence was laid out, together 'with a like interest in all sales and improvements thereunto belonging.'" Oliver, Baum and Williams, agreed to lay out the town of Toledo on the site of Port Lawrence, and to make titles to the Port Lawrence purchasers of lots, on their complying with their contracts. Some years after this, Oliver purchased from the Michigan University the tracts of land he conveyed to it in exchange for tracts one and two. Of the Piatt Company, John H. Piatt is deceased, and his administrators and heirs are made parties to this suit. William M. Worthington assigned one half his interest in the Port

Lawrence Company, and it is claimed and represented by John E. Worthington. The interest of Worth has been assigned to the defendant Ewing, who also claims the entire interest of Baum, Mack, Barr, Burnet, and half the interest of the complainant. Of the Baum Company, Martin Baum, Jesse Hunt, William C. Schenck and William Barr, are deceased.

These are the outlines of the present case. Many of the facts have been omitted in this statement, which will be adverted to in considering the legal questions that are involved. On the part of the defendants' counsel, it is objected that the complainant has failed to show, either in his bill or by the proof, any interest in the subject matter of controversy, which will enable him to maintain this suit. And as this objection goes to the very ground of the right asserted, it will be first considered. In his bill, the complainant states, that he, in connection with the other members of the Piatt Company, formed an association to purchase public lands. And this allegation is proved by an instrument of writing signed by the parties. And it appears from the bill and the evidence, that the company paid a large sum on the purchases made by them separately, and as connected with the Port Lawrence Company. It does not appear how this money was obtained, whether by an equal contribution of the partners or otherwise; nor is it necessary for the purposes of this suit, that this should appear. It is enough to show that the complainant, and the others named, were partners, and that the money paid was the money of the company; that the lands purchased were for the interest of the company; and all this is sufficiently shown by the pleading and evidence.

The next point which it seems proper, in the order of time, to examine, is, as to the legality of the joint purchase by the two companies at the public sale. On the part of the defendants, it is contended there was an unlawful combination, between these associations, to purchase the public lands at the sale at a reduced price. That, in effect, they agreed not to bid against each other, and by that means, bought the tracts stated at a less price than they would have sold for. And that, under such circumstances, neither a court of law nor a court of chancery will give any relief. That the contract was made in fraud of the law and against public policy, and, consequently, can receive no countenance in a court of justice. This question was raised by the pleas in bar above noticed, but as the pleas were held to be defective on other grounds, it was not then decided. The first and leading authority on this subject, is in the case of Bexwell v. Christie, 1 Cowp. 395. The plaintiff sent a horse to an auctioneer to be sold with other goods, which belonged to a deceased person, the whole of which were to be sold to the best bidder; but the auctioneer was directed not to sell the horse under £15—he was bid off for £6 16 6. And the question was, whether the owner may employ another person to bid for him privately. The court considered this unfair, and that it was a fraud upon the public to throw this horse into the sale of goods represented as being an executor's. The plaintiff was nonsuited. Upon the authority of this case, was, afterwards, decided Howard v. Castle, 6 Term R. 642. In that case, it was held that where puffers were secretly employed by the seller, the sale was fraudulent, and the bidder to whom the property was struck off, was not obliged to complete the contract. In the case of Jones v. Caswell, 3 Johns. Cas. 29, it was decided that no recovery could be had upon the note in question, as it had been given to induce the plaintiff not to bid at a sheriff's sale. That it was against public policy. A contract made in fraud of a law will not be enforced, or where it grows immediately out of, or is connected with, an illegal or immoral act. Hannay v. Eve, 3 Cranch [7 U. S.] 242; Armstrong v. Toler, 11 Wheat. [24 U. S.] 258.

In 1 Story, Eq. Jur. 290, it is laid down that agreements, whereby parties agree not to bid against each other at a public auction, especially on a sale of chattels, or other property on execution, are held void, as against public policy. And so, if underbidders or puffers are employed at an auction to enhance the price and deceive other bidders, and they are in fact misled, the sale will be void. Doolin v. Ward, 6 Johns. 194; Wilbur v. How, 8 Johns. 346; Bartle v. Administrators of Coleman, 4 Pet. [29 U. S.] 184; Craig v. State of Missouri, Id. 436. An unlimited number of authorities might be cited to show, that a contract made in violation of the law, or against its settled policy, will not be enforced. In [Case No. 11,114] a number of authorities are cited to sustain that position. And also a number which, to some extent, conflict with some of the principles laid down in Cowper and in other authorities. In the case of Conolly v. Parsons, 3 Ves. 624, it is said to be the common practice for bidders not to bid against each other for particular lots. And as a protection against this, it is said the seller may employ persons to bid for him. Bramly v. Alt, Id. 623. The purchaser objected to a specific performance on the ground that the vendor employed a person to bid against him, and the fact was admitted. The property was put up at £900. The defendant bid £10, and the person employed by the plaintiff bid £920, the defendant then bid £950, and it was knocked down to him. Under these circumstances, Lord Loughborough decreed a specific performance. It would seem not to be reasonable or just in every case, without regard to circumstances, where a seller of property has employed a bidder to protect his interest, to hold the sale void. But however this may be, there can be no doubt that an association of in-

dividuals may be formed for the purpose of purchasing property, either at public or private sale. This is nothing more than a limited partnership for a special object, and it is strictly legal. Such associations, it is known, have been formed to purchase the public lands at public auction and otherwise; and no objection is believed to have been made to them by the government. At the time the sale in question was made, the law fixed the minimum price at two dollars per acre, for which the land must sell; and this guarded the public interest. After the sale, any of the lands which had been offered and not sold, were liable to be entered at that price. And the whole policy of the government has regarded a fair and open competition as more important, than to obtain a high price for the land. This is shown by the reductions of the price of the public lands, the liberal manner in which pre-emption rights have been given, and the indulgences granted to purchasers under the credit system.

In the present case, there was no agreement that one company should not bid against the other, but that certain tracts being desired by both companies, should be purchased for the joint interest of both. Was there any thing immoral in this? Was it in fraud of the law, or against the public policy? We can best judge of an action by its effect. And what was the effect of this combination which is so much complained of? The two tracts of land in controversy, numbered one and two, containing about four hundred acres, sold for about twenty thousand dollars; and the other tracts purchased by the joint company, sold higher than other tracts purchased by individuals. If this transaction then be scrutinized, it will be found to have operated most beneficially to the government, and injuriously only to the purchasers. They agreed to pay a much greater sum than the land was worth. A sum so extravagant, that, to save the company from ruin under the pressure of the times, they were obliged to relinquish it to the government. And it is said that the company had determined to forfeit the payment on these tracts of more than four thousand dollars which they had made, rather than pay the balance of the purchase money, before the relief law of 1821 [3 Stat. 612] was passed. And yet the counsel for the defendants contend that, by reason of this combination, tracts one and two were sold for less than they would under other circumstances have sold for. Whatever other objection may be urged to this association, there would seem to be no ground for this objection.

In another branch of the argument, the character of Baum is relied on against the imputations made in the bill; and with how much greater force may the same argument be used against the imputations of the answers, by referring to the Port Lawrence Company, which included Baum, the defendant, Oliver, and other gentlemen of high character. This transaction, in our view, is sustainable on principle and authority. And if in this view doubts could arise, still it would not follow that the defence could be available to the defendants. We consider the purchase fair to the public, to bidders, and free from objection under the law. It was sanctioned by the government, and that without objection. But if objection could be made to the purchase, it could avail the defendants nothing. The sale was not only sanctioned by the government, but, under the relief law of 1821, the transaction was again sanctioned, and assumes a new aspect by the application of the money paid on tracts one and two, to complete the payments on other purchases. Where persons have combined to defraud the public, and one individual happens to get the advantage of another, no court will grant relief. The agreement being infected with fraud, and each party being alike guilty, no court will apportion between them the wages of their iniquity. But the Port Lawrence Company, in their association and purchase, were guilty of no immorality. They violated no public policy or law; they did nothing injurious to the public interests—nothing which had not been ordinarily done, in similar cases, under the sanction of the government. A rule which would enable a participator in such a transaction, who had obtained a title for the land purchased, to shelter himself from responsibility under the plea of fraud, would itself become an instrument of the grossest injustice. It is due to the justice of the case, to the character of the persons concerned, not excepting the defendant, Oliver, to vindicate the transaction from any just imputation of fraud. And this defence of fraud at the public sale, as it regards the interests of the other principal defendant, Williams, is equally unsustainable. He was not a party to the purchase at the sale, but subsequently having acquired an interest in the lands purchased, it is insisted that his right is not examinable on account of the original fraud. In other words, that a vendee instead of relying upon his contract of purchase, may hold the property by showing that the vendor had obtained it fraudulently, or against public policy; and this without having the shadow of a right, except that which is derived under the vendor. When such a rule shall be sanctioned by that court, whose decision is the law of this court, it will here be recognized.

Where a person's property is taken by execution and sold against his consent, it is just and proper that his interests should be scrupulously guarded. The property to be sold is generally of small amount, and but few persons attend the sale under the limited notice required to be given. Any combination which shall defeat a fair competition, under such circumstances, would be unlawful; and any contract, on which such combination was formed,

would be void. But suppose at such a sale, some two or three individuals being desirous of purchasing the property, associate together for that purpose, and buy the property at its full value, there being an open sale and competition, could the purchase be set aside? And if, in addition to this, the owner of the property subsequently to the sale receives it back again, and gives to the purchasers, other property or money in lieu of it, would the transaction be fraudulent? And could one of the party purchasers, having got possession of the property or money received in exchange, and claiming it as his own, protect himself against his partners, on the ground that the original purchase was fraudulent? The public sales of lands are made on a liberal and national scale. Notice of a sale is given throughout the United States, and the large amount of the public domain to be sold on such an occasion, not unfrequently attracts particular attention in every part of the Union. Vast numbers of persons attend the sale, and hundreds, if not thousands, become bidders. Such regulations as are deemed necessary to protect the public interests are adopted by congress, and, under their authority, by the executive branch of the government. It may well be doubted whether a rule which may be salutary and just in a sale on execution, must be equally applicable to a sale of the public lands by the government. For the present purpose it is enough to say, that we see nothing in the original purchase of the lands in question which can effect its validity.

We will now examine the jurisdiction of the courts of the Michigan Territory, before whom the proceedings in attachment, and the decree of sale of the mortgaged premises, were had. No judgment or decree of the courts of any state or territory can operate upon the title to lands in another state or territory. It is peculiarly the province of the sovereign power to regulate, whether by operation of law or by actual conveyances, the transfer of real estate within its own jurisdiction. And no conveyance or will, executed in a foreign state, can have any effect, except under the laws of the state where the land is situated. That the lands in controversy in this suit are now within the acknowledged jurisdiction of Ohio, is admitted; but it is contended they were within the jurisdiction of Michigan at the time the proceedings stated took place. By the law of congress [2 Stat. 173] authorizing the people of Ohio to form a state government, it is declared, that the state to be formed shall be bounded "on the north by an east and west line drawn to the southerly extreme of Lake Michigan, running east, after intersecting the due north line aforesaid, from the mouth of the Great Miami, until it shall intersect Lake Erie, or the territorial line, and thence with the same through Lake Erie," &c. This boundary was adopted by the convention, and was copied into the constitution of Ohio, with a proviso "that if the southerly bend or extreme of Lake Michigan should extend so far south that a line drawn due east from it should not intersect Lake Erie, or if it should intersect the said lake east of the mouth of the Miami river of the lake, then and in that case, with the assent of the congress of the United States, the northern boundary of the state shall be established by, and extended to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami Bay, after intersecting the due north line from the mouth of the Great Miami river as aforesaid; thence northeast to the territorial line, and by the said territorial line to the Pennsylvania line;" and the constitution was sanctioned by congress with this proviso.

Under a law of 1812 [2 Stat. 741] the surveyor general of the United States caused two lines to be run, one in conformity with the act of congress, copied into the constitution of Ohio, and the other as called for by the proviso in the constitution. And, in pursuance of a law of 1831 [4 Stat. 479], the president of the United States caused to be ascertained, by observation, the latitude and longitude of the most northerly cape of the Miami Bay, and also the point at which a direct line drawn east from the southerly extreme of Lake Michigan will intersect the Miami river and bay. And it was found that the latter line was forty one degrees thirty seven minutes and seven seconds north, and the former forty one degrees forty four minutes and seven seconds north. These observations are supposed to correspond with the lines run by the surveyor general. Neither the lines nor the observations seem to have been satisfactory to the parties concerned, but they are sufficiently accurate for the question of jurisdiction in this case. From the proviso in the constitution it appears, that the northern boundary was to run to the most northerly cape of the Miami Bay, and if the line running east should be south of that, with the assent of congress, it was to be so altered as to run to the cape. But the consent of congress being a condition precedent to any deviation from an east line, such line being run, constituted the northern boundary of Ohio until changed under the sanction of congress. The required assent of congress was given by the act of the 23d June, 1836 [5 Stat. 56], which declared "that the northern boundary of the state of Ohio shall be established by, and extend to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami Bay." As the northern boundary of Ohio, whether temporarily or permanently established, constituted, in that part, the southern boundary of Michigan, it follows that the jurisdiction of Michigan was properly exercised north of the line, and that of Ohio south of it. And it would seem that the alteration of the line, with the assent of congress, which extended the jurisdiction of Ohio further north, should not affect titles acquired in any legal form under the jurisdiction of Michigan. This is a very different question from one which arises under a disputed location of boundary. In such a case,

the settlement of the boundary shows whether the jurisdiction exercised by the litigant parties has been rightfully or wrongfully exercised. But in the present case it is clear, that the jurisdiction of Ohio could not be legally exercised north of the east line, until the assent of congress to a line that should strike the cape was obtained. No question can arise as to the power of congress to act in the case, as Ohio, in her own constitution, made their consent a condition precedent and indispensable. It is admitted that the land in controversy lies north of the east line, and south of the line running to the cape. And this would seem to determine the right of jurisdiction to be in Michigan, until the act of 1836.

We will now examine the nature and extent of the agency of Baum, and also of that of Oliver. There is no evidence in writing which shows the nature of the trust vested in Baum. It appears from the bill and answers, that tracts one and two were purchased by the Port Lawrence Company, with a view of laying out and building up a town; and that Baum was appointed a trustee to sell lots in the town, make titles, and superintend the concerns of the company. In his deposition Judge Burnet says his impression is, "that Baum's powers were general and unrestricted. That the company relied on his judgment and correctness in everything relating to their interest, and expected he would lay out a town and dispose of the lots as he thought best. He says the company did not meet often, nor did they frequently give instructions to Baum. They seem to rely on his prudence and discretion." In their instructions to Oliver, to lay out the town, &c., the proprietors of the Port Lawrence Company say "an immediate correspondence is to be opened by the agent with Martin Baum, Esq., of this city, (Cincinnati,) who will act as trustee for the proprietors; and every information will be given to him, in relation to the business of the agency, the progress of the settlement, and the sale of lots, that may be required or deemed essential to the interests of the concern."

The complainant states, in the amended bill, that Baum was appointed trustee, and accepted the trust; and that it was agreed "that the certificates for said tracts should be assigned to him to enable him to execute the trust." He, it seems, had power to appoint an agent, and he did appoint Oliver. Baum acted in this agency, it is insisted, until his death. There is no pretence that it was terminated prior to the assignment by him of the lands of the company. He also acted as agent for the Baum Company, in relation to other lands held in their own right. Oliver's agency was constituted under the hand and seal of Baum. The instrument is dated the 14th August, 1817, and authorized Oliver, "in the name of Baum, to sell and dispose of the lots in a town to be laid out at Swan creek, on the Miami of the lake, agreeably to a letter of instructions therewith delivered, and to receive payment for the same from the purchasers; and to execute and deliver certificates, in the nature of title bonds, for the lots by him sold; and to do all lawful acts requisite for effecting the premises." As it regards the plan of the town, the conditions on which lots were to be sold, &c., Oliver received from the proprietors a letter of instructions, bearing the same date as the power of attorney from Baum, and also a letter of instructions from him of the same date, and which is an exact copy of that of the proprietors. On the same day Baum addressed a letter to Oliver, in which, after referring to his agency, he says, "Your appointment is for one year, commencing this day, for which services so rendered you are entitled to receive from the proprietors twelve hundred dollars." And he further remarks: "And the proprietors of the lands lying in that county, but which is a distinct concern from the above, have agreed to allow you three hundred dollars for attending to their separate business." And there is among the papers a regular power of attorney, from Baum to Oliver, in regard to this separate interest, of the same date as the above. In the spring of 1818, Oliver was appointed cashier of the Miami Exporting Company Bank; and on the first of July ensuing he assumed the duties of that appointment. At this time, he alledges in his answer, he surrendered his agency to Baum, and made with him a final settlement. He admits, however, that being interested with Baum in town lots 223 and 224, on which they built a warehouse and other improvements, and having other lands in the neighborhood, and possessing a better knowledge of the business and interests of the Port Lawrence Company than any one of the parties concerned, he was repeatedly brought in contact with Baum, was consulted by him, and on his occasional visits to the Maumee country, was intrusted with business for the company after the close of his agency.

On the part of the complainant, it is contended that his agency continued, and did not terminate on his assuming the duties of cashier; and in proof of this his acts are relied on. The power of attorney to Oliver was unlimited as to time, and there is nothing which restricts it to one year, unless it be the letter which fixes his compensation; and the limitation of this letter may be considered perhaps as much, if not more, with reference to the salary allowed, than to the authority given him. The duties, however, of cashier, were wholly incompatible with that general superintending agency which it would seem, from the salary paid, was at first contemplated. He resided a considerable part of the first year of his agency at Port Lawrence, and gave the greater part of his time to the concerns of the company. He alledges, in his answer, that Peter G. Oliver, in 1818, and for three years thereafter, acted as agent for the company; and being young and inexperienced, the defendant frequently advised him respecting the business. And John E. Hunt, the defendant also alledges, acted as

agent for the company. But it seems from the accounts stated by Baum against the Port Lawrence Company, and also by accounts presented by Oliver to Baum for services rendered and moneys paid, that he acted as his agent, at least to some extent, down to the spring of the year 1830. It is true that several of these accounts related chiefly, and some of them exclusively, to the concern of the Baum Company, which was entirely distinct from the Port Lawrence Company. The last account rendered contains a charge for surveying two small tracts which related to the Port Lawrence Company. In fact, his claims against the Port Lawrence Company, on which was instituted his legal proceedings, and on which his whole title rests, except the amount paid by him and his partner, Baum, for lots 223 and 224, and their improvements, were founded on moneys refunded by him to purchasers of town lots and services rendered. This could only have been done in the capacity of agent. It cannot be supposed that as a mere volunteer, without authority, he would make these advances; indeed, this is not pretended by the defendant. He alledges that, having been agent in selling the lots, and instrumental in inducing many to purchase, he felt bound to aid in indemnifying them after the town tracts were relinquished to the government. The agency which Oliver exercised, after his duties as cashier commenced, was of a more limited character than that with which he was at first invested. He was not bound, perhaps, to give any fixed portion of his time to the business of the company; but that he did transact, after the 1st July, 1818, the principal business of the Port Lawrence Company, is shown by his acts and declarations. On the 19th September, 1818, associated with Wm. M. Worthington, he divided between the proprietors the unsold lots. And in a letter to Sage, dated at Piqua, March 27, 1825, he says: "The company (meaning the Port Lawrence Company) were and are largely indebted to me; and at the request of Mr. Baum, trustee, I continued, after disposing of my interest in the company, to aid in the perplexing business of the concern, as I understood the details better than himself." And in reference to Mr. Prentice, a purchaser of the Port Lawrence Company, he says: "I procured him a deed, and other things, for his advantage. Mr. Prentice knows I would not have acted without authority," &c. In 1823, Prentice swears, "being at Cincinnati, to settle for work done at Port Lawrence, where he saw Oliver and Baum, and was told by both of them that Oliver was still the agent of the proprietors of Port Lawrence."

Having examined the authority under which Baum and Oliver acted, we will now consider their acts, separately and conjointly, as they are supposed to be connected with the merits of this case. The assignment of tracts three and four was made by Oliver to Baum, the 15th September, 1821; and about the same time the Piatt Company assigned to him tracts one, two, eighty six and eighty seven, and also the five quarter sections; and at the same time Baum appointed the defendant, Micajah T. Williams, agent, to relinquish to the government tracts one and two, and to apply the money which had been paid on them to the full payment of other tracts. The assignment of the tracts owned by the Port Lawrence Company may have been made in pursuance of the trust vested in Baum; but the complainant asserts that the five quarter sections were assigned to him, to enable him to apply to their full payment a part of the money arising from the relinquished tracts. There is no evidence which contradicts this averment, and the circumstances of the case go strongly to establish it. The act of the 2d March, 1821, under which the relinquishment was made, requires "the legal holder of any certificate, or certificates, to file a relinquishment with the register of the land office, and to apply the money which had been paid on the relinquished tract to the payment of others." An assignment of the five quarter sections to Baum enabled his agent to complete the payments on them by the above appropriation. The bill alledges, that tracts one and two were relinquished by the Port Lawrence Company, with the intention of repurchasing them. This is denied by the answers; and Judge Burnet, in his deposition, states that he was a member of the Port Lawrence Company, and was unapprized of any such intention.

On the 20th January, 1822, four months after the relinquishment, Baum prepared a petition to congress, stating the purchase of the two tracts relinquished, the purchase money for which amounted to about twenty thousand dollars; that in August, 1817, a town was laid out on them by him, and that many of the lots were sold, and bonds for a title given to the purchasers; that the reduction of the price of the public lands by congress, and the pressure of the times, disabled him from paying the purchase money to the government, and he was obliged to surrender the tracts to the United States; that being unable to make titles, he was liable to suits for damages by the purchasers of lots; and he prays that the tracts might be again offered for sale, or that relief in some other form might be given him. This petition was forwarded to Mr. Ross, a member of congress from Ohio, who presented it to the house of representatives. On the 25th December, 1822, Baum forwarded a duplicate of the above petition to congress, in a letter to Mr. Brown, a senator from Ohio, in which he says: "Inclosed is the petition, signed by myself only; still, others have an interest in it;" naming Williams, Piatt, and others; and he speaks of the just claim which he and his associates had for redress. In another letter to Mr. Brown, on the same subject, of the 6th February, 1823, he says, "The

tracts purchased by himself and his associates can be ascertained at the land office." The 20th January, 1823, Baum agreed with Prentice, who purchased lot 192, that if Baum and his associates should repurchase lots one and two, so as to be able to make a title to lot 192, they might do so, and Prentice agreed to relinquish the 30 acres, in lot 86, which he had received in lieu of it; and a similar arrangement was made with Jacob Bromley for lot 71, in Port Lawrence.

In a letter to Mr. Graham, the commissioner of the general land office, dated 20th July, 1827, Baum says: "In consequence of the president's proclamation, announcing the sales of lands, he attended at Delaware, on the 9th instant, but was much disappointed to find that, by the instructions of the general land office, lands north of the Ohio boundary were not offered for sale;" and, he says, that he went there for the express purpose of purchasing tracts one and two, in the Maumee reservation, which he had formerly owned, and relinquished. He says, "These lands were bought in the names of different persons, and were afterwards transferred to him, as agent, for the purpose of managing and conveying them, in case of sales." He says, "He petitioned congress on the subject early in 1822, but believes no decision has yet been made; that the case was still before congress, and he hopes for a favorable result." It is intimated, he remarks, "that the trustees of the seminary lands of the Michigan Territory have had sufficient influence to delay the sale, with a view to locate those two tracts; and he protests against such an arrangement, as they have no claim to the lands whatever, but that his is a strong claim, and that he was determined to pursue it in every possible way, until he obtained justice." Prentice, a witness, swears that he, having purchased a lot in Port Lawrence, went to Cincinnati, in 1823, to claim an adjustment of his demand; and, whilst there, Baum told him that tracts, one and two, had been surrendered to the United States, but that he expected he, and his associates, would purchase back said tracts, and go on with the building of the town; and that, in such an event, the witness should have the lot, surrendered by him, at the original price and interest. For this lot, Baum sold to Prentice 30 acres, in tract 86, which Prentice agreed, in writing, to relinquish for his original lot, should the above purchase of lots, one and two, be made. A similar contract was made with Bromley. On the 13th January, 1830, an act of congress was passed, which authorized the trustees of the University of Michigan "to exchange, with Martin Baum and others, the tracts of land designated as river lots, numbered one and two, in the United States reserve, &c., heretofore purchased from the U. States, and which have been relinquished by the said Martin Baum," &c.—which tracts, under the act of the 20th May, 1826, had been selected by the secretary of the treasury for said university—"for such other lands as may be agreed upon by them." As before remarked, Baum, as the agent of the Port Lawrence Company, on the 10th September, 1822, gave to Oliver a certificate, that there was due to him from the Piatt Company, two hundred and thirteen dollars and ten cents. Of this transaction, the defendant Oliver, in his answer, says: "He was occasionally authorized by Baum, soon after the relinquishment, to take up claims of purchasers of lots in Port Lawrence; which he did, and the amount was refunded to him by said Baum. In this way, in 1822, he paid to purchasers, for their claims, $426 14, expecting Baum to refund the same, on his return home. But, on presenting his account, Baum declined paying it, alledging that the Piatt Company had refused to contribute any further, and that he must get their share out of that company."

On the part of the complainant, it is insisted that, at the time this certificate was given, no part of the amount was owing by the Piatt Company. To this inquiry the defendants object, that they are not responsible for Baum's errors, and that their title was derived under a judgment at law. So far as it may be necessary to consider the judgment merely, and the proceedings under it, collaterally, we can neither go into the grounds of the action, nor the technicality of the procedure. If the court had jurisdiction of the subject matter, by a levy of the attachment, we can not avoid the effect of the judgment, by errors either before, or after, its rendition. But there are other aspects of the case, arising from the relations and acts of the parties, in which this inquiry may be important. Prior to the date of the certificate, Oliver states, in his answer, that, having made similar disbursements for the Port Lawrence Company, they were refunded by Baum. The account against the Port Lawrence Company, made out by Baum, as agent, it is presumed, contains an account of all his disbursements. This would seem to be the case from an inspection of the account. The first item, of $59 50, is for so much paid to Williams, for services, as agent, under the relief law. The next is for $221 07, paid Oliver, the 21st October, 1821, for so much refunded by him to Port Lawrence purchasers of lots. And the next charge is, for $426 04, paid to Oliver, on the same account, on the 10th September, 1822. This must be the sum to which Oliver alludes, in his answer, as having been paid by him, and for the one half of which the above certificate was given by Baum.

From the account of Baum, including the above sum, it appears he had paid, as agent of the Port Lawrence Company, the 10th September, 1822, the date of the certificate, $706 61; one half of which sum, being $353 30½, was justly chargeable to the Piatt Company. In the account, Piatt is credited

with $25, paid to Williams, in 1821; and there remains the sum of $474 59, which belonged, as has been shown, to the Piatt Company, but which was applied, at the relinquishment of tracts one and two, to the payment of lands which had been entered by the Baum Company. It is stated there was an arrangement with John H. Piatt, that the Piatt Company should receive, in payment for this sum, Miami Exporting Company paper, which was at a discount of more than fifty per cent. Of this agreement, there is no evidence, except a memorandum in the account of Baum; and, by whom made, or on whose authority, does not appear. If it may be supposed to have been made by Baum, yet it may not have been made on his own knowledge of the fact. It is very singular that this sum, having been received by the United States, as equal to specie, from the Baum Company, in payment for land, should be agreed to be received by the Piatt Company, when it might be convenient for the Baum Company to pay it, in bank paper worth not more than forty cents to the dollar. That the Piatt Company agreed to receive the payment of this sum, in this manner, is so unreasonable as not to require our belief without evidence. The memorandum appears to have been loosely made, about two years after the relinquishment, and is without any authentication. It is not a matter which is properly an item in an account, and can, therefore, derive but little, if any, force from the manner in which it is brought into the account.

In the account there is a credit entered for half the amount of this sum, to the Piatt Company; but we think, under the circumstances, the credit should have been for the full amount. But whether the credit should have been for the whole, or one half of the amount, the certificate, given by Baum to Oliver, was incorrect. If the Piatt Company were entitled to a credit for the full sum, on the 10th September, 1822, the Baum Company were in debt to them about $140; if for but half the sum, they were in arrear to the Baum Company only $91.

About six weeks after Oliver obtained the certificate, he wrote a letter to the complainant, informing him that he had the account against the Piatt Company, and, as he did not know the particular interest of the members of that company, he asked the favor of the complainant to state to him the proprietors, and their respective interests; and he also asked him to say when it would be convenient to arrange his proportion. What answer, if any, was returned, does not appear; nor does it appear that the complainant paid any part of this claim. Whether, having a knowledge that the Piatt Company could not be in arrear for the payments made to the purchasers of lots, or from mere negligence, the complainant failed to pay the whole, or any part of this claim, we are left to conjecture. An attachment was issued by Oliver on this demand, as before stated, the 5th October, 1825, in the county of Monroe, and territory of Michigan. As an excuse for this proceeding, he alledges, in his answer, that Worth and Worthington, of the Piatt Company, had left Cincinnati; that John H. Piatt had deceased, and his estate was insolvent. John H. Piatt departed this life in February, 1822, and his estate, which was very large, it is admitted, was found to be insolvent. But it does not follow that his representatives would not have paid a small sum, to save the estate from a sacrifice of property, if it had been demanded of them. However this may be, it is not denied, and seems to be admitted, that the complainant, who lives near the Ohio river, in Kentucky, about forty miles below Cincinnati, is a man of large property; and, it appears, that he was often at Cincinnati, and might have been made amenable to process issued at that place. Under these circumstances it is unaccountable, if the defendant Oliver had no other object than to collect the small demand of $213, that he should have resorted to an attachment in Michigan, more than two hundred miles distant from Cincinnati, the place of his residence. In addition to this consideration, the Baum Company, as partners of the Port Lawrence Company, were liable, equally with the Piatt Company, for the payment of this sum; and, in fact, a suit could not have been sustained against a part of the Port Lawrence Company, under a proper defence, for a debt due by that company. 1 Story, Eq. Jur. 629; Bosanquet v. Wray, 6 Taunt. 597; 2 Bos. & P. 120. But, if this were known to the defendant, he had little ground to apprehend any difficulty, in prosecuting the suit, in a foreign and so remote a tribunal. Of the pendency of the attachment, no one of the Piatt Company seems to have had notice, until long after the judgment was entered.

The object of the bill, in this case, is to open up the accounts of the parties, and to set aside, or disregard, the proceedings by attachment; and, also, the decree of foreclosure, and sale of the mortgaged premises, for the reasons alledged. And we are now to consider the attachment suit. Several objections are taken, which might well be urged, on a writ of error, before a court which could supervise the judgment of the Monroe court; and, it is contended, that they may be here considered and decided. We think otherwise. So far as the question of jurisdiction or fraud is made, or the effect which the relations of the parties may have, the case is fully and fairly before us; but, beyond this, we can not go. The county court of Monroe appear to have a right to issue a writ of attachment, and, from the record, it seems the writ was levied. We can not, now, examine any matter which might have been pleaded in abatement; but an important question has been raised,

which goes to the foundation of the action, and this we may examine. We do not refer to the fact of the indebtment of the Piatt Company, which has already been investigated, but to the question, whether the interest of the company, in these quarter sections, was liable to be attached? Under the writ, the rights and credits of the defendants may be attached; but are not these rights and credits demands on which a suit at law may be brought? In some respects, an attachment differs from an execution. A chose in action, or an existing debt, however evidenced, can not be reached by an execution, but may be levied on by an attachment.

It is clear that the estate, in the hands of the trustee, is not subject to any of his incumbrances. He holds it for the benefit of the cestui que trusts, and it is not subject to his specialty, judgment, or the dower of his widow. 1 P. Wms. 278; 2 P. Wms. 318. The members of the Piatt Company hold a resulting trust in the premises, which is not evidenced, it is believed, by any deed or agreement in writing. This interest, clearly, could not be reached by an execution; but may it be attached? Under the statute of frauds in England, a trust estate may be sold on execution; but such sale is by virtue of the statute. That it may be made liable to creditors, by a proceeding in chancery, is not contested; and it would seem that this is the most appropriate, if not the only, mode by which such an interest can be made liable to creditors. On an attachment, how is the nature of the trust to be ascertained, and the extent of the interest of the cestui que trusts? These things, as in the present case, may not be evidenced by writing; and a court, on an attachment, have no means of ascertaining them. It would seem, indeed, that all the objections to a transfer of such an interest on execution, equally apply to a transfer on an attachment. The vagueness and confusion, and probable sacrifice of property would be as great in the one case as in the other.

The language of Lord Ellenborough, 8 East, 481, though made in reference to a sale of an equitable interest on execution, may well be applied to this case. "The sheriff could only sell, subject to the trusts; that the execution creditor, or the vendee, would still be obliged to go into equity to get an account, or to redeem prior incumbrances, which might have been done, in the first instance, by a judgment creditor, with less expense and delay, besides the destruction of the debtor's estate, which, under so much doubt and difficulty, would sell greatly under value; so that a large equitable interest might be exhausted in satisfaction of a small demand, to the detriment of other creditors."

At common law it is a well settled principle, that an equity is not liable to an execution. In some of the states it has been held that an equity of redemption may be so sold, and, in others, such an equity is made subject to execution by statute. But wherever the common law rule prevails, an equitable interest can not be sold on execution. 1 Ves. Jr. 431; 5 Bos. & P. 461; 6 Rand. [Va.] 255; 4 Kent, Comm. 153, 154; Vanness v. Hyatt, 13 Pet. [38 U. S.] 294; 2 Saund. 11. In the case of Clark v. Wilson [Case No. 2,841], it was held that a foreign attachment will not lie to recover damages, for the breach of a contract, where the damages are uncertain, and without any rule, furnished by the contract itself, for their measurement. In the case of Pratt v. Law, 9 Cranch [13 U. S.] 456, it was held that, in the state of Maryland, an equity of redemption is liable to an attachment. But the court, in that case, say: "We are not now at liberty to enter into the consideration of the question, whether an equitable interest, in lands and tenements, is subject to attachment under the laws of Maryland, as the court of appeals of that state had decided the point. That decision was made under the provisions of the attachment law of that state."

In looking into the report of that case it will be found that, although the effect of the judgment of the court of appeals of Maryland was correctly stated by the supreme court, yet the court of appeals, in fact, decided the case on a different point. Subsequently to that case, an act of Maryland subjected the equity of redemption to legal process. In 2 N. H. 13, and 10 Johns. 481, it is decided that an equity of redemption can not be attached. In the case of Badlam v. Tucker, 1 Pick. 399, it was said that it was only by statute that equities, or rights to redeem, are subject to attachment by ordinary process. A creditor can reach such an interest of his debtor only by resorting to a court of equity.

But the interest of the Piatt Company was not an equity of redemption, in which the mortgagor, for many purposes, may be considered as holding the legal estate. The legal estate being in the government, the trustee, could, at most, have held only an equity, subject to the equity of his cestui que trusts. And how is such an interest to be reached by an action at law? There is believed to have been no statute or rule of decision in the territory at the time, which made such an interest liable, at law, to the claims of creditors. And, by the rules of the common law, we think it could not be levied on by an execution or an attachment. We can perceive no reason why this interest should not be liable to both these processes, if liable to either. If the interest of the Piatt Company in these quarter sections could not be reached by a proceeding at law, the defendant acquired no right, by his purchase, under the attachment.

It is insisted, if this were the case, that "equity is not the place to vacate judicial proceedings for technical formalities." But

is this a technical formality? It has no reference to the technical mode of proceeding in the attachment, but goes to the foundation of the suit. If the interest in these lands was not liable to an attachment at law, is the question merely a formal one? And why may not the question be raised as well in a court of chancery as in a court of law? It was the proper service of the attachment only which could give the court jurisdiction. And if the writ were attempted to be served by attaching an interest which was not attachable, the court could legally take no jurisdiction, and their proceedings were void. This does not vacate the proceedings. They stand as they at first stood. But they were coram non judice, and not binding upon any one.

In the case of Vanness v. Hyatt, above cited, which was a proceeding in chancery, the court held that the sale of an equity of redemption, on execution, was void, such an interest not being liable to execution. "Courts of equity will, in effect, examine the judgments of foreign courts, and even the sales made under those judgments, where fraud has intervened, or under the judgments a grossly inequitable advantage has been taken. In such cases, they do not disregard such judgments, or directly annul them; but they determine the equities of the case in the same manner as if the proceedings had been matters in pais, subject to their general jurisdiction." 2 Story, Eq. Jur. 531; Lord Cranstown v. Johnston, 3 Ves. 170; Jackson v. Petrie, 10 Ves. 165; White v. Hall, 12 Ves. 321. But if the purchase, under the attachment, be invalid, may not the defendant assert his right to these lands under the assignment from Baum? There can be no doubt that, under this assignment, he was enabled to obtain the patents in his own name. If the record of the attachment suit, and the deed of the creditors only had been presented to the land office, the proceedings would not have been considered, it is presumed, as authorizing patents for the different tracts to be issued in the name of the defendant. The assignment of the certificates by Baum, and this only, enabled the defendant to perfect, in form, his title. It is contended that Baum held these lands in trust, to make good payments that might become due from the Piatt to the Port Lawrence Company. And, it is strongly urged that, at least, the Port Lawrence Company had a lien on these lands for the sum of $1,248, paid on them by a transfer of that sum, at the time tracts one and two were relinquished. That these quarter sections were purchased by the Piatt Company on their own account, at the public sale, is admitted. And the complainant alledges that they were assigned to Baum in September, 1821, in order that payments on them to the United States might be completed under the relief law, and for no other purpose. And these payments were made, it would seem, in pursuance of this intention.

This allegation of the bill is not positively denied by the answers, but the defendants say they have no recollection of it, and that they understood the lands were held by Baum as a pledge for payments by the Piatt Company, and that Baum had power to sell them. Now, at the time these tracts were assigned, it is not probable they could have been given as a pledge or security, as at that time there were no demands against the Port Lawrence Company, except from the United States, which were paid by the relinquishment. And, if such an agreement were made subsequently, where is the evidence of it? This matter, set up in the answer, is not responsive to the bill, and requires proof, and there are no facts or circumstances of the case which conduce to show that there was any such agreement or understanding between the parties. On the contrary, the facts and circumstances go strongly in support of this allegation in the bill, and the answers do not positively deny it. We feel ourselves authorized, therefore, to assume the fact, as proved, that the object of the assignment to Baum of these quarter sections, by the Piatt Company, is truly stated in the bill. But was there a lien on these lands by the Port Lawrence Company, on account of the $1,248 paid on them? It will at once be admitted that the lien, if any, on these lands was of the same nature as a lien on the lands of the Baum Company, paid for at the same time, and with a part of the same fund. And if Baum could, under this lien, sell the Piatt Company lands to pay the debts of the Port Lawrence Company, he could sell the Baum Company lands for the same purpose. After paying in full for the lands still held by the Port Lawrence Company, the surplus fund belonged equally to the Baum and Piatt Companies; and, it being paid to them in that proportion, no ground is perceived on which to raise a lien on the fund, or on the lands purchased by it, which would not apply generally to the property owned by the respective companies. The fund being paid, was mixed up with the other property of the companies, and how could it afterwards be separated? The argument is, that the fund, having been applied, draws after it, and subjects to the same lien, the whole property with which it is connected.

There are cases where an agent mixes up the funds of his principal with his own, that this consequence may follow; but these cases, in fact and in principle, are wholly dissimilar from the one now under consideration. But it is unnecessary to argue this point. If the lien existed, it did not authorize the assignment of the certificates by Baum. A lien is a charge upon the thing, and not a property in it. 2 Story, Eq. Jur. 461; 2 P. Wms. 20; Ex parte Knott, 11 Ves. 617. Baum received the assignment of the certificates for a specific purpose, and, that purpose being accomplished, he was a mere recipient of the title, having no power over the land. Nor is it necessary, on this point, to discuss the ques-

tion, whether the relation which Oliver bore to the Port Lawrence Company, as agent, forbid his purchase of these lands. He took the assignment of the certificates with a full knowledge of the nature of the trust vested in Baum.

If he did not know these were the lands of the Piatt Company, why did he proceed against them by attachment as such? And why, it may be emphatically asked, did he prosecute a demand against that company, for which the Port Lawrence Company were liable? Oliver had been a member of the Port Lawrence Company, and as an agent, for a time at least, managed their principal concerns. In his own words, "he was better acquainted with the concerns of that company than the trustee." No man understood better than he the interests of the Baum and Piatt Companies, separately and conjointly. Having this knowledge, the assignment of these certificates to him, by Baum, could convey no greater interest than was vested in the assignor. Oliver, as assignee, must, therefore, be treated as holding the lands in trust for the use of the cestui que trusts, subject to any equitable or legal liens which may exist. 2 P. Wms. 706; 1 and 2 Cruise, Dig. tit. 12, c. 4, p. 489.

We come now to examine that branch of the case that rests on the mortgage and the proceedings under it. The mortgage was given by Baum, as before stated, on tracts three, four, eighty six, and eighty seven, to secure to Oliver the payment of an account against the Port Lawrence Company, amounting to the sum of $1,835 47. With the view to sustain the charges in the bill, the counsel of the complainant have entered into a detailed statement and argument to show that this account was incorrectly stated, and that a part of it only was due the 9th June, 1823, when it was exhibited. The entire account amounted to the sum of $2,727 41½, of which sum $1,536 48½ appeared to be due to Oliver and Baum for the purchase money paid on town lots 223 and 224, and moneys expended in making improvements thereon, including interest. Without any impeachment, it may be remarked, as a singular circumstance, that the trustee and agent, being equally interested in this part of the account, should have acted upon it, and that the trustee should have executed a mortgage on the entire property of the Port Lawrence Company for the payment of it, and the additional sum of $1,180 93 for so much money paid to Stickney and Henderson. On the account of Oliver there was a credit of $773 24, cash paid by Baum, and two other small items by Prentice and Hunt, which being deducted from the gross amount of the account, left the balance for which the mortgage was given. That Baum, as trustee, had a right to sell and convey lots in the town of Lawrenceport, is clear; indeed, that seemed to be the principal object in vesting him with the title. It is not equally clear that this right to sell and convey extended to the other tracts. But taking this as granted, what interest did the mortgage cover? The fee being in the government, the equity only was covered by the mortgage; it was, then, in this sense, an equitable mortgage. About the one half of the sum for which it was given was payable to Oliver as the partner of the trustee. Independent, then, of this partnership transaction, there was raised by this mortgage about the sum of one thousand dollars, for the benefit of the Port Lawrence Company, which could have afforded that company but little relief. But small as was the sum, it will be found in the sequel to have been more than enough to purchase, at the sale under the mortgage, the whole of the property of the company.

Proceedings were instituted on the mortgage the 13th October, 1825, in the supreme court of the Michigan territory. Baum only was made defendant. A decree for the sale of the premises was obtained, and they were sold to the defendant for the sum of $618 56 the 1st of September, 1828. Was this sale binding on the members of the Port Lawrence Company, who were not made parties to the suit? That every member of the company was directly interested in the suit, is evident. But it is contended that "the title by the certificates being in Baum, and the interest of all the others being involved in his title, they were not necessary parties to the proceedings." And, in support of this proposition, Hopkirk v. Page [Case No. 6,697], and 8 Ohio, 500, are cited. The case Hopkirk v. Page [supra] is not similar to the one under consideration. All persons having distinct interests, says the late chief justice, "must undoubtedly be brought into court; but where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the court. Thus, he says, a trustee may sue without naming the cestui que trust as a party." &c. That suit may be maintained in some cases in the name of the trustee, without naming the cestui que trust, is admitted; but this can not be done where the object of the suit is to divest the vested right of the cestui que trust.

The court held, in 8 Ohio, above cited, that a deed which conveyed certain lands in trust could be set aside at the suit of the grantor, on the ground of fraud, without making those who might claim in remainder or reversion, parties. The right barred in that case had not vested at the time of the decree. In the case of Caldwell v. Taggart, 4 Pet. [29 U. S.] 202, the court say all persons are to be made parties who are legally or beneficially interested in the subject matter and result of the suit, extending in most cases to heirs at law, trustees, and executors. Thus, where a remainderman in tail brought a bill against the tenant for life, to have the title-deeds brought into court, and there were annuitants on the reversion, and a child interested for a term

of years prior to the limitation to the plaintiff, that is, incumbrances prior and posterior to the plaintiff's, Lord Hardwicke (3 Atk. 570) refused a decree without first making them parties. So, where a husband, tenant for life, remainder to his wife for life, remainder over, brought his bill, without joining the wife, the objection was made and sustained, on the ground that if there was a decree against the husband it would not bind the wife. 1 Atk. 289.

To a bill of foreclosure of a mortgage, all incumbrances, or persons having an interest at the commencement of the suit, subsequent as well as prior to the plaintiff's mortgage, must be made parties, otherwise they will not be bound by the decree. Haines v. Beach, 3 Johns. Ch. 459; Draper v. Earl of Clarendon, 2 Vern. 517; Godfrey v. Chadwell, Id. 601; Hobart v. Abbot, 2 P. Wms. 643; Fell v. Brown, 2 Brown, Ch. 276; Palk v. Lord Clinton, 12 Ves. 48, 59; Mondey v. Mondey, 1 Ves. & B. 223. A bill of foreclosure against parties to whom an equity of redemption had been assigned upon trust for sale, and to divide the surplus among certain persons named, was held defective for want of the cestui que trusts, as parties interested in the equity of redemption not being made parties, although it was provided by the deed, that the receipts of the trustees should be a discharge. Calverley v. Phelp, 6 Madd. 229.

In Story, Eq. Pl. 187, it is laid down as a general rule, in cases of trusts, that in suits respecting the trust property, brought either by or against the trustees, the cestui que trusts, as well as the trustees, are necessary parties. And where the suit is by or against the cestui que trust the trustees are, also, necessary parties. The trustees have the legal, the cestui que trusts the equitable, right; they are both, therefore, necessary parties to protect their interests. Coop. Eq. Pl. 34; Mitf. Eq. Pl. (by Jeremy) 176, 179. Adams v. St. Leger, 1 Ball & B. 181, 184, 185; 1 Sim. & S. 105; Wood v. Williams, 4 Madd. 186; Burt v. Dennet, 2 Brown, Ch. 225; Osbourn v. Fallows, 1 Russ. & M. 741; Malin v. Malin, 2 Johns. Ch. 238. If a trustee bring a bill for a specific performance of articles, the cestui que trusts should be made parties. Douglas v. Horsfall, 2 Sim. & S. 184; 2 Johns. Ch. 238; Story, Eq. Pl. 188, 189. So if a bill for the redemption, or a bill for the foreclosure, of a mortgage, should be brought against a trustee, the cestui que trusts are in each case necessary parties. Story, Eq. Pl. 190; Calverley v. Phelp, 6 Madd. 229; Whistler v. Webb, Bunb. 53. There are some qualifications to this rule, as where there is a fixed trust fund, and each cestui que trust has a certain aliquot part in it, distinct from the others, so that there is no common interest in the object of the bill; the others need not be made parties. Smith v. Snow, 3 Madd. 10; Montgomerie v. Marquis of Bath, 3 Ves. 560; Lowe v. Morgan, 1 Brown, Ch. 368. If the demand upon the trust property existed before the creation of the trust, a suit may be sustained against the trustee, without making the cestui que trusts parties. Story, Eq. Pl. 191. And where there is a general trust for creditors or others, whose demands are not specified in the creation of the trust, as their number or the difficulty of ascertaining who may answer, &c., it is not necessary to make all the creditors parties. The bill should state, in such case, that it is filed in behalf of all interested. Id. 192. And it is upon this ground of the numerous parties, as well as upon the ground of a virtual representation, and of the general nature of the trust, that trustees of real estate for the payment of debts may ordinarily sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees, which, in many cases, would be almost impossible. Id. All these modifications of the rule rest upon the ground that it would be extremely inconvenient, if not impracticable, from the number of persons interested, to make them parties. But no such excuse exists in the present case. The cestui que trusts were not numerous, and they were known to Oliver, and should have been made parties to the bill to foreclose the mortgage. They were, in fact, the only persons beneficially interested in the mortgaged property, and not being made parties to the suit they are not bound by the decree. But if the purchase of the mortgaged premises under the decree gives no right, as against the cestui que trusts, who were not parties to the suit, it is contended that the assignment of the certificates by Baum, he having power to sell, must vest Oliver with the equitable title.

The facts which led to this assignment are before the court. There was no sale of the premises by the trustee to the defendant. The transfer was made with the view to give effect to the purchase under the decree. If the decree were not binding on the cestui que trusts, the assignment which was founded on it must be equally invalid. The question is not before us, and, from the facts established, can not be made, whether the trustee had not power to convey to Oliver, by sale, the interests of the cestui que trusts. But after the execution of the mortgage, had the trustee power to sell? In Sugd. Vend. 278, it is laid down, that a power to sell and raise a sum of money implies a power to mortgage, which is a conditional sale. Mills v. Banks, 3 P. Wms. 9. And a power generally to raise a sum out of an estate, enables a sale of it. Wareham v. Brown, 2 Vern. 153.

It may be well to inquire whether the trustee in this case, in making the mortgage, exhausted his power. Palk v. Lord Clinton, 12 Ves. 48; Omerod v. Hardman, 5 Ves. 722. A power to a tenant for life to grant leases was destroyed by a mortgage made by him, and a tenant for life in remainder under the same settlement. 5 Vin. Abr. 432, pl. 10; Sugd. Vend. 56. A conveyance of the whole life

estate, although by way of mortgage, is deemed an extinguishment of a power appendant or appurtenant. Sugd. Vend. 57. The assignment of the certificates in this case by Baum, as in the attachment case, enabled Oliver to obtain the patents in his own name. But this can not affect the relation he bears to the cestui que trusts; he must be considered as holding the lands as mortgagee, and not as a purchaser. The bill charges that tracts one and two were relinquished with the intention of repurchasing them. But, as before remarked, of this intention, at the time, there is no evidence, and it is denied in the answers. It appears, however, within four months after the relinquishment, Baum petitioned congress on the subject, and placed his claim for relief exclusively on the fact, that, under the former purchase, he had sold town lots, and that improvements on the lots had been made by purchasers, which would subject him to damages; and he prayed that these tracts might again be offered for sale, or that relief in some other form might be given. And in his letter to Senator Brown the ensuing year, 1823, which inclosed a copy of this petition, he stated that others were interested with him in the matter of his petition, although the petition was signed only by himself. And, again, in 1827, in his letter to the commissioner of the general land office, complaining that the above tracts had been withdrawn at the land sales at Delaware, in 1827, at which place he had attended with the intention of purchasing them, he states the claim of himself and his associates to these lands, and remonstrates against their being located for the Michigan University, as they could have no claim to them. And so far from abandoning his right, he says, it is still before congress, that he hopes for a favorable result, and expresses a determination to pursue it until he obtains justice. At this time the suits of Oliver were pending in Michigan by attachment and to foreclose the mortgage, and, indeed, a judgment had been entered on the attachment, and the sales, under both suits, took place the ensuing year. In the summer of 1828, before these sales, the tracts one and two having been selected for the university, Oliver proposed, as the agent of Baum, to its trustees to exchange a certain part of the lands, then held in the name of Baum, for tracts one and two. And eventually this exchange was effected in January, 1831. Previous to this, on the 13th January, 1830, the law was passed which has been referred to, authorizing the university to make the exchange with Martin Baum and others. In 1831 deeds were executed, and Oliver became the patentee of tracts one and two; and shortly afterwards Baum and Williams became interested with him in laying out a town on the site of Port Lawrence; and they proposed to make titles to the former purchasers of town lots, on their complying with the conditions of sale.

Now, when we consider the agency of Baum and of Oliver, and scrutinize the acts of both, as above stated, without explanation, it would be difficult to resist the conclusion, that, in obtaining tracts one and two, they acted in behalf of the Port Lawrence Company. After the relinquishment of tracts one and two, there can be no doubt that either Baum or Oliver had a right to purchase them. But it would seem the petitions of Baum to congress in behalf, as he declared, of himself and his associates, his letter to Senator Brown in 1823, and especially his letter to the commissioner of the general land office in 1827, the passage of the law in 1830, authorizing Baum and others to exchange lands for these tracts, connected with the application to the trustees of the university by Oliver, as the agent of Baum, to exchange lands owned by Baum and others for them, form a combination of circumstances conducing strongly to show that tracts one and two were obtained for the Port Lawrence Company.

But it is insisted by the defendant's counsel that these circumstances are so explained as to show that, neither the application of Oliver to the trustees of the university, nor the law authorizing the exchange, had any reference to the interests or proceedings of Baum, as agent of the Port Lawrence Company. That his name was used in the proposition to the trustees to exchange by Oliver, who represented himself as the agent of Baum, is admitted. At least the answer of Oliver admits that such is the entry in the proceedings of the trustees; but he alledges that the proposition was made on his own account, and that the name of Baum was used, like the names of others, without his knowledge, and for the purpose of assuring the trustees, should they sanction the exchange, that a town would be built up on tracts one and two. This explanation involves the defendant in an act equivocal in its character, and which can scarcely be justified. If the names thus used formed an inducement to the contract by the trustees, as the defendant admits he supposed they would, and he was wholly unauthorized to use them as he now says, unless this fact was stated in his proposition, the trustees, on this ground, might have claimed a recision of the contract.

From the answer of the defendant, Williams, if that could be received as evidence in favor of his codefendant, it appears that his name was used in the negotiation with the trustees without his knowledge. And in the deposition of Mr. Wing, it is stated that the witness understood (of course from Oliver) that the name of Baum was used because, at the time the proposition was made, the title was in him, and that "Baum was ultimately to become interested." But whether Baum and Oliver co-operated or not, as agents of the Port Lawrence Company, in obtaining the title to tracts one and two, may make no difference in the final decision of this case. In conformity with the view taken, Oliver could set up no title to the lands

under the judicial proceedings stated, but must rely upon his assignment from Baum. And, under the assignment, having notice of the trust, he could take no greater interest than Baum possessed. That, in relation to the cestui que trusts, though he obtained from the government the legal title, yet he holds it only in trust. This position being sustained, so far as Oliver is concerned, it only remains to examine what effect was produced on the interests of the cestui que trusts, by a conveyance to the university of tracts three and four, and three of the quarter sections, in exchange for tracts one and two.

It is a well established rule, in equity, that no act of a trustee shall prejudice the cestui que trust. Cruise, Dig. tit. 12, c. 4, p. 488; 2 P. Wms. 706; 1 Story, Eq. Jur. 317; Newl. Cont. 461; Ex parte Lacey, 6 Ves. 625, 626; 1 Madd. Ch. 92, 93; Chesterfield v. Janssen, 2 Ves. Sr. 138; Ex parte James, 8 Ves. 337, 345; Ex parte Bennett, 10 Ves. 381, 385; Cane v. Lord Allen, 2 Dow, 289, 299; Van Horne v. Fonda, 5 Johns. Ch. 388; Brown v. Rickets, 4 Johns. Ch. 303; 1 Johns. Ch. 510, 535, 623, 629. Where the trustee purchases the estate of his cestui que trust, the question is not whether he has made a profit, but the sale is set aside as a matter of course, unless ratified with a full knowledge of the circumstances by the cestui que trust. 1 Story, Eq. Jur. 318; Davoue v. Fanning, 2 Johns. Ch. 252; Campbell v. Walker, 5 Ves. 678, 680, 13 Ves. 601; Morse v. Royal, 12 Ves. 355. If a trustee purchase land with the trust fund, and take the conveyance in his own name, in equity, the land is held as a resulting trust for the person beneficially interested. 2 Story, Eq. Jur. 456; 2 Fonbl. Eq. bk. 2, c. 5, § 1, note 6; Deg v. Deg, 2 P. Wms. 414; Sugd. Vend. c. 15, § 3, p. 628; Perry v. Phelips, 4 Ves. 107; 17 Ves. 173; Bennet v. Mayhew, cited in 1 Brown, Ch. 232. The rule is, whatever acts are done by the trustee, are presumed to be done for the benefit of the cestui que trust, and not for the benefit of the trustee. 4 Kent, Comm. § 61; Davoue v. Fanning, 2 Johns. Ch. 252; Holridge v. Gillespie, Id. 30; Griffin v. Griffin, 1 Schoales & L. 352; James v. Dean, 11 Ves. 392; Nesbitt v. Tredennick, 1 Ball & B. 46, 47; Wilson v. Troup, 2 Cow. 195. Wherever the trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the cestui que trust. 2 Story, Eq. Jur. 503; Ex parte Dumas, 1 Atk. 232, 233; Scott v. Surman, Willes, 400; Thompson v. Perkins [Case No. 13,972]; Burdett v. Willett, 2 Vern. 638; Murray v. Lylburn, 2 Johns. Ch. 441; Lewis v. Madocks, 17 Ves. 57, 58; Holridge v. Gillespie, 2 Johns. Ch. 30; Evertson v. Tappen, 5 Johns. Ch. 497; Hart v. Ten Eyck, 2 Johns. Ch. 62, 104. The cestui que trust has his option, in cases of this sort, to insist upon taking the property; or he may disclaim any title thereto, and pursue any other remedy in rem or in personam. But he can not insist on opposite and repugnant rights. Docker v. Somes, 2 Mylne & K. 655; Murray v. Lylburn, 2 Johns. Ch. 441, 442, 444, 445; Murray v. Ballou, 1 Johns. Ch. 581; 2 Story, Eq. Jur. 506. This doctrine is not limited to trustees, but extends to all other persons in a fiduciary relation to the party, whatever that relation may be. Wormly v. Wormly, 8 Wheat. [21 U. S.] 421, 438; Brown v. Lynch, 1 Paige, 147; Fellows v. Fellows, 4 Cow. 682.

From these authorities it would seem to follow that the Port Lawrence Company have a right to call upon Oliver to account, as trustee, for tracts one and two. If he received the assignment from Baum of the tracts which were exchanged with the university for tracts number one and two, with a full knowledge of the trust, he could, under the circumstances, only hold those lands in trust. Standing in this relation, by the exchange of these lands for tracts one and two, the cestui que trusts have a right to claim the property received in exchange for that which, in equity, belonged to them. The principle must be the same whether money or property be given in purchase of land, the trust fund or property may be followed to the land purchased, at the option of the cestui que trust.

In the present case the complainant asks not only the lands received in exchange by Oliver, but, also, those conveyed to the university. That he can not claim both is perfectly clear. Oliver has purchased the lands from the university, which he conveyed to it for tracts one and two. And it is a question whether the court should not limit the plaintiff's claim to the lands thus purchased. As this point can be better determined when we shall have all the facts before us, as to the present condition of the property, it is reserved. The question of notice, as it regards the defendant, Williams, will now be examined. In his answer he denies notice, and alledges that his various purchases, of a part of the property in controversy, were made bona fide, and for a valuable consideration; and that the purchase money was paid before he had any notice of the complainant's claim or title. This defendant had no interest in either the Baum or Piatt Company at the time of the public sale; but subsequently, in the year 1819, he purchased an interest in the Port Lawrence Company. This is admitted in his answer. He was appointed an agent by Baum to attend at the land office, in September, 1821, to relinquish to the United States tracts one and two, and to apply the money paid on those tracts to the payment of others, as it was applied. This necessarily gave him a knowledge of the interests of the Baum and Piatt Companies, separately and conjointly. The apportioning of the funds arising from the relinquished lands, first to the lands of the Port Lawrence Company, and then to the lands of the Baum

and Piatt Companies, respectively, showed the joint and several interests of the companies. It is true the certificates of purchase were all assigned to Baum; but, standing in the relation which the defendant bore to the parties, he could not but have known, when he performed the above service, that the five quarter sections belonged to the Piatt Company, and had been assigned to Baum to enable him to complete the payments on them. He was, in fact, a member of the Port Lawrence Company, having an undivided interest in their property; and, as a matter of course, he could not but know in what lands he had an interest. As a member of the Port Lawrence Company this defendant must be presumed to be acquainted with the transactions of that company. Baum, in fact, was his agent, and the legal proceedings resorted to by Oliver being in operation, no other ground of title could be assumed than the assignment. And this assignment, as has been shown, as it regards the four quarter sections assigned, was not within the scope of his power, and was, consequently, invalid; and as regards tracts three, four, eighty six, and eighty seven, the assignment rested for its validity on the decree of sale, which was not binding on the cestui que trusts, who were not parties to the suit.

These acts of the trustee or agent, being in the one case not valid for want of power, and in the other invalid, as the sale was invalid, were known to Williams. A notice to an agent is notice to his principal. Brooks v. Marbury, 11 Wheat. [24 U. S.] 78. And here is a case where an agent does certain acts which are not within his powers, and which, consequently, do not bind his principals; the defendant being one of them, can he set up a want of notice? Can a cestui que trust, connected with others, purchase a part or the whole of the trust estate through the unauthorized acts of the general agent, and insist that he is a purchaser, without notice of the acts of the agent? Baum, in making the assignment, was as much the agent of Williams as if he were the only cestui que trust; and the assignment, being unauthorized, did not divest his interest. Is not Williams to be presumed to be acquainted with his own title? And, if he is, he had full knowledge of the acts of his agent Baum; and although he may have been mistaken as to the legal effect of Baum's acts, still, knowing the facts, he is responsible for the legal consequences. Wormly v. Wormly, 8 Wheat. [21 U. S.] 421; 1 Story, Eq. Jur. 390. The title is thus in the hands of Oliver by the assignment of Baum, but Oliver having notice, as well as Williams, of the powers of the trustee, the lands in the hands of Oliver are still held in trust; are held, so far as the Port Lawrence interest is concerned, in trust for the defendant, Williams, and his partners. Oliver, beyond the powers of his trust, conveyed a part of these lands to the Michigan University, and received in exchange therefor tracts one and two. Now, as has been shown, the cestui que trusts may claim the lands received in exchange. The change in the property makes no change in the nature of the trust. The defendant, Williams, then, may claim, as cestui que trust, to the extent of his interest, a part of tracts one and two, as well as a part of tracts eighty six and eighty seven. But he claims the one half of these tracts as a purchaser, without notice, from Oliver; without notice of his own title, for it amounts to that. If it can be supposed that he had notice of his own title, he had notice of the full history of the title of his partners.

If the positions of the court on the great points of this case be correct, there would seem to be no doubt that this defendant is chargeable with notice. And as this point is considered free from difficulty, it is unnecessary to refer to the negotiations of Oliver with the trustees of the university, the recital of their deed to him, of the patent from the government to Oliver, and of those contained in the different deeds from Oliver to the defendant, to show notice.

Two grounds were urged by the defendant's counsel which have not been examined; and as much stress seemed to be laid on them, they will here be very concisely noticed. One was the lapse of time; and the other, that if, upon the whole, substantial justice has been done, the court will not, for any informality, open up the proceedings. In answer to the first it would be enough to say that the statute of limitations does not run against an established trust. Nor does lapse of time operate to bar in such a case, where the title has been held consistently with the trust set up. In such a case no presumption arises against the cestui que trust from lapse of time. Prevost v. Gratz [Case No. 11,406]; Boteler v. Allington, 3 Atk. 459; Cholmondeley v. Lord Clinton, 2 Mer. 360; 4 Desaus. Eq. 474; 1 McCord, 395, 398; 4 Desaus. Eq. 77. If the views of the court be correct, the character of the estate was not changed by an exchange of the lands, and the obtainment of the patents by Oliver. But, at all events, negligence can only be imputed from the time the trust property was purchased by Oliver, and but few years elapsed from the time the notice of this purchase was received until this bill was filed. Upon this view we think that lapse of time does not bar the right of the claimant.

The other ground, as to substantial justice having been done, is equally unsustainable. That the Port Lawrence Company, generally, have been remiss in not paying, in just proportion by the members, the expenses of the company as they accrued, can not be denied. And that the complainant and the other members of the Piatt Company, forming a part of the Port Lawrence Company, were most negligent in this duty, is not doubted. That the trustee of the company, from his position, became involved by claims of pur-

chasers of lots, is established by the evidence. But an examination of this branch of the case will show that his involvement on this account was not so great as he supposed it to be. And it will appear that the account made out by him was not as full as would be required by a court of equity.

Not to refer to other accounts against the company, it appears by the one made out by Oliver for himself and Baum, for the purchase and improvement of lots 223 and 224, that whilst the company were charged for every item of expenditure in building a warehouse and a tavern, and the instalments paid on the purchase, with interest, there was no allowance for rent. The evidence shows that rent was received, but the amount is not stated. Now, it is not always a correct mode of showing the value of an improvement by the cost of making it. And where such improvement has been occupied two or three years by tenants, it is proper, under the above circumstances, that rent should be deducted. How the trustee and Oliver, in this respect, settled with the other purchasers of lots, does not appear. No account is taken of the eight hundred fifty five dollars and thirty three cents received at the sale, and transmitted to the trustee by Schenck. This sum may have been accounted for, as Oliver alledges in his answer, but it was proper that so considerable an item should have been stated, and not left to the memory of the trustee or his agent. Baum and Oliver appeared to have been the largest creditors of the company for improvements; and although, in the account exhibited by Oliver to Baum, there was a credit to the latter for upwards of seven hundred dollars, yet how this money was paid nowhere appears. There is no credit for this sum in the general account of Baum against the company. As before remarked, independently of this partnership account for improvements by the mortgagee, Baum received the payment of little more than one thousand dollars to the creditors of the Port Lawrence Company.

The case made by the defendants is simply this: The lands of the Port Lawrence Company, consisting of tracts three, four, eighty six, and eighty seven, have been sold, and four quarter sections owned by the Piatt Company, to Oliver, for the sum of about eight hundred and sixty dollars; and there is still a large balance, more than one half, of the account of Oliver, unpaid, and this account was, for moneys paid, as agent, to purchasers of lots in Port Lawrence. With a part of the land thus sold, Oliver exchanged with the Michigan University for tracts one and two. For these tracts the Port Lawrence Company agreed to pay, some years before, about twenty thousand dollars; and this sum was less than they would have sold for, the defendants contend, had it not been for the fraudulent combination of the two companies at the public sale. By the acquisition of these tracts Oliver became the owner of all the improvements made in the town of Port Lawrence, which proved so prolific a source of claims against the company, and which has produced to him so rich a harvest. In addition to lots one and two, he and those associated with him held, under the purchase, numbers eighty six and eighty seven, and one of the five quarter sections, having paid for the whole the sum of $860.

From this short outline, we are mistaken if any very strong grounds of equity arise against the right of the complainant, which should control the decision of the court. If the complainant's equity rested on his own vigilance and punctuality, in attending to the concerns of the Port Lawrence Company, he would have but a slender foundation for a decree. But this is not the ground of his equity. It is founded on the acts of the agents, and not on what the complainant has done, or omitted to do, since the formation of the company. He has been negligent, but this does not subject his property, and the property of his associates, to any mode of transfer, however illegal. A company or an individual can be divested of property only in the mode sanctioned by law; and, for the reasons stated, we think the mode adopted by the defendants, in the present case, was not conformably to legal principles. The course pursued, in all probability, was the result of a misconception of the law applicable to the relation of the parties and the facts of the case; and we are always gratified in being able to take this ground, instead of one which would cast a shade over the character of any of the parties. On this occasion this gratification is peculiar, from the high character sustained by the living and the dead who were the principal agents in the above transactions.

That the court may have the facts fully before them, in regard to the present condition of the property, they order an account to be taken of the sales made in whole or in part of the tracts one, two, three, four, eighty six, eighty seven, and of the four quarter sections, designating the date and amount of sales in each tract, titles made, moneys received and due; and, also, an account of all moneys expended, either in the purchase or improvement of each tract, by the defendants, Williams and Oliver, or either of them, including compensation and expenses for the agency exercised in the general management of the property, &c.

[NOTE. Upon reargument this opinion was confirmed. Case No. 11,116. Exceptions were filed to the master's report. These were heard, and the case recommitted. The case was again several times recommitted because of death of parties or other causes, and a final decree was not entered until July 30, 1842. The decree was in conformity with the opinion above. From this decree the respondents took an appeal to the supreme court. The decree was affirmed, 3 How. (44 U. S.) 333.]

Case No. 11,116.

PIATT v. OLIVER et al.

[3 McLean, 27.] [1]

Circuit Court, D. Ohio. July Term, 1842.[2]

PARTNERSHIP—OWNERS OF REAL ESTATE—SURVIVORSHIP—TRUSTS—SALE BY TRUSTEE—RIGHTS OF CESTUI QUE TRUST—WARRANTY—HEIRS.

1. The active partner of a mercantile partnership may transfer its funds.

2. Real estate purchased by the partnership is liable for its debts.

3. But the acting partner cannot transfer the real estate of the partnership, the same as personal.

[Cited in Ruffner v. McConnel, 17 Ill. 216.]

4. In chancery such real estate, for the purposes of paying the debts of the partnership, is considered as personal property.

[Cited in Davis v. Christian, 15 Grat. 28; Willett v. Brown, 65 Mo. 142.]

5. But the conveyance of the real estate of the firm, must be made as the statute requires.

6. On the decease of one of the partners, his interests descend to his heirs at law, subject to the debts of the partnership.

[Cited in Merrill v. Downs, 41 N. H. 77.]

7. A partner by failing to contribute his share of the partnership fund, does not, in ordinary cases, forfeit the interest which he already has in the firm. And this is especially the case where no extraordinary emergency exists requiring such payment.

8. A decree may be made as between defendants. The court can only decree as between parties to the suit, but in equity it is not essential, as at law, that the parties litigant should all be on opposite sides of the case.

[Cited in Woolsey v. Dodge, Case No. 18,032.]

[Cited in McCormick v. District of Columbia, 18 D. C. 540.]

9. Where a trustee disposes of the trust property the cestui que trust may claim the thing received, if it can be identified. And this may be done, although the property received may have become greatly increased in value.

10. If the present value be the result of skilful labor, this may not be the case.

11. Where an election is necessary, the parties to the bill praying a specific relief, must be considered as having made it.

12. A trustee may convey his own interest, though the assignment may not convey the interests of his cestui que trusts.

13. The warranty of the ancestor does not bind the heir, where the right does not vest before the fall of the warranty.

[Cited in brief in Scott v. Scott, 70 Pa. St. 247.]

14. A warranty, with assets does bind the heir, and is a good plea in a formedon.

15. The heir is never bound by a warranty unless the ancestor was bound by it.

16. A man cannot bind his heirs to pay a sum of money unless he is himself bound to pay it.

17. The old common law warranty if not in form, in effect, has been superseded by covenants real.

[Cited in Young v. Hargrave, 7 Ohio, 68.]

[This was a suit by Robert Piatt against William Oliver, Micajah Williams, and others. It was first heard upon pleas to bill. Case No. 11,114.]

OPINION OF THE COURT. At December term, 1840 [Case No. 11,115] the main principles of this case were considered and decided in the opinion then given. Whether relief to the complainant shall extend to lots numbered one and two, or be limited to the tracts given in exchange for those lots, and which were subsequently purchased by Oliver, was reserved for future decision. An interlocutory decree was entered, directing accounts to be taken, &c., and the reports of the masters being now before the court, the case stands for a final decree. The counsel who now appear for the defendants did not argue the case at the former hearing, and they have been indulged with a re-argument of the whole cause. This course has been recommended, by the great amount of property and the numerous and important principles involved in the decision. But zealous, searching, and able as the arguments have been, on the maturest consideration they have failed to convince the court of any material error in their former views. Among the many points made in the argument, three only will be now considered. These were not raised, or not fully discussed, in the former argument: 1. That the land held by the Port Lawrence Company must be considered as personal property; and as such was liable to be sold by Baum, the principal agent. 2. That the negligence of the complainant worked a forfeiture of his interests. 3. That no decree against Oliver and Williams can be entered in favor of their co-defendants.

That the active partner of a mercantile partnership may transfer its funds placed in his hands, of what character soever they may be, is not doubted; and that real estate, purchased for the purposes of the partnership, is liable for the debts of the concern, is equally clear. But, from these principles, it does not follow that the active partner may transfer the real estate of the partnership, the same as personal. And this is the doctrine for which the defendants' counsel contend. They rely upon the case of Sumner v. Hampson, 8 Ohio, 364, in which the court say: "In the earlier stages of the common law, no proper partnership in lands could subsist; but, as social arrangements became more complex, land was necessarily used in partnership purposes, firstly as auxiliary to the general objects of the association, or received for debts, and more lately as direct capital stock. The cases cited in the argument show, that the same rules which affect chattels have gradually been extended to lands held for partnership purposes; that wherever partners manifest their intention to hold lands as partnership stock, either by express convention or by their course of dealing, it will be treated as such, in all respects, by courts of equity." The conveyance of real property is regulated

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

[2] [Affirmed in 3 How. (44 U. S.) 333.]

by statute, and also its descent; and neither of these modes is affected by any general law of partnership. Although lands belonging to the partnership may be liable for its debts, yet they descend to the heir at law, and do not go to the executor. Neither in their transfer nor descent are they regarded as personal property; but still, in equity, they are considered as liable for the debts of the partnership, and are applied as the personal property of the firm. Mr. Collyer, in his late work on Partnership (page 76), gives the following as the result of the reported cases on this point: "Upon the whole, therefore, the better opinion seems to be, that although the legal estate in freehold property, purchased by partners for the purposes of their trade, will go in the ordinary course of descent, yet the equitable interest in such property will be held to be part of the partnership stock, and distributable as personal estate." To hold that a partner in lands could sell and transfer them as he could a bolt of muslin, would disregard the law and its policy, and would introduce great confusion and uncertainty in land titles.

It is not perceived that the authorities cited can have any bearing in the present case. Nor, in the opinion of the court, has a forfeiture of his right been incurred by the complainant through his negligence, as contended under the second head. A very late case, of Prendergast v. Turton (Michælmas term, 1841), reported in 11 Law J. p. 1, is a strong authority, it is insisted, to sustain the forfeiture. That decision, it seems, was made by Knight Bruce, vice chancellor, in which it was held that a partner in certain mines failing to pay an instalment for some nine or ten years, which the company had no right to demand, forfeited the shares he had paid for. On the supposition that the demand of the instalment was not authorised, which seems to be admitted, the decision of Mr. Knight Bruce was wrong, and, unless sanctioned by higher authority, is entitled to but little consideration. But, if the instalment was properly demanded, the decision was clearly right, as the deed of settlement expressly provided "that, if any instalments on the shares should not be paid within fourteen days after the time fixed for payment, they should be forfeited." There were circumstances, stated in the opinion of the vice chancellor, which authorised the court to refuse to set aside a forfeiture which had been legally incurred. The sum for which the mortgage was given, it was alleged, had been paid by Oliver to purchasers of lots in Port Lawrence, for moneys paid by them and improvements made on their lots; and, it seems, nearly half the amount was for moneys expended by Oliver himself, as he alleged, in paying for and improving lots 223 and 224, which he and Baum jointly purchased. Now there was no special emergency which required the payment of this mortgage debt, or the small debt on which the attachment issued. The payment was not required for building up the town, but, on the contrary, it was demanded on the hypothesis that the town was to be abandoned. And it may be proper to remark, that although several of the members of the Port Lawrence Company were dead, and others had became insolvent, the remaining partners were abundantly able to pay any just demand against the company. But judging of the intention by the action, the defendant Oliver was more solicitous of using the debt, as a means of possessing himself of the property of the company, than to obtain the payment of it; and through the instrumentality of the mortgage and the attachment, and the co-operation of Baum, for about eight hundred dollars, he did acquire the whole property of the company, and the four quarter-sections owned by the Piatt Company; and by exchanging a part of this property for lots one and two, he acquired town lots 223 and 224, with their improvements, and all the other lots, and their improvements. It was the reimbursement of the purchasers and improvers of these lots, which constituted the mortgage and attachment debts. Here then, it seems, Oliver had all the lots with their improvements, and other property to an immense amount; and yet he, by the purchases under the attachment and the mortgage, had not exhausted half the sum which he paid, as he alleged, to the purchasers of lots. This is a result so extraordinary as to startle a common observer. It shows the strong inducement he had to go against the property of the Port Lawrence Company, rather than against the company or the individuals who composed it. For the protection of property thus acquired, a court of chancery will not be very astute to seek for technical objections, or rules of forfeiture applied in cases wholly dissimilar. The case cited from the Law Journal, in all its essential parts, is unlike the one under consideration.

As regards the third objection, as to a decree between co-defendants, it is laid down in 1 Story, Eq. Jur. 630: "In equity, it is sufficient that all parties in interest are before the court as plaintiffs or as defendants; and they need not, as at law, in such a case be on opposite sides of the record." 2 Story, Eq. Jur. 729: "In courts of equity, persons having very different and even opposite interests are often made parties defendant." And the court decreed as between co-defendants, in the case of Chiles v. Boon, 10 Pet. [35 U. S.] 177. It seems, therefore, that it is conformable to the rule of proceeding in chancery to decree, as between defendants, where they set up conflicting rights.

We come now to consider the point reserved, whether the relief shall be extended to lots one and two, or limited to the property given in exchange for those tracts, and which was afterwards purchased by Oliver. Although the tracts of land conveyed to the

Michigan University, in exchange for lots one and two, on which the town of Port Lawrence was laid off, have been purchased by Oliver, yet it appears that he subsequently disposed of a considerable part, if not the whole, of those tracts by valid conveyances, which places such parts, or the whole, beyond the reach of this court. It seems, therefore, that no exercise of the powers of this court can reach this property. The difficulties, great as they may be, in reaching the parts of lots one and two which remain unsold, and the proceeds of those parts which have been sold, are far less than those which attend the other tracts. Lots one and two were received by Oliver, as before remarked, in exchange for the lands of the Port Lawrence Company, tracts three and four, and the four quarter-sections which belonged to the Piatt Company. The Port Lawrence Company and the Piatt Company, therefore, as the cestui que trusts, may claim lots one and two. This is resisted, on the ground that Oliver was guilty of no fraud in the transaction, but acted in good faith; and that there is no case where a trust is raised by implication, that a court of chancery has exacted a penalty from the trustee; that the property has been made valuable by the skill, labor, intelligence, and influence of Oliver and his associate Williams; and that, to require them now to account for the increased value of the property, would be unjust and unprecedented.

The court have taken a very different view of the case, and they suppose that they are sustained by the whole current of authority. In their former opinion the court have not characterised, in strong terms, the acts of Oliver; they supposed it was unnecessary to do so. But they cannot now refrain from saying, that there is nothing in the whole transaction which, in their judgment, can shield him from liability for lots one and two. In 2 Story, Eq. Jur. 502, it is laid down, that "where a party purchases trust property, knowing it to be such, from the trustee, in violation of the objects of the trust, courts of equity force the trust upon the conscience of the guilty party, and compel him to perform it, and to hold the property subject to it, in the same manner as the trustee held it. It has been truly said by an eminent judge, that the only thing to be enquired of in a court of equity, in cases of this sort, is, whether the property bound by the trust has come into the hands of persons who were either compellable to execute the trust, or to preserve the property for the persons entitled to it." 2 Madd. Ch. Prac. 103, 104; Jeremy, Eq. Jur. bk. 2, p. 281, c. 3; Adair v. Shaw, 1 Schoales & L. 262. "Where ever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or cestui que trust." The rule is, that property covered with a trust, however converted or exchanged for other property, and into whose soever hands it may pass, with notice, is still charged with the trust. The principle is illustrated in 2 Story, Eq. Jur. 503, by supposing A receives money from B to purchase a horse, and he buys a carriage; B is entitled to the carriage, and may sue for it even at law. And further, "it matters not in the slightest degree into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods, or of stock; for the produce of a substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such."

The case of Docker v. Somes, 2 Mylne & K. 665, goes farther, as to the liability of the trustee, than the case now under consideration. Chancellor Brougham says, "The solicitor general has put a case of a very plausible aspect, with a view of deterring the court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with one hundred pounds of trust money, and earning one thousand pounds a year by selling them to his patients; and so he might have taken the case of trust money laid out in purchasing a piece of steel, or a skein of silk, and these being worked up into goods of the finest fabric, where the work exceeds by ten thousand times the material in value. But these instances, in truth, prove nothing, for they are cases not of profit on stock, but of skilful labor very highly paid; and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit."

And the counsel for the defendants contend, that the case at bar falls within the category of the cases supposed by the chancellor, in reply to the one put by the solicitor general. And they propose to return the piece of steel or the skein of silk, as all that justice can demand.

Had not this argument been made in a printed form, I should not have supposed it to have been made deliberately. I can suppose a case in which it might have applied. If, of the soil of lots one and two, bricks had been made, potters' ware, or any thing else of great value, and which had been sold for more than ten thousand times the value of the soil, the argument used would be conclusive to show that the cestui que trusts could not claim the sum realised. In the language of Chancellor Brougham, that would not have been a case of profit on stock, but of "skilful labor very highly paid."

What is the case under consideration? Only a part of lots one and two, perhaps less than one-half or one-third, has been sold by the defendants. By the general advance

of the country in improvements and in population, by the great canals made by the states of Ohio and Indiana, which are united and pass through these lots, by the railroad which extends from Toledo to the interior of Michigan, by the great improvements made of the town by the purchasers of lots, and, above all, by the eligible site afforded by tracts one and two for a great city, they have increased immensely in value. Whatever of labor or skill the defendants, Oliver and Williams, may have performed, which conduced to this great result, is a proper subject of compensation; as, also any expenditures which they have made in laying out the town, or in improving it. Even their general superintendency may be satisfied by a just compensation. This case, in fact, differs not in principle from an ordinary one, where, by a disregard of the trust, the trustee, or his assignee, with full notice, comes into the possession of property, which, under propitious circumstances, is rapidly enhanced in value. And it would be a new head in equity, that this rapid advance should shelter the trustee from liability. In plain language, that if the trustee, by his wrongful acts, had made rather a bad bargain, the property in his hands might be reached by the cestui que trust; but if he has shown great sagacity and tact in selecting property so situated, as to outstrip in value all other property in the neighborhood, he is freed from responsibility. At least, that he shall not be held to account for the property at its increased value.

Upon the whole, we think, upon principle and authority, the defendants, Oliver and Williams, are bound to account to the cestui que trusts for tracts one and two. That they must receive a liberal compensation for their general superintendency, the amount of which to be somewhat influenced by the high qualities requisite for the business, and the success with which it was managed. That they shall also be reimbursed for expenditures by them for the laying off, building up, and advancing the town. Those expenditures having been made by them in promoting, as they supposed, their own interest, must be taken to have been made in good faith. Where lots have been sold, and the purchase moneys received, the defendants must account. But for sums lost through the unfaithfulness of agents, they are not to be held responsible.

It is objected, that this is a case requiring an election, and that under no circumstances can relief be given to any of the cestui que trusts, except to the complainant, be being the only one who has made an election. That infants and femmes covert are concerned, who will not be bound by the decree, and may, when they shall become of age or discovert, elect to take the property originally held by the cestui que trusts, or prefer a personal remedy against the defendants, Oliver and Williams.

All the parties in interest are before the court, with very few exceptions, either as complainant or defendants; and, of course, have made their election. And the decree of the court, as above indicated, being manifestly for the advantage of those concerned, would be presumed to have been made with their consent. As to those, if any, who are not parties to the suit, their interests are in no way affected by this proceeding.

Some of the defendants, whose rights are in conflict with those of Oliver and Williams, have not answered the bill; but, with the assent of the complainant, they have been made defendants, and claim under the facts and circumstances set out in the bill. These persons have made their election as fully as if they had answered the bill at length. Indeed, they assent to its truth. And this is the understanding of all the parties concerned. Their rights may be as fully opposed as those of the complainant. In fact, they all claim under the same right, and the only difference between the rights asserted by them and the complainant is, that some of them claim under assignments. These assignments, from the original cestui que trusts, must be proved, and may be controverted by the defendants, Oliver and Williams. In this respect they will have as wide a range, and as ample an opportunity to contest these transfers, as if the claimants were plaintiffs. The court do not perceive much force in the objection, either on the ground of election or inconvenience.

A question is made whether Baum, by his mortgage on the property of the Port Lawrence Company, and afterwards by his assignment to Oliver of the certificates for the same, did not transfer the individual interest he held in that company. Baum undoubtedly had a right to transfer his individual interest in the Port Lawrence Company, at any time, and in any manner, he might choose; and the court think that, although he acted as trustee, and as such transcended his power in attempting to transfer the property to Oliver, yet such transfer must be held good to the extent of his individual interest.

It is contended, that Baum had a right to execute the mortgage as trustee, and that, although the purchase by Oliver under the attachment and the mortgage may be invalid, yet the warranty in the mortgage deed binds the cestui que trusts.

It has already been decided, that the defendants, Oliver and Williams, held the property in trust for the cestui que trusts, with the exception of Baum's interest; and that tracts one and two, having been received in exchange for a part of the above property, and the four quarter-sections owned by the Piatt Company, are also held by them in trust. Now, if the purchase by Oliver, and afterwards by Williams, substituted them as trustees in the place of Baum, giving them a lien only for the money paid by Oliver, it is not perceived how the warranty can have

any effect. A lien on land is not a property in it. The warranty can have no other effect as to the cestui que trusts generally, than if there had been no proceedings on the mortgage. It may, perhaps, estop the heirs of Baum, so far as they may claim his interest by descent. But it is contended that the warranty estops the right set up by the heirs of Baum, which they purchased long after his decease, with assets of the estate that descended to them; and it is supposed that the rule in Shelley's Case applies to the one under consideration. That rule is, "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either immediately or mediately, to his heirs in fee or in tail, that always in such cases the words heirs, &c., are words of limitation of the estate, and not words of purchase." The court do not perceive the application. No part of the right referred to ever vested in Baum, and, of course, it did not descend to his heirs. The heirs acquired it by purchase, and, as regards the present question, it is immaterial whether the purchase was made with the assets of the estate descended to the heirs, or with other means. A warranty must be annexed to some estate which is capable of supporting it; for, if a person covenants to warrant land to another, and makes him no estate, or makes him an estate that is not good, and covenants to warrant the thing, in these cases the warranty is void. 4 Cruise, Dig. 378. The warranty must take effect in the lifetime of the ancestor, who must be bound by it; for the heirs shall never be bound by an express warranty, unless the ancestor was bound by it. And the heir must claim in the same right that the ancestor did. Id. 379. Where the right is not in esse in the heir, or any of his ancestors, at the time of the fall of the warranty, there it shall not bind. Also, a warranty shall never bar any estate that is in possession, reversion, or remainder, that is not divested, displaced, or turned to a right before or at the time of the fall of the warranty. Co. Litt. 259. By the common law, the heir shall never be bound to any express warranty but where the ancestor was bound by the same warranty; for if the ancestor were not bound, it cannot descend upon the heir. If a man make a feoffment in fee, and bind his heirs to warranty, this is void, because the ancestor himself was not bound. Also, if a man bind his heirs to pay a sum of money, this is void. Co. Litt. [Thom. Ed.] 262, 263.

From these authorities it is clear that, in all cases of lineal and express warranty, the heir is not bound unless the ancestor was bound; so that, at some time before the death of the ancestor, the right must vest in him and descend to the heir, to bind the heir by the warranty. Now the right in controversy was not in esse at the decease of Baum, but was purchased by his heirs subsequently to his death. The warranty, therefore, was never binding on him, and cannot bind his heirs. This conclusion is not shaken by the position of the defendants' counsel, that a lineal warranty with assets will bind the heir. That doctrine was laid down by Littleton, on which Coke says (Co. Litt. [Thom. Ed.] 325), "Here it appeareth by Littleton, that a lineal warranty and assets is a good plea in a formedon in the descender, wherein it is to be known that if tenant in tail alieneth with warranty and leave assets to descend, if the issue in tail doth alien the assets and die, the issue of that issue shall recover the land, because the lineal warranty descendeth only on him without assets; for neither the pleading of the warranty without the assets, nor the assets without the warranty, is any bar in the formedon in the descender. But if the issue to whom the warranty and assets descended had brought a formedon, and by judgment had been barred by reason of the warranty and assets; in that case, albeit he alieneth the assets, yet the estate tail is barred for ever." The old common law warranties, if not in form, in effect have been superseded by covenants real. 2 Bl. Comm. 304. No personal action lay at common law upon the warranty; and when an action was brought, as, for instance, a common recovery against the tenant, he vouched his warrantor who was duly summoned to appear; and judgment was given, that the demandant shall recover seisen of the lands in question, and that the tenant shall recover against the voucher lands of equal value to those warranted by him and now lost by his default. In the same page Coke says, "If the heir in tail bringeth a writ of formedon, and a lineal warranty of his ancestor, inheritable by force of the tail, be pleaded against him, with this, that assets descended to him of fee simple which he hath by the same ancestor that made the warranty; if the heir that is demandant may annul and defeat the warranty, that sufficeth him; for the descent of other tenements of fee simple maketh nothing to bar the heir without the warranty." Now, under the old forms of proceeding on the warranty, the heirs of Baum would not be bound, for the reason that he was not at any time during his life, the right or estate not being in esse. But, in addition to this consideration, no judgment is now given against the vouchee for other lands of equal value on his warranty, but a personal action is brought on his covenant. We think that the sale to Rowan of the interest of Steel in the Port Lawrence Company, under the deed of trust to Edwards, was valid; and also the transfer of one and a half shares to Ewing by Rowan. And the transfer of Mack and others to Ewing of their interests, we also think is sufficiently proved.

[On appeal to the supreme court the decree subsequently rendered in this court in conformity with the opinion above and that in case No. 11,115 was affirmed. 3 How. (44 U. S.) 333.]

Case No. 11,117.

PIATT v. VATTIER et al.

[1 McLean, 146.] [1]

Circuit Court, D. Ohio. Dec. Term, 1831.[2]

LIMITATION OF ACTIONS—NON-RESIDENTS—FRAUD —NOTICE.

1. The statute of limitations of 1804 was repealed by the act of 1810. This act was repealed by the act of 1824—no provision in this act where the former statutes had begun to run—this was remedied by the act of 1826.

2. A statute of limitations cannot bar for lapse of time before its passage; but if a reasonable part of the time fixed for the limitation has to run, at the time the statute is enacted, it will operate.

[Cited in Johnson v. Bond, Case No. 7,374; Campbell v. Holt, 115 U. S. 632, 6 Sup. Ct. 215.]

[Cited in Price v. Hopkin, 13 Mich. 325, 328; Pritchard v. Spencer, 2 Ind. 486.]

3. The statute of Ohio does not operate against non-residents of the state.

[Cited in Bowman v. Wathen, Case No. 1,740.]

4. Lapse of time may be applied, under proper circumstances, to bar an equity, where the statute would not bar.

[See Reed v. Dingess, 56 Fed. 175.]

5. This rule is applied by a court of chancery, on its own principles, which do not depend upon the statute of limitations.

[See Reed v. Dingess, 56 Fed. 175.]

6. The statute will operate even where there has been fraud, from the time the fraud is discovered.

[Cited in Parks v. Satterthwaite, 132 Ind. 413, 32 N. E. 82.]

7. Mere rumor is not sufficient notice.

8. Where notice is denied in the answer, it must be proved by more than one witness.

9. Notice to a purchaser, who purchased from a bona fide purchaser, without notice, cannot affect the title.

[This was a bill in equity by Robert Piatt against Charles Vattier and others and the Bank of the United States to secure title to a certain lot.]

Mr. Scott, for complainant.

Mr. Starr, for defendants.

OPINION OF THE COURT. This suit is prosecuted by the complainant, for the title to lot number one, on the town plat of Cincinnati. He alleges that this lot, with several others, was given as a donation, on condition that the donee within a limited time should construct a house of certain dimensions. That the proprietors gave a certificate of this right, which was transferable by assignment. That the above lot was allotted to one Samuel Blackburn, who transferred his right to one James Campbell, and he to one John Bartle, under whom the complainant claims by deed dated 22d June, 1827; that in the summer of the year 1790 Bartle took possession of the lot, and made the improvement required within the time limited. That he occupied the building first by himself, and then by his tenants Elliott and Williams; also by Abijah Hunt, for several years. The complainant further states, that the said Bartle, becoming embarrassed in his circumstances, mortgaged the lot to one Robert Barr, of Lexington, Kentucky, for the sum of about seven hundred dollars, to the payment of which the rents reserved to the said Bartle from the tenants in possession were to be, and a large amount was in fact, paid. That Bartle lost the certificate for the lot in crossing the Ohio river, and that the defendant, Vattier, coming to the knowledge of this loss, fraudulently purchased Barr's right to the lot, which had become very valuable, and obtained possession of it. And that the said Vattier obtained fraudulently from John C. Symmes, who held the legal title, a conveyance for said lot. That Vattier sold the same to John Smith, who had full notice of Bartle's claim. That Smith transferred the lot to John H. Piatt, who also had full notice of Bartle's claim. Piatt, now deceased, in his life-time, mortgaged the lot to the United States Bank, to whom the equity of redemption has been relinquished. That the agents of the bank had full notice of Bartle's interest before the mortgage was executed. That, though Bartle asserted to the respective purchasers of the lot his right, he was unable, by reason of his poverty, to sue for its recovery. The complainant prays that the bank may be decreed to deliver up possession of the lot to him, and execute a quit claim deed for the same; and that it may be compelled to account for the rents and profits, &c. That if the title of the bank be held good, the defendant Vattier may be decreed to pay the value of the lot, &c.

In the answer, the bank admits that Vattier obtained a deed for the lot in controversy in 1799, and entered into the possession of it; and continued to occupy it until he sold to Smith, who possessed the property for some years. That it was purchased by John H. Piatt, and by him mortgaged to the bank, to secure the payment of a large sum of money. That afterwards the equity of redemption was relinquished by the representatives of Piatt. All notice is denied, and also the allegation of fraud.

Vattier, in his answer, denies expressly that Bartle ever mortgaged the lot to Barr, and avers that he never heard of such a mortgage until after the commencement of this suit. No such instrument is found on record. He understood that Bartle had been in possession of the lot in conjunction with another individual, and that they had made some improvements on it, but to what extent, or what was the nature of their claim, or how long they lived on it, he never knew. He denies that Bartle ever had the donation

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

[2] [Affirmed in 9 Pet. (34 U. S.) 405.]

right. Being desirous of purchasing the lot, he was informed, on enquiry, that Barr was the owner, by Jesse Hunt and Ludlow, one of the original proprietors of the town. He understood there was some dispute between Barr and Symmes respecting the lot. That he went to Lexington, saw Symmes and Barr together, and there purchased the lot of Barr for seven hundred and twenty-five dollars, which sum was paid by him. Symmes gave him a writing, obligating himself to make a deed for the lot on his return to Cincinnati. The dispute between Barr and Symmes was, at this time, adjusted. When the purchase was made, he received no writing from Barr as evidence of title. He understood that the legal title was in Symmes. He took possession of the lot after he obtained the deed, and continued to occupy it about nine years, when he sold and conveyed it to John Smith, in the year 1806. That in obtaining possession of the lot he used no fraud; it was voluntarily surrendered to him by the person in possession of it, and he denies any knowledge whatever of the equitable claim of Bartle, either at the time he made the purchase or took possession. That although he frequently saw Bartle, he never made known to the defendant any claim to the property. He was frequently in the house while it was occupied by the defendant. He denies that Smith had any notice, and avers that since 1797 there has been an uninterrupted possession under the deed from Symmes.

From the evidence, it appears that, in 1799, Bartle and one Strong, in Cincinnati, were connected in business, and kept a tavern in one part of the house, on the lot in controversy, and a store was kept in the other part. There was a rumor that Bartle and Strong, having bought goods of Barr, mortgaged the house and lot to him to secure the payment of the debt. Shortly after, Strong died in the house, and in June or July, 1792, Bartle left Cincinnati and resided in Kentucky; and Barr came into the possession of the lot, and had the whole under his charge. Bartle became embarrassed, was unable to pay Barr, and he took possession of the lot, received the rents, claimed the property, whether absolutely or not does not appear, until he sold it to Vattier. Vattier obtained the deed from Symmes, in whom the legal title was vested, to whom he paid fifteen pounds. The lot was originally a donation lot, and Bartle and Strong purchased it, and built the first house upon it. Blackburn seems to have been the donee of the lot, and he sold it to one Campbell, of whom Bartle and Strong purchased in 1789 or 1790. It was the practice to give the original donee a certificate, which was transferable. Some time after, Vattier purchased and came into possession; he had notice of some claim that Bartle had on the lot, but the former remarked he did not regard it, as he had a deed for the lot. Some of the witnesses say that Campbell was connected with Strong and Bartle in business, but that he left Cincinnati some time before Strong died, and the business was carried on in the name of Strong and Bartle. Bartle, it seems, lost the donation certificate for the lot. When the lot was owned by Piatt, one of the witnesses states that he was requested by Bartle to communicate to Piatt that if he would pay up all rent on the lot from the time the mortgage was paid off up to that time, which was in 1817, he would relinquish all claim to the lot; which Piatt refused to do. The deed from Symmes to Vattier bears date the 20th of March, 1797. Smith's deed from Vattier is dated 9th July, 1806. The sheriff's deed to Piatt bears date 17th August, 1812, and the mortgage from Piatt to the bank is dated 13th October, 1820.

An objection is made in the argument that the necessary parties are not before the court. It is alleged that Bartle and the representatives of Symmes are necessary parties, and the decision of the supreme court in the case of Findlay v. Hinde [1 Pet. (26 U. S.) 241], is referred to as in point; and also the decision of this court in the case of Smith v. Shane [Case No. 13,105]. In the first case, the supreme court decided that Garrison was a necessary party, although he had conveyed the property to one of the defendants, on the ground that the complainants could recover only by force of the equity set up against Garrison, and that an opportunity should be afforded him, by making him a party, to rebut that equity. In the case of Smith v. Shane [supra], the complainant set up an equity as against Buford, though he had conveyed to the defendant, Shane, and the court decided, under the authority of the above case, that Buford was a necessary party. But in the case under consideration, Bartle has conveyed his interest by deed to the complainant, and he only sets up the interest thus derived. For what purpose, then, is it necessary to make Bartle a party? Whatever right he had in the premises passed to the complainant, not by an executory but an executed contract. Claiming under a deed which, without conditions, transferred to the complainant the right of the grantor, the sanction of a court of equity cannot be necessary to perfect the title of the complainant as against Bartle; nor can he claim a right to invalidate the deed because the consideration has not been paid. The deed imports a consideration.

The authorities referred to do not sustain the objection as to Bartle. It appears from the facts in the case that Symmes held the title as a naked trustee, and having conveyed it, no right or interest in the premises could devolve upon his heirs, nor can they be held responsible in any point of view, under the circumstances of the case. The necessity, therefore, of making them parties to the suit is not perceived. Whether Campbell and Strong have an interest in the premises, so as to require them to be made parties to the

suit, depends upon the proof in the case. The complainant only asserts the right of Bartle, and unless he shall show a transfer of whatever interest both Campbell and Strong had in the premises, he must fail in his suit. It is admitted that the donation of the lot was made to Blackburn, and it is alleged that Campbell purchased his right. From the proof, it appears that a certificate from the proprietors was the evidence of right held by the donee, and that this certificate was transferable either by assignment or delivery, but which does not satisfactorily appear. There is no proof of any assignment having been made of the certificate held by Blackburn, if indeed he held any such evidence of title. It does not appear, from any competent proof, that a certificate was ever issued for the lot in controversy. If the mere statement of Bartle, that he had lost the certificate which he held for this lot, be sufficient to prove its loss, it cannot be received as evidence of the contents of the paper. Jacob Fowler, one of the witnesses states, that he heard Israel Ludlow, one of the proprietors, and who acted for the other two proprietors, say, that lot number one belonged to James Campbell, and he knows that in the summer of 1790, Campbell, Bartle, and Strong, erected a building on the lot, which satisfied the terms of the donation. The same summer the building was completed, and those three individuals occupied it, and were connected in the business of merchants. Campbell left the firm in a short time, and then the firm was known by the name of Bartle and Strong. Some time afterwards Strong died in the house, and in a few months Bartle left Cincinnati. About this time Campbell informed the witness, Fowler, that he had sold the house and lot to Bartle. This declaration of Ludlow as to Campbell's right, and the admission of Campbell that he had sold the property to Bartle, are the only facts, except common report and the circumstances of the case, which show the derivation of title by Bartle. What evidence of title was given by Blackburn to Campbell does not appear, nor how he conveyed to Bartle. From the statement of Hunt, it appears that Strong was interested with Campbell and Bartle in the property, and assisted in its improvement. How his interest has been disposed of, does not appear. There is no proof conducing to show that it was purchased by Bartle, unless the fact of his remaining in possession of the property, after the decease of Strong, and the acknowledgment of Campbell that he had sold the lot to Bartle, authorize such an inference.

If the above transactions were of recent occurrence, would not proof of the transfer of Strong's right be necessary to authorize a divesture of the legal title from the defendants. If the proof of his right were as clear as that of Bartle's in the first instance, which is believed to be the case, a court of chancery would require some evidence of the transfer of that right before it would invest Bartle with the full legal title. This evidence is not found in the fact of the possession of the lot by Bartle a few months subsequent to the decease of Strong, or in the circumstances that followed. Nor is it satisfactorily found in common report. This may be evidence as to the boundaries of land, or to establish the genealogy of heirs. But if the proof of the transfer of the right from Campbell and Strong to Bartle, were indisputable, as that transfer is not pretended to have been made by deed, as is done by Bartle to the complainant, would it not be necessary to make the heirs of Strong parties, and also Campbell, that they might rebut the equitable claim to their interest, as set up by the complainant. If, as to Campbell, the existence of the certificate be presumed, and that the property was transferred to Bartle on the delivery of this certificate from Campbell, yet the interest of Strong's heirs seems not to have been conveyed. Should the court presume against the evidence of Hunt, Fowler and White, that Strong had no interest in the premises, and that Bartle's right covered the whole property, still there are objections to the complainant's title, which it would become important to consider. The claim of Barr originated under a mortgage, as contended by the complainant, to secure the payment of a bona fide debt of between six and eight hundred dollars. And the complainant presents himself as invested with Bartle's equity and as having a right to redeem the title from the lien of the mortgage. If any mortgage were executed from Bartle to Barr, it could only have been an equitable mortgage, as the legal title was never in Bartle. At what time this mortgage was dated, if it ever had any existence, does not appear, nor whether it was executed by Bartle and Strong, or by Bartle only. Hunt understood that Bartle or Strong mortgaged the property to Barr, and this witness seems to have had as accurate a knowledge of the circumstances of the case, as any other one examined. No witness ever saw the mortgage, and whether it existed in parol or in writing, does not appear. Nor are the conditions of the mortgage shown by proof.

From the facts established, it is to be presumed that the debt to Barr being for goods, was due from Bartle and Strong, as they sold goods as partners, and the business was continued by Bartle only a few months after the decease of Strong. It is probable the mortgage was given in the summer of 1792, and that Barr came into the possession of the property either in that or the following year. If the property were mortgaged with the understanding that the annual rent should be applied to the payment of the mortgage so soon as it was discharged, the right would revert to the mortgagor. It is to be regretted that an agreement so important to the rights of the parties as this, should not have been committed to writing, or preserved in the memory of witnesses. Mr. Fowler, the witness, seems

to have derived his knowledge on this point from Bartle, and the tenants of Elliott and Williams, who rented the lot or a part of it. They stated to him the amount of the rent annually, and that it was to be applied to the payment of the mortgage. Mr. Hunt states, that Abijah Hunt had the agency of the lot for Barr, until about the time that Vattier purchased it, and that the agent accounted to Barr for the rent. And the witness seems to have no doubt that the annual rent was paid to Barr in discharge of the mortgage. This is an inference which he draws from the facts and circumstances of the case; for he does not pretend to state the fact of payment as coming within his own knowledge. If this impression were received by communications made to him by the agent of Barr, it is not competent testimony; nor is it more competent if it be an inference from the facts disclosed in his deposition. The receipt of the rent by Barr was consistent with the ownership of the property, which seems to have been asserted by him in his offering to sell it, and, at last, in his actually selling it. White understood that the property passed into the hands of Barr by virtue of a mortgage, or some other agreement; and Hunt says that Barr being unable to obtain the payment of his claim against Bartle, took possession of the property to secure his debt, though the witness does not think he claimed the absolute title to it. As these transactions took place nearly forty years ago, and as they are only evidenced by the frail recollection of witnesses, it is not extraordinary that they are vaguely stated. After so great a lapse of time, it is not to be expected that witnesses can discriminate very accurately between facts which came within their own observation, and those which they received from others.

No aid is given to this part of the complainant's case, by the answers of the defendants. They deny the material allegations in most parts of the bill, and require strict proof of every part of it. No fact has been proved going to show that either Barr, while he was in possession of the property, or those who subsequently claimed it, ever admitted Bartle's right. No one seems to have seen the mortgage, or was present when it was executed. No one proves the existence of the mortgage or its contents, as coming from Barr. The facts stated by the witnesses in relation to this lien, seem to rest on floating rumors, and on statements made by Bartle and his tenants, and perhaps the agent of Barr. In the leading circumstances of the case, there is but little found to relieve the mind from this state of uncertainty in regard to the foundation of the complainant's claim; for the legal title being in his adversary, a divesture of it can only be decreed by the clear exhibition of a paramount equity. A legal title, sanctioned by a long and uninterrupted possession, cannot easily be shaken. The better right, under such circumstances, must be proved so fully as to leave no ground for serious doubts, before chancery will divest the legal interest. But, if the mortgage were clearly established, and the mortgagee, having entered into the possession of the premises, may be compelled to account for the rents received, after deducting the money expended in judiciously improving the property, still there are serious objections to be overcome before the title of the complainant could be sustained. The statute of limitations and the presumption against his title from lapse of time, have both been insisted on in the argument. Indeed, on these two grounds, the defendant's counsel principally rely for their protection. The first statute of limitations in this state was passed in January, 1804, and took effect the 1st May following, and it takes away the right of action by ejectment for the recovery of real estate, where an uninterrupted possession has been held adversely for twenty years. But there is a saving in behalf of femes covert, infants and persons beyond seas. Bartle, it is contended, being a citizen of Kentucky, is within the saving beyond seas. The bill was filed the 6th December, 1827. By the act of 1810, the above act of the 1st January, 1804, was repealed, but its provisions, except twenty-one years were inserted in lieu of twenty years, were substantially embodied in the repealing act, and it contained a special provision for cases where the previous statute had begun to run. On the 25th February, 1824, the above act of 1810 was repealed, but the same limitation was continued, and it was provided that actions barred under former statutes should not be maintainable, but there was no provision respecting cases where the previous statutes had begun to run. This act took effect the 1st June, 1824. By an act of 1826, the previous acts of 1824 and 1810 were revived in all cases where they had begun to operate. As the act of 1824 repealed all former acts of limitation with a saving only in cases where the full term of a previous statute had run, it follows that, unless the defendants can bring their case within the provisions of this statute, or the resuscitating act of 1826, the bar set up under the statute cannot be sustained. The statute of 1804 took effect the 1st of May, and that of 1824 the 1st of June, so that there was one month more than the twenty years limitation fixed by the act of 1804, before it was repealed by the act of 1824. Unless, therefore, the statute began to run against the claim asserted by the complainant within one month from the time the act of 1824 passed, it creates no bar unless aided by the statute of 1826. When the act of 1804 was passed, Bartle, it seems, was a resident of Kentucky, or at least he was not a resident of the state of Ohio. Being a non-resident, he comes within the saving of the statute as to persons beyond seas, unless he came within the state, which would subject him to the operation of the statute. The time which had

elapsed previous to the taking effect of this statute, could form no part of the twenty years required under it to bar an action.

On a careful examination of the proof in this case, it does not appear that Bartle was in Cincinnati, or in any other part of the state, at any time within the month of May, 1804. Since Vattier's purchase and possession of the property, it seems, from the statement of Mr. White, one of the witnesses, he was several times in Cincinnati, but from so general a statement, the fact cannot be inferred that he was in Cincinnati in the month of May. The only time that Bartle is proved, specifically, to have been in Cincinnati was, after the purchase of the lot by Smith, and while he was digging the cellar for the building he erected on the lot. Within what month or even year, this cellar was dug, does not clearly appear. It must, probably, have been subsequent to the 9th of July, 1806, as that is the date of Smith's deed from Vattier. No witness specifies the time the above improvement was commenced. It may have been commenced in 1806, 7 or 8. If the time above referred to, at which Bartle was within the state be less than twenty years preceding the commencement of this suit, the statute does not bar. The bill was filed on the 6th day of December, 1827; consequently if the time referred to was not anterior to the 6th December, 1807, the statute cannot operate against the title of the complainant. If the statute of 1804 had begun to run by Bartle's coming into the state, so that the twenty years expired before the act of 1826 took effect, that act could not constitute a bar. By the act of 1824, the previous act of 1810 was repealed, and no subsequent statute could so revive the act of 1810, and the previous one of 1804, as to give them the same effect in every respect as if they had not been repealed. In 1826, when the resuscitating act was passed, the statutes of 1810 and 1804 had no existence, and could have no effect, except as to causes of actions which had become barred under them. If the action had accrued, so that the time of the statute was completed between the time the act of 1810 was repealed, and the passage of the resuscitating act of 1826, the latter statute could not operate. To give effect to its provisions in this respect, would recognize a power in the legislature to bar an action, by a provision entirely retrospective in its operation. It would scarcely be contended that it would be in the power of the legislature to prevent, by special provision, the prosecution of any action for the recovery of a right where the limitation had expired before the passage of the act. Such acts must be prospective, although the time within which suit must be brought, may be limited by legislative discretion. If, when the act of 1826 took effect, a part only of the statutes revived had run, it might well be enforced. For effect could be given to it, under the circumstances of the case; and the time the statutes of 1804 or 1810 had to run would be the limitation imposed by the act of 1826. But in all cases where limitation had run before the passage of the act of revivor, no effect whatever can be given to it. In this view of the statutes, and on a failure of proof to show that the statute of 1804 began to operate on the title of Bartle in the month of May, 1804, it is essential for the defendants to show that the same act began to run at a time which would fix the expiration of the limitation of twenty years, a reasonable time after the act of 1826 took effect. As before remarked, if Bartle was not within the state before the 6th December, 1807, which was twenty years preceding the filing of the bill, the plea of the statute cannot avail the defendants; nor can it avail them, according to the construction given to the above statutes, if they show the statute did begin to operate prior to the above day, unless they fix the time within less than twenty years preceding the act of 1826. This limits the period within which the defendants must show that Bartle was within the state from a reasonable time, for the operation of the statute after the 8th February, 1806, to the 6th December, 1807. This reasonable time must be the limitation imposed by the act of 1826, connected with the act revived, and applicable to cases like the present. It may not be necessary for the court to determine on the reasonableness of the time, unless the proof shall show that Bartle was in the state within the period specified. The time being fixed, the enquiry remains as to the fact, when did the statute begin to operate against the title of Bartle. He was within the state while Smith was digging the cellar on the lot in controversy, or was about to commence digging it. At what time was this? The witnesses do not specify the date. It was, probably, as before remarked, subsequent to the 9th July, 1806, but was it anterior to the 6th December, 1807.

In the argument, a reference was made to the motion for the expulsion of Smith from the senate of the United States, connected with other circumstances, as fixing the time the above improvement was commenced. It appears from the statement of the witness that Smith was in Cincinnati when Bartle was present and the cellar was being dug; but whether this was before or after the motion referred to does not appear. On a fact so material as this, it is somewhat extraordinary that the evidence is so indefinite. The time this cellar was dug, it would seem probable might be shown by the testimony of living witnesses. But the witnesses called to testify have been unable to fix the time with precision, or they have not been examined as to the fact. It is incumbent on the defendants to fix the time the statute began to operate, in order to entitle themselves to its provisions. A fact so important cannot be inferred from slight circumstances, nor can it be established on doubtful testimony. As

it has not been proved that the statute began to operate within the time specified so as to constitute a bar to the plaintiff's title, it is unnecessary to consider the other grounds assumed in the argument against the operation of the statute. It may be remarked, however, that, even in cases of fraud the statute will begin to run from the time the fraud is discovered. And in such a case the policy of the statute is as clearly in favor of its operation as under any other circumstances.

If it be important in ordinary cases, that the facts should be investigated and the controversy settled within the limitation fixed by the statute; it is not less so, when fraud has been committed, that facts which constitute the fraud should be investigated while they remain in the recollection of witnesses. The lapse of time insisted on by the defendants' counsel remains to be considered. On this ground most reliance was placed in the argument. On the part of the complainant, it is contended that lapse of time cannot operate against the title he sets up, because Bartle was not a citizen of the state, and lapse of time can only operate in cases where the statute of limitations applies: and because Vattier was a purchaser with notice and was guilty of fraud in procuring the legal title; and that each purchaser, down to the present owners had notice of Bartle's claim. It is a well-settled principle, that effect will be given to the statute of limitations in equity the same as at law. At first this rule was controverted and afterwards frequently evaded, on the ground of implied trusts, but the modern decisions have sustained the principles as above stated.

The position assumed by the complainant's counsel, that lapse of time can only operate where the statute applies, is not sustained by authority. "At all times courts of equity, have, upon general principles of their own, even where there was no statutable bar, refused relief to stale demands, where the party has slept upon his rights and acquiesced for a great length of time." This doctrine is fully sustained in the case of the Marquis of Cholmondeley v. Lord Clinton, 2 Jac. & W. 1, 138–152. In the case of Townshend v. Townshend, 1 Brown, Ch. 551, the court, on possession of thirty years by the defendants, presumed that the settlement under which the complainant claimed was voluntary and dismissed the bill. And in the case of Andrew v. Wrigley, 4 Brown, Ch. 125, where an executor had sold the testator's term specifically devised, under strong circumstances of fraud, Lord Thurlow refused relief from the lapse of time, although his decision would have been different if an earlier application had been made. The same principle was acted on in the case of Morse v. Royal, 12 Ves. 373, and also in the case of Beckford v. Wade, 17 Ves. 87. Lord Kenyon in this last case says, "Courts of equity by their own rules independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity to any particular demand." Smith v. Clay, 3 Brown, Ch. 640; note Bond v. Hopkins, 1 Schoales & L. 413, 428; Stackhouse v. Barnston, 10 Ves. 466, 467; Kane v. Bloodgood, 7 Johns. Ch. 93. In the case of Bonney v. Ridgard, 1 Cox, Ch. 145, relief was refused from the lapse of time, though from the face of the assignment, fraud was apparent. And in a later case of Blennerhassett v. Day, 2 Ball & B., 104, it was decided that, "where the facts constituting fraud, are in the knowledge of the party, and he lies for nearly twenty-five years, he cannot get relief." This doctrine is illustrated with consummate ability by that distinguished judge, Lord Reddesdale, in the case of Hovenden v. Lord Annesley, 2 Schoales & L. 608. And in the case of Gregory v. Gregory, Coop. 201, "where the time was only eighteen years and the case on the merits favorable for relief, yet it was refused."

The supreme court have decided in [Hughes v. Edwards] 9 Wheat. [22 U. S.] 489, that "where no interest has been paid, and the mortgagee has been in possession of the mortgaged premises for twenty years, and no special circumstances being shown, the mortgagor is barred from the equity of redemption." And so where the mortgagor has remained in possession for the same term, without the payment of interest or an acknowledgment that the mortgage is still existing, he may rely on the lapse of time against a bill to foreclose, and the court will presume the money paid. It will be perceived, from these cases, that the lapse of time, connected with an adverse possession, which may close the door of a court of equity, does not necessarily depend upon a statute of limitation. In the state of Tennessee, the limitation within which the action of ejectment must be brought is five years, and in Kentucky seven. Would it be contended that, by analogy to these statutes, a title might be presumed where an uninterrupted adverse possession had been proved for the terms specified? Such a presumption arises under the common law, in many cases, after the lapse of twenty years, and, under peculiar circumstances in a shorter period.

Vattier procured a deed for the lot, and entered into possession of it, in 1797. Previous to this purchase, for some years, it had been in the possession of Barr. In his answer Vattier denies that he had any knowledge of Bartle's claim. He states that he never heard of the mortgage until after the commencement of this suit. Are these allegations of the answer contradicted by two witnesses, or by one witness and strong circumstances? Fowler, one of the witnesses, states that, on his asking Vattier what he would do with Bartle's claim, a

short time after he made the purchase, he replied that he had examined and found that Bartle had no deed for the house and lot, on which he went to Lexington, and purchased Barr's claim. This is the only witness that proves that Vattier had any notice of Bartle's claim before the purchase was made. It seems the house was called Bartle's, either on account of his claim to the property, or from the circumstances of its having been built by him and others. Perhaps from a floating rumor of his right, Vattier may have been induced to make the examination he did make to see if Bartle had any title to the premises. He found nothing to show a color of title in Bartle. Nor does it seem that he could have been successful in ascertaining the nature of this title as set up by the complainant, except by application to Bartle himself or to Barr. He did apply to Barr, and purchased the property from him at its full value. There is no pretence that Vattier did not pay an adequate consideration for this lot. What kind of notice will affect the conscience of the purchaser? Floating rumor is not sufficient, nor a notice by one who has no interest in the property. 1 Story, Eq. Jur. 389; Jolland v. Stainbridge, 3 Ves. 478; Sugd. Vend. c. 17. But if the statements of this witness were sufficiently explicit to show a notice of Bartle's title, still it is but one witness in contradiction of the answer. If the notice be not established, the circumstances of Vattier's obtaining the deed from Symmes does not show fraud. Aside from the motive, the obtainment of the deed was an act done in good faith. Symmes compelled him to pay fifteen pounds under the pretence that that sum was due from Bartle for the lot. If Symmes acted fairly in this transaction, the payment of this money goes strongly to refute the fact insisted on, by the complainant, that this was a donation lot. But if Symmes acted unfairly in exacting this sum, it affords no presumption against Vattier; for he might have preferred paying the sum to a legal controversy. It seems he received no written evidence of title from Barr, but Symmes gave him an obligation for the deed. Some of the witnesses refer to a controversy between Barr and Symmes respecting the title; and it seems this controversy was adjusted at the time of Vattier's purchase. If Vattier could be considered as a purchaser without notice, the title to the subsequent purchasers is not affected by any notice, though clearly proved. The sufficiency of the notice, as proved against Smith, Piatt and the bank is denied.

Without going into a special investigation of the facts in regard to these notices, or of the principles of law which apply, we feel ourselves required to consider the question of lapse of time, connected with all the circumstances of the case. In 1792 or 1793, Barr took possession of this lot. He was succeeded by Vattier in 1797, whose possession was clearly adverse as has been the possession and claim of every subsequent holder of the property, down to this day. Bartle resided in Newport, Kentucky, for several years, within full view of the property. This residence might shield him from the operation of the statute so long as he remained without the limits of Ohio. But does it afford an equal protection against the lapse of time, in the point of view under consideration. Shall the same importance be given to a mathematical line in one case as in the other? This statute can only operate within the limits of the sovereignty as construed by the courts; consequently, it cannot affect the interest of one who is beyond seas, or without the limits of the sovereignty. The legislature have undoubtedly the power to bar the rights of non-residents in the tribunals of the state, but they have not done so in the statute referred to. Lapse of time when considered as a rule in equity, rests upon a different principle. It is not founded upon statutory provisions, though the statute of limitations may be referred to as fixing a reasonable time for its operation. The rule is applied, by the courts, on a broad view of all the circumstances of the case. It does not depend upon an arbitrary exercise of power by the court; but like other principles, it must be applied to the facts of the case, as they may be found in the judgment of the court. If the rule be varied, it is because the circumstances of the case are different. Under some circumstances, an uninterrupted adverse possession for twenty or a less number of years, may afford as strong presumption of title as a much longer period under different circumstances. From the time Bartle relinquished the possession of this property, in 1792 or 1793, he has not assumed to exercise any acts of ownership over it, or made claim of title except in one instance, when Smith was about digging his cellar; and in another, when a proposition was made to Piatt to relinquish the title, if a certain amount of rent was paid. Here is a lapse of time exceeding thirty years, during which time great improvements were made on the property. Its value is greatly enhanced. It has been transmitted through various hands. Still the claim of Bartle remains dormant. He lives in view of the property, or at most, within a few miles of it. Whether this distance of a few hundred yards or a few miles, be in a direction out of the state or in it, cannot be material. He is poor, but does this exempt him from the use of ordinary vigilance? Does the law fix one rule for the rich and another for the poor? Poverty is a circumstance, and, sometimes a misfortune, but it cannot alter the rule of property. Could Bartle have been ignorant that Vattier claimed the property? His possession, his acts of ownership, the record of his title, evi-

denced to the world his claim to the property. This property, worth about six or eight hundred dollars when Bartle relinquished it, is now, with its improvements, worth seventy or eighty thousand dollars. Has not Bartle slept upon his rights. In failing for so great a length of time to adopt any means for the legal adjustment of his claim, has he not acquiesced in the adverse claims accompanied with possession.

If the equity set up by the complainant were to be sustained, and not only the title to the property decreed to him, as prayed in his bill, but the rents and profits, would not the principle shake the security of titles to real estate? There would be ground of alarm to holders of such property that some slumbering equity, which had not seen the light for many years, but about which rumors may have been circulated, might be exhibited to the destruction of their title. In no sense could Vattier be considered as the tenant of Bartle. His legal title was adverse from its commencement. He never acknowledged Bartle's title in any form. If he had even entered as his tenant, under the decision of the supreme court in Willison v. Watkins, 3 Pet. [28 U. S.] 44, the assertion of his own right to the property, and a denial by himself and those who claim under him, of the right of Bartle, would give him or them the benefit of the statute of limitations, by proving that Bartle had come within the state.

On the view of the case we have taken, looking at the doubt and uncertainty of the equity set up, at the lapse of time, connected with all the facts of the case, a sense of duty compels us to say that the complainant has failed to establish an equity which would authorize us to vest in him the legal title. The statute would bar the special relief prayed against Vattier. The bill must be dismissed at the costs of the complainant.

This case was taken by appeal to the supreme court, where this decree was affirmed. 9 Pet. [34 U. S.] 405.

Case No. 11,118.

Ex parte PIC.

[1 Cranch, C. C. 372.] [1]

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

NATURALIZATION—FEME COVERT.

Mrs. Marianne Pic, a feme covert, was admitted to be naturalized.

PIC (BEEDING v.). See Case No. 1,227.

PIC (MAUPIN v.). See Case No. 9,309.

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

Case No. 11,119.

PICKELL v. The LOPER.

[Taney, 500.] [1]

Circuit Court, D. Maryland. April Term, 1851.

MARITIME LIENS—SUPPLIES—HOME-PORT—RESIDENCE OF OWNER—FOREIGN SERVICE.

1. The port where a vessel is enrolled and licensed is her home-port. The circumstance that her owner or charterer was a citizen of another state, would not make her a foreign vessel at that port.

[Cited, but not followed, in The Albany, Case No. 131.]

2. Supplies furnished at that port must be considered as furnished at her home-port, and will create no lien on the vessel.

[Cited in The George T. Kemp, Case No. 5,341; The Rapid Transit, 11 Fed. 329.]

3. A vessel whose voyages are confined within the limits of the district where she is enrolled and licensed, although she may connect with vessels or vehicles by which the line of communication is extended to the port of another state, cannot be considered as engaged upon foreign voyages.

4. The furnishing of necessaries to enable her to perform such voyages, is not a maritime contract, and has no connection with commerce upon the high seas, and does not fall within the principles and reasons upon which the maritime law implies a lien.

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

[This was a libel in rem by John Pickell against the steamboat Loper to recover the value of certain supplies furnished the vessel. From a decree of the district court dismissing the libel for want of jurisdiction (case unreported), libellant appeals.]

John Glenn, for libellant.

Wm. Hamilton, Jr., for respondent.

TANEY, Circuit Justice. This is a proceeding in rem, to charge the steamboat Loper with the value of a quantity of coal furnished by the libellant for the use of the vessel. The case is imperfectly brought up by the record. It appears from the answer, that the Loper was employed under a charter-party, at the time when the coal was furnished; but the charter-party is not produced, nor is it stated for what voyages she was chartered, nor at what port she was enrolled and licensed. But there is enough in the case, notwithstanding these omissions, to enable the court to decide the question of jurisdiction, which will dispose of the whole case.

It is admitted, that the vessel was employed in voyages between Baltimore and Chesapeake City, which is situated at the entrance

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

of the Chesapeake and Delaware Canal, on the Maryland side. She formed part of a line established for the conveyance of passengers and freight between Baltimore and Philadelphia, passing through the canal; but the Loper did not traverse the whole line, her trips from Baltimore terminated at Chesapeake City, in the same collection district; she must, therefore, have been enrolled and licensed in the port of Baltimore, where the coal was furnished. It is also admitted, that she was owned by citizens residing out of the state of Maryland; but the residence of the charterer is not stated.

At the hearing in the district court, the libel was dismissed for want of jurisdiction, and I think the decision was clearly right. The voyages in which the Loper was engaged, and for which these necessaries were furnished, were not even foreign voyages, but were confined to the same state and to the same collection district; they were confined to the district in which she must have been enrolled and licensed. Her connection with another vessel or vehicle by which the line of communication was extended to the port of another state, could not alter the nature or character of the voyages which the Loper performed. And certainly, necessaries supplied to enable a vessel to perform such a voyage, is not a maritime contract, and has no connection with commerce on the high seas, and does not fall within the principles and reasons upon which the maritime law implies a lien. The grounds upon which the power to create these liens by the contract of the master or agent, are briefly and clearly stated in the case of The St. Jago de Cuba, 9 Wheat. [22 U. S.] 416, 417.

But if the Loper had passed through the canal, and run from Baltimore to Philadelphia, this libel in rem could not be maintained. The circumstance that the owner or charterer was a citizen of another state would not make her a foreign vessel in the port of Baltimore; the port at which she was enrolled and licensed was her home-port. And as she belonged to Baltimore, and the supplies were furnished here, they were furnished at her home-port, and created no lien upon the vessel. This question was directly decided by the supreme court, in the case of The General Smith, 4 Wheat. [17 U. S.] 438, in which the court said, that in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied, unless it is recognised by that law. Certainly, there is no law of Maryland which gives such a lien.

The decree of the district court must, therefore, be affirmed, with costs.

Case No. 11,120.

In re PICKERING.

[10 N. B. R. 208;[1] 1 Cent. Law J. 371.]

District Court, W. D. Michigan. 1874.

BANKRUPTCY—EFFECT UPON ADJUDICATION OF PASSAGE OF AMENDATORY ACT.

1. A was adjudged a bankrupt on a creditor's petition, filed March 30, 1870, before the passage of the amendments approved June 22, 1874 [18 Stat. 178]. On an application for an order permitting one-fourth in number and one-third in value of the creditors to join in the petition, in compliance with section 39 of the bankrupt act [of 1867 (14 Stat. 536)], *held*, that the decree of adjudication having been rendered prior to the approval of the amendatory act, it stands as the decree of the court.

[Cited in Re Comstock, Case No. 3,077; Re Leland, Id. 8,231.]

2. It is not in the power of the legislative department of the government to so far interfere with the judicial department as to vacate the judgments and decrees of the latter.

[In the matter of William J. Pickering, a bankrupt.]

WITHEY, District Judge. Pickering was adjudicated a bankrupt April 6, 1874, on a creditor's petition filed March 30th, 1874. The amendments to the bankrupt act were approved June 22, 1874. June 29th the attorney for the petitioning creditor applied for an order permitting one-fourth in number and one-third in value of the creditors to join in the petition, in order to comply with the 39th section of the amended bankrupt act. The application assumes that the decree made April 6th, adjudicating Pickering a bankrupt, is void under the language of amended section 39, and that it is necessary to have the requisite number and value of creditors unite in the petition, and thereupon proceed to a hearing after proper notice to the debtor. The language of amended section 39 justifies such view, but the court holds that such is not the effect of the amendatory law. The decree of adjudication having been rendered prior to the approval of the amendatory act, it will stand as the decree of this court. It is not in the power of the legislative department of the government to so far interfere with the judicial department as to vacate the judgments and decrees of the latter. Congress may so legislate as to deprive the courts of the machinery and power to execute their judgments and decrees, and may give enlarged rights to suitors by way of appeals and writs of error, but it is fundamental that a decree which, at the time of being rendered, is valid under existing laws, cannot be vacated or reversed by the legislative power of the government. Application denied.

[1] [Reprinted from 10 N. B. R. 208, by permission.]

Case No. 11,121.

PICKERING et al. v. McCULLOUGH et al.

[3 Ban. & A. 279; 13 O. G. 818; Merw. Pat. Inv. 677; 6 Reporter, 101; 25 Pittsb. Leg. J. 157.] [1]

Circuit Court, W. D. Pennsylvania. May 13, 1878.[2]

PATENTS—ABANDONMENT—EFFECT OF SAME.

1. It is well settled that an abandonment of the use of a mechanical structure which has been perfected and the operative merit of which has been demonstrated by trial, will inure to the benefit of the public, and not to that of an original but subsequent inventor.

[Cited in Brush v. Condit, 20 Fed. 835.]

2. Reissued letters patent No. 6,166, granted to complainants, assignees of George Nimmo, December 8th, 1874, for an improvement in moulding crucibles, *held* void.

[This was a bill in equity by Arthur Pickering and others against Michael McCullough, Jr., and others, for the infringement of letters patent No. 49,140, granted to G. Nimmo August 1, 1865, reissued October 24, 1871, No. 4,608.]

[The plaintiffs were the owners of a patent issued to one Nimmo for a machine for the manufacture of plumbago crucibles, and they alleged that the defendants were infringing their patent. The defense showed that prior to the patent a machine essentially the same, and producing the same results, as that of the plaintiffs', had been made and used for about the space of a year at Kier's works, in Pittsburg. The use of the machine had been discontinued, and it was not produced at the trial.] [3]

J. E. Maynadier and R. Robb, for complainants.

Bakewell & Kerr, for defendants.

McKENNAN, Circuit Judge. In deciding this case it is unnecessary to go beyond the proofs presented by the respondents touching the existence and use of a machine at Kier's works, in Pittsburg, for the manufacture of plumbago crucibles. That such machine was constructed before the date of Nimmo's patent is clearly established by the proofs. That it was capable of successful operation is the result of a decided preponderance of the evidence. That it was so constructed as to perform the distinguishing function of Nimmo's machine—viz., the guidance of the rib toward the axis of revolution of the mould, so that it could be withdrawn therefrom without touching the sides of the mould—is manifest from the drawing prepared from the description of those who operated and saw the machine. In a word, in the mechanical forces employed, in mode of operation in so far as the essential feature of Nimmo's machine is concerned, and in the results produced, the machines are indistinguishable.

Why, then, is not the Kier machine an effectual anticipation of Nimmo's? The argument against this hypothesis is that it was an abandoned experiment. But the proof is, that it was a complete machine, that it operated for nearly a year, that crucibles were made upon it without any imperfection in form, and that the rib was removed from the mould by guiding it to the centre, and thence withdrawing it without touching the sides. True it is that it was not produced in evidence, and that it was not shown what had become of it. But these considerations tend rather to discredit the testimony touching the existence, construction and operation of the machine than to impress upon it the character of a mere experiment. If that testimony is believed, there can be no doubt that the machine was neither incomplete in construction nor ineffective in adaptation to the work for which it was intended.

And it is now too well settled to admit of controversy that an abandonment of the use of a mechanical structure which has been brought to such a degree of maturity, and whose operative merit has been demonstrated by trial, will inure to the benefit of the public, and not to that of even an original but subsequent inventor. Bedford v. Hunt [Case No. 1,217]; Reed v. Cutter [Id. 11,645]; Gayler v. Wilder, 10 How. [51 U. S.] 498; Coffin v. Ogden, 18 Wall. [85 U. S.] 124. There is no sufficient reason to reject that testimony, and the result necessarily is, that the bill must be dismissed with costs.

[On appeal to the supreme court the decree of this court was affirmed. 104 U. S. 310.

[For another case involving this patent, see note to Pickering v. Phillips, Case No. 11,122.]

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 677, contains only a partial report.]

[2] [Affirmed in 104 U. S. 310.]

[3] [From 6 Reporter, 101.]

Case No. 11,122.

PICKERING et al. v. PHILLIPS et al.

[4 Cliff. 383; 2 Ban. & A. 417; 10 O. G. 420.] [1]

Circuit Court, D. Massachusetts. Sept. 1, 1876.

COMPROMISE—PATENTS—REISSUE—LICENSE—ESTOPPEL.

1. The complainants brought suit against the defendants, under their original patent, and the suit was dismissed, the respondents recovering costs. The parties entered into a stipulation to the effect that the defendants, by the use of a certain machine, had infringed one of the patents named in the bill, but had settled therefor; that in order to estop the complainants from reasserting claims of infringement set forth in the bill, as far as plaster moulds, French machine, or old pot-stuff were concerned, the bill was dismissed with costs, and that judgment was satisfied. The patent was subsequently reissued to complainants. It was insisted by respondents that the complainants were estopped from maintaining their second suit, by the agreement. *Held*, that agreement extended no further than to estop the owners of the original patent

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

from prosecuting the respondents for infringing the right set up in that first bill of complaint, no mention being made of any right except the one set up in the bill of complaint.

2. The agreement did not operate as a license to the respondents to make and use the invention secured by the reissued patent, nor did it estop the complainants from prosecuting the respondents under that patent.

The agreement made at the termination of a prior suit referred to in the answer quoted below, was as follows: "Charles R. Atwood and Others, in Equity, v. Taunton Crucible Co. Stipulation. In this case the parties having agreed: 1. That the defendants, by the use of the Bramer machine, have infringed upon one of the patents mentioned in the bill, and fully satisfied the plaintiffs therefor. 2. That the plaintiffs are in error in supposing that they have any claim upon the defendants by reason of their use of the plaster moulds, French machine, or old pot-stuff. 3. And with the intent to estop the plaintiffs from reasserting the claims of infringement set forth in the bill, so far as the plaster moulds, French machine, or old pot-stuff, either or both, are concerned,—it is hereby agreed that the bill in this case may be dismissed, with costs, and that the judgment for costs is fully satisfied. (Signed) J. E. Maynadier, for Plaintiffs. (Signed) Bennett & Fuller, for Defendants. Aug. 16, 1872." This suit referred to in the above stipulation was brought on the original patent of complainants. The patent was reissued before the institution of the present bill.

Bill in equity [by Arthur A. Pickering, Charles R. Vickery, Charles R. Atwood, and the Phœnix Manufacturing Company], founded upon certain letters-patent [No. 49,140] for a new and useful improvement in moulding crucibles [granted to G. Nimmo August 1, 1865, reissued October 24, 1871, No. 4,608]. The defendants [William H. Phillips, Artemas Briggs, and Daniel A. Trefethen] were the officers and agents of the Taunton Crucible Company. In their answer they alleged that they were the assignees of Thomas G. French, of his patent for an improved crucible moulder, and denied infringement. An amended answer was subsequently filed as follows: "And the defendants, for further answer, say the complainants ought not to have and maintain their bill of complaint, because they say that these same complainants heretofore commenced a prior suit in equity against the Taunton Crucible Company for an alleged infringement of their said patent, by the use of the same French machine before mentioned in this answer, and in said suit it was expressly agreed by the parties thereto, as by the files of said case in this court will fully appear, that the plaintiffs had not any claim upon the defendants therein by reason of their use of said French machine; and with intent to estop the plaintiffs from reasserting any claim for infringement, by the use of said machine, it was agreed that said bill might be dismissed with costs (incurred by reason of the use, by the defendants, of a certain other machine called the Bramer machine), and that upon the payment of the costs of the former suit said complainants should be for ever barred and estopped from any claim arising from the use of said French machine by the defendants; and the defendants say that, relying upon said agreement and estoppel, they paid the complainants the costs of said former suit, and that since that time the only use they have made of said French machine was as officers and agents of said Taunton Crucible Company, and for their interest and benefit; and in fulfillment of said stipulation they ceased to use the aforesaid Bramer machine, and have in all respects fulfilled their said stipulation with the plaintiffs, and therefore the same ought to be enforced against the plaintiffs and in favor of these defendants."

J. E. Maynadier, for complainants.
Bennett & Fuller, for respondents.

CLIFFORD, Circuit Justice. Defective patents, if invalid, may be surrendered and reissued, and the lawful grantee of the new patent may maintain a suit in equity against an infringer, to recover the gains and profits which such infringer made by his unlawful acts, if the cause of action is properly set forth in the bill of complaint.

Sufficient appears to show that letters-patent were, on August 1, 1865, granted to George Nimmo for a new and useful improvement in moulding crucibles and pots, as more fully set forth in the record, and that the complainants, during the lifetime of the patentee, became the assignees of the same. Infringers were prosecuted, but the grantees of the original patent, finding that the specification was defective, settled the suit against the Taunton Crucible Company, and surrendered the patent, and the record shows that the same was reissued to them as such assignees. Since that time they have commenced the present suit, and the charge is that the respondents unlawfully and wrongfully use an apparatus which, in construction and mode of operation, embraces the invention described and claimed in the reissued letters-patent. Service was made, and respondents appeared and set up three defences: 1. They deny that George Nimmo is the original and first inventor of the alleged invention; 2. That the complainants are estopped from maintaining the present suit against the respondents, for the reasons set forth by the respondents in their special plea; 3. That none of the acts done by the respondents amount to an infringement, for the reason that they were all done by the respondents, as officers and agents of the Taunton Crucible Company, under a license from Thomas G. French, and because they are not in violation of any rights of the complainants.

Unless the invention is new and useful, the letters-patent are not the proper foundation of a suit for infringement, but the let-

ters-patent, when introduced in evidence, if regular in form, afford a prima facie presumption that the alleged inventor is the original and first inventor of what is therein described as his improvement. Persons charged with infringement may disprove that presumption by showing that the invention had previously been patented or described in some printed publication, or that the alleged inventor was not the original and first inventor of the improvement, but they cannot be allowed to give such evidence in a suit at law unless they give notice in writing of their intention to do so thirty days before the trial. Notices of the kind are required to state the names of the patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented the same, and where and by whom the invention had been used. Proofs of the kind may be given in equity suits for infringement, upon proper notice being given in the answer to the respondent, and with the like effect. 16 Stat. 208; Rev. St. § 4920, p. 960. Such notice was never given in this case, and of course the first defence must be overruled.

Prior to the surrender of the original patent, a suit was commenced by the then grantees of the same against the Taunton Crucible Company, charging the respondents with the infringement of the exclusive right secured by the letters-patent, and it appears that the bill of complaint was dismissed upon the terms and conditions specified in the agreements exhibited in the present record. It appears by the entry that the respondents recovered costs, but the proofs show that the respondents paid the costs of the suit to the complainants. Support to the second defence is attempted to be drawn from that agreement, but the complainants insist that the terms of the agreement extend no further than to estop the grantees of the original patent from prosecuting the respondents for infringing the title set up in that bill of complaint, and the court, after a careful consideration of the question, is compelled to adopt that conclusion. No mention whatever is made of any right, except what is secured by the patent set forth in the bill of complaint. Reasonably construed, the court is of the opinion that the agreement set up in the second defence does not operate as a license to the respondents to make and use the invention secured by the reissued patent, nor does it estop the present complainants from prosecuting the respondents for an infringement of the exclusive right secured by the reissued patent.

Suppose that is so, still it is insisted by the respondents that they do not infringe the exclusive rights secured to the complainants, which is the only question that remains to be considered. Issues of the kind make it necessary to construe the claim of the patent, and to ascertain what is the real nature and character of the invention secured by the patent. Crucibles made of clay, or other articles made of plastic material, require to be moulded before they are exposed to heat, and what the complainants claim as the invention of George Nimmo is the apparatus described in the specification, which consists of a revolving vessel and the device called a rib, and the mechanism for connecting the rib and the vessel, and for so guiding the rib that it will approach the axis of revolution as it is withdrawn from the revolving vessel. Clay suitable for moulding is placed in the vessel, which is then rapidly revolved, when the rib is brought down upon the clay in the vessel and is pressed down upon it until the clay is reduced to the desired form, the profile of the rib forming the inside of the crucible, and the revolving vessel giving form to the outside of the same. Due form having been given to the crucible, the rib is then withdrawn, which is a matter of difficulty in case the crucible is of less diameter at the mouth than below, unless the mechanism for guiding the rib is so constructed that it will cause the rib to approach the axis of revolution as it is withdrawn from the revolving vessel. Unless the rib can be so guided, it is impossible to manufacture vessels having a bilge without injury to the manufactured article, and it is for that reason that the patented apparatus of the complainants is greatly superior to any thing which has preceded it in the art.

Taken as a whole it is both new and useful, and when taken as a whole the court is of the opinion that the articles manufactured by the respondents do infringe the exclusive rights secured to the complainants by the reissued letters-patent. Doubts were entertained upon that subject at the argument, but a more complete examination of the record has had the effect to remove those doubts, and to convince the court that the apparatus used by the respondents is substantially the same as that described in the specification of the reissued patent. They use the vessel and the rib, and mechanism for connecting the two, and for causing the rib to approach the axis of revolution as it is withdrawn from the revolving vessel. Viewed in the light of these suggestions, it is clear that the complainants are entitled to a decree for an account and for an injunction.

[In Pickering v. McCullough, Case No. 11,121 (affirmed in 104 U. S. 310), it was held that this patent was void for want of novelty.]

PICKERING (UNITED STATES v.). See Case No. 16,042.

Case No. 11,123.

PICKERSGILL et al. v. WILLIAMS.

[30 Hunt, Mer. Mag. 710.]

District Court, S. D. New York. April 18, 1854.

SHIPPING—MASTER—REPAIRS TO SHIP—DRAFTS—MARITIME LIEN—BOTTOMRY.

[1. Where the owner of a vessel authorizes the master to draw upon him for supplies necessary

to the vessel on a foreign cruise, he is bound to honor such drafts, even though drawn by a master other than the one designated by the owner; that master having died, and his place having been filled by another appointed by the American consul.]

[2. Where supplies were furnished upon the personal responsibility of the owner, and not upon the implied authority of the master to bind the owner, in a foreign port, a bottomry security, executed without authority, after the supplies were furnished, is void, and cannot discharge a prior valid demand.]

[This was a suit by William C. Pickersgill and others against John G. Williams for the amount of certain supplies and repairs furnished the ship Selma on the faith of letters of credit given the master by libelants at respondent's special request, who agreed to honor drafts for the amount.]

In the month of March, 1850, the respondent was the owner of the brig Selma, then lying in this port, and bound for San Francisco. Wishing to provide her captain with funds, in case he should need them on the voyage, he wrote to the libelants the following letter: "New York, March 5, 1850. Messrs. W. C. Pickersgill & Co.—Gentlemen: You will please give me letters to your friends in Rio and Valparaiso, for Capt. John J. Dean, of the brig Selma, to enable him to draw drafts on me at one day's sight, if necessary, on account of said brig, which drafts will meet with due honor on presentation, and much oblige. Your obedient servant, J. G. Williams."

Upon this request, the libelants furnished to Capt. Dean a letter of credit upon Messrs. Rostern, Dutton & Co., at Rio, and the brig soon after sailed. Early in May she arrived at Rio in a damaged condition. Capt. Dean presented his letter of credit, and requested that the necessary supplies and repairs should be furnished, which was done. After the repairs were commenced, Capt Dean died, never having drawn the drafts. The vessel was for a time under the charge of the mate, and afterwards a new master—Capt. Story—was appointed by the American consul, approved by Rostern, Dutton & Co. The repairs were prosecuted meanwhile, and, when completed, drafts were drawn by Capt. Story on the respondent for the amount, being between seven and eight thousand dollars, which he refused to pay, whereupon this suit was brought. The vessel sailed from Rio in August. She afterwards put into Valparaiso, in need of further repairs, where she was sold with her cargo by her master, and the avails of such sale, or a portion of them, were sent by him to the respondent, who received them.

The respondent claims that this letter was merely a special application to authorize Capt. Dean, and no one else, to draw drafts. He also claims that, on hearing that the brig had gone into Rio damaged, he made an abandonment of her to the underwriters on the 19th day of July, which abandonment took effect from the time the cause of abandonment existed; and that he was not, therefore, the owner of the brig when the repairs and supplies were furnished, and was not, therefore, liable for them. He did not, however, pay over or tender to the insurance company the avails of the sale of the brig received by him. He also claims that he is not liable to pay the claims, because, on the 30th of August, the then master executed a bottomry obligation for them, by which the original demand was merged. It was not, however, under seal, and was expressly stated to be a collateral security. He also claims that this security was recognized by the parties as a valid bottomry obligation by a subsequent agreement, dated December 27, 1850, entered into between the libelants and the owners of the cargo of the brig, the respondent being one of them. The agreement provided that nothing in it should affect the bottomry obligation, or any rights which the libelants might otherwise have against the owners of the vessel, and the respondent promised that, if the bottomry obligation should not be a full security to the libelants, he would pay them the balance that might be due.

HELD BY THE COURT (INGERSOLL, District Judge): That the promise, in the letter of March 5th, to accept drafts, was only secondary, the object of the letter being to secure funds for the necessities of the vessel, and that whatever repairs and supplies were furnished at Rio to the brig, were to be paid for by the respondent; such payment not depending upon Capt. Dean's drawing drafts, as a condition precedent. That the supplies were not furnished upon the implied authority of the master to bind the owner, whoever he may be, when in a foreign port, but upon the personal responsibility and at the special request of the respondents; that it is not, therefore, necessary to inquire whether, by his abandonment, he ceased to be the owner of the brig, although his retaining the avails of the sale of the brig would render that seriously questionable. That the supplies being furnished on the personal responsibility of the respondent, without any agreement for a bottomry security, that security, executed after they were furnished, was without authority and void, binding neither the ship nor the respondent, and no prior valid demand could be merged in or discharged by it. That, being not voidable, but void, it could not be made valid by any recognition of it as valid. That, moreover, the master of the brig, not being a party to the agreement of December 27, could not ratify the bottomry security which he executed, while the respondent in that agreement says that he was not the owner of the brig, and his ratification would not bind the brig, if that was so.

Decree, therefore, for libelants for the amount of the repairs and supplies furnished to the brig at Rio, with a reference to a commissioner to ascertain that amount.

Case No. 11,124.

PICKERT v. The INDEPENDENCE.

[9 Ben. 395;[1] 55 How. Pr. 205.]

District Court, S. D. New York. March, 1878.

MORTGAGE—PURCHASE WITH NOTICE—STATE LAW.

1. Under the act of the legislature of New York passed April 28, 1864 (Laws N. Y. 1864, p. 993), in regard to filing in the office of the auditor of the canal department a mortgage on a canal-boat and refiling a copy, no filing is necessary, after the original filing of the mortgage and the first filing of the copy, with the proper statement, in order to make the mortgage a continuing security, and there need not be a subsequent refiling.

2. The act of 1864 has never been amended so as to require a copy of the mortgage, with a statement of interest, to be again filed within thirty days next preceding the expiration of each and every term of one year after the filing of the mortgage.

3. The provisions of the act of the legislature of New York passed April 29, 1833 (Laws N. Y. 1833, p. 402), so far as they apply to canal-boats, are superseded and replaced by those of the act of 1864; and the filing of mortgages on canal-boats depends wholly on the act of 1864, and not at all on the act of 1833.

4. A person is not a purchaser of a canal-boat in good faith, within the meaning of the act of 1864, when he purchases with notice of a prior mortgage on the boat.

5. A person who has notice enough to put him on inquiry is bound to make inquiry, and will be held to have had notice of everything to which such inquiry would have reasonably led.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.
M. M. Budlong, for claimants.

BLATCHFORD, District Judge. On the evidence I am of opinion that there is a considerable sum of money still due to E. Remington & Sons on the mortgage, and that the notes given to them in March, 1874, were not given in settlement or discharge of the mortgage. Prima facie, the claimants are entitled to retain possession of the canal-boat under the mortgage.

The provisions of the act of April 28, 1864 (Laws N. Y. 1864, p. 993), in regard to filing in the office of the auditor of the canal department a mortgage on a canal-boat, and refiling in the same office a copy thereof, with a statement of interest, within thirty days next preceding the expiration of one year from the original filing of the original mortgage, are the same as the provisions in the act of April 29, 1833 (Laws N. Y. 1833, p. 402), in regard to filing, in the office of a register, a county clerk, or a town clerk, a mortgage on goods and chattels, and refiling in the same office a copy thereof, with a statement of interest, within thirty days next preceding the expiration of one year from the original filing of the original mortgage. It was the law of this state, under the act of 1833 (Newell v. Warren, 44 N. Y. 244), that no filing after the original filing of the mortgage and the first filing of the copy, with the proper statement, was necessary in order to make the mortgage a continuing security, and that there could not be a subsequent refiling. The same rule must apply to the canal-boat statute. By the act of May 13, 1873 (Laws N. Y. 1873, p. 767), the act of 1833 was so amended as to require a copy of a mortgage on goods and chattels, with a statement of interest, to be again filed within thirty days next preceding the expiration of each and every term of one year "after the filing of such mortgage." The construction in Newell v. Warren, made in 1870, was thus recognized, but no similar amendment was made to the act of 1864. In the present case the act of 1864, as thus construed, was complied with.

It is urged, for the libellant, that it was necessary, in addition, to file the mortgage and renew it by refiling, in accordance with the act of 1833, because, although the mortgaged property was a canal-boat, it was also goods and chattels, and the mortgagor resided, when the mortgage was executed, in this state, in the town of Mohawk, Herkimer county. I am not referred to any decision of the courts of the state directly upon the point, but the general practice, I understand, has been to file mortgages on canal-boats only in the office of the auditor of the canal department. The act of 1864 was a substitute for the act of April 15, 1858 (Laws N. Y. 1858, p. 396). The act of 1858 provided, that any person having any lien or incumbrance on any canal-boat, by a chattel mortgage, "duly filed," could file in the office of the auditor a statement of the date, circumstances, nature and amount of his claim, with an affidavit thereto; and that "all claims and liens by chattel mortgage, a statement of which shall be filed as herein provided, shall, from the time of such filing, have preference and priority over all other claims and liens, in the same manner and to the like extent of claims and liens arising on chattel mortgages filed and entered in towns where the mortgagor resides, but shall not have any priority over existing liens and claims." The act of 1858 was based on the idea of a double filing. It was only where a chattel mortgage had been "duly filed," that is, filed under the act of 1833, that the statement and affidavit could be filed in the office of the auditor, under the act of 1858. When both filings had taken place, then, under the act of 1858, the lien by the mortgage was to have preference and priority over all other claims on the canal-boat, except existing claims, to the same extent that claims under mortgages on other property, filed under the act of 1833, would have, under that act, as to such other property, preference and priority. In other words, as to canal-boats, there was made necessary, by the act of 1858, a double filing, and, until it had taken place, mortgages on canal-boats

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

could not acquire the standing which mortgages on other goods and chattels acquired by a compliance with the act of 1833 alone. Then came the act of 1864, superseding the act of 1858 and its provisions, and providing for a single filing in the case of canal-boats, and that in the office of the auditor, on the same plan, as to filing and refiling, as that of the act of 1833 in regard to other goods and chattels. Still more, the act of 1864 went on to provide as follows: "All claims and liens by chattel mortgage, which shall be filed as herein provided, shall, from the time of such filing, have preference and priority over all other claims and liens, but shall not have any priority over existing claims and liens." This enactment strikes out the words, "in the same manner and to the like extent of claims and liens arising on chattel mortgages filed and entered in towns where the mortgagor resides," and manifests an intention, in connection with the other provisions of the act; to dissever the filing of mortgages on canal-boats from the act of 1833, and leave them to depend wholly on the act of 1864. It is enacted, that, when they are filed, as provided in the act of 1864 (which is a filing in the auditor's office alone, and not, as in the act of 1858, a filing of something in the auditor's office in conjunction with a previous filing of something else elsewhere), they shall, from the time of such filing in the auditor's office, have preference over all claims but existing claims, and, of course, preference over the claims of subsequent purchasers and mortgagees. If some other filing elsewhere is necessary, effect cannot be given to the enactment that the filing under the act of 1864 gives the preference and priority. This makes the provisions of the act of 1833 repugnant to those of the act of 1864, so far as canal-boats are concerned, and makes it necessary to hold, that the provisions of the act of 1833, so far as they apply to canal-boats, are superseded and replaced by those of the act of 1864.

E. Remington & Sons complied, therefore, with all the provisions of law required to make their mortgage a valid continuing security, as against the libellant, even if he was a purchaser in good faith. A person is not a purchaser in good faith, within the meaning of the statute in question, when he purchases with notice of the prior mortgage. Hill v. Beebe, 13 N. Y. 556. In the present case, the libellant claims to have purchased the boat from his mother, who was the owner and the mortgagor. He testifies that he asked her if there were any claims against the boat; that she said the parties of whom she bought the boat were owing her; and that she said nothing about having given a mortgage on the boat. The mortgage was given to E. Remington & Sons for the purchase money of the boat, when the libellant's mother bought it. The libellant's father and mother testify to the same conversation between him and his mother. After such conversation the libellant went to the auditor's office at Albany, and inquired if there were any claims against the canal-boat. The person in charge took down a book, and, after consulting it, replied that there had not been since 1874. The libellant left without inquiring further. All this was sufficient notice to the libellant. He was bound to inquire further. He had notice that the persons who sold the boat to his mother had had a mortgage on the boat, and that such mortgage had been filed in the auditor's office, and that his mother claimed that the mortgage had been paid. He was bound to seek out those parties, whose names were on the book, which, through the clerk, he was consulting, and ascertain from them whether they regarded the mortgage as paid. If he had done so, he would have learned that the mortgage was, in fact, not paid. Jackson v. Post, 15 Wend. 588. His conduct shows that he knew he was bound to inquire, and that he was advised there had been a mortgage filed, but he evidently relied on the view that the mortgage had run out because not refiled from year to year. He had notice enough to put him on inquiry, and he was bound to follow up his inquiry by going to E. Remington & Sons, who were stated in the record before him to be the mortgagees. This was notice to him of everything to which such inquiry would have reasonably led. Carr v. Hilton [Case No. 2,437]. The libel is dismissed, with costs.

Case No. 11,125.

PICKETT v. LYLE.

[1 Cranch, C. C. 49.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

PLEADING AT LAW—PLEA BY BAIL—NEW PLEA.

After plea by appearance-bail the defendant may give special bail and plead a new plea.

[Action by Pickett's executors against Lyle.] The appearance-bail had appeared and pleaded for the principal.

Mr. Swann, for defendant, now offered special bail, and moved for leave for the defendant to appear and plead the general issue, and withdraw the plea filed by the appearance-bail. Granted.

Mr. Love, for plaintiff.

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

Case No. 11,126.

PICKETT v. McGAVICK.

[14 N. B. R. 236; 3 Cent. Law J. 303; 13Alb. Law J. 218, 400; 2 N. Y. Wkly. Dig. 378.] [1]

District Court, W. D. Arkansas. March Term, 1876.

BANKRUPTCY—SUIT TO SET ASIDE DISCHARGE—LIMITATIONS.

A suit to set aside a discharge of a bankrupt must be brought within two years from the date of the same.

[This was a bill by W. S. Pickett, assignee, against Felix G. McGavick, to set aside a discharge in bankruptcy.]

Pillow & Pillow, for complainant.

Stephenson & Stephenson, for defendant.

PARKER, District Judge. This is a suit brought by the plaintiff, as assignee in bankruptcy of the defendant, against the defendant, to set aside his discharge as a bankrupt, and recover from him a large amount of diamonds, alleged by the plaintiff to be of the value of five thousand dollars. Plaintiff alleges that on the 19th day of December, 1868, defendant, McGavick, filed his petition in the bankrupt court for the Eastern district of Arkansas, sitting at Little Rock; that he was duly declared a bankrupt, and on the 14th day of June, 1871, received his discharge as such bankrupt; that the plaintiff was appointed assignee of said bankrupt; that at the time the defendant filed his schedule of assets as a bankrupt, he omitted from said schedule the following property, to wit: Three solitaire diamonds studs, one cluster diamond ring, and one pair of solitaire diamond cuff buttons; all set in gold, and estimated by him to be worth five thousand dollars. That the defendant fraudulently withheld them from the assignee. This suit in equity is to set aside the discharge, and recover these diamonds, or their value, for the benefit of the creditors of this bankrupt.

Suit was brought in this case on the 10th day of June, 1874. The plaintiff alleges that he did not discover that defendant had so fraudulently withheld this property, until the —— day of July, 1872. The plaintiff, among other things, prays that the discharge of the defendant as a bankrupt may be held void, and that the defendant may be still held responsible for his debts. To this bill in equity the defendant sets up the plea of the statute of limitations, alleging in said plea "that the said supposed cause of action in said complaint mentioned, did not accrue at any time within two years next before the exhibiting of the bill of said plaintiff against the said defendant, in this behalf."

It is difficult to tell, from the face of this plea, whether the defendant intends to rely upon section 2 of the bankrupt law [18 Stat. 178], or section 34 of the original act of 1867 [14 Stat. 533]; but, from the brief filed by the defendant's counsel, Mr. Stephenson, it is clear that he relies upon section 34 of the bankrupt law. If the provisions of section 2 of the bankrupt law could be made to apply to this case, then the rule would apply as laid down by the supreme court, in Bailey v. Glover, 21 Wall. [88 U. S.] 342, "that the bar does not commence to run, in cases where the action is intended to obtain redress against fraud concealed by the party, or which, from its very nature, remains secret, until the fraud is discovered." But the question presents itself, does this section apply to this case? From the language of this section, I am of the opinion that it applies to cases only where suit is brought in regard to property held adversely to the bankrupt and the assignee, or to cases (as it now stands amended) where suit is brought to recover any debt that may be due the bankrupt. Davis v. Anderson [Case No. 3,623]; Bailey v. Wier, 21 Wall. [88 U. S.] 342; Smith v. Crawford [Case No. 13,030]. Then we are called on to ascertain the true construction of the 34th section of the bankrupt act. The court has no hesitation in saying, if it be true, as alleged in the petition, that the defendant was guilty of the act charged against him, that it presents a most flagrant and outrageous case of fraud, and one which this court will, if it can, aid in uncovering. But, bad as this case may be, we must treat it legally, and if a remedy is wanting under the law, it is not with the court (which does not make laws, but construes and administers those already made), but with the law-making power. Section 34 of the bankrupt law provides that any creditor of the bankrupt may, at any time within two years after the date of the discharge, apply to the court to set aside and annul the same, on the ground that it was fraudulently obtained.

When does the cause of action first accrue in a case under this section? From the date of the discharge, or from the discovery of the fraud? Under the ordinary statutes of limitations, which provide that suit shall be brought in a specified time after the cause of action accrues, it has become a fixed rule, that, where an action is based on fraud, the statute does not commence to run until the discovery of the fraud, or until it has become known to the party injured by the fraud. Because it can well be said that a cause of action does not accrue until the party could avail himself of a remedy to enforce that cause of action, and he could not do so until the cause of action was discovered or became known to him. But this section is different from the ordinary statute of limitations. This language is entirely different. It positively provides that the discharge may be contested at any time within two years after the date thereof, on the ground that it was fraudulently obtained. That time (the date) must, then, in my judgment, be taken as the time when the cause of action accrues.

[1] [Reprinted from 14 N. B. R. 236, by permission. 2 N. Y. Wkly. Dig. 378, contains only a partial report.]

In the case of Corey v. Ripley [57 Me. 69], decided by the supreme court of Maine, the judge says: "Instead of subjecting the bankrupt to the liability of having the validity of his discharge called in question, in any and all suits that should be brought against him for his debts, or provable under the bankrupt act for an indefinite time, the proviso in the 34th section of the act of 1867 was intended to limit all contestants to the period of two years from the date of the discharge, and to the tribunal therein specified, in respect to the time and mode of annulling his discharge." The act (says the court) in effect says to all such, 'You have had an opportunity to prove your claims and to show cause why your debtor should not receive his discharge in bankruptcy; you are allowed two years to impeach that discharge before the tribunal that granted it; at the expiration of that period you will have had your day in court, and must thereafter be forever silent.' 'Interest reipublicæ ut sit finis litium.' The commonwealth is interested that there be an end of contention.

The supreme court of Texas, in the case of Alston v. Robinett [37 Tex. 56], says: "Every creditor of the bankrupt may prove his claim and have his day in court; he may defeat the discharge of a fraudulent bankrupt. The law even gives him two years within which to attack the discharge after it has been granted. These provisions are ample to meet the end of justice. The question should some time be definitely settled, whether the discharge should be treated as valid or not." In the case of Way v. Howe, 108 Mass. 502, the court, among other things, says that the creditor "should be obliged to try the validity of the discharge while the facts are comparatively recent."

From the language of the 34th section, and the general policy of the law of bankruptcy, I am inclined to the opinion that congress intended to limit the creditors, or any one representing them, to two years from the date of the discharge, as the time alone within which they might seek to set aside or annul the same. This is the interpretation placed upon that section by all well-considered cases. I am aware that a different construction was placed upon the section by Judge Taft, of the superior court of Cincinnati, in the case of Perkins v. Gay [see note at end of case], where he held that the discharge could be attacked at any time and in any court for fraudulent concealment by the bankrupt. But, with all due respect to that learned judge, I think this is not good law, that such a construction is not deducible from the language of the bankrupt law, or from its intent or spirit.

With my view of the law, the plea of the statute of limitations will be held good, and judgment will go for the defendant.

[NOTE. The following is the opinion of Judge Taft, in the case of Perkins v. Gay, in the superior court at Cincinnati, referred to in the above opinion. It was filed in 1870, and is reprinted from 3 N. B. R. (Quarto) 189:

["Taft, J. The suit is founded on a judgment rendered against the defendant some twelve years ago in Erie county, Ohio, for $1,266 damages and $43.95 costs. The answer sets up a decree in bankruptcy rendered October 15th, 1867, discharging defendant, Gay, from all his debts. The plaintiff replies that the defendant concealed valuable property when he made his application in bankruptcy, and describes several parcels of real estate situated in Indiana, not included in his schedule, but which the defendant owned at the time of making his application. To this the defendant demurs.

["The defendant, to sustain his demurrer to the plaintiff's reply, relies on the 34th section of the bankrupt act of 1867 (14 Stat. 533), which provides that 'a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts,' and that the decree shall be a complete bar to all suits therein, and that 'the certificate shall be conclusive evidence of the fact and regularity of the discharge.' The plaintiff, however, claims that there is still another ordeal to which the bankrupt is liable to be subjected under the 29th section of the act. This section provides that 'no discharge shall be granted, or, if granted, be valid, if the bankrupt has concealed any part of his estate,' or 'has been guilty of fraud' in any of the sundry particulars in that section specified. It is provided in the 34th section that in making an application to set aside the discharge the creditors shall specify some one of the acts of fraud mentioned in section 29, and the defendant claims that this indicates that the question of the validity of the discharge raised under the 29th section is to be determined according to the provision of the 34th section, and not otherwise; and such is the construction adopted by Avery & Hobbs in their recent and valuable work on Bankruptcy. In their comments on section 34 of the bankrupt act, they remark (pages 245, 246, note b): 'It will be observed that there is no appeal given upon the allowance of a discharge; but, in case any creditor desires to contest its validity, this clause of the act points out the way. It was evidently intended by the framers of the law to limit all contestants to the period of two years after granting the discharge, and to the forum that granted it. In all suits founded upon any claim provable in bankruptcy, the discharge is by express terms made "a full and complete bar," and there is no such reservation as that in the law of 1841 (5 Stat. 440), "unless impeached for fraud," etc. It would seem to follow, from the language of this section, that the discharge cannot be impeached in any suit at law, founded upon any claim provable in bankruptcy, nor can the regularity of the discharge in any suit be inquired into. There is but one way of contesting its validity, and that is expressly indicated in this section.' Mr. James, on the contrary, in his work on the Bankrupt Law (page 136), after discussing the provisions for contesting the validity of the discharge under the 34th section, says: 'The bankrupt has still another ordeal to pass through. If sued by a creditor for a debt due before the adjudication of bankruptcy, such creditor proceeds with his action, and does not prove under the bankrupt's estate, and the bankrupt, having obtained his order of discharge, pleads it in bar to such action, the creditor may, by way of replication to such plea, impeach such discharge upon any or all of the grounds in respect of which this act invalidates it; and the question thus raised upon the pleadings is that which is to be tried by the jury.'

["The question of construction thus presented by these two learned commentators is not without difficulty,—a difficulty not at all aided by their disagreement. Under former bankrupt acts, the certificate of the bankrupt has been impeachable for fraud in obtaining it, in whatever court it was pleaded. The present act provides

in the 34th section for a proceeding to set aside the certificate of discharge, to be commenced in the court which granted it, within two years. This, however, does not, in our opinion, take away the right to impeach the certificate under the 29th section, which says expressly that 'no discharge shall be granted, or if granted be valid, if the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition,' 'or if he has concealed any part of his estate or effects,' —with several other similar exceptions.

["The 34th section provides 'that a discharge duly granted under this act with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge. Always provided that any creditor of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt,' etc.; providing also for notice to the bankrupt and for a hearing, 'and that if the court shall find the fraudulent acts proved, and that the creditor had no knowledge of the same till after the granting of said discharge, judgment shall be given in favor of such creditor, and the discharge of said bankrupt shall be set aside and annulled.' It is to be observed that this section, in making the certificate conclusive, expressly says 'with the exceptions aforesaid.' For the defendant it is claimed that the 'exceptions aforesaid' must be taken to refer to those only which are contained in section 33, immediately preceding. But we think that they may be taken to refer to all the exceptions to the validity of the discharge which are mentioned in the preceding sections, including section 29.

["The result of the construction claimed for this defendant would be to enable a bankrupt to secure the benefit of a premature discharge from his creditors, though he may have defrauded them by concealing his property. It may be that the legislature intended to leave the creditors no longer time than two years to inquire into the fraud. But it seems to offer a permission to fraud and concealment, which is not to be looked for in a bankrupt act that professes to discharge a man from his honest debts on the surrender of his property. It has been argued that the bankrupt would not secure the right to keep his property from his creditors if he should succeed in concealing it for two years. This may be true. The assignee would probably be entitled to recover the concealed property if he could find it. Nevertheless, such a construction of the act as is claimed for the defendant, we think, would encourage fraud. The discharge from personal liability for his debts is the grand object of the bankrupt, and this he is entitled to if he gives up his property. A dishonest bankrupt may hope successfully to conceal his property for two years. If he can secure an effectual discharge, he can afford to run the risk of losing his concealed property after the two years have passed. The creditor would have less motive to detect the fraud upon the law, as he could not thereby deprive the bankrupt of his ill-gotten certificate, or hold him liable personally. We are unwilling to adopt a construction which will so obviously tend to encourage deception and fraud, unless the language of the act clearly requires it.

["It has been the uniform policy of all former bankrupt acts, both in this country and in England, to guard against concealment of property by the bankrupt. The temptation is so strong to hide from his creditors, and his facilities are so great for hiding assets, the existence of which he alone may know, that the severest enactments have not always prevented it. It is not to be presumed that the legislators of the present day would intend to remove any of the guards against temptation and fraud on this critical point. Nor is it to be regarded as a hardship that the bankrupt shall be required to be ready to meet any charge of this kind. The burden of proof is on the creditor who asserts such a concealment; and, if the bankrupt is innocent, he need not be very much embarrassed in his defense.

["We think, therefor, that the provision in the 34th section making the certificate conclusive, and allowing an application within two years in the U. S. district court to annul it, did not intend to cut off a creditor from setting up a fraudulent concealment by the bankrupt of his property, against his certificate, in whatever court he may plead it. Demurrer overruled."]

PICKETT (UNITED STATES v.). See Case No. 16,043.

PICKETT'S HEIRS (LEDGERWOOD v.). See Case No. 8,175.

PICO (SPARKS v.). See Case No. 13,211.

Case No. 11,127.

PICO v. UNITED STATES.

[Hoff. Land Cas. 116.] [1]

District Court, D. California. Dec. Term, 1855.

MEXICAN LAND GRANTS—FREMONT'S CASE.

This claim must be confirmed under the ruling of the supreme court in Fremont's Case [17 How. (58 U. S.) 542].

Claim for eleven leagues of land in Amador county, rejected by the board, and appealed by the claimant, Andres Pico.

Stanly & King, for appellant.

S. W. Inge, U. S. Atty., for appellees.

HOFFMAN, District Judge. The claim in this case is founded on a grant by Governor Alvarado to Teodocio Yorba on the eighth of May, 1840. The title of the present claimant is derived from the original grantee by deed dated October 4th, 1852.

The genuineness of the original is established by proof, but the only evidence that the grantee ever performed the conditions of the grant is contained in the depositions of Luis Arenas, Vicente P. Gomez and Antonio Castro taken in this court. By the testimony of the first of these witnesses it appears that the rancho in March or April, 1849, was occupied by both Pico and Yorba, and that they had cattle and a small house on the place. Vicente Gomez swears that he has known the rancho since 1848, and that at that time it was occupied by Pico and Yorba; that they had a log house upon it and cattle and horses. The witness Castro testifies sub-

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

stantially to the same facts. Neither of these witnesses states positively the reason why the land was not sooner occupied, but they all testify that at the time they mention, and as late as 1848, the Indians were very hostile. It also appears by the testimony of S. Vallejo that from 1840 to 1846 it was impossible to occupy the rancho without the continual presence of the soldiers; that the Indians held almost absolute possession of that part of the country, unless when repelled by a strong military force. Under the former views of this court, this claim would have been rejected; but the decision of the supreme court in the case of Fremont v. United States [17 How. (58 U. S.) 542] has laid down other rules for our guidance. The grant must, under the principles established in that case, be regarded as having given the grantee "a vested interest in the quantity of land therein specified." The only inquiry "is whether the right of the grantee was forfeited by breach of the conditions, and the title revested in the Mexican government." Fremont v. United States, 17 How. [58 U. S.] 560. If the interest which is adjudged to have vested in the grantee by the unconfirmed grant of the governor be the legal estate in the land, then the only right which could have passed to this government would be the right to declare and enforce a forfeiture which had accrued under the former government. If, then, by the judgment of the court, the legal title remaining in the grantee at the time of the acquisition of the country and undivested by any proceeding under the Mexican authority be declared to be forfeited, it would seem that the court is in effect asserting the "right of the United States by forfeiture for conditions broken to lands which had been once legally granted." The authority of the court to make such an inquiry or assert such a right seems to have been doubted in Sibbald's Case, 10 Pet. [35 U. S.] 321, and in other cases, nor is this court aware of any case in which that right has been recognized, unless the Case of Fremont be so regarded. It may, however, be considered that on the breach of the conditions, the title which had vested in the grantee reverted ipso facto to the government, without any judicial proceeding or other act on the part of the government manifesting its intention to take advantage of the forfeiture. In that case the legal estate in the land passed to our government by the treaty, and not the mere right to enforce a forfeiture. Whether such a consequence could have ensued from the mere breach of a condition subsequent, without an entry of the grantor or an office found, is not decided by the supreme court; but it would seem more in accordance with the principles which pervade every system of jurisprudence to treat the breach of such conditions as rendering the grant voidable rather than void, and especially where the grantor is a government which has no motive vigorously to enforce such "clauses of nullity" or "penal clauses," and whose policy it is to regulate their effect by the discretion of the judge or other officer who enforces them, according to the circumstances of each case.

Under the Mexican system it appears that though a formal judicial inquisition was not invariably instituted to ascertain the forfeiture, yet where land was denounced the inquiry was made whether the forfeiture had occurred or not, and the excuses of the first grantee for nonperformance were heard, and if reasonable received. If then it be considered that the legal title vested in the grantee by virtue of his grant, and that it did not revest in the government by the breach of the conditions unless some proceeding were had to ascertain and declare the forfeiture, it would seem to follow that the title must remain in the grantee, unless the court has power to declare and enforce the right to a forfeiture which passed to the United States from the former government. That the supreme court did proceed to inquire whether or not there had been a forfeiture, is evident. On the supposition, therefore, that the legal title vested in the grantee by the original grant, the Case of Fremont would seem to be an authority for the position, that in the California grants the court has a right to inquire into and enforce a forfeiture which accrued under the Mexican government of lands legally granted. But the interest which vested in the grantee may have been deemed by the supreme court merely an equitable interest, not constituting the legal title but entitling the grantee to a legal title from this government, or giving him a right of property in the land, which we are bound to respect.

This equity the supreme court apparently regard as perfect, unless the omissions of the grantee to perform had been such as by the Mexican laws and usages would have induced the government to have regranted the land as vacant or forfeited. Under this view the inquiry to be made in these cases would seem to be identical with that made on a denouncement under the Mexican system. The same and no other grounds of forfeiture should be investigated and the same excuses received. The benignant generosity of such a principle, so worthy of a great nation dealing with the rights of a conquered people, all must appreciate. If it was not adopted by this court, it was because it was considered that the only equity which could be judicially regarded in these cases arose, not from the grant of the governor alone, but from the grant and the subsequent performance of the conditions as required in the grant or cyprès, and that in the case of imperfect or incomplete titles, such as unconfirmed grants were deemed to be, it was considered that under the altered condition of the country, the enormously increased value of lands, and the radical change in the policy of the government with regard to its public domain, the

grantee who had neither obtained a complete title or performed the conditions had no right to demand that the indulgence should be shown by us which the former government, during its existence, had no motive to refuse, but which if it had continued it would not probably, under the present circumstances, have extended to this class of claimants. Perfect or confirmed grants were supposed to stand on a different footing; with regard to them it was considered by this court that a forfeiture could only be declared, if at all, under the same circumstances as by Mexican laws and usages would have authorized a regrant of the land on a denouncement. But whatever view may be taken of these questions, the duty of this court is clear. Following then, as I am bound to do, the course of inquiry upon the result of which the determination of these cases has been adjudged on this point to depend, the only question is "whether there has been any unreasonable delay or want of effort on the part of the grantee to fulfill the conditions, so as to justify the presumption that the grantee had abandoned his claim before the Mexican power ceased to exist, and is now endeavoring to resume it from its enhanced value."

This question is widely different from that upon the determination of which the validity of grants unconfirmed by the departmental assembly had been by this court supposed to depend. It had been considered by this court that until the grant received the approbation of the assembly, the concession by the governor passed only an imperfect or inchoate title. That the grantee who had under the former government fulfilled the conditions, and by occupying and cultivating the land rendered the only consideration contemplated by its policy and laws, had an equitable right to have his title perfected, and that that equity was binding upon the conscience of this as well as the former government. But it was the opinion of this court that where the grantee had omitted to fulfill these conditions, or was prevented by obstacles which existed and were known to him when he undertook the implied and sometimes express obligation to occupy and cultivate the land, he had no claim upon this government to recognize the imperfect title he had obtained from the governor. It was not of course supposed by this court that these concessions by the governor were identical with the permissions to occupy or to have a survey made, which were given in Louisiana and Florida. But it was considered that the regulations of 1828 expressly required the approval of the assembly to give definitive validity to the grant, and that until that was obtained the title of the person to whom the governor had determined to concede remained imperfect or inchoate, and that his equitable claim upon this government to respect or complete it must be founded on the fact of his having fulfilled the conditions or rendered the equivalent required by the Mexican law. Under this view it was thought that the Louisiana and Florida cases bore a close analogy to those in this state, and that the decisions of the supreme court with regard to the former furnished a guide and imposed a rule as to the latter. Some confirmation of these views might seem to be afforded by the record in this case, for the witness called by the claimants to prove the usages of the former government states that when his lands were denounced for the nonperformance of the conditions, he assigned as an excuse that possession had not been taken because the grant required the approval of the assembly, that this excuse was received by the government, and that six months longer was allowed for the fulfillment of the conditions. But these views, formerly taken by this court, have been by the judgment of our highest tribunal decided to be erroneous, and it now becomes our duty to ascertain and obey the rules of decision which that venerated authority has laid down. In the Case of Fremont it is decided that by the grant of the governor the grantee acquired a vested interest in the land, and that the question is "whether anything done or omitted to be done by the grantee, during the existence of the Mexican government in California, forfeited the interest he had acquired and revested it in the government." No denouncement or regrant of the land having been made under the former government, the court declares "that there is nothing in the language of the conditions, taking them altogether, nor in their evident object and policy, which would justify the court in declaring the land forfeited to the government where no other person sought to appropriate it, and their performance had not been unreasonably delayed."

In the case at bar there seems to have been neither any formal inquest to ascertain and declare the forfeiture, nor any regrant of the land to a subsequent applicant, and the reasons which it is said by the supreme court, in the case so often cited, would justify them in declaring the land to be forfeited, do not seem to exist. The delay seems to have arisen from the same causes, and to be excusable on the same grounds as those urged in Fremont's Case; nor do I discover any evidence justifying the presumption of a final abandonment of his grant by the grantee.

We, therefore, think that this claim ought not to be rejected for the nonperformance of the conditions.

This title was also held to be invalid by the board by reason of the insufficiency of the description of the granted land. On this subject it is enough to say that this objection is already disposed of by the Case of Fremont. The grant in that case "was held to convey a vested interest in the quantity of land mentioned in the grant, to be afterwards laid off by official authority in the territory described." The exterior limits in that case embraced one hundred square leagues—

the grant was for ten square leagues. In this case the exterior limits embrace about fifty square leagues, while the quantity granted is limited to eleven. The cases seem to be identical, and the objection under that decision cannot be maintained.

The above are the only grounds assigned by the board for rejecting this claim.

The case has been submitted without argument on the part of the United States, or the suggestion of any other objections to its validity. In its examination and decision I have felt an anxious desire correctly to understand and apply the principles laid down for our guidance by the supreme court, and if I have in any respect misconstrued or misapplied their decision, the error has been involuntary.

Case No. 11,128.

PICO et al. v. UNITED STATES.

[Hoff. Land Cas. 142.] [1]

District Court, D. California. June Term, 1856.

MEXICAN LAND GRANTS—FREMONT'S CASE.

Entitled to confirmation under the ruling of the supreme court in Fremont's Case [17 How. (58 U. S.) 542].

Claim for eight leagues of land in San Joaquin county, rejected by the board, and appealed by claimants [Antonio Maria Pico and others, claiming the Rancho El Pescadero].

Lockwood, Tyler & Wallace, for appellants.
William Blanding, U. S. Atty., for appellees.

HOFFMAN, District Judge. The claim in this case is founded on a grant issued by Governor Micheltorena, bearing date the twenty-eighth day of November, 1843. The expediente is produced from the archives, and the original grant delivered to the party interested—the authenticity of which is duly proved. The claim was, however, rejected by the board, on the ground that the conditions of the grant had not been performed, and, that no legal excuse for nonperformance had been offered. This decision was rendered before the Case of Fremont was determined by the supreme court. In the statement of the case filed by the counsel for the appellants no argument is offered on the points involved in the case, the expectation being confidently entertained that the rules laid down in Fremont v. U. S. [17 How. (58 U. S.) 542], would govern the case. On the part of the United States no argument is submitted, the court being merely referred to the objections urged in similar cases.

It is to be regretted that the point involved in this case was not debated by counsel, and that the court is obliged to arrive at a conclusion unassisted by arguments at the bar.

It is not pretended that the grantee ever complied, during the existence of the former government, with the conditions of the grant. By the testimony of A. Suñol it appears that "soon after Pico received his grant he prepared to remove his cattle on his rancho, but the Indians became hostile about this time and murdered Gulnac's mayor domo on the other side of the river, and prevented Pico from settling on his land. From this time until 1848 and 1849 the Indians continued hostile, and robbed the ranchos down to the valley of San José. In 1847, troops were sent against them, but they continued their depredations until after the discovery of gold in 1848."

The conditions attached to grants in California were clearly conditions subsequent, and by the decision of the supreme court in the case of Fremont v. U. S. [supra], it is established that the grant of the governor, although unconfirmed by the departmental assembly, "vested in the grantee a present and immediate interest." It is true that the grant in that case alluded to the meritorious services of the grantee; but independently of the fact that the governors do not seem to have been authorized by the colonization laws to recompense such services by grants of land, and could at most only consider them as entitling the applicant to a preference over other petitioners, it is clear that the grants being in the same terms must receive the same construction, whatever consideration may have moved the governor to make them. The law under which he acted was intended to secure the settlement of the country by providing for the distribution of the public land among colonists and settlers. To such alone the governor was authorized to grant, and we accordingly find that in almost all cases conditions were annexed to the grant requiring the occupation and cultivation of the ceded land. Under our system the same result is attained by withholding the patent or final title until after the person who has entered the land has effected a permanent settlement upon it. Under the Mexican law, however, a full title issued in the first instance, but conditions were attached to it providing for a forfeiture in case the grantee, by omitting to occupy and settle upon his land, defeated the policy of the government, and failed to furnish what was the sole consideration of the grant. The grants, then, passed a present and immediate interest to the grantee, subject, however, to conditions subsequent; and such was their effect not only when the departmental assembly had confirmed, but even, as decided in the Case of Fremont, without such confirmation.

From this general statement it is, we think, apparent that the principles established in that case apply to all colonization grants made under the regulations of 1828, and cannot be restricted to those alone in which the meritorious services of the grantee may happen to be alluded to in the grant. This grant, then, like that to Alvarado in the case referred to, having vested in the grantee a present and immediate interest, the inquiry, as in that case, is "whether there has been any unreasonable

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

delay or want of effort on the part of the grantee to fulfill its conditions, and whether there is room for the presumption that the party had abandoned his claim before the Mexican power ceased to exist and is now endeavoring to resume it from its enhanced value." The facts in the Case of Fremont, in which it was held that no unreasonable delay had occurred, and that no such presumption arose, were established in a manner much more satisfactory than those relied on in this case. It may not be "very clear," as in that case, that during the continuance of the Mexican power it was impossible to have made a survey or built a house on the land, but the fact exists in this case, as in that, that no one else proposed to settle on it or denounced it for nonfulfillment of the conditions. The testimony of Suñol, though less full and satisfactory than could be wished, nevertheless shows that the obstacles to the settlement were nearly identical with those which prevented Alvarado from complying with the conditions of his grant. The grant to Pico is dated November, 1843, while that to Alvarado was issued in February, 1844 —only three months afterwards. The general condition of the country, and the political disturbances, which prevented a settlement in the one case must have interposed obstacles equally insurmountable in the other. But the inquiry is not whether the grantee could, by possibility, have effected a settlement on his land, but whether his delay has been unreasonable, and so unreasonable as to furnish a presumption that he abandoned his claim, and that he is now fraudulently attempting to resume it. Under the evidence we feel constrained to say, that his delay is not only susceptible of an explanation consistent with the absence of any intention on his part to abandon his claim, but that it seems to have been caused by circumstances over which he had no control, and which probably rendered it unavoidable.

It may be urged that in this case the governor did not, as in the case of Alvarado, dispense with the diseño or plan which usually accompanied the petition; and that the presumption does not arise in this case, as in that, that the governor, by "officially admitting that the land was situated in such a wilderness and bordered by such dangerous neighbors as that no plan could be prepared," impliedly recognized the impracticability of effecting a settlement within the time. There is some force, perhaps, in this suggestion. But it is to be remembered that the governor expressly imposed upon Alvarado the condition of making his settlement within the year; and if his dispensing with the diseño might be considered as a recognition of the fact that the condition of the country might occasion delays, and that such delays would not be deemed unreasonable, the circumstance that he, notwithstanding, insisted in the second condition on the settlement within the usual time, in some degree at least impairs the force of the argument. The insertion of the condition is not, however, so conclusive on this point as it might appear; for the dispensing with the diseño was an unusual and exceptional indulgence of the governor, in granting which he exercised a discretion after his attention had been attracted to the subject, while the insertion of the usual conditions in the grant was probably the work of some clerk, who drew up the paper in the usual form, and without reference to any peculiar circumstances attending it. The insertion of the conditions could, moreover, under the Mexican law, have naturally been but little regarded by the grantee, for he knew that so long as he was unable to effect a settlement no one else would be, and, as observed by the supreme court, that the grant would not be forfeited unless some other person desired and was ready to occupy the land. I do not perceive, therefore, that the fact that the governor in the Case of Fremont dispensed with the diseño, while in this case it was duly submitted with the petition, furnishes ground for a broad distinction between that case and this.

The important and the sole question is, as propounded by the supreme court in the case so often referred to, "whether any thing done or omitted to be done by the grantee during the existence of the Mexican government in California, forfeited the interest he had acquired, and revested it in the government." Such forfeiture could only have been incurred by unreasonable delay or want of effort on his part to fulfill the conditions; and such as to raise the presumption that he had abandoned his claim. It being shown in this case that the delay arose from obstacles which may be regarded as insuperable, that it was not only not unreasonable, but probably unavoidable, no presumption of abandonment can arise; and the title not having been "forfeited and revested in the government, remained, at the time the sovereignty passed to the United States, vested in the grantee, and the United States are bound in good faith to uphold and protect it." [Fremont v. U. S.] 17 How. [58 U. S.] 557.

A decree of confirmation must therefore be entered.

Case No. 11,129.

PICO v. UNITED STATES.

[Hoff. Land Cas. 188.] [1]

District Court, D. California. Dec. Term, 1856.[2]

MEXICAN LAND GRANT—FREMONT'S CASE.

Under the ruling of the supreme court in Fremont's Case [17 How. (58 U. S.) 542], this claim is valid.

Claim for eleven leagues of land in Calaveras county, rejected by the board, and appealed by the claimant [Andres Pico].

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 22 How. (63 U. S.) 406.]

Stanly & King, for appellant.

William Blanding, U. S. Atty., for appellees.

HOFFMAN, District Judge. The claim in this case is founded on a grant made by Governor Pio Pico, June 6th, 1846, and which was approved by the departmental assembly June fifteenth, of the same year. The genuineness of the grant, and of the certificate of approval, is testified to by N. A. Den. No attempt has been made to contradict or impeach him; nor is any doubt suggested as to the authenticity of the papers. A document is also produced from the archives purporting to be a communication from the secretary of the assembly, transmitting the title papers to the secretary del despacho, with the approval of the assembly. The claim was rejected by the board for want of proof of occupation and cultivation. Additional testimony has been taken in this court, from which it appears that in 1848 the grantee had some horses upon the land, and took possession of some improvements made upon it by C. M. Weber.

This evidence is of course wholly insufficient to show a fulfillment of the conditions. But if the grant and other papers be regarded as genuine (and under the evidence we are compelled so to consider them), the grantee obtained a full and complete title from the former government. The failure to perform conditions subsequent, though it might have exposed him to a denouncement of the land, did not, until such a proceeding was had, forfeit it; and his vested title remained unimpaired up to the change of sovereignty. But even if in the case of a complete title we were authorized to declare the land forfeited where the grantee had so unreasonably delayed the performance of the conditions as to justify the presumption that he had abandoned his land, this case would not fall within the principle. The grant was issued about a month before the American flag was raised in this country; the disorder incidental to the invasion of the country would naturally prevent any settlement in remote parts, and it seems unreasonable to say that any failure to perform conditions of a grant issued but a few months before the Mexican authority was finally subverted, justify the inference "that the grantee had abandoned his land during the existence of the former government, and is now seeking to resume it from its enhanced value." Fremont v. U. S., 17 How. [58 U. S.] 542. The land granted is described as "eleven square leagues, bordering on the river Moquelamos, bordering on the north upon the southern shore of said river, on the east upon the adjacent ridge of mountains, on the south upon the land of Mr. Gulnac, and on the west by the extremes of the shore." There would seem to be no difficulty in identifying this tract.

This case was submitted many months ago, without argument or observation of any kind on either side. It was rejected by the board for nonfulfillment of the conditions. But if the grant be really genuine, the nonperformance cannot, under all the circumstances, divest the title which the claimant acquired by the grant of the governor, approved by the departmental assembly. No expediente containing the usual documents (petition, informes, order of concession, diseño, copy of the grant, etc.) has been produced. No diseño or map of the land has been exhibited. The only paper found in the archives is the communication of Botello, transmitting the title with the approval of the departmental assembly to the secretary del despacho, before alluded to. The production, however, of the original title, authenticated by the testimony of an unimpeached and uncontradicted witness, leaves us no alternative but to regard it as genuine, and if the grant was duly made and approved, the title to the land passed to the grantee. To any one acquainted with the facility and unscrupulousness with which, in this class of cases, frauds have been perpetrated and sustained by testimony apparently conclusive, a grant unsupported either by evidence from the archives, or by proof of occupation of the land, must appear suspicious. But even in such cases the court is not at liberty in the face of the uncontradicted testimony of unimpeached witnesses to substitute its own suspicions for proofs. In the case at bar, however, a document is found in the archives, which affords the best if not the only moral evidence of the genuineness of the grant.

Under the proofs in this case, we do not feel warranted in pronouncing the title to be spurious and rejecting the claim.

A decree of confirmation must therefore be entered.

[NOTE. Upon appeal to the supreme court the decree affirming this claim was reversed upon the ground that there was no proof of the genuineness of Gov. Pio Pico's signature. The case was remanded for further evidence. 22 How. (63 U. S.) 406. Upon the subsequent hearing of the case in the district court the claim was rejected. Case unreported. This decree was affirmed by the supreme court upon appeal. 2 Wall. (69 U. S.) 279.]

Case No. 11,130.

PICO et al. v. UNITED STATES.

[Hoff. Land Cas. 279.] [1]

District Court, D. California. Dec. Term, 1857.[2]

MEXICAN LAND GRANTS — ISSUE OF TITLE BEFORE CONQUEST OF CALIFORNIA.

Although the final grant in this case was not issued until the seventh of July, 1846, which date the political branch of our government seems to have indicated as the period of the

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

[2] [Reversed in 23 How. (64 U. S.) 321.]

actual conquest of California, yet, the governor having ordered the title to issue on the eleventh of June, 1846, the claim presents an equity which must be respected by the United States.

Claim for eleven leagues of land in Tuolumne county, rejected by the board, and appealed by the claimants [Francisco Pico and others, claiming the Rancho Las Calaveras].

Stanly & King, for appellants.
P. Della Torre, U. S. Atty., for appellees.

HOFFMAN, District Judge. The expediente produced from the archives in this case contains the following documents: 1st. A petition by the claimant to the justice of the peace and military commander, Don Juan A. Sutter, requesting a favorable report for the grant of the land mentioned in the petition and delineated on the map which accompanied it. This petition is dated May 1st, 1846. In the margin of this petition is a certificate by Sutter, dated on the same day, that the land solicited is vacant. 2d. A petition by the claimant to the sub-prefect of the Second district, soliciting his report to accompany the representation and diseño previously presented to the judicial officer of said establishment, from whom the petitioner had already obtained a certificate, so that further proceedings may be taken with a thorough understanding of the matter. This petition is dated May 8th, 1846. In the margin is a note by Francisco Guerrero, dated May 12th, 1846, in which he declines to act in the matter, not having the necessary authority, and he refers it to the prefect of the Second district "to resolve what he shall deem proper." 3d. A report of the prefect, Manuel Castro, dated May 18th, 1846, in which he states, that in view of the petition, the report of the sub-prefect, and that of the judge of Nueva Helvetia, the qualifications of the petitioner, and everything else, he is of opinion that the said party may be granted the ownership of said land, "if it shall appear convenient to your excellency." 4th. An order of the governor as follows: "In view of the reports contained in this expediente in favor of the interested party, let the title issue to secure the ownership, without prejudice to what may belong to the bordering land owners. Angeles, June 11th, 1846. Pico."

The claimant has also produced the final title issued in pursuance of the above order. It is dated, however, on the twentieth of July, 1846, about thirteen days after the capture of Monterey. The claim was rejected by the board, on the ground that the final title issued after the occupation of the country by the American forces. It must be admitted, that after California was subjected to the American arms, no Mexican authority could do any act which would affect the rights of the United States to the public property. Fremont v. U. S., 17 How. [58 U. S.] 563. "The civil and municipal officers who continued to exercise their functions, did so under the authority of the American government." Id.

It is not, however, easy to determine the precise period at which the Mexican authority ceased de facto to exist, and at which California must be deemed to have been subjected to our arms. The political branch of our government seems to have indicated the seventh of July, 1846, the date of the capture of Monterey, as the period at which the conquest is deemed to have been effected. Act 1851, § 14. It is to be considered, however, that Los Angeles, the capital of the country, was not taken until some months later. The governor continued in the exercise of his functions until August, and regular sessions of the departmental assembly seem to have been held for some time afterwards. But assuming the earlier date as the period when the powers of the Mexican functionaries ceased, the question arises whether the circumstance that the final document issued thirteen days after taking of Monterey is a fatal objection to the claim. From the expediente already referred to, we find that as early as the month of May, all the proceedings were had preliminary to the issuance of the final document. A petition was presented with favorable reports and accompanied by a diseño, and the governor, on the eleventh of June, accedes in effect to the petition, and orders the final title to be issued to secure the ownership. So far as the governor's discretion was concerned, he had fully exercised it, and had determined to grant the land. If the disturbed state of public affairs, or the neglect of the secretary, prevented the performance of the merely ministerial act of drawing out the title in form and presenting it for signature to the governor, it seems to me that such an omission ought not to invalidate the inchoate or incipient title which the petitioner had acquired by the previous proceedings.

In the case of U. S. v. Sanchez [Case No. 16,217], which depended on the same question as that raised in this case, the judge of the Southern district of this state decreed in favor of the claimant. That decision has been acquiesced in by the United States and the appeal to the supreme court dismissed. In the reasoning and conclusions of the court in that case I entirely concur, and am of opinion that the petition, the favorable reports, and the order of the governor directing the title to issue, followed by the actual issuance of the title at a period, when the governor could hardly have anticipated the consequences of the capture of Monterey, and certainly before he could have been fully satisfied that the sovereignty had finally passed away from Mexico, constitute an equitable title which the United States must respect.

A decree of confirmation must be entered.

[On appeal to the supreme court, the decree of this court was reversed. 23 How. (64 U. S.) 321.]

PICO (UNITED STATES v.). See Cases Nos. 16,044–16,048.

Case No. 11,131.

PICQUET v. CURTIS.

[1 Sumn. 478.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1833.

BILLS AND NOTES—POSSESSION BY INDORSER AS EVIDENCE OF OWNERSHIP—DEMAND AT TIME AND PLACE OF PAYMENT—LIMITATIONS.

1. Where bills of exchange were specially indorsed, and the indorsement still continued uncancelled, and there were no re-indorsements, or other evidence of any subsequent assignment, *held*, that possession by the original indorser is prima facie evidence that he is the owner of them.

[Cited in Jackson v. Love, 82 N. C. 405; Witherell v. Ela, 42 N. H. 296; Austin v. Birchard, 31 Vt. 591.]

2. Where bills of exchange are made payable at a particular place, no action can be maintained until after a demand at that place, and a dishonor there. Therefore, the statute of limitations begins to run from the time of such demand, and not from the time when the bills were payable according to their tenor.

[Cited, but not followed, in Brown v. Noyes, Case No. 2,023. Cited in Cox v. National Bank, 100 U. S. 712.]

Assumpsit on a large number of bills of exchange, drawn on the 4th of July, 1811, by one Fretag in Paris, payable to his own order, on James Swan, (the deceased,) and accepted by him in Paris, payable in Boston, Massachusetts, at different and distant dates. All of them were indorsed to the plaintiff's intestate by Fretag, and fell due between February, 1813, and February, 1822; and all of them were dishonored. The whole amount of the bills was about $97,759. The declaration contained, besides the money counts, a number of counts upon the bills, alleging a title in the plaintiff [Antoine F. Picquet, administrator] by the indorsements to his intestate. Among the pleas there were (1) the general issue to all the counts; (2) the plea of the statute of limitations. Replication to this plea, that James Swan was without the United States, and left no property within the limits of Massachusetts, which was attachable by the ordinary process of law. The defendant [Charles P. Curtis, administrator] rejoined, that Swan left attachable property within the commonwealth, &c.; upon which issue was joined by the parties. Upon these issues the cause came on for trial at the present term; and a verdict was found for the plaintiff. At the trial it was found, that payment of the bills was demanded for the first time in Boston, on the 15th of November, 1823; and the bills were then dishonored and duly protested therefor. Swan never was within the United States after the time, when the bills were drawn; and was at that time domiciled in Paris; and died at Paris in 1831. It did not appear, that Swan ever had any funds in the United States to pay any of the bills. A motion was now made for a new trial. [For the prior litigation concerning these bills of exchange, see Case No. 11,132, and note.]

Charles G. Loring, for defendant.
Blair & Fletcher, for plaintiff.

STORY, Circuit Justice. The present motion for a new trial has been made on behalf of the defendants, not so much perhaps from any strong doubts as to the points ruled by the court; but from an anxious desire of the defendant acting in autre droit, not to be supposed to omit any practical duty to those, whom he represents. I appreciate the motive; and have considered the points made, with as much care, as if they had been urged in the earnest conviction, that they were beyond question in favor of the defendant.

The first ground is, that the court instructed the jury, that the plaintiff was entitled to maintain the action upon thirteen of the bills, which appeared to have been specially indorsed by his intestate to other persons, notwithstanding the indorsements were not cancelled, when the bills were produced, and there were no re-indorsements, or other evidence, of any subsequent assignment to him, excepting the plaintiff's possession of the bills. And such was certainly the direction of the court. I was aware then, and still am, that the authorities are at variance on this point; but I am of opinion, that the better authorities clearly establish the principle, that the possession of such bills, after such special indorsements by the indorser, is prima facie evidence, that he is the owner of them, and that they have been returned to him, and taken up in due course upon their dishonor; so that he is remitted to his original rights. It seems to me, that this is the natural presumption from the facts; and that it would be difficult upon any other supposition to account for such possession by the indorser, which must deprive the special indorsee of the means of enforcing any adverse rights against him. I do not say, that the presumption is conclusive; but I think it prima facie sufficient to found a title in the indorser until it is rebutted by some controlling circumstances. This doctrine was directly approved by the supreme court of the United States in Dugan v. U. S., 3 Wheat. [16 U. S.] 172, where the court laid down the rule, "that if any person who indorses a bill of exchange to another, whether for value or for purposes of collection, shall come into possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such in-

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

dorsees, whose names he may strike from the bill, or not, as he may think proper." This doctrine would be conclusive upon my judgment sitting here, even if I entertained doubts upon the subject. But I was one of those judges who concurred in that opinion; and I now adopt it, toto animo, with a solid confidence. And I think it may fairly be inferred, that such is also the French law, from the passage cited so frankly at the bar by the defendant's counsel, from the work of Pardessus on the commercial law of France. 2 Pardessus, p. 179, art. 349.

The other point is, that the court instructed the jury, that the statute of limitations began to run from the time of the presentment for payment, to wit, on the 15th of November, 1823; and not from the times when the bills were respectively payable according to their tenor. I remain of opinion that this direction was right, according to the principles of the common law. It is to be recollected, that this is a suit against the acceptor of the bills, and that they were payable in Boston. In my judgment, no action could be maintained until after a demand was made in Boston, and a dishonor there. The decision of the house of lords in the great case of Rowe v. Young, 2 Brod. & B. 165, 2 Bligh, 391, settled this, as to inland bills, upon principles, which strike my mind as irresistible. And there cannot, I believe, be found a single authority, that denies it in relation to foreign bills. It would, in my humble judgment, be a monstrous doctrine, to hold, that upon a bill drawn upon England, and accepted here, payable in England at a particular time after date, the holder might maintain an action against the acceptor without transmitting the bill to, or asking payment in England.

I have looked into the Code of Commerce of France, to ascertain, whether any different rule is there established; for, as these bills were contracts made in France, and the acceptances in France, the rights and responsibility of the acceptor may, in some measure, depend upon the laws of France, although payment is to be made in Boston. What I have been enabled to find, satisfies me, that by the law of France, in cases of this nature, there must be a demand of payment of the bills at the place assigned, and a protest of dishonor, before a suit is maintainable against the acceptor. The 123d article of the Code of Commerce declares, that the acceptance of a bill of exchange, payable in another place than that of the residence of the acceptor, must indicate the domicil, where the payment is to be made, or the protest in case of non-payment. Another article (article 173) requires a protest to be made in cases of non-payment; and another (article 184) declares, that interest on the principal of the bill of exchange, protested for non-payment, is due from the date of the protest. These articles seem to me to close all controversy on this point. They show that there is no default in the acceptor, which puts him in mora, or default, until a demand and protest at the place of payment.

I therefore overrule the motion for a new trial.

Case No. 11,132.

PICQUET et al. v. SWAN.

[3 Mason, 469.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1824.

ACTIONS—MISJOINDER OF PARTIES—SUIT BY FOREIGN ADMINISTRATOR.

1. Where the plaintiff joined counts on a bill of exchange as indorsee, with counts on bills of exchange "as beneficiary heir and administrator of the estate of J. C. P. deceased," by the law of France, and thereby proprietor of the bills, it was *held*, that the latter counts were in his representative character, and there was a misjoinder.

2. In such a case the plaintiff cannot sue on the bills of the intestate in the circuit court, without taking out letters of administration in Massachusetts.

[Cited in Taylor v. Barron, 35 N. H. 495. Cited in brief in Reel v. Elder, 62 Pa. St. 313.]

[3. Cited in Pinney v. McGregory, 102 Mass. 192, to the point that the courts in Massachusetts will exercise the jurisdiction of granting administration on property belonging or debts due to persons residing abroad in order to enable them to be collected in the state.]

Assumpsit on several bills of exchange, drawn by the defendant [James Swan] in Paris, payable in Boston. On some of these bills the plaintiffs [Cyrus B. Picquet and another] declared as indorsees; on others they declared as having been indorsed to one Jean Claude Picquet, the father of the plaintiffs, in his lifetime, and afterwards he died; and the plaintiffs being his right heirs, by the law of France, "accepted the heirship with the benefit of an inventory," whereby they became, by the laws of France, "the beneficiary heirs and administrators of the estate" of the said J. C. Picquet at his death, "and joint and lawful and only proprietors" of these bills of exchange. The plaintiffs were described in the writ, "as aliens and beneficiary heirs of Jean Claude Picquet." The defendant pleaded in abatement of the suit two pleas: 1. That no probate had ever been made in any probate court of Massachusetts of any last will or testament of Jean Claude Picquet, nor any administration there taken upon his estate; nor were the plaintiffs administrators thereof under any administration taken in any of the United States. 2. That there is a misjoinder of different causes of action in the same suit, viz. some causes in the plaintiffs' own personal right, and others in their capacity as administrators, executors or heirs of Jean Claude Picquet. The plaintiffs demurred to both pleas, and there was a joinder in demurrer.

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

J. T. Austin, for plaintiffs.

Argued that the first plea was bad as to some of the counts, as they were founded on indorsements to the plaintiffs personally. But all the counts are founded on the personal right of the plaintiffs. By the law of France the absolute property is vested in them; and the lex loci governs in such a case. 2 Bos. & P. 232; 4 Term R. 184; 3 Ves. Jr. 200; 1 Bin. 346; 4 Johns. Ch. 460. Persons may take by operation of law, and in such case may sue in their own names, as proprietors, as by virtue of marriage. Dalrymple v. Dalrymple, 2 Hagg. Ecc. 54. So foreign assignees, in cases of bankruptcy, may sue in their own name and right here, or at their election, in that of the bankrupt. 4 Johns. Ch. 460; 1 East, 10; 13 Mass. 146. The averment in the writ, as to the plaintiffs' right as administrators, is misunderstood. They are asserted to be beneficiary heirs, and administrators, and joint proprietors. Administration cannot be taken out by the plaintiffs here. They are not in the country. Our probate courts have but a limited authority to grant administration, when there is estate left here. The plea does not state, that J. C. Picquet left any estate here. These bills are not estate in Massachusetts. The second plea is not well founded. The plaintiffs do not claim as administrators of the deceased, but in their own right. There is no misjoinder of counts. If there were a misjoinder, the suit would be abatable only as to part, and good as to the rest. 2 Dow. 230.

W. Sullivan and Mr. Prescott, for defendant,

Argued that, if there was a misjoinder, the whole suit must be abated, for it was fatal to the whole. Com. Dig. "Abatement," G. 4; "Action," G; Hob. 88; 2 Lev. 110; 1 Salk. 10; 3 Inst. Cler. 121; Story, Eq. Pl. 54; 2 Saund. 209, note. The plaintiffs sue in the third and fourth counts in a representative character. The money if recovered will be assets. They do not pretend in these counts to sue as indorsees. If not, how otherwise can they sue, than as representatives of the deceased? By the French law "beneficiary heirs" are in fact administrators. Code Nap. arts. 718, 724, 731, 739, 774, 775, 778, 782, 784, 788, 793, 796, 802, 803, 807, 814, 815–842; 1 Domat. bk. 3, tit. 2, §§ 2, 3. An administrator sues as owner, but it is also in autre droit. Here the attempt is to vest a right to sue by succession, which would only be by assignment by the ancestor while living. This contract being to be executed in Massachusetts must be governed by our law. 8 Term R. 496; 2 W. Bl. 1269. The case of assignees is essentially different. American decisions are not uniform even on that subject in favour of the right of the assignees. 4 Johns. Ch. 460; 20 Johns. 254; [Harrison v. Sterry] 5 Cranch [9 U. S.] 289. If property passes by assignment, still the assignees must sue in the name of the assignor of a chose in action. A debt due to an assignee personally and a debt due to a bankrupt cannot be joined in one suit. Cowp. 569; 2 Johns. 342; 1 Johns. 127; 3 Wils. 371.

STORY, Circuit Justice. It is not necessary to consider, how far the pleas in abatement are exact in their form, nor whether both can be pleaded successively to the writ. The substance of the objections raised upon the pleadings is, 1st. that there is a misjoinder of different causes of action, some in a personal and some in a representative character; 2d. as to the causes of action in a representative character, that no administration has been taken out in any court of probate of this state. The first objection, though it is pleadable in abatement, is fatal also in every stage of the suit, if well founded. Com. Dig. "Abatement," G 4; "Action," G 1; Chit. Pl. 206, 444. The last is properly pleaded in abatement; for if the defendant pleads in bar, it is an admission, that the plaintiffs are competent to sue in their representative character, if they state such character. In the present suit some embarrassment might arise, because the representative character is not set forth in the technical language of the common law.

Some doctrines are so well settled, that they need only to be stated to command assent. Such is the doctrine, that in Massachusetts no foreign administrator can maintain any suit without taking out administration in our courts of probate. That principle is obligatory upon this court sitting in the administration of local law. The fact, that no such administration has been taken out by the plaintiffs is admitted by the demurrer; and therefore the only inquiry is, whether upon the pleadings the first objection is maintained. In other words, are any of the causes of action in point of law brought in a representative character? It appears to me, that those in the third and fourth counts clearly are so, and can be maintained upon no other ground. I lay no stress upon the language of the writ, describing the plaintiffs "as aliens and beneficiary heirs of Jean Claude Picquet." That allegation may be gotten over as mere matter of personal description. But the third and fourth counts allege, that the bills of exchange therein declared on were indorsed to J. C. Picquet in his lifetime, and belonged to him at his decease, and that the plaintiffs are his right heirs, and have accepted the heirship with the benefit of an inventory, according to the laws of France, and thereby have by the same laws become "the beneficiary heirs and administrators of the estate of J. C. Picquet," and as such, "the joint and sole proprietors" of the same bills. Now, if I am at liberty to examine into the French laws, I cannot but know, that this is precisely a description of an administrator in the sense of the common law. The civil law

throws the heirship and administration upon the heirs of the deceased; and the acceptance of it with the benefit of an inventory, is the same, as accepting it with a liability only for the debts of the deceased, coextensive with the assets coming into the hands of the heir. But the counts plainly state the death of the holder of the bills, and the right asserted is a derivative right under him by operation of law after his decease. It is therefore not a personal right of the plaintiffs upon the transfer inter vivos; but a right claimed in virtue of a representation of the deceased under the French laws, which makes the plaintiffs successors to the property in the bills. Under these circumstances the plaintiffs must be deemed to sue here, as administrators of the property of the deceased; and therefore the objections are maintained in their fullest extent. There is a misjoinder of counts and the want of a rightful administration under our laws. The French laws may prescribe how rights shall pass to property of the deceased in that country; and we, out of comity, may recognise the like rights as to his property here. But the mode of instituting and pursuing remedies must be decided by our laws. Judgment must be for the defendant on the demurrers. Judgment accordingly.

[NOTE. Subsequently Cyrus B. Picquet sought by foreign attachment to subject to the payment of his claim certain property before conveyed by James Swan to his wife, who at this time was deceased, having conveyed the same for the benefit of her three daughters. The case against the trustees was dismissed. Case No. 11,133. Later it was held that Swan had not been properly served with process. The action was dismissed. Id. 11,134. Antonio F. Picquet then, as administrator of his deceased father, Jean Claude Picquet, filed his bill in equity against Swan and the other defendants in the attachment case. Swan, being out of the jurisdiction of the court (in France) refused to appear and answer. The case was heard upon motion to dismiss because of the inability of the plaintiff to procure the necessary parties before the court. Before granting the motion the plaintiff was allowed additional time in order to procure Swan's appearance. Id. 11,135. Swan died in 1831, and after his death a judgment at law was obtained against his administrator. Case unreported. A motion for a new trial was overruled. Case No. 11,131.]

Case No. 11,133.

PICQUET v. SWAN et al.

[4 Mason, 443.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1827.

TRUSTEE PROCESS—ACT OF MASSACHUSETTS, 1794—POST-NUPTIAL SETTLEMENTS—POWER OF APPOINTMENT—NEW TRUSTS—WIFE'S SEPARATE ESTATE—WILL OF FEME COVERT.

1. Of the true nature and extent of the trustee process authorized by the statute of Massachusetts of 1794 (chapter 65).

2. It seems that it does not authorize an attachment of any property which is not tangible, and might be levied upon on execution, if discovered, or of any debts or credits, where the trustee sets up any title or claim adverse to that of the debtor; for example, where the trustee claims under a post-nuptial settlement by the debtor.

3. Of the general validity of post-nuptial settlements. A post-nuptial settlement, made by a stranger upon the wife, is good, unless expressly dissented from by the husband. A post-nuptial settlement made by the husband upon his wife, if for a valuable consideration, is valid; and even if voluntary, if bonâ fide, and the husband be not indebted at the time, or it be not disproportionate to his means, taking his debts and his situation into consideration, it is valid.

[Cited in Barnett v. Goings, 8 Blackf. 286; Gassett v. Grout, 4 Metc. (Mass.) 488.]

4. In such a post-nuptial settlement a power of appointment and to create new trusts may be reserved to the wife, toties quoties, and it is no objection to it or to the title derived under the secondary trusts and appointments.

5. Where such a power of appointment is absolute and universal in its terms, the wife may exercise it, and create new estates on new trusts.

6. The income or profit arising to the wife from such post-nuptial settlements follows the nature of the principal estate, and cannot be taken by the husband or his creditors, but belongs to the wife, and is subject to the control and disposition of the wife. It is her separate property, and when invested by her, will be protected for her use. Into whose-soever hands it comes, it is clothed with the trust for her, and not for her husband, even when no trustees are expressly provided for in such a case.

7. If a wife, under such circumstances, lives separate from her husband, the furniture &c. of her house will be presumed to be purchased out of her own property; and will not, on her death, go to her husband, or his creditors; but to her own appointee.

8. What circumstances furnish presumptions of exclusive ownership of furniture &c. in the wife.

9. Where the persons sued as trustees of the husband, claim title as appointees and trustees under the will of the wife, and the will has not been admitted to probate, they cannot be adjudged trustees.

10. The will of a feme covert under a power reserved in a settlement, must be proved in our courts of probate before it can be acted upon elsewhere, exactly as the wills of persons sui juris. The courts of probate have exclusive jurisdiction of such questions.

[Cited in Cassels v. Vernon, Case No. 2,503.]

[Cited in Allison v. Smith, 16 Mich. 422. Cited in brief in Cutter v. Butler, 25 N. H. 350.]

11. If a feme covert gives a legacy in her will to her husband, out of her separate property, for his maintenance, under a power of appointment, the executors are not liable to be attached as trustees of the husband until after a probate of the will, and the taking upon themselves the administration thereof. An executor is not liable to be charged as the trustee of a legatee, in a foreign attachment.

[Cited in Stratton v. Ham, 8 Ind. 87. Cited in brief in Short v. Moore, 10 Vt. 448.]

12. Quære, if a legacy given by way of annuity to a husband for his maintenance can be attached in the hands of the executors. Is not such an annuity in its very nature a sum to be paid personally to the husband by the executors; as the bounty of the testator?

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

13. Property pledged, and on which the party has a lien, is not liable to be attached by a trustee process.

[Cited in Briggs v. Walker, 21 N. H. 77.]

14. Quære, whether a wife making advances out of her separate property to her husband, upon an hypothecation of his personal estate, may not, in equity, hold the same as against his creditors.

15. A trustee may, in a foreign attachment process, set off against a debt or claim due from him to the debtor, any claim he has against the debtor, which he could set off in an adverse suit at law brought by the debtor himself.

[Cited in Allen v. Hall, 5 Metc. (Mass.) 266; Capen v. Alden, Id. 271.]

16. Where persons, sued as trustees in a foreign attachment, assert an adverse title to the property in a third person, as her separate property, they are not bound to answer how they have disposed of it, for her use, from time to time.

[Cited in Wright v. Foord, 5 N. H. 180.]

[17. Cited in Cutter v. Butler, 25 N. H. 350, 359; Marston v. Norton, 5 N. H. 210. And cited in brief in Fisher v. Kimball, 17 Vt. 326, to the point that at common law a will by a married woman disposing of her freehold estates is void.]

[18. Cited in Sexton v. Amos, 39 Mich. 699, to the point that there must be a clear admission of goods, effects, or credits not disputed or controverted by the supposed trustees, before they can be truly said to have them in deposit or trust.]

[19. Cited in Crossman v. Crossman, 21 Pick. 24, to the point that the statements in the trustee's answer are to be taken as true, and that this rule extends to assertions made on his belief of facts derived from other sources of information, as well as from his personal knowledge.]

This was a foreign attachment, commonly called a trustee process [brought by Cyrus B. Picquet]. The principal debtor [James Swan] did not appear, or make any defence in the cause; and it came on to be heard upon the answers made by the trustees, who denied that they had any property of the debtor in their hands liable to attachment; and having made a special disclosure of all the facts, moved the court for their discharge. The motion was resisted. [The plaintiff had previously failed to obtain judgment in an action of assumpsit. Case No. 11,132.]

J. B. Davis and J. T. Austin, for plaintiff.

William Sullivan and William Prescott, for trustees.

STORY, Circuit Justice. This suit is brought by the plaintiff, an alien and subject of the king of France, against James Swan, a citizen of this state, as principal debtor, and against certain persons who are summoned, as his trustees, viz. Harrison G. Otis, William Sullivan, and Hepzibah C. Howard, to recover the amount of certain bills of exchange belonging to the intestate, and yet due and unpaid by Swan. The process is familiarly known among us by the appellation of the trustee process, and is more generally known elsewhere by the appellation of foreign attachment. It has its origin in the statute of 1794 (chapter 65), which provides, that any creditor, entitled to an action against his debtor, "having any goods, effects, or credits, so entrusted, or deposited in the hands of others, that the same cannot be attached by the ordinary process of law, may cause not only the goods and estate" of the debtor "to be attached in his own hands or possession &c., but also all his goods, effects, and credits so entrusted and deposited," &c. by an original writ, by which the debtor and the supposed trustee are summoned to appear, and answer to the suit in the manner prescribed by the act. In the present case the principal has not yet appeared; but the persons sued as trustees have appeared pursuant to the statute, and have made regular disclosures of facts under oath; and they now demand that they be discharged from the suit, upon the ground, that these disclosures establish that they have no goods, effects, or credits of the debtor entrusted or deposited with them in the sense of the statute. The case, so far as respects them, is to be tried upon their answers, and no evidence aliunde is admissible to controvert or explain the facts stated therein. This is the known course under the statute, and has never been broken in upon by the legislature, except in a class of cases not necessary on this occasion to be noticed. I own that I am one of those, who are not inclined to give a larger operation to the statute than what its words clearly import. It is an extraordinary process, and from its very nature can afford but a very imperfect administration of rights and remedies as to the litigant parties. Nor as far as my limited experience has gone, has it enabled me to say, that in complicated transactions, where various and conflicting rights have been brought forward for controversy, the result has in a general view been such as entitles it to peculiar public favour on account of its advancement of public justice. Cases, like the present, full of nice law and refined equity, would seem hardly within its scope, and are far more fitted to be decided upon a bill in equity, where all the parties in interest may be brought before the court, and the whole facts may be put in controversy, and supported or repelled by the answers of the parties, as well as by evidence drawn from disinterested sources. If I were called upon to put a construction upon the words of the statute for the first time, I should not hesitate to say, that it was meant to be limited altogether to cases where goods and effects, such as are liable to execution in ordinary cases, and are tangible, corporeal property, were in the hands and possession of the supposed trustee, for the sole use and benefit of the debtor, and under no claim of right or interest therein, contested or uncontested on the other side; or to acknowledged deposits of money or credits admitted, as real balances due from the trustee in money transactions or matters in account, between the trustee and the debtor. And that it did not extend to cases

where the trustee controverted the right of the debtor to any such goods, effects, or credits altogether, or asserted any adverse interest, title, or claim. This appears to me the true intention of the statute, as it is expounded by the simple words of the enacting clause, and more fully by the recital of the preamble. Whether decisions have gone to an extent beyond this reach of the words, it is not now necessary to consider. If they have, it may become my duty to follow them in the administration of local law; but I should hesitate much, before I should take a single new step, or make any new inroads upon the natural meaning of the words. Especially should I feel an almost insuperable repugnance to such a step, when it might vitally affect the interests of third persons not before the court, who, in the character of cestuis que trust, or beneficial proprietaries, might have their rights concluded without any legal opportunity of presenting their whole merits. The foreign attachment custom of the city of London is probably the common origin of the statute process in the different states of this Union; and it is quite apparent, that the principles of that process have never been supposed to reach cases, where there were any trusts set up by the party in favor of third persons. See Com. Dig. "Attachment," C, D; Blacquiere v. Hawkins, 1 Doug. 378. See, also, Barnes v. Treat, 7 Mass. 271. In the present case it is most manifest, that all the parties in interest are not before the court; and that if the merits of the whole proceedings spread upon the record are to be examined into, and decided upon, it is quite probable, that the rights of third persons may be most materially affected. I throw out these suggestions, not for the purpose of escaping from a decision upon the general questions presented in the cause, and which have been argued with so much ability and learning; but with the hope, that they may attract the attention of abler minds, valere quantum valere possent.

The first question presented by the disclosures arises from the post-nuptial settlements stated in the case. The first is by an indenture tripartite of the 14th of June, 1796, between John Coffin Jones, of the one part, James Swan and Hepzibah his wife of the second part, and Henry Jackson and Joseph Russell of the third part, reciting that Jones had on that day transferred to Jackson and Russell 86,000 dollars, of the five and a half per cent. stock of the United States, in trust for the said Hepzibah, with the consent of her husband. The trusts expressly authorize her to receive the whole, principal and interest, to her separate use during her coverture, and to dispose of the same as she may please, during her life-time, and afterwards to appropriate the same to such persons as she should by deed, or by any writing purporting to be a last will and testament, limit, direct, and appoint. It does not appear, from any recital in this indenture or otherwise, from whom the property so placed in trust was derived. Another indenture was executed between the same parties on the 25th of April, 1797, by which the additional sum of 6,000 dollars on the same stock was secured to Mrs. Swan upon the like trusts. On the 10th of October, 1796, an indenture was made between Henry Jackson of the first part, John C. Jones and Joseph Russell of the second part, and Mr. Swan and his wife of the third part, whereby certain real estate and mortgage securities thereon, then held by Jackson, were conveyed to Jones and Russell, upon trusts substantially similar in effect, though varying in some of the provisions from those before mentioned, and including a power of appointment of such estates by Mrs. Swan. I do not dwell on them, because nothing particularly grows out of them in the present controversy. By another indenture between the same parties, executed on the 20th of November, 1797, certain other lands were conveyed upon the like trusts. On the 28th of July, 1798, by another indenture, General Jackson conveyed certain other lands to Jones and Russell upon like trusts. Neither Mr. Swan nor his wife were parties to this indenture; but by a deed of the 16th of July, 1800, he gave his assent thereto. In this last indenture are contained the estate called the Greenleaf estate, now the Washington Gardens, and also the Mount Vernon Lands, so called, in Boston.

Mrs. Swan, pursuant to her power of appointment during her life-time, made sundry conveyances of the real estates above-mentioned, upon like trusts, for her separate use, which lands, by intermediate conveyances, came to the trustee, William Sullivan; and by an indenture of three parts, made on the 30th of March, 1825, between the said William Sullivan of the first part, Jonathan Amory, Richard Sullivan, and James Sullivan of the second part, and James Swan of the third part, the same estates were conveyed to the said parties of the second part, upon like trusts, and for the purpose of enabling Mrs. Swan to execute an appointment thereof, in the nature of a last will and testament. On the 25th of April of the same year, another indenture was made between the trustee, William Sullivan, of the one part, Peter O. Thacher and James Sullivan of the second part, and James Swan of the third part, whereby certain personal estate, then in the hands of the said William Sullivan, belonging to Mrs. Swan, and for her separate use, was conveyed to the parties of the second part, for the separate use of Mrs. Swan, and to enable her to dispose of the same in her life-time, and afterwards by deed, or by writing, purporting to be her last will and testament, to appoint, direct, and dispose of the same. There was a supplementary agreement of the same date, between the same parties, containing further provisions respecting future personal estate, which

might accrue to Mrs. Swan, and the investments of the property already assigned by the preceding indenture. Mrs. Swan, in pursuance of these several indentures, made a certain instrument, purporting to be her last will and testament, dated the 29th of April, 1825, and thereby executed, in the fullest manner, her powers of appointment over the real and personal property, which passed under all the indentures above-mentioned. By this testamentary instrument she bequeathed the whole of her real and personal estate to William Sullivan, Harrison Gray Otis, and William Foster Otis, whom she also made her executors, in trust, to pay certain legacies and annuities, and to distribute the residue among her three daughters, with the usual powers of sale, &c. Mrs. Swan died in August, 1825; and this testamentary instrument has never yet been proved and allowed in any probate court in Massachusetts; and the executors have not as yet applied for probate, or taken upon themselves the discharge of the trusts therein contained. It is further alleged, in the answer of William Sullivan, that James Swan assented to the making of the same testamentary instrument, when the same was made, and since the decease of Mrs. Swan he has also assented to the same, and accepted the provision therein made for his benefit. There is no proof, in the answers, what was the true origin of the various settlements above stated. The trustees do not undertake to state them, expressing their own ignorance of the subject. At the same time, two of them assert, that Mrs. Swan originally possessed by devise, from a Mr. Dennie, an estate, real and personal, beyond the amount of that included in all the settlements, which was received by Mr. Swan, and lost in his commercial enterprises; that he subsequently retrieved his fortune, and became possessed of great wealth; and that, if these settlements were made out of his property, they were made as a compensation for the property of his wife, so received and lost by him, upon the plain principles of equity and justice.

Now, upon this summary exposition of the facts, stated in the answers, the question arises, whether these post-nuptial settlements are, or are not, valid in point of law. If valid, their importance, in the future inquiries in this cause, will presently be seen. Upon any view, which I am able to take of the facts now before the court, and it is upon these facts only that I am permitted to judge, there does not seem the slightest ground to impeach these settlements, or any of them. Nothing is more clear, both upon principle and authority, than that a post-nuptial settlement, made by a stranger upon a wife, is good and operative, in point of law, unless it is dissented from by the husband. And in this case we have the assent of the husband, expressed in the most formal manner, by becoming a party to most of the instruments, and by yielding his positive assent in all other cases. If, therefore, these settlements were made out of their own property, by strangers, for the benefit of Mrs. Swan, they are incontrovertibly good. And certainly the court cannot judicially say, that such was not the real posture of the case. There is nothing, by which the court is at liberty to say, that the property, so secured and settled, was derived from Mr. Swan. I may conjecture, that it was so, or might have been so, if I were at liberty to deal with conjectures upon subjects of such grave importance. But the law has wisely prohibited any latitude of this sort. The court must deal only with facts, standing upon the face of the record. And after thirty years, when many of the parties are dead, in an examination of persons, not originally connected in privity with these settlements, it would be the extreme of rashness to adventure upon such perilous presumptions. But, supposing the property so settled were derived from Mr. Swan; it by no means follows, that these settlements are open to impeachment on that account. It is common learning, that a post-nuptial settlement may be made for a valuable consideration, by a husband, upon and for the benefit of his wife. And even a voluntary settlement, without such valuable consideration to support it, would be upheld, if the husband were not in debt at the time, or the settlement were not disproportionate to his means, taking into view his debts and his situation. In short, if the settlement were bonâ fide, reasonable, and clear of any intent, actual or constructive, to defraud creditors, it would be valid. I do not pretend to cite the cases on this subject. The doctrine will be found stated, with admirable clearness and accuracy, in the excellent Commentaries of Mr. Chancellor Kent (2 Kent, Comm. 145), and in the treatises of Mr. Atherley on marriage settlements (chapter 11, pp. 155, 175, 176), and Mr. Roper, on the law of property between husband and wife (chapter 8, § 2, pp. 301, 304, 306, 307, 309, etc.). The subject is also very amply discussed in Reade v. Livingston, 3 Johns. Ch. 481, and Sexton v. Wheaton, 8 Wheat. [21 U. S.] 229. See Battersbee v. Farrington, 1 Swanst. 106; Kidney v. Coussmaker, 12 Ves. 136. It is the less necessary to dwell on this point, because the counsel for the plaintiff have, with great frankness and propriety, admitted the general law on this subject, and also, that they are not able to persuade themselves, upon the facts stated, that enough appears to entitle the court to overturn these settlements. This appears to me a conclusion altogether irresistible. The same observations apply with equal, nay, with increased force to the devises to Mrs. Swan, in Gen. Jackson's will in 1809; for all these devises expressly refer to the antecedent settlements, and give the whole property upon similar trusts. It appears to me, that his will is sufficiently certain, in every particular necessary to give

effect to the devise, and establish the trusts. "Id certum est, quod certum reddi potest." In the construction of wills, courts of law, as well as of equity, grant a most favourable consideration to the intentions of the testator, and will give them form and efficiency, as far as they may, consistently with principle, however imperfectly such intentions may, in a technical sense, be brought forth and embodied. But it is argued, that, however good these post-nuptial settlements may have been in their origin, yet if they have since been abandoned or extinguished in point of law, the property thereby secured falls with them, and reverts to the power and use of the husband, and is attachable by his creditors. In support of this proposition it is said, that the original power of appointment, secured by them to Mrs. Swan, did not authorize her to create new estates upon new trusts, with powers of appointment reserved to herself toties quoties; and that, when once she had exercised her original power of appointment, it was gone forever, and no reservations, in the instruments so executing it, of new powers of appointment, were valid; in short, that such successive powers and trusts were void, unless provided for in the original post-nuptial settlements.

Now, if the argument itself were well founded, in point of law, that no such new powers of appointment could be successively exercised, unless provided for in the original settlements; yet the consequence, deduced therefrom, would not follow. In a court of equity it is impossible, that an instrument, affecting to execute a power of appointment, but disappointed in all its objects and intentions, would be held a valid execution of the power. If the estates appointed, cannot be created and possess life, as the appointer intends and provides; if the estates are created as trusts, and not as beneficial estates, and yet cannot prevail, except as absolute, beneficial estates, under the power, the true manner, in which a court of equity would contemplate them, would be, as mere nullities, and void executions of the power. It would certainly not create beneficial estates in the appointees, where none were intended; or make those interests absolute, which were expressly declared to be conditional. It would, on the other hand, hold, that the power of appointment was not well executed, because the manner of execution was beyond, and exceeding the power. But it appears to me, that the argument itself proceeds on a false foundation. This is not the case of a power limited in its effect and means, and bound to precise estates and purposes. The power of appointment in Mrs. Swan, in all these settlements, is contemplated as absolute, covering the whole title and interest in all the property, without control or condition. Now, no position is more clear, than that he, who possesses the whole power of disposal, may exercise it partially. The absolute owner may part with the whole or part of his rights, upon conditions or limitations, for beneficial, or for fiduciary interests. This principle results from the very nature of absolute ownership over property; and, of course, includes all modifications short of an absolute disposition of the whole interest. To entitle Mrs. Swan to dispose of her separate property under these settlements, upon new trusts and new appointments, it was not necessary to provide, in the original settlements, for such successive trusts and appointments. The law silently annexes such rights, as of course, to the general dominion and absolute ownership, reserved by those settlements to her, over the property as her own separate property. In either view, then, the argument is unmaintainable. See Jaques v. M. E. Church, 2 Johns. Ch. 543; 17 Johns. 548.

In the next place, it is argued, that, however valid may have been the original settlements, or subsequent trusts, still the moment the proceeds, or income, arising from the property so secured, were paid by the trustees into the hands of Mrs. Swan, they ceased to be trust funds, and were immediately liable to attachment, as her husband's property, in the same manner, as if they had been her property, not secured by trusts. This proposition is utterly untenable in a court of equity. It involves, in effect, a total defeat of the original trusts. These trusts were to secure the income and proceeds to the sole and separate use of Mrs. Swan, with an unlimited power to dispose of them as a feme sole. Nothing is more clear, than that the separate property of a feme covert, secured or given to her separate use, will be upheld for her use by a court of equity. Into whose ever hands the same may come, whether of a stranger, or even of the husband, if it comes clothed with the trust, and with notice of it, the party, so possessing it, becomes a trustee for the feme covert. It is in no sense the property of the husband, and can never become his, except by a voluntary appropriation of it to his use by the wife herself. She may invest it as she pleases; and appropriate it to furniture, or pictures, or plates, or jewelry, or bank stock, or other securities, or personal ornaments, or paraphernalia, still it is her own, and cannot be touched while she retains her power and dominion over it. For these principles I do not cite particular authorities. They are spread everywhere over the doctrines on this subject, which have been long entertained by courts of equity, and are now generally considered as incontrovertible. Indeed, the moment courts of equity decided, that femes covert could hold separate property to their own use, as femes sole, it was a necessary consequence, that the protection of it should be as universal as the right. The principle is not even confined to cases, where trustees are appointed to preserve the trust; but it extends to cases,

where no trustees are interposed, and yet the nature of the property, or the express provisions of the donation, direct it to be for the separate use of the wife. Even the husband himself will, in such cases, be adjudged a trustee for the benefit of his wife. See Bennet v. Davis, 2 P. Wms. 316; Fettiplace v. Gorges, 3 Brown, Ch. 7; 1 Ves. Jr. 46; Rich v. Cockell, 9 Ves. 369; 1 Thom. Co. Litt. 132, note n; 3 Thom. Co. Litt. 309, note o; Id. 314, note r; Ath. Mar. Sett. c. 21, p. 330; Id. c. 22, p. 334; 1 Madd. Ch. Prac. 376; 2 Rop. Husb. & Wife, pp. 179, 184, 185, 226, 227, c. 19; Id. c. 17, § 3, b, 140, 143; Id. p. 151, etc., c. 18; Jaques v. M. E. Church, 2 Johns. Ch. 543; 17 Johns. 548; 2 Kent, Comm. 136, etc. In the next place, it is argued, that the personal property in the possession of Mrs. Swan, at the time of her decease, is to be deemed her husband's; and especially the furniture, books, silver plate, and pictures, which are stated in the answers. Now that depends altogether upon the question, whether these were her own separate property at that time, either by original purchase from her own separate property, or as proceeds of her original property, or by any other equitable title as against her husband. For if they were, they are not liable to attachment as her husband's property, but must pass according to her own appointment and disposition of them.

We are therefore necessarily led to the inquiry, whether the furniture, books, silver plate, and pictures, above mentioned, are the separate property of Mrs. Swan. It is said, that primâ facie these ought to be presumed to be the property of the husband, because found in his family, and he, being a man of fortune in 1796, might well be presumed to have purchased them as a part of his family establishment. Such a presumption might arise under ordinary circumstances. But there are various circumstances in the present case, which repel the inferences deducible from the ordinary relation of husband and wife. In the first place, Mr. Swan left America in 1798, and has never since returned. His absence abroad was voluntary until the year 1808; and it has, since that period, been compulsive, he having been, during all the intermediate time, in prison in France, under an arrest by civil process, and as we are given to understand, upon an execution for debts. During the whole of this period (except during a visit of his wife to France in 1804), he has left the whole of his family under the control and management of Mrs. Swan, who has maintained them out of her separate property; and Mr. Swan has never, at any time, interfered with the furniture, books, plate, or pictures, which were in her possession. For a considerable part of this period, almost for twenty years, he has been a distressed man, not without means indeed, but embarrassed and in difficulties; and Mrs. Swan has advanced him, out of her separate property, not as a gift, but as a debt, or loan, between thirty and forty thousand dollars. In the next place, none of the furniture has been traced back to a period antecedent to the settlement in 1796; and from the facts in the case, it is most apparent, that a great portion of the old furniture was sold by Mrs. Swan, and new furniture purchased by her on her occasional changes of residence, and to furnish her new houses. No means are pretended for such purchases, except out of her separate property; and if so purchased, it remains her sole property. The two iron bedsteads referred to in the supplementary answer of Mrs. Howard, are the only articles of furniture now remaining, which are known to have been in existence in 1796; and these are now in the Dorchester house, where they were in that year. They have never been taken into possession by any of the parties now before the court, except as property supposed to belong to Mrs. Swan, and to be disposed of by her will, and shut up for preservation. In the third place, Mrs. Swan remained in the possession of all the furniture, plate, books, and pictures, claiming the same as her own separate property, and exercising all sorts of acts of ownership over them by sale and otherwise, without any intervention of her husband, from the time of her husband's departure from America, in 1798, until her death, in 1825, a period of twenty-seven years. Such a possession, so notorious and open, under circumstances like the present, furnishes a very strong presumption of right on her part. See Gore v. Knight, 2 Vern. 535. In common cases of persons not under coverture, it would afford an irresistible presumption of right. This presumption of right and acquiescence on the part of Mr. Swan, up to the period of her death, admits of various corroborative explanations. It may have arisen, if the furniture, plate, books, and pictures were in 1796 the property of Mr. Swan, that they were contained in some distinct settlement of the personal estate on Mrs. Swan, which has since been lost. Or they may have been subsequently purchased by her of her husband, out of her separate property, to relieve his necessities, and thus, equitably, have vested an exclusive interest in her. Or they may have been taken and held by her as equitable security, with his assent, pro tanto, for advances made to him. And if since purchased, they may have been purchased by her out of her separate property, and used to grace her residence, as means suited to her own fortune and rank in life. The answers of the trustees embody various explanations of this nature, which are certainly entitled to great weight, though they explicitly state that they are in total ignorance of the general origin and ownership of the property, and the circumstances under which it came to Mrs. Swan; but they, at the same time, express an unequivocal belief that it was the separate property of Mrs. Swan, and did not belong to her husband. In the fourth place, the recitals in Mrs. Swan's will,

which have been relied on by the plaintiff's counsel, appear to point to this property, and show that she meant to treat it as her separate property, and claim title to it as her own. The words, "whereas I am or may be possessed of divers chattels, furniture, &c. as of my own separate property, which are, and were intended, and ought to be, subject to my appointment," &c. do not indicate any doubt as to the title; but are expressive merely of the status rei, the understanding of the testatrix, and the claim asserted by her. In the fifth place, as to the plate, there is very strong affirmative proof of the absolute right claimed by her over it for the purpose of sale; and what is not immaterial, it was deposited by her with General Jackson, an intimate friend of herself and her husband, as early as 1802, as her own property, and was then recognised by him "as the property of Mrs. H. C. Swan." It is stated also in Mrs. Howard's answer, that all but a small portion of this plate was obtained, or first known to the family, after 1796; and that even that portion was understood to be family plate, which came to Mrs. Swan by inheritance or bequest. In the last place, the trustees expressly assert that, according to their best knowledge and belief, the whole of this property was not only claimed by Mrs. Swan, as her separate property, but was in fact hers, so far as they have any means of information: That they claim it, as such, and not otherwise: That they do not admit any right or title to the same in Mr. Swan: That they admit no privity with him in respect to it; and that they claim title to it under Mrs. Swan's will as beneficiaries, or trustees, or executors, and utterly deny to hold the same in any other character; and that the same will has hitherto been delayed from probate; and the pendency of this and other suits by the plaintiff, has prevented the due execution of the will.

Against all this, there is nothing but a post-mortuary claim of Mr. Swan to the plate, books, and pictures; for he lays none to the furniture. He never intimated any claim to them until after Mrs. Swan's death, and that claim is now resisted on behalf of her devisees and legatees, by the trustees and executors appointed by her will.

Now upon this posture of the case, it is impossible for the court to adjudge the parties sued in this case to be trustees of all, or any part of the property disclosed in the answers, unless it is prepared to pronounce, that it ought so to decide in opposition to claims set up by the trustees, not only adverse to, but inconsistent with, any title to the same in Mr. Swan. It has never yet been decided, to my knowledge, that in our process of foreign attachment a person can be adjudged a trustee of any debtor, who sets up a title and interest adverse to that of the debtor, and denies his right to any "goods, effects, or credits" in his hands. It seems to me utterly inconsistent with the professed objects of the statute, to suppose any such case to be within its contemplation. There must be a privity in contract or interest between the parties, to bring any case within the reach of that statute. How is it possible to say, that any goods, effects, or credits are deposited with, or entrusted to, a party by the debtor, when the party has no privity with him, asserts his interest to be under a third person, who holds an adverse interest, and on his own account and for other uses, has deposited such goods, effects, and credits with the supposed trustee? An attempt to push the statute to this extent, would trench upon the constitutional right of the parties to the trial by jury in all controversies respecting property; for I know of no cases in which, under this process, any such course had been used and practised before the adoption of the convention of 1780. Especially it seems to me, that such a course cannot be contemplated, when all the parties in interest, as cestuis que trust, or otherwise, are not before the court, and when, from the nature of the case, different conclusions on the same facts might be legitimately drawn by a court and a jury. If ever such a doctrine shall be engrafted into our local jurisprudence, it will be time enough to consider, whether it is the duty of this court to follow it. At present I stand upon the ground, that it is not, and, as far as I can read the language, it cannot be established upon any just exposition of the statute. There must be a clear admission of goods, effects, or credits, not disputed or controverted by the supposed trustees, before they can be truly said to have them in deposit or trust. How far, indeed, they may be admitted to set up claims in the nature of a set-off against the admitted property and credits of the debtor in their hands, by way of retainer, or satisfaction, or security, is quite a different consideration. If, then, the case stopped here, the denials of any property of the debtor being clear, and the facts establishing none, but adverse claims and interests, my judgment would at once lead me to pronounce that the supposed trustees are entitled to be discharged.

There is another difficulty in the case, as it is now presented, which forms, in my mind, an insuperable obstacle to the charging of these parties as trustees. Mrs. Swan's will has never yet been admitted to probate; and until that is done, it would seem impracticable to act upon the subject-matter of that instrument. The supposed trustees in this attachment, Harrison G. Otis and William Sullivan, are two of the persons named in that will as trustees and executors of the property devised therein. The other trustee and executor is not even made a party to the present attachment. Messrs. Otis and Sullivan have not yet accepted the trusts, or taken upon themselves the duties of executors. Their only title to assume either, depends upon the validity of that will, as a legal ap-

pointment. And they disclaim having any possession, actual or constructive, of the property, except merely as preparatory to the assumption of their duties under it, when it shall have been duly proved and allowed. Indeed Mr. Otis has never intermeddled, in the slightest manner, with the property since Mrs. Swan's decease; and all his antecedent interests therein, under prior trusts, were devested by other conveyances made in her life-time. Now it is familiarly known, that in this commonwealth our courts of probate have not only a general, but an exclusive jurisdiction over the probate and allowance of all wills, whether they concern real or personal estate. No other court can entertain the question of the validity of a will directly or indirectly, whether it be a court of law or of equity. Until such probate, no notice can be taken of the instrument, by whomsoever made, as a testamentary paper. If rejected or disallowed by the court of probate, as a will, it is incapable of being set up elsewhere. If allowed and approved by such court, the probate is, as to its validity, conclusive upon every other court sitting within this jurisdiction. Sitting in the circuit court here, I have no right to entertain any question upon the matter; but must wait until it has been litigated and decided in the proper forum. If, therefore, all the proper parties were before the court, and all their interests fully represented, it would be impracticable for this court to move on with the cause, until the testamentary instrument of Mrs. Swan had passed the proper probate.

It has been argued at the bar, that this testamentary instrument, being made by a feme covert, is not properly and technically a will, but an appointment in the nature of a will. Be it so. It does not change the posture of the difficulty. If it be an appointment, it purports to be so, as a will; and it must be proved, as a will; and if it wants validity, as a will, it is utterly void. It is a mode of executing the power of appointment provided for by the indentures of the 30th of March and the 25th of April, 1825, and must be proved as it purports, that is, as a will. If it cannot be so proved, then the whole property remains in the persons to whom it was conveyed in trust by those indentures; and neither of the parties to this attachment have any interest or power inchoate or complete over it. Their possession, if it exists at all, is a possession for other persons, and not for themselves, or for Mrs. Swan. Now, the persons named in these indentures, or either of them, are no parties to the present attachment. Surely their rights and interests cannot be precluded by such an ex parte proceeding as the present. It is perfectly clear from the authorities, that testamentary instruments, executed by femes covert for the disposal of their separate property under powers of appointment, are matters, in England, of ecclesiastical jurisdiction, and are to be proved in the ecclesiastical courts, as to personal property, (over which alone those courts have jurisdiction) before notice can be taken of them elsewhere. This is abundantly shown in the elementary writers and commentators; 1 Madd. Ch. Prac. 372, 373; 1 Thom. Co. Litt. 132, note n; 2 Rop. Husb. & Wife, pp. 191, 192, c. 19, § 3. See, also, 2 Kent, Comm. 143; Ross. v. Ewer, 3 Atk. 160, and was acted on in the very recent cases of Tappenden v. Walsh, 1 Phillim. Ecc. 353, and Temple v. Walker, 3 Phillim. Ecc. 394. The case of Osgood v. Breed, 12 Mass. 525, so far from impugning this doctrine, as to the jurisdiction of our probate courts over testamentary instruments of this nature, proceeds upon the supposition of its existence, and assigns very satisfactory reasons (page 533) why the jurisdiction ought to be exercised, and that it is exclusive, both as to real and personal estate. The non-existence, then, of that probate in the present case, (I repeat it) seems to me a fatal defect, which cannot be cured in this suit, and must defeat the attachment, so far as it seeks to charge the parties as trustees of Mr. Swan.

It has been farther argued, that the parties are at all events chargeable as trustees to the extent of the annuity of 2000 dollars, which, by Mrs. Swan's will, is given to her husband. To this argument various answers have been given, and some, if not all of them, are conclusive against it. In the first place, without a probate of her will, no right to any such legacy can legally attach in him, and her executors cannot be liable therefor, until they have taken upon themselves the execution of the office according to the course of our laws. In the next place, an executor cannot be charged as trustee of any person to whom a legacy is bequeathed by his testator; for such a legacy is not "goods, effects, or credits," within the meaning of our statute of foreign attachments. So was the decision of the supreme court of this state in Barnes v. Treat, 7 Mass. 271. And for a broader reason of public policy, it has been held by the same court in Brooks v. Cook, 8 Mass. 246, that an administrator is not liable to be holden as a trustee of a creditor of the estate of his intestate; for he derives his authority from the law, and is obliged to execute it according to law. In the next place, if an executor might ordinarily be held as trustee of a legatee, it is far from being certain that he could be so in the present case. The bequest is of an annuity of 2,000 dollars, to be paid in semi-annual payments of 1,000 dollars to Mr. Swan, during his life, by the executors. It can scarcely be presumed, that it was not the intention of the testatrix that this should be a personal payment for the personal comfort and maintenance of her husband, and that the annuity itself should be placed beyond the reach of any creditors. To direct a payment to the creditors of Mr. Swan, through the instrumentality of a foreign attachment, would be to defeat the purposes of the will. It would be, in effect, to

declare that the executors should not pay her bounty to her husband; but should pay it to his creditors. If such a course be repugnant to the manifest intention of the will, I do not see how a court of law can intercept the bounty of the testatrix, and give it a new direction. There is an implied trust in the executors to make the payment personal, and to retain the money until so paid. And if so, what court can be at liberty to overthrow it?

But if these difficulties could be, as I think they cannot be, overcome, there remain behind other obstacles of no ordinary magnitude. There is, in the first place, the claim or lien upon the furniture, plate, books, and pictures for the advance of 6,000 dollars. If these things could be deemed in any just sense the property of Mr. Swan, as upon the answers I think they cannot, still they are expressly pledged by him in terms perfectly unequivocal and certain to the persons who have made that advance. The doctrine of the supreme court of this state (as I understand it) is, that property pledged, or under a lien, is not attachable on this process. Badlam v. Tucker, 1 Pick. 389. It has been suggested, that this point has never been directly decided; and that in the case cited it is a mere dictum. It may be so; but it is a dictum from a learned judge in a court where the question must often have been presented for decision; and I consider him as speaking, not so much to the point, as new, but as one perfectly known and settled. But if there were no authority in point, it appears to me, that the result is the same upon principle. In case of a pledge, the pledgee has a special property in the pledge, and is not bound to deliver it up until his incumbrance is discharged. And a creditor surely cannot, in this respect, have greater rights than the pledgor himself. The case of a lien is the same in principle. The party is not bound to take the property as his own, and thus become a purchaser, and account for the surplus value; nor is he bound to deliver it upon execution, unless his lien is discharged. It would be a violation of his rights and contract to hold otherwise. It would be to create a new contract, and not administer upon that which the parties have made. In a general sense, goods, which are not attachable by the common process, are not attachable by this extraordinary process. There may be special exceptions, such as that in Clark v. Brown, 14 Mass. 271, standing on a peculiar ground; but the general principle is, as has been stated. Maine Fire & Marine Ins. Co. v. Weeks, 7 Mass. 438; Perry v. Coates, 9 Mass. 537. And goods in pawn cannot be taken in execution for the debt of the pawner at the common law. Bac. Abr. "Executors." p. 175, c. 4. Badlam v. Tucker, 1 Pick. 389, 400. Then, again, if these things belonged to Mr. Swan, there would be very strong ground to hold upon the circumstances, that there was an implied hypothecation of them, as security for the advances made by Mrs. Swan. And, if so, a court of equity would fasten it upon the property, and hold in favor of the wife, and her donees, the claim as valid, as if the advances had been made to a stranger out of the separate property. And what a court of equity would hold, ought, in favor of the parties summoned as trustees, to be now held in their favor. It is expressly asserted in the answers, that the advances of Mrs. Swan were not mere bounties to her husband, but were charged as debts against him. In the rear of these claims another lien is asserted against these things, if the property belongs to Mr. Swan. I refer to the claim of Mr. Sullivan for $6000 for professional and other services, a claim, of the justice of which the court, at least, entertains not the slightest doubt. Whether this claim constitutes a lien, or not, upon the property, or may be asserted as a set-off, or is otherwise equitably to be recognized under this particular process, need not at present be decided. The case of Allen v. Megguire, 15 Mass. 490 (see, also, Jarvis v. Rogers, 15 Mass. 389, 406, 414), is against any such lien, or set-off. But there is a very material qualification upon the doctrine of that case in a later one (Hathaway v. Russell, 16 Mass. 473, 476), where the court distinctly held, that the trustee may, in a suit of this nature, avail himself of any claims which he has against his principal, and of which he could avail himself by set-off at the trial, or by a set-off of judgments and executions under our statutes; claims for unliquidated damages for mere torts only, being excepted. There is good sense, equity, and convenience, in this latter course; but it is not necessary for me, on this occasion, to decide the point; and I cheerfully leave it to those courts, which are more familiarly called upon to consider and settle questions of this nature.

In what has been already said, it will be perceived, that no distinction has been taken between the two iron bedsteads and the other furniture. This is not an accidental, but designed omission. Upon the facts in the case I am unable to distinguish between them and the other articles, as to presumption of title from origin, or use, or possession. An exception has been taken to the refusal of the trustees to answer certain questions asked of them by the plaintiff; and they have put themselves to the court, upon their rights and duty in these particulars. Those questions go altogether to details, which respect the separate property of Mrs. Swan. The trustees have expressly sworn, that they possess no property, which they do not claim as the trust and separate property of Mrs. Swan; and if so, the plaintiff has no right to inquire further, in what manner her separate property has been, from time to time, disposed of. These are res inter alios acta.

Such are the conclusions, to which my mind, upon deliberate consideration, has arrived, upon the various questions raised at this argument. They admit of much more ample

discussion and illustration. But being satisfied, that these conclusions are, so far as my judgment goes, entirely decisive of the case, I have thought it my duty not to keep the parties any longer in suspense, when I am relieved from all doubt. It is for the interest of the plaintiff to know, at as early a period as possible, the result of this litigation, that hope deferred may not make the heart sick. And it is fit also, that the persons sued as trustees should not be held in a state, in which they can take no step, from uncertainty of right or duty. If I had possessed more leisure, I should probably have dealt more elaborately with some of the topics, and enlarged on some distinctions. As it is, nothing further is left, but to pronounce my judgment, that the trustees be discharged with costs. Trustees discharged accordingly.

[NOTE. Subsequently it was held that judgment by default could not be taken against Swan because of want of proper service of process. Case No. 11,134. After this Antonio F. Picquet, as administrator of his father, Jean Claude Picquet, filed his bill in equity against Swan and the other parties, trustees in the case above. Swan, being out of the jurisdiction of the court, refused to appear and answer. The other defendants moved, on this account, that the bill be dismissed. Before granting the motion, the plaintiff was allowed additional time. Id. 11,135. Swan died in 1831, and after his death a judgment at law was obtained against his administrator. Case unreported. Later a motion for a new trial was overruled. Id. 11,131.]

Case No. 11,134.

PICQUET v. SWAN. et al.

[5 Mason, 35.] [1]

Circuit Court, D. Massachusetts. May Term, 1828.

FOREIGN ATTACHMENT—NON-RESIDENT CITIZEN—JURISDICTION—JUDICIARY ACT OF 1789—STATE LAWS.

1. Where a party defendant is a citizen of the United States, and resident in a foreign country, not having any inhabitancy in any state of the Union, the circuit courts of the United States have no power to maintain jurisdiction over him in a suit brought by an alien against him, although he has property within the district, which may be attached.

[Cited in Lincoln v. Tower, Case No. 8,355; Day v. Newark India-Rubber Manuf'g Co., Id. 3,685; Prentiss v. Brennan, Id. 11,385; Chittenden v. Darden, Id. 2,688. Quoted in Galpin v. Page, 18 Wall. (85 U. S.) 367. Cited in Darst v. Peoria, 13 Fed. 564; Romaine v. Union Ins. Co., 28 Fed. 639.]

[Cited in Cahoon v. Harlow, 7 Allen, 153; Dearing v. Bank of Charleston, 5 Ga. 497; James v. Townsend, 104 Mass. 372; Moore v. Wayne Circuit Judge, 55 Mich. 87, 20 N. W. 803. Cited in brief in Putnam v. McDougall, 47 Vt. 481. Cited in Salem v. Eastern R. R., 98 Mass. 451; State v. Richmond, 26 N. H. 242; State v. Boyd, 31 Neb. 715, 48 N. W. 739, 51 N. W. 602; Turrill v. Walker, 4 Mich. 182.]

2. The judiciary act of 1789, c. 20 [1 Stat. 73], does not contemplate compulsive process against any person in any district, unless he be an inhabitant of, or found within, the same district at the time of serving the writ.

[Cited in Peters v. Rogers, Case No. 11,033; Re Metzger, Id. 9,511; Day v. Newark India-Rubber Manuf'g Co., Id. 3,685; Saddler v. Hudson, Id. 12,206; Pennoyer v. Neff, 95 U. S. 724; Galpin v. Page, Case No. 5,206; New England Ins. Co. v. Detroit & C. Steam Nav. Co., Id. 10,154; Paine v. Caldwell, Id. 10,674; Atkins v. Fibre Disintegrating Co., Id. 602; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. (87 U. S.) 147; Wilson v. Pierre, Case No. 17,826; Myers v. Dorr, Id. 9,988; Treadwell v. Seymour, 41 Fed. 580.]

[Cited in brief in Comstock v. Holbrook, 82 Mass. 113. Quoted in Dearing v. Bank of Charleston, 5 Ga. 497. Cited in Lance v. Dugan (Pa. Sup.) 13 Atl. 492.]

3. The act of Massachusetts of 1797 (chapter 50), prescribing the modes of serving process, does not apply to a case where the defendant has been an inhabitant, but at the time of the suit brought has his actual domicil in another state or country.

4. Where an alien sues in the circuit court, the defendant must be described as a citizen of some particular state. Stating him to be a citizen of the United States is not sufficient.

[Cited in Cissel v. McDonald, Case No. 2,729.]

[5. Cited in Clark v. Sohier, Case No. 2,835, to the point that the laws of the states must govern as to rights when the acts of congress do not provide exclusively on the subject.]

[This was a proceeding by Antonio F. Picquet, administrator, against James Swan and trustees.]

The trustees were discharged at the last term [Case No. 11,133], and at this term, being the third term since the commencement of the suit, a motion was made, that the defendant be defaulted for his non-appearance, and judgment be given against him for such default according to the usual practice of the state courts of Massachusetts.

J. B. Davis and J. T. Austin, for plaintiff.

W. Sullivan, as amicus curiæ, e contra.

STORY, Circuit Justice. This suit was commenced by a writ, which is known in this state as the "trustee process," but is better known elsewhere as the "process of foreign attachment," and was returnable to May term, 1827, of this court. By the state laws it is a process equally applicable to cases, where the suit is against an inhabitant, and where it is against a non-resident, whether he has ever been an inhabitant or not. In the writ the parties are described as follows: The plaintiff as "of the city of Paris in the kingdom of France, an alien, and subject of his most Christian majesty the king of France, in his capacity as administrator," &c., and the defendant, as "now commorant of the city of Paris in the kingdom of France, of the city of Boston, in the commonwealth of Massachusetts, one of the United States of America, and a citizen of the said United States." The return of the marshal on the writ is as follows: "Boston, April 18, 1827. Pursuant hereunto I have attached all the real estate of the said James Swan lying and being in the district of Mass-

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

achusetts, especially a lot of land in Boston in said district, bounded, &c., called the Washington Garden, &c., and summoned William Sullivan, Esq., agent for the said Swan, and on the same day I summoned the within named Sullivan, Otis, and Howard (the supposed trustees) to appear and show cause as within commanded, by leaving a true and attested copy of this writ at their last and usual places of abode. The said Swan has not been an inhabitant or resident within this district for three years last past."

At the last term the trustees summoned in the suit were duly discharged. [Case No. 11,133.] The defendant has never appeared as a party to the suit; and it is now contended, that the plaintiff is entitled to consider him in default, and to have a judgment by default entered against him. That is the point, which has been argued, and is now to be decided by the court. I will briefly advert, in the first instance, to the local laws regulating this process, as they may be important to illustrate the conclusion, to which the court has arrived, and also more fully to explain the grounds of the argument at the bar. The trustee process, under which the present suit is brought before the court, owes its origin to the act of 28th of February, 1795 (Act 1794, c. 65), which was a substitute for the provincial act of 32 Geo. II. c. 2, to enable creditors to receive their just debts out of the effects of their absent or absconding debtors. It provides, that "the officer to whom the writ is directed shall serve the same by attaching the goods and estate of the principal in his hands and possession of the value required, if so much may be found in his precinct, by reading the said writ to him, or by leaving an attested copy thereof at his last and usual place of abode, if he had been an inhabitant or resident within this commonwealth at any time within three years next before the suing out such writ, and by reading the same to each of the trustees, or by leaving an attested copy thereof at such trustees' usual place of abode; and in case the principal has not been an inhabitant or resident as aforesaid, a service made on the supposed trustee or trustees in manner as aforesaid, shall be deemed a sufficient service," &c. It further provides, that in case all the trustees are discharged, "the plaintiff may, notwithstanding, proceed against the principal to trial, judgment, and execution." A subsequent statute (Act 1798, c. 5) has however provided, that "in all such cases, the plaintiff shall not proceed in his suit against the principal, unless there shall have been such service of the original writ upon the principal as would have authorized the court to proceed to render a judgment against him, in an action brought and commenced in the common and ordinary mode of process." But the principal might voluntarily come into court and take upon himself the defence of the suit. In the very case before the court all the trustees have been discharged; so that it is necessary to ascertain what service would be sufficient to entitle the plaintiff to judgment in an action by the common and ordinary mode of process, which is, by our local laws, by a writ known by the name of a writ of "capias" or "attachment," and authorizing either an arrest of the person of the defendant, or an attachment of his goods or estate. The act of 17th of February, 1798 (Act 1797, c. 50), provides for the mode of service of this process. Of course it can be used as a capias, only when the party is found within the state. When used as an attachment, the officer attaches the goods or estate of the defendant and a summons in due form is to be delivered to him, or left at "his dwelling-house, or place of last and usual abode," fourteen days before the return day; and "in case the defendant was at no time an inhabitant or resident within this commonwealth," then such summons is to be left with his or her tenant, agent, or attorney, &c.; otherwise the writ shall abate. There is also provision made in this act, that if the defendant is not an inhabitant or present in the state at the time of the service, and does not return before the time of trial, the court may continue the same to the next term upon a suggestion of the fact on the record. If at such term the defendant does not appear, and be so remote, that notice of the suit could not probably be conveyed to him during the vacancy, the court may continue the same to the next term, and no longer. After these two continuances, if he does not appear, judgment by default may be entered up against him. It is not material to follow up the proceedings consequent upon such judgment. But it may not be useless to add, that the trustee act of 1794 (chapter 65) adopts regulations of a similar nature, in substance, to them. Of their own force these processes and modes of service could have no validity in the courts of the United States. But by the act of congress of 29th of September, 1789, c. 21 [1 Stat. 93], the then existing forms of writs and modes of process (by which was meant modes of proceeding) in the supreme courts of the states, respectively, were adopted into the judicial proceedings of the courts of the United States; and by a subsequent act (Act 1792, c. 36 [1 Stat. 275]) the same forms were perpetuated, subject to the authority in the courts to alter and add to the same, in their discretion, so as to conform to the state jurisprudence. After the very elaborate expositions of this subject by the supreme court in Wayman v. Southard, 10 Wheat. [23 U. S.] 1, and United States Bank v. Halstead, Id. 51, it is unnecessary farther to discuss the nature and extent to which the state process applies in the courts of the United States. The state acts of 1795, c. 65; of 1797, c. 50; and of 1798, c. 5,—have never been adopted by any formal rule of the circuit court in this district; but they have constantly been used in it, both as to process

and service, ever since their first enactment; and must now be admitted to be of as high authority by usage, as if any promulgation by rule, however formal, had taken place. They can have no effect, where they contravene the positive legislation of congress; nor can they give a jurisdiction to this court, which it might not independently of them maintain. Where jurisdiction is given by any act of congress, this court may use the appropriate state process to enforce it. But the state laws can confer no authority on this court to extend its jurisdiction over persons or property, whom it could not otherwise reach.

Let us, then, first examine the existing legislation of congress on this subject. The constitution of the United States has, among other things, extended the judicial power to controversies between citizens of different states, and between citizens of a state and foreign citizens or subjects. The actual legislation of congress has not as yet been coextensive with this constitutional boundary of jurisdiction. The judiciary act of 1789 (chapter 20) provides, "that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature where the matter in dispute, exclusive of costs, exceeds 500 dollars, and the United States are plaintiffs, or petitioners; or an alien is a party; or the suit is between a citizen of the state, where the suit is brought, and a citizen of another state." As to citizens, therefore, there exists no jurisdiction, unless either the plaintiff, or the defendant is a citizen of the state, where the suit is brought. As to aliens, by which must be understood, in the language of the constitution, "a foreign citizen or subject," the jurisdiction is in all cases given, where an alien is a party. In a subsequent part of the same section is the clause, which has been so much commented on at the bar. "But no person shall be arrested in one district for trial in another in any civil action before any circuit or district court. And no civil action shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that, whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." It is observable, that the language is confined to original process, and does not apply to final process, or process of execution. If this clause had not been inserted, what would have been the legal operation of the other clauses of the act? A prior section had divided the United States into certain judicial districts, whose limits generally were coextensive with the territorial limits of a single state. Within these districts a circuit court is required to be held at certain times and places prescribed by the act. The circuit court of each district sits within and for the same, and is bounded by its local limits. In the exercise of jurisdiction within those limits, the general principles of law must be presumed to apply to them all. Whatever might be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, that jurisdiction is available only within the limits of the district. The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them, would be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the court of king's bench in England, though a court of general jurisdiction, never imagined, that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle, that a court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. It matters not, whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority. It was doubtless competent for congress to have authorized original as well as final process, to have issued from the circuit courts and run into every state in the Union. But it has conferred no such general authority. In a single case only has it authorized—by the statute of 3d of March, 1797, c. 74 [Folwell's Ed., vol. 3, p. 423], § 6 [1 Stat. 515, c. 20]—writs of execution to run throughout the United States; and that is, upon judgments obtained for the use of the United States in any of the courts of the United States. By the act of 2d of March, 1793, c. 66 (22), § 6 [1 Story's Laws, 312; 1 Stat. 335], it has also authorized subpoenas for witnesses to attend the courts of the United States to be served in other districts within certain limited distances. And until a very recent statute—Act May 20, 1826, c. 123 [3 Story's Laws, 2034; 4 Stat. 184, c. 124]—no authority existed to serve writs of execution, in favour of private persons, in any other district, than that where the judgment was rendered, although both districts were within the territorial limits of the same state. This very course of legislation, during a period of almost forty years, demonstrates the understanding of congress, as well as of the profession, that the process of the circuit court could not be served in ordinary cases out of the limits of the judicial district for which it was established. My Brother Washington, in his able judgment in the case Ex parte Graham [Case No. 5,657], has gone largely into the considera-

tion of this doctrine; and I follow with undoubting confidence the whole course of his reasoning. I owe it, perhaps, as a matter of justice to myself to add, that the process in that case, from the circuit court of Rhode Island, was issued at the peril of the party, without any deliberate examination of the law on the part of the court, the party being anxious to take it, valere quantum valere possit. If, therefore, the restraining clause already mentioned were not in the eleventh section of the act of 1789 (chapter 20) I should be of opinion, for the reasons so forcibly given by my Brother Washington, that the exercise of the jurisdiction of the circuit courts by compulsive process, was essentially confined, by their very organization, within the limits of their respective districts. It would otherwise follow, that final process might in all cases run into every district of the Union, since the terms of the clause apply to original process only. Yet the professional opinion and practice, as well as the positive legislation of congress in the cases above mentioned, demonstrate, that the contrary is the true construction of the act.

The jurisdiction of the circuit court in this case, so far as it depends upon the citizenship and alienage of the parties, may for the present be assumed de bene esse to be complete. But this alone is not sufficient to give the court complete authority to proceed to judgment. There must exist other facts and circumstances as a just foundation of jurisdiction. Cases are familiar of actions, which cannot be maintained, although the parties are within the reach of process, from the nature and locality of the cause of action. Suits, which concern the realty, such as writs of entry, dower, ejectment, and trespass, quare clausum fregit, cannot be maintained in the circuit court unless the land lie within the district, although the party may reside there, and, in a personal view, the jurisdiction is unexceptionable. The reason is, that the title to real estate can by the general principles of law be litigated only in the state, where the land lies, and where the process may go to bind and reach the land, and enforce the title of the party. If, therefore, the land be sought, or in other respects the suit be purely local, it must be brought, where the law of the place acts on it directly. See Massie v. Watts, 6 Cranch [10 U. S.] 148. Collateral suits for other purposes, binding the conscience, or controlling the acts of the party personally, may be brought and decided elsewhere. Id. This principle is recognized at the common law; but it has, to a certain extent at least, a foundation also in universal jurisprudence. I have already intimated, that no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals. If a state were to pass an act declaring, that upon personal notice of a suit brought against a foreigner, resident in a foreign country, proceedings might be had against him, and a judgment obtained in invitum, for aught I know, the local tribunals might give a binding efficacy to such judgments. But elsewhere they would be utterly void, as an usurpation of general sovereignty over independent nations and their subjects. Lord Ellenborough, in Buchanan v. Rucker, 9 East, 192, has put the case with great clearness and force. "Supposing," said he, "however, that the act had said in terms, that though a person sued in the island (of Tobago) had never been present within its jurisdiction, yet, that it should bind him, upon proof of nailing up the summons at the court door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such a jurisdiction?" Nor would it in such a case vary the legal result, that the party had actual notice of the suit; for he is not bound to appear to it. No sovereign has a just right to issue such a notice, and thereby to acquire a jurisdiction to draw the party from his own proper forum ad alium examen. Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced, on such process, against him. Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment in personam, for the plain reason, that except so far as the property is concerned, it is a judgment coram non judice. If the party chooses to appear and take upon himself the defence of the suit, that might vary the case, for he may submit to the local jurisdiction, and waive his personal immunity. Such appear to me to be the principles established by the better opinions in the cases cited at the bar, and particularly in Phelps v. Holker, 1 Dall. [1 U. S.] 261; Killburn v. Woodworth, 5 Johns. 37; Smith v. Brush, 8 Johns. 84; Fenton v. Garlick, Id. 151; Pawling v. Bird's Ex'rs, 13 Johns. 192; Borden v. Fitch, 15 Johns. 121; and Bissell v. Briggs, 9 Mass. 462. In the two last cases, the learned chief justices of New York and Massachusetts reasoned out the doctrine with great acuteness and ability. The principles of the common law (which are never to be lost sight of in the construction of our own statutes) proceed yet farther. In general, it may be said, that they authorize no judgment against a party, until after his appearance in court.

He may be taken on a capias and brought into court, or distrained by attachment and other process against his property to compel his appearance; and for nonappearance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice, and regular personal appearance in court.

The conclusion, to be deduced from the foregoing considerations, which must necessarily have been in the contemplation of the framers of the judiciary act of 1789, is, that the whole structure of that act proceeded upon the supposition, that, independent of some positive provision to the contrary, no judgment could be rendered in the circuit court against any person, upon whom process could not be personally served within the district. This was the natural result of the principles of the common law in relation to jurisdiction and process. In this view of the matter, the clause in the eleventh section already cited was introduced, as my Brother Washington supposes it to have been, from abundant caution, to guard against every possibility of latent doubt. And it should be remembered in this connexion, that the process act of 1789 [1 Stat. 93,] which alone gave life to the state process in the United States courts, formed no necessary part of the system, and was brought forward by an independent and temporary statute.

Let us, then, consider, what is the true interpretation to be put upon this clause. It first provides, that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court." So that it is clear, that the process of capias is limited to the local boundaries of the court, by which it is issued. It next provides, that "no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that, whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Now the argument is, that this last provision applies only to persons, who, at the time of the suit are inhabitants of the United States. It is a restriction of the general authority of the courts to bring before them by original process any person, who, as a citizen or alien, was amenable by the general grant of jurisdiction to these courts. Swan was either an inhabitant of Massachusetts at the time, when the present suit was brought, or he was not. If he was an inhabitant, then the suit is brought in the proper district; if not an inhabitant, then the restriction is inapplicable to him. Such is the dilemma, into which the argument supposes the adverse party to be driven, and on which it seeks to suspend him. It appears to me, that such is not the true interpretation of the words of the clause. They admit of an interpretation, in my view, much more natural, and consonant with the principles of justice. The argument supposes, that as a general jurisdiction is given in cases, where an alien is party, if he is not an inhabitant of the United States, and has not any property within it, (for to this extent it must reach,) still he is amenable to the jurisdiction of any circuit court, sitting in any state in this Union. So that a subject of England, or France, or Russia, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts. Such an intention, so repugnant to the general rights and sovereignty of other nations, ought not to be presumed, unless it is established by irresistible proof. My opinion is, that congress never had any such intention; that it presupposed, that no suit would lie against any person, who was not locally present, either as an inhabitant, or in transitu in the United States; and that it designedly enlarged the power to proceed in cases of inhabitancy, where the party happened at the time to be absent without any intentional change of domicil, as well as allowed it in any district, where the party might, at the time, be found. The words of the clause are, "against an inhabitant of the United States." But I lay no particular stress upon the word "inhabitant," and deem it a mere equivalent description of "citizen" and "alien" in the general clause conferring jurisdiction over parties. A person might be an inhabitant, without being a citizen; and a citizen might not be an inhabitant, though he retained his citizenship. Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, animo manendi, quite another. I read, then, the clause thus: "No civil suit shall be brought before either of said courts against an alien or a citizen, by any original process, in any other district than that, whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ." It cannot be presumed, that congress meant to say, that if an alien or citizen were not an inhabitant of, or commorant in the United States, a suit might be maintained against him in any district, and process served abroad upon him, or a judgment given against him without any notice or process served upon him. If it be said, that process may be served upon his property within the district, what is to be done, when there is no such property to be found, or it is merely nominal? If in the latter cases an exception is to be implied upon general principles, why not in the former? The judiciary act of 1789 (chapter 20) has not provided for either case in terms; and the right to serve process upon the property of the party, and thereby to bring him into court, when an absentee, so as to bind that property, or him personally, by the judgment, is not a right growing out of the common law, but everywhere, at least in countries governed by the

common law, depends upon statute regulations. Looking, therefore, to the plain tenor of this act, and construing it by the real objects, which it avows, my judgment is, that it contemplates no effective exercise of jurisdiction by the circuit court, except in cases where the party defendant is an inhabitant of, or found within, such district, at the time of serving the writ. If no forms of process or modes of proceeding had been prescribed by any other law, I do not see how the courts could have exercised their jurisdiction at all, except by reference to writs, process, and service according to the common law, a construction, which seems naturally to flow from the provisions of the fourteenth section of the act.

The process acts of 1789 (chapter 21) and of 1792 (chapter 36), have prescribed the forms of process, and modes of service, to be according to the state jurisprudence. But they do not appear to me to be intended to enlarge the sphere of jurisdiction of the circuit courts. Whenever the person is an inhabitant of, or found within, the district, the proper writ may issue, and the process may be served against him, whether it be a capias, summons, attachment, or otherwise, as the local jurisprudence authorizes. I cannot judicially say, that the general phraseology of these process acts ought to receive a more extensive interpretation, so as to break down or interfere with the policy of the judiciary act of 1789 (chapter 20), founded, as it seems to me to be, in principles of public law, public convenience, and immutable justice. If the state jurisprudence authorizes its own courts to take cognizance of suits against non-residents, by summoning their tenants, attornies, or agents, or attaching their property, whether it be a farm or a debt, or a glove, or a chip, it is not for us to say, that such legislation may not be rightful, and bind the state courts. But when the circuit courts are called upon to adopt the same rule, it ought to be seen, that congress have, in an unambiguous manner, made it imperative upon them. There is no pretence to say, that the circuit court in this district has by its practice, or by rule, sanctioned such a proceeding. If such modes of service have in such cases been used, the matter has passed sub silentio, without any knowledge on the part of the court, which implied a sanction of it.

No case has been cited, in which the question has been brought directly before any court of the United States for a decision. In Hollingsworth v. Adams, 2 Dall. [2 U. S.] 396, there was a foreign attachment in the circuit court of Pennsylvania; but the principal debtor was an inhabitant of Delaware, and not found in Pennsylvania; and the court quashed the writ for want of proper jurisdiction. In Pollard v. Dwight, 4 Cranch [8 U. S.] 421, the plaintiffs were citizens of Massachusetts and Connecticut, and the defendants were citizens of Virginia, and not found in the district of Connecticut, and were sued in a foreign attachment in the state court, and the cause removed by them into the circuit court for the district of Connecticut. The question was, whether they could be so sued. The supreme court held, that "by appearing to the action, the defendants in the court below placed themselves precisely in the situation, in which they would have stood, had process been served upon them, and consequently waived all objection to non-service of process." This was a strong case; for though the suit was between citizens of different states, yet within the terms of the eleventh section of the act of 1789, it was not a suit between a citizen of the state where the suit was brought (for the plaintiffs were partly citizens of Connecticut, and partly citizens of Massachusetts) and a citizen of another state. Shute v. Davis [Case No. 12,828], and Craig v. Cummins [Id. 3,331], turned on the very words of the statute just cited. The suit in the former case was brought in Pennsylvania between citizens of New York and New Jersey; in the latter, one of the defendants was a citizen of Pennsylvania, and the other not; but the contract being joint and, by the local law, capable of being pursued against one only, the severance was deemed complete by the return of non est inventus of the non-resident. Fisher v. Consequa [Id. 4,816], was a foreign attachment against a non-resident Chinese merchant; but there seems to have been a general appearance for him, and at all events no exception was taken on this particular point. In Bissell v. Horton [Id. 1,448], in the circuit court in Connecticut, the plaintiffs were described as partly citizens of Vermont, and partly citizens of Connecticut. The defendant was described as a citizen of New York, now dwelling in Hebron in Connecticut. The court held, that they had no jurisdiction, and on motion dismissed the suit. Mr. Justice Livingston said, "the plaintiffs are partly in Vermont and partly in Connecticut. They are not, therefore, citizens of Vermont within the constitution and laws of the United States. With regard to the defendant, it is admitted, that he now resides in Connecticut, and has resided here during the time, in which he has been in possession of the demanded premises, which clearly evinces a determination in him to remain here permanently." This case may, from the shape given to the opinion of the learned judge in the report, be open to some critical observation. Upon the motion to dismiss, the citizenship of the defendant in New York, as alleged in the writ, must have been taken to be true. The process was duly served upon him in Connecticut. And upon the authority of Pollard v. Dwight, 4 Cranch [8 U. S.] 421, the jurisdiction was maintainable; for the citizenship of one of the plaintiffs in Connecticut was there thought sufficient to bring the case within the act of con-

gress. I have not met with any other cases, in which the question has been judicially discussed, except Ex parte Graham [supra], already referred to, where the reasoning, so far as it bears at all on this subject, presents itself unfavourably to the maintenance of the present suit. If, therefore, I were called upon to decide this case exclusively upon principle, my judgment would lead me to adopt these conclusions: That by the general provisions of the laws of the United States, the circuit courts could issue no process beyond the limits of their districts. That independent of positive legislation, the process can only be served upon persons within the same districts. That the acts of congress, adopting the state process, adopt the forms and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. That the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court in personam,—that is, where they are inhabitants, or found within the United States,—and not where they are aliens or citizens resident abroad at the commencement of the suit, and have no inhabitancy here.

There are two reasons, which have great weight with me in support of these positions. One is, that otherwise the judgments in the courts of the United States would not, in cases of non-residents, be binding, as general judgments in personam; but if at all, only as proceedings in rem to the extent of the property attached, whether it be a chip, or a bale of goods, upon the principles of the cases of Bissell v. Briggs, 9 Mass. 462; Buchanan v. Rucker, 9 East, 192; and other cases before mentioned. Another is, that the forms of process in Massachusetts, (which forms are made applicable by the acts of congress to the courts of the United States,) both in the common process and the trustee process, whenever goods or estate are attached, require a summons to be served on the party. In the trustee process, the words are, "We command you to attach the goods and estate of A. B. (the defendant) to the value of ——, and summons the said A. B. (the defendant), if he may be found in your precinct (district), to appear," &c. Not one word is stated in the writ itself, as to any summons, where the party is not found within the precinct or district of the officer. The mode of service in such cases, and in cases of non-residence generally, is prescribed by other distinct acts or sections of acts. So, that the exigency of the writ looks only to the fact of the party being found within the district; and unless the marshal is at liberty to make a service in a case and mode beyond the exigency of this writ, not expressly reached by the acts of congress, but dependent entirely upon state laws, made for local purposes, the service in cases of non-residence would be utterly void. The argument for the plaintiff is, that as the summons is authorized by law, it is sufficiently served by the marshal in any mode, within his district, which the local laws justify. Generally speaking, that may be true, where the party is within the district, or an inhabitant bound to obey the summons within the district, viis et modis prescribed by the law. The difficulty is, how to deal with cases, where the party is an alien, or a citizen of another state, not resident within any of the United States. Yet the state laws extend to all these cases equally with those, where the party is a non-resident citizen of the state, where the suit is brought. I know no principle, upon which the court can say, that the service as to the latter shall be good, and not as to the former; for in each case the sufficiency of the service of the summons must stand upon the same provisions of the state laws. Unless, therefore, the court can say, that an alien, who has never been within the United States, may be rightfully served with a summons or other process by any attachment of his property, however small, within the district, and be bound thereby to appear and submit to the jurisdiction of the court, or otherwise have a judgment against him in invitum, I do not perceive, how the present case can, on general principles, be maintained. If congress had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law. The point of difficulty is, whether such a rule ought to be inferred from so general a legislation as congress has adopted, not necessarily leading to the conclusion, that such was the intent. It would seem strange, that a provision should be so solicitously made for persons inhabiting the country, that they should not be held amenable, except in the districts where they resided; and yet that no protection should be afforded to aliens or citizens, who were permanently domiciled abroad.

But supposing the preceding reasoning less well founded than, in my judgment, it seems to be; it remains to consider, whether, under the circumstances of this case, the service of the process was such, as by the local laws, would justify the judgment of default now asked of this court. We may lay out of the case all consideration of the service, so far as relates to the provisions of the trustee act of 1794 (chapter 65), because the trustees having been discharged, no judgment can, by the express provisions of the act of 1798 (chapter 5), be rendered against the principal, unless the service has been such, as would authorize the court to proceed to render judgment against him in an action commenced by the common and ordinary mode of process. The mode of service in the common process is provided for by the act of 1797 (chapter 50) already cited. In cases of attachment, a sum-

mons is required to be left at the "dwelling-house, or place of last and usual abode" of the defendant, and "in case the defendant was at no time an inhabitant or resident within this commonwealth, then such summons to be left with his or her tenant, agent, or attorney." It appears to me, that the plain intent of the statute is to apply the words of the first clause exclusively to cases, where the defendant was at the time of the suit an inhabitant or resident of the commonwealth, having a dwelling-house, or place of last and usual abode therein. Where a defendant has no such inhabitancy or residence, but has left the commonwealth, and changed his domicil, how can it be said, that he has a dwelling-house there, or a place of last and usual abode? These words "last and usual" (not "last or usual") refer to cases, where the party has had several residences within the commonwealth. To make the service good, the last residence, if it be the usual residence of the party, is the proper place at which the summons is to be left. If the party has no place of usual abode in the commonwealth at the time, the statute has not made the service at the place of his last abode sufficient. Both must concur. And there is sound reason in this provision; for otherwise it might happen, that if the party were at one time an inhabitant, and afterwards should change his domicil, and become a citizen of another state, or have his home and usual and constant place of abode abroad for any length of time whatsoever, his property might be attached here, and without any notice to him, or to any agent or attorney, a judgment might be obtained against him, binding the property attached for ever. So monstrous and mischievous a provision could hardly be deemed a just exercise of legislative power in any civilized country. The second clause applies wholly in terms to defendants, who have been at no time inhabitants or residents within the commonwealth. Now the writ itself negatives the presumption, that Swan is in this predicament. It describes him as now commorant at Paris, but of the city of Boston; so that his inhabitancy or residence at some time, in the commonwealth, is distinctly averred. The return of the marshal states, that such inhabitancy has not been within three years. So that the case before the court is of a defendant, who has once been an inhabitant, and for three years last past has ceased to be an inhabitant. No mode of service is provided for in such a case by the statute of 1797 (chapter 50); and the trustees having been discharged, it is not provided for by the act of 1794 (chapter 65). It is a casus omissus. In respect to the service of process in such a new and extraordinary manner, varying so much from the principles and practice of the common law, and in many instances so little consonant to the principles of public law, or general justice, there can be no ground to extend the statute provision by implication or equity. The state court itself has not so construed them; and in the cases of Tingley v. Bateman, 10 Mass. 344, Lawrence v. Smith, 5 Mass. 362, and Gardner v. Baker, 12 Mass. 36, has been disposed rather to narrow down than widen the means, by which non-residents are to be brought within the sphere of our process. It appears to me, therefore, that as the service of the summons on an agent is not authorized, except where the defendant has at no time been an inhabitant or resident, such service is void; and as no summons was in fact left at any place of abode of the defendant, either last or usual, in the commonwealth, there has been no compliance with the other branch of the statute. Either way, therefore, the service is, according to the local laws, defective and nugatory.

There is another defect in the description of the writ, which would be fatal, if every other were surmounted. Swan is not described to be a citizen of Massachusetts, or of any particular state, but only as "a citizen of the United States." Now, such a specific description is, according to the known course of decisions, indispensable to give the circuit courts jurisdiction. Although the judiciary act of 1789 has given to the circuit courts jurisdiction of causes, where "an alien is a party," yet this must be construed and controlled by the provisions of the constitution itself. The latter does not extend the judicial power of the United States to such an extent, but limits it to controversies between citizens of a state, and foreign citizens or subjects. Hence the uniform interpretation of the act of 1789 has been, that if an alien is one party, a citizen of some particular state must be the other party. The constitution does not recognize such a description of persons as "citizens of the United States," as the objects of its judicial power. The circuit courts have no jurisdiction of suits between aliens, or between persons having no other description than "citizens of the United States." A citizen of one of our territories is a citizen of the United States; but he is not by law entitled to sue or be sued in the circuit courts of the United States. This doctrine was settled at an early period in the circuit courts, as appears from the case of Irving v. Frazier [Case No. 7,075], Story, Pl. 9, and other cases cited in the note to Rea v. Hayden, 3 Mass. 24, 25, and has been affirmed in the supreme court in Hepburn v. Ellzey, 2 Cranch [6 U. S.] 445, and Montalet v. Murray, 4 Cranch [8 U. S.] 46.

Upon the whole, in every view, which I have been able to take of the present case, it is the duty of the court to stay further proceedings, upon the ground, that there has been no sufficient service of the process to compel the appearance of Swan, or authorize a judgment of default against him.

[NOTE. Subsequently a bill in equity was filed against Swan and the other parties, trustees in the attachment proceedings. Swan, being out of the jurisdiction of the court, refused to appear and answer. The other defendants moved that on this account the bill be dismissed. Before granting the motion, the court allowed the plaintiff additional time. Case No.

11,135. After Swan's death a judgment at law was obtained against his administrator. Case unreported. Later a motion for a new trial was overruled. Id. 11,131.]

Case No. 11,135.

PICQUET v. SWAN et al.

[5 Mason, 561.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1830.

EQUITY—NECESSARY PARTIES—DISMISSAL.

If one defendant does not appear, and is not compellable to appear, and is a necessary party to the bill in equity, the other defendants, who have appeared and answered the bill, may move for a dismissal of the suit for non-prosecution of the bill, against the non-appearing defendant; and the court will grant a further time for the appearance of such defendant, if it seems reasonable, after which the bill is to be dismissed, unless such defendant appears and answers.

[Cited in Galpin v. Page, Case No. 5,206; Jessup v. Illinois Cent. R. Co., 36 Fed. 736.]

[Cited in Town of Virden v. Needles, 98 Ill. 370. Cited in brief in Marco v. Low, 55 Me. 550; Cleaver v. Smith, 114 Ill. 115, 29 N. E. 682.]

[For former actions at law to obtain judgment on this claim, see Case No. 11,132 and note.]

This was the case of a bill in equity, brought by the plaintiff, an alien, and a subject of the king of France, as administrator of Jean Claude Picquet, late of Paris, in the kingdom aforesaid, deceased, intestate, an alien, and also a subject of France, against James Swan, who was described in the bill as "a citizen of the United States, who now is, and for the last twenty years has been, a resident in Paris aforesaid, and not having an inhabitancy in any of the said United States," and against William Sullivan and others, also citizens of the commonwealth of Massachusetts. The bill sought payment of a large sum of money, asserted to be due from [James] Swan to the intestate, and charged, that the defendants, Sullivan and others, were possessed of large funds of real and personal estate, belonging to Swan, which had been conveyed by Swan to them (either directly or derivatively) in the manner set forth in the bill, in fraud of his creditors. The bill, therefore, prayed process against Swan, and all the other defendants, and a discovery, and account and injunction, and satisfaction of the debt which was due to the intestate out of the funds of Swan, so conveyed to the other defendants, and for other relief, &c. The bill was filed in November, 1829, and process issued, returnable to the rule day in December following. The defendant Swan never has appeared. All the other defendants except Swan have appeared and put in their answers, denying the equity of the plaintiff's bill. Exceptions were taken to these answers, which remain as yet undisposed of; and the plaintiff, upon leave granted, amended his bill, and to the amendments so made, no answers have been put in.

In January, 1830, the plaintiff obtained an order, appointing Nathaniel Niles, of Paris, a commissioner, to make service upon Swan in Paris, and to take his answer thereto. The commissioner, on the 7th of July, 1830, made return of the commission, that on the 7th of April, 1830, he had made service of the bill upon Swan, in Paris, by reading the same to him, and informing him that he would attend to the taking of his answer to the bill, if he chose, when he, the commissioner, should be requested. That for this purpose, he had kept the bill and commission three months, and that Swan had refused to make an answer thereto, within the said three months; and therefore, he returned the same. The commission was received by the clerk of the court, and filed on the 6th of September following.

On the 18th day of the same month, W. F. Otis and William Sullivan, on behalf of all the defendants excepting Swan, moved, that the bill be dismissed, setting forth at length the grounds of their motion, the principal points of which were in substance as follows: (1) That it fully appeared from the plaintiff's own showing, that the real parties to the suit were the complainant and said Swan, and that the other persons named as defendants in the bill, could not, in any event, be made accountable, until the plaintiff had first established a right against said Swan. That from the grounds of the suit as set forth in the plaintiff's bill, it was apparent that the matters of defence could not be set forth and availed of by any other party than said Swan, that he was, therefore, a material and necessary party, and the cause could not be had and determined, without his presence. (2) That it appeared from the return of the commission, issued by the court for the purpose of taking the answers of said Swan at Paris under oath, that he declined answering or submitting himself to the jurisdiction of the court, and that the plaintiff therefore could not further proceed against said Swan in this court, nor, consequently, against the other persons made defendants in the suit. (3) That even if said Swan was within the jurisdiction of the court, and had appeared and answered in this suit, the bill of complaint charged no such sufficient matter of equitable jurisdiction, as would support the case, and the plaintiff had, by his own showing, a plain, complete, and adequate remedy at law. (4) That it was repugnant to the fundamental principles on which courts of chancery proceed, to entertain litigations, which are founded on mere breaches of promise, and on choses in action for the recovery of damages; that a party having such a claim, must show that he has resorted to all the remedies, which are afforded in the courts of common law, without success, before he

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

can apply for aid to a court of equity; and that it did not appear from the complainant's bill, that there was not a competent tribunal before which he might obtain a legal remedy for his alleged wrongs.

On the 27th of October following, Messrs. Hubbard and Blair, for the plaintiff, moved, that further time be allowed to the defendant Swan, to appear and answer, and supported their motion by the affidavit of the plaintiff, which stated that he had good reason to believe, that Swan admitted the justice of the claim, and was willing and anxious to appear in the cause and make answer thereto; but that he could not put in a sufficient answer without reference to documents and information, accessible in the United States only. That during the time given him to answer under the commission, he was confined in Paris, but expected in a short time to be released, and to arrive in the United States within a short period; and for the grounds of his belief in these statements, the plaintiff referred to certain letters from said Swan, and the commissioner, addressed to himself, his counsel, and the court, which were attached to his affidavit. Both motions were heard together by the court, upon the request of counsel.

Messrs. Sullivan and Otis for defendants, excepting Swan.

When many parties are named in a bill as defendants, and process is prayed against all of them, and some are within the jurisdiction and appear and answer, and others are not within the jurisdiction and do not appear, what is the chancery practice in England, in such case? It is believed, that the English practice is to see. whether the bill is so framed, that the court can proceed against the parties who are before the court; and if it can decree without the absent parties, or can so decree as not to affect their rights, it will proceed. The English courts notice the distinction between "active" and "passive" parties; and when the former are absent, it cannot decree. In 1 Madd. C. P. 178, it is said, "there sometimes arises an absolute defect of justice" (from the absence of parties), "which seems to require the interposition of the legislature." "Active" parties are those who are legally or beneficially interested in the subject matter, or result of the suit. When such parties are not before the court, it may refuse to decree, or if a decree be made, it may be reversed. Whether the absent party be legally or beneficially interested, must depend on the charges in the bill. Coop. Eq. Pl. 33 et seq.; Palk v. Lord Clinton, 12 Ves. 58; Fell v. Brown, 2 Brown, Ch. 276. If the court in this case can only examine the bill, and not the answers, it appears that Swan is the principal party, as supposed debtor, and as cestui que trust. Adams v. St. Leger, 1 Ball & B. 181. If the answers of the defendants, who have appeared, are examinable, then it clearly appears, that prima facie the absent party is the only party; as those defendants, who have appeared, are not even necessarily put upon their defence, until a right is established between the plaintiff and the absent party. In such a case, English courts of chancery are limited by rules common to all courts, viz. that they must have parties before them, before justice can be administered between parties. It would be as new in England, as it would be here, to insist, that the court ought to proceed to decree between parties, who are before it, because other necessary, or active parties, cannot be compelled to appear. To prevent a demurrer for want of parties, a bill sometimes charges, that a party is beyond the jurisdiction. In such case it would depend on the frame of the bill, whether the absent party was a necessary one, or not; and in such case, the question would arise on the hearing.

The case now before the court arises on a preliminary motion to dismiss, because a necessary party is not before the court. The plaintiff has charged, that this party is out of the jurisdiction, but has prayed process against him. The plaintiff has done what he could to bring him in, and has failed to do so. The plaintiff admits the necessity of that party's presence. It is not doubted, that in such case the English practice would require, that the bill should be dismissed. The plaintiff has shown to the court, that it cannot proceed: First, by charging, that the absent person is an indispensable party. Secondly, by charging that he is beyond the jurisdiction. Thirdly, by showing (from the commission sent forth and returned) that he will not appear. No case has been found, in which an English court has retained a bill under such circumstances.

As to the practice in the United States. The chancery courts of the United States are governed (1) by the constitution and laws of congress; (2) by their own rules of practice; (3) by English rules, when neither of the former apply.

These courts are of limited jurisdiction; and it is too well settled to need authorities, that the jurisdiction must appear on the record. (1) Has this court jurisdiction between the parties on the record? Ex parte Graham [Case No. 5,657]; Picquet v. Swan [Id. 11,134]. (2) Must not the record show that the court has jurisdiction over all the parties in the suit? Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267; Corporation of New Orleans v. Winter, 1 Wheat. [14 U. S.] 92. When it appears on the record that the court has proper parties before it, then the question may arise, whether it has all the proper parties before it. On this question several adjudications appear. Ex parte Graham [supra]; Harrison v. Rowen [Case No. 6,140]; Joy v. Wirtz [Id. 7,554]; Russell v. Clarke's Ex'rs, 7 Cranch [11 U. S.] 88; Wormley v. Wormley, 8 Wheat. [21 U. S.] 451 (in which case, in a

note, West v. Randall [Case No. 17,424] is quoted, in which the learning on parties is exhausted); Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 166; Mallow v. Hinde, 12 Wheat. [25 U. S.] 196. On the question of delay, to decide whether the court will retain a bill for an absent party to come in, no case has been found in the English books, but Fell v. Brown, 2 Brown, Ch. 276. It does not appear that the defendant in that case was injuriously affected by delay, or that he objected to it; nor even that the suggestion did not come from him. He was ready to account.

The motion for further delay is addressed to the discretion of the court. It is believed that the exercise of this discretion requires that all the circumstances attending these long continued litigations should be adverted to; and that the court should look into the answers to decide, whether delay will help the plaintiff. As the defendants set up an adverse and distinct interest, it is suggested that the plaintiff is held to show that there will be a time when he can proceed with the presence of the now absent party; because, if that party should ever return, he may proceed anew. The difference to him, between retaining this bill and beginning again, is trifling. To the defendants it is a most serious evil, and a damage for which they know not of any remedy against this party. A judgment against him for the wrong done, if it should be found to be a wrong, may be fruitless as to compensation. In Livingston v. Gibbons, 4 Johns. Ch. 99, the doctrine of appearance is recognised and stated.

Messrs. Hubbard and Blair, for plaintiff.

(1) As to dismissing the bill. When one party is out of the jurisdiction, and the other parties within it, the practice is, to charge that fact in the bill; and if admitted in the answer, or proved in the cause, the court, if the property in dispute is in the power of the other parties, may act upon the property, notwithstanding the absent party is not before the court. 1 Brown, Ch. 250; 1 Schoales & L. 240; 2 Brown, Ch. 277; 1 Vern. 487; 2 Brown, Ch. 395; Mitf. Eq. Pl. (4th Ed.) 164; 1 Ves. Jr. 385; Prec. Ch. 83; 2 Atk. 510; 2 Brown, Ch. 399; Mitf. Eq. Pl. 134, 164; 2 Sim. & S. 219; Harding v. Handy, 11 Wheat. [24 U. S.] 132; Bunb. 200; 16 Ves. 326; Blake, Ch. Prac. 20; Eq. Cas. Abr. 74; 4 Desaus. Eq. 343; 1 Mont. Dig. 66; [Milligan v. Milledge] 3 Cranch [7 U. S.] 220; [Elmendorf v. Taylor] 10 Wheat. [23 U. S.] 166; West v. Randall [supra]. If the absent party is required to be active in the performance of the decree, as if a conveyance by him be necessary, or the foreclosure of a mortgage against the original mortgagor, the court cannot proceed to a determination against the absent party. 1 Turner & Veneble (6th Ed.) 93. If absent parties are merely passive objects of the judgment of the court, they will proceed against the defendants who are before the court. 1 Grant, Ch. Prac. (2d Ed.) 25; 2 Mod. Ch. Prac. 177.

As to service on Swan. Service of a subpœna upon a defendant while abroad, as in Scotland, seems to be good. But not upon a foreigner, residing in a foreign country. 1 Newl. Ch. Prac. (3d Ed.) 78; 1 Grant, Ch. Prac. (2d Ed.) 78.

(2) Plaintiff's motion for time to enable Swan to appear and answer. If plaintiff suffer three terms after answer filed, without taking any steps in the cause, the defendant may move to have the bill dismissed for want of prosecution. 1 Newl. Ch. Prac. (English Ed. 1819) 240; 15 Ves. 291; 16 Ves. 127–204; 3 Ves. & B. 1; 1 Har. Ch. (Farrand's Ed.) 401. Where there are a number of defendants, and some abroad, and the plaintiff is in prosecution for an answer, the court will not dismiss. 2 Atk. 604; Hand, Solicitor, 23–30, as to time given. Where there is a plea and answer, the bill will not be dismissed till the plea is argued. Barnard. 280; 2 Ves. Jr. 287. After an order to amend, the defendant cannot dismiss the bill for want of prosecution, until three terms after his answer to the amendments. 14 Ves. 208; 1 Newl. Ch. Prac. 243, 244; 1 Turn. Ch. Prac. (English Ed. 1817) 345; Har. Ch. Prac. (Ed. 1808) 31; 1 Ves. & B. 523. Upon the first application to dismiss, the plaintiff undertakes to speed the cause. After the expiration of another term, defendant may move it again, and then the undertaking is special. 13 Ves. 455; 3 Brown, Ch. 191.

STORY, Circuit Justice. There are two motions before the court; one on behalf of all the defendants, except Swan, to dismiss the bill on account of its non-prosecution, and the inability of the plaintiff to procure an appearance and answer from Swan. The other on behalf of the plaintiff, for further time to procure the appearance and answer of Swan, grounded upon the affidavit and papers accompanying the motion. Upon the actual structure of the bill it is very clear, that Swan is a necessary party, and that no relief can be had against the other defendants until the debt is established against him. The whole frame of the bill points to this conclusion, and the process and proceedings to compel Swan to come in all show, that he is deemed an indispensable party, or in the sense of a court of chancery, an active, and not merely a passive party. The importance of having the person before the court, whose interests are to be bound by an account or debt, is very forcibly illustrated by the case of Fell v. Brown, 2 Brown, Ch. 276. It is not, however, necessary at this time to enter into any consideration of the question of parties, since the plaintiff, by making Swan a party, is bound to proceed against him as such, or to dismiss him wholly from the bill. The general principle is perfectly well settled, that the defendant may have the bill of the plain-

tiff dismissed for non-prosecution, if the plaintiff does not proceed therein within a reasonable time. In England, if the plaintiff suffer three terms to elapse after answer filed, without taking any steps in the cause, the defendant may move to have the bill dismissed for want of prosecution. And the plaintiff, upon such an application, can give no other answer than an undertaking to speed the cause. If, after such an undertaking; another term expires without the plaintiff's taking any steps in the cause, the defendant is then entitled again to move for a dismission, which is granted of course, unless the plaintiff enters into a special undertaking. See Degraves v. Lane, 15 Ves. 291; Bligh v. ——, 13 Ves. 455; Naylor v. Taylor, 16 Ves. 127; Fuller v. Willis, 3 Ves. & B. 1. This practice seems wholly inapplicable to the circuit courts of the United States, as it would operate the most vexatious and unjustifiable delays, considering the great intervals between the terms of our courts. The practice, however, such as it is, looks to the case, where a sole defendant answering insists upon the right to dismiss.

The present is a case, where co-defendants, having answered, insist upon the right to dismiss the bill on account of the non-prosecution of the same against Swan. It would be an intolerable grievance, if co-defendants could not insist upon such a right; for it might otherwise happen, that the cause could not be brought to a hearing against them alone; and thus they might be held in court for an indefinite period, perhaps during their whole lives, and very valuable property in their hands be incapable of any safe alienation. No court of justice, and least of all, a court of equity, could be presumed to suffer its practice to become the instrument of such gross mischief. We accordingly find it very clearly established, that a co-defendant possesses such a right. Anon., 2 Atk. 604; Anon., 9 Ves. 512. That right, however, in England, seems governed very nearly, if not altogether, by the same rules, which apply to the case of a single defendant. It may not be fit for this court to follow the English practice without modification; but the spirit of that practice clearly indicates, that where there has been no affected delay, the rule to dismiss ought not to be peremptory in the first instance. Time ought to be given to the plaintiff to relieve the cause, if possible, from the difficulty of the non-appearance of the other defendant. In the present case the plaintiff has been guilty of no laches. He has used all commendable diligence to procure the appearance of Swan. He has sent a commission to give him notice of the suit, and to take his answer. Swan has, indeed, declined at present to answer. And if the case stood solely upon the commissioner's return, there would be no use in any farther delay; and the bill might be at once dismissed. But the affidavit of the plaintiff and the other papers accompanying his motion, do not demonstrate a determination on the part of Swan never to appear, and make answer to the suit. On the contrary, he expresses a readiness to do so at a future time.

It is true, that under the limited authority confided to the circuit courts of the United States, Swan cannot be compelled to appear and answer the present bill. I do not now go into a consideration of this subject, having had occasion to express my opinion at large, in the recent case of Picquet v. Swan [Case No. 11,134]. But Swan may appear, if he chooses, and answer the bill; and if he should so do, there is not, as I conceive, any want of jurisdiction in the court to entertain the cause. See Harrison v. Rowan [Case No. 6,140]; Logan v. Patrick, 5 Cranch [9 U. S.] 288; Pollard v. Dwight, 4 Cranch [8 U. S.] 421. I am fully aware of the extreme inconveniences resulting to the co-defendants from this protracted litigation; but the court is bound to guard itself against any undue influence, which such a circumstance is well calculated to produce. This question must be decided upon principles applicable to all cases of a like nature. Unless Swan should appear, there must be a dismissal of the bill. That is the common course, when persons, who are necessary parties, refuse to appear, and the court has no power to reach them by its process, and compel them to become parties. It was the ultimate fate of the case of Russell v. Clarke's Ex'rs, 7 Cranch [11 U. S.] 69, after it was remanded to the circuit court.

What the court propose to do under all the circumstances of this case, is, to pass an order giving farther time to the plaintiff to procure the appearance and answer of Swan, until the rule day in May next; and in case no such appearance and answer shall be filed on or before that time, then, that the plaintiff's bill do stand dismissed without prejudice to the merits, and that the defendants, except Swan, do recover their costs.

[NOTE. James Swan died in 1831, after which a judgment was obtained against his administrator. Case unreported. Later a motion for a new trial was overruled. Case No. 11,131.]

Case No. 11,136.

In re PICTON.

[2 Dill. 548;[1] 11 N. B. R. 420.]

Circuit Court, E. D. Missouri. 1873.

BANKRUPT ACT—SECOND SECTION CONSTRUED—REVISORY JURISDICTION OF CIRCUIT COURT.

1. The second section of the bankrupt act [of 1867 (14 Stat. 518)] gives to the circuit court jurisdiction to review, upon a proper record, an order of the district court, upon a trial before it without a jury, adjudicating the petitioner a bankrupt.

2. Where all of the testimony in the district court on the trial of such an issue was reduced to writing, preserved by bill of exception, and certified to the circuit court, the latter court can

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

review the correctness of the order of the district court adjudging the petitioner a bankrupt.

3. But in such a case the appellate court will not reverse on a question of fact unless the judgment below is, in its opinoin, clearly erroneous.

4. Testimony considered to establish the fraudulent transfer of property charged as an act of bankruptcy.

[In review of the action of the district court of the United States for the Eastern district of Missouri.]

This is a petition, under the second section of the bankrupt act, to review and reverse an order of the district court adjudging the petitioner a bankrupt. The petitioning creditors, Sterling Price & Co. charge as an act of bankruptcy that the present petitioner purchased of them three hundred and four bales of cotton at the price of $22,000; that it was expressly agreed that payment therefor was to be made in cash on delivery; that Picton, by means of the promise to pay on delivery, obtained possession of the cotton, and, without making payment therefor, immediately shipped the same to New York, and transferred the bills of lading with intent to hinder, delay, and defraud his creditors.

An answer was filed denying the act of bankruptcy charged, and, no jury having been demanded, the issue was tried to the court, which, upon the testimony produced, found against the debtor. The testimony before the district court was preserved by a bill of exception signed by the district judge, and is in the record of the present proceeding. The present petitioner seeks to reverse the order adjudging him a bankrupt, on the ground that the court below erred in holding that the evidence established the act of bankruptcy alleged. This is the only error of which he complains.

Bakewell, Farish & Mead, for petitioner for review.

Hill & Bowman, for petitioning creditors.

DILLON, Circuit Judge. 1. The petitioning creditors object that the circuit court, in the state of the record, cannot review the order by which the present petitioner in review was adjudicated a bankrupt, and insist that if such an order can be here revised at all, it must be upon writ of error. It will be observed that the issue below was tried to the court, and not a jury, and that all of the evidence upon which that court acted is preserved of record and is certified to this court. I am of opinion that the case falls within the general supervisory jurisdiction of the circuit court, and that the decision below may be reviewed, all of the testimony having been preserved.

In Morgan v. Thornhill, 11 Wall. [78 U. S.] 65, 78, 79, Mr. Justice Clifford, speaking of such cases, says, arguendo, that where the issue is tried by a jury, "the case is excluded from the general superintendence and jurisdiction of the circuit court by the exception introduced as a parenthesis into the body of that part of the section." But he adds: "Such cases may be tried by the district court without a jury, and in that event no doubt is entertained that the case is within the supervisory jurisdiction of the circuit court." In Langley v. Perry [Case No. 8,067], Mr. Justice Swayne held that the circuit court could, upon petition for review, revise the ruling of the district court upon a petition in involuntary bankruptcy.

2. But while I may thus review the decision of the district court on a question of fact, yet the ordinary rule governing appellate tribunals should apply, viz: that to justify a reversal, the finding below should be clearly erroneous. The rule rests upon good reasons. The court below sees the witnesses face to face, while the appellate tribunal sees them only on paper; and this gives the former court advantages in passing upon the weight of evidence which the latter court does not possess. I have gone through the one hundred and fifty pages of testimony in the record, but as it would conduce to no useful end to discuss it at length, it must suffice to say that it has not produced upon my mind the conviction that the conclusion of the district court was erroneous. I may add that I do not think the testimony establishes that the present petitioner, in the purchase of the cotton of the petitioning creditors, premeditated any scheme to defraud them; but his purchase was expressly for cash on delivery (that is, upon inspection and acceptance), and his action in his embarrassed circumstances in at once, before inspection and acceptance, taking the cotton notes, that is, warehouse receipts, for the cotton which he had received from the sellers in order to inspect, and pledging them to his banker to make his account good, and subsequently assigning to him the bills of lading for the same cotton, he, meanwhile, on various grounds, putting off or refusing to pay the seller, though superinduced by the stress of his circumstances, and though he may have hoped in the end to make payment for the cotton, was not improperly regarded by the district court as being legally, if not intentionally, fraudulent, in that it did hinder, delay, and defraud his vendors, and should, in law, be taken to have been intended to effect the result which it accomplished. Affirmed.

PIECE (INSDETH v.). See Case No. 7,026.

PIECES OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of pieces, e. g. "Pieces of Mahogany. See Five Hundred and Twenty-Eight Pieces of Mahogany."]

PIEDMONT, The (LARRABEE v.). See Case No. 8,095.

Case No. 11,137.

PIEHL v. BALCHEN.

[Olc. 24.] [1]

District Court, S. D. New York. Feb., 1844.

ADMIRALTY—FAILURE TO PRODUCE ARTICLES IN SUIT FOR WAGES—SUPPORT FOR AVERMENTS—DEVIATION—DESERTION—FORFEITURE—RECEIPT IN FULL—COMPENSATION FOR SHORT ALLOWANCE.

1. An avermen: in a libel by a seaman for wages, who has signed articles for a voyage from New-York to Pernambuco, thence to a port in Europe and back to the United States, is sufficiently supported, in case the master or owner does not produce the articles on trial, by proof that the agreement was, that the first terminus was some port in South America, not designated.

2. But an allegation that the voyage was continued from the port in Europe to the Cape de Verd Islands, to Rio Janeiro, to Monte Video and Buenos Ayres, does not render the after run of the vessel a part of the voyage agreed for in the articles; and unless assented to by the crew, will be a wrongful deviation, which discharges their obligation to the vessel.

3. A stipulation in writing for a series of voyages may be terminated or varied by mutual consent of the master and crew, and a new voyage be substituted by parol agreement.

4. But the desertion of the seaman during the second voyage cannot be made to enure to the master as a forfeiture of wages earned and due under the first one.

[Cited in The Pioneer, Case No. 11,177.]

5. A receipt signed by a seaman at the end of an eight months' voyage, acknowledging the payment of $9, in full of all demands against the ship, will not bar his suit for wages and short allowance, without proof of an adequate compensation actually paid him.

6. Quere. Whether proof of the handwriting of a subscribing witness to the said receipt, the witness being dead, is adequate evidence of its execution.

7. Compensation for short allowance is recovered as wages, and a general form of pleading is sufficient to admit evidence of the right, if not excepted to before trial.

8. Usually the sailor is required to prove no more than that a deficiency of provisions was served out, and the master can justify the short allowance only by proving the ship was furnished with a sufficient supply.

9. But if the seaman delays his action three or four years after the voyage is ended, the court will require him to give, also, at least proof constituting a reasonable presumption that the vessel went to sea unprovided with a proper supply of provisions.

10. If a seaman, sent on shore in the employment of the ship, neglects to return to his duty, the ship continuing at the port a sufficient time to give him opportunity to do so, the master in the mean time making inquiry for him, such voluntary absence will be a desertion and forfeit his wages.

[Cited in The John Martin, Case No. 7,357.]

The libel in this case was filed for the recovery of wages, including compensation for short allowance of provisions and water. The libellant [William Piehl] alleges that he shipped as an ordinary seaman, in New-York, on board the bark Caroline, of which the respondent [George Balchen] was master, in the month of October, 1839, and signed articles for a voyage from New-York to Pernambuco, and thence to a port or ports in Europe and back to New-York, at the rate of ten dollars per month. He further alleges, that he performed the voyage to Pernambuco, and from thence to Hamburgh, between which two places he was put on short allowance of bread, water and salted provisions for forty-eight days, caused by the master's having sold the ship's provisions at Pernambuco. That the vessel then proceeded from Hamburgh to the Cape de Verd Islands, from thence with a cargo to Rio Janeiro, which was delivered there; thence with another cargo to Monte Video, which was there delivered; thence to Buenos Ayres with a cargo, which was delivered at the latter place. That he was sent ashore several miles from the ship by the master in a small boat, and was, by the violence of the seas, thrown out of it, and greatly injured, by being washed upon the rocks, and, as he imputes, was intentionally abandoned there by the master, where he was impressed into the naval service of the country; and he further alleges in detail, great bodily sufferings and detentions, which prevented his return to New-York until the 25th of July last. The respondents say, in their answer, that "it is true," as is alleged in the libel, "that in the month of October, 1839, the barque, then in the port of New-York, and bound on a voyage thence to Pernambuco, and thence to one or more ports in Brazils, thence to Europe, Havana or the United States," shipped the libellant to serve as an ordinary seaman, for said voyage, at the rate of seven dollars per month wages, and admits that the voyage stated in the libel was performed by the libellant. But the answer denies all the allegations of short allowance, cruel treatment, &c., and alleges, in defence of the demand of wages by libellant, that he deserted from the vessel at Buenos Ayres, and thereby forfeited all wages earned previous to such desertion and after the vessel left Hamburgh; and that for the wages earned before the arrival at Hamburgh, he had paid him in full, for which he produced a receipt, dated at Hamburgh, June 29, 1840, for nine dollars, in full of all demands against the ship, and proved the handwriting of the subscribing witness to the receipt, who is now dead. Upon these issues the parties went to trial, September term, 1843, and on the 5th of October the court rendered a decision in favor of the libellant for wages, at the rate of $10 per month to the termination of the voyage at Hamburgh, and at the rate of $7 per month for the voyage from Hamburgh to Buenos Ayres, up to the time the libellant left the vessel at that port, and denied any compensation for short allowance. The parties moved for a rehearing of the cause. The motion was granted, and the cause was again argued in February term, 1844.

E. C. Benedict, for libellant.

N. D. Ellingwood, for respondent.

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

BETTS, District Judge. The libellant in this cause seeks to recover a balance due him for wages, and compensation by way of wages, for short allowance of provisions and water on the voyage. The shipping articles were not produced on the trial. Gelston, the shipping-broker, testified, that he shipped the libellant in October, 1839, on a voyage, at ten dollars per month, to go to South America, thence to Europe, and back to the United States, and for a time not exceeding two years. The agreement is not proved by the libellant as he alleges it, nor is it distinctly admitted by the answer; and the voyage actually performed was one variant from that described in the libel or answer, or by the broker who made the shipping contract with the libellant. But the voyage run comports sufficiently with the agreement proved to support the libellant's case, up to the arrival of the vessel at Hamburgh. After that, a new line of adventure was entered upon by the vessel, the libellant insisting on the trial that he continued on board under the terms of his first engagement; and the respondent, in his answer, did not allege there had been any change of voyage or agreement. It merely avers that the libellant was paid off in full discharge of his wages at Hamburgh. The answer also admits that the libellant continued to serve on board the vessel subsequently until her arrival at Buenos Ayres, and charges that the libellant deserted the vessel at Buenos Ayres, and thereby forfeited all claim to wages. The libellant does not, in his libel, assert any change of voyage or departure from his original shipping contract, at Hamburgh, nor does the answer set up a new engagement at Hamburgh, or abandonment of the old one there. The pleadings, if severally held to, would limit the controversy to the first voyage, which terminated at Hamburgh; there are no averments in the pleadings bringing the after voyage under these terms. But the proof is clear on both sides, that the libellant, after having left the bark at Hamburgh, reshipped at that port, and continued to serve on board to the arrival of the vessel at Buenos Ayres. Indeed, the main points to which the evidence and arguments in the cause were directed, relate to transactions at Buenos Ayres. There is no written evidence of the terms of the latter engagement, nor is there oral proof, direct or satisfactory, to that point; all that is alleged by the respondent to have been earned by the libellant relates to the amount of wages.

The respondent, upon this state of the pleadings, cannot avail himself of the fact, if sufficiently established by the proofs, that the libellant deserted the vessel at Hamburgh, and thus lost his claim to antecedent wages; nor can the libellant justify a subsequent desertion from the vessel at Buenos Ayres, upon the ground that she had deviated from the voyage for which he shipped at New-York. Because, it is manifest that if there had been cause of complaint on both sides that the shipping contract was violated, the objections were adjusted or waived, on the termination of the voyage at Hamburgh, where a new contract and voyage were entered into by the parties. The points of contestation upon the issues, made by the pleadings, in relation to the first voyage, are the rate of wages to be paid, whether the libellant was put on short allowance on the voyage, and whether he abandoned the vessel at that port, and his claims were wholly paid and settled at Hamburgh; and in respect to his further continuance on the ship, whether he was to receive the same wages as under his first engagement, and whether he deserted the vessel at Buenos Ayres, and thereby forfeited all wages then unpaid him. The respondent does not produce the shipping articles, but insists that the libellant shipped at seven dollars per month wages. The proof is quite satisfactory that the agreed rate of wages at New-York was ten dollars per month, and that it was so expressed in the shipping articles. The respondent gave in evidence a receipt signed by the libellant, at Hamburgh, June 29, 1840, for nine dollars, in full, of his demand against the vessel. There is no proof of any payment made the libellant for the eight months he had then served on board, except his advance of $12. Even at the rate of $7 per month, the libellant had then earned fifty-six dollars, and no court would allow a bald receipt given by a sailor, for nine dollars, to extinguish a clear debt of $64, without proof of some further satisfaction, amounting to a real compensation to the seaman. Harden v. Gordon [Case No. 6,047]; Thomas v. Lane [Id. 13,902]; The Nimrod [Id. 10,267].

In cases where parties act upon equality of intelligence, and no foundation for suspicion of fraud or imposition is laid by proof, a receipt is no more than prima facie evidence of payment, and may be explained, contradicted or varied by parol proof; and in the case of seamen dealing with a master upon the consideration of a small advance of ready money, for the discharge of their wages, the courts will exact satisfactory proof that they have been justly compensated. It would be a glaring impropriety to allow this naked receipt to conclude the seaman, and bar his action, when the respondent only claims to have settled with him on the basis of paying at the rate of seven dollars per month, whilst the testimony is incontestable that the agreement was to pay him $10. There was, accordingly, earned at the time that receipt was obtained, $3 per month, for the period of service, above the sums claimed by the respondent, to have been credited and paid to the libellant. I do not advert to the questionable adequacy of the proof of the receipt to render it a reliable voucher against a claim of wages, only the handwriting of the subscribing witness being proved; because, in my opinion, the respondent is bound to give

other evidence of actual payment or satisfaction of the debt, and cannot extinguish or bar the demand by proving the signature of the seaman to a paper acknowledging payment. The order entered on the first hearing in respect to wages only, is therefore affirmed. But on a more critical consideration of the testimony and the answer of the respondent, I am inclined to think the former order rejecting the claim for short allowance ought to be modified. The technical objection that the libel did not sufficiently specify his claim for short allowance, had its weight in that decision; yet perhaps in the exceeding looseness and inapplicability of the pleadings on both sides (for neither libel or answer make any issue upon the facts of the second or continued voyage), the court ought not to turn the cause back to procure from the parties a more apt and complete frame of pleadings. This objection was made on the final argument, and was not brought forward to shut out the testimony to that point. So in respect to all the transactions on the voyage from Hamburgh to Buenos Ayres, each party went into full proofs, notwithstanding there were no averments in the libel or answer to which the evidence was applicable. There is the more justification in letting evidence to this claim to compensation, because of short allowance, come in under a very general form of pleading, because a recompense for short allowance is given a seaman in the way of increased wages. Act July 20, 1790 [1 Stat. 131]. And particularly in this instance the court would be disinclined to favor severe strictness of practice, since an entire forfeiture of wages is made a substantive part of the defence. One of the witnesses testifies that the crew were on exceedingly short allowance for forty or fifty days, and the witness called by the respondent admits the allowance was very scanty for a considerable period between Pernambuco and Hamburgh.

No evidence is given of the quantity of provisions supplied the vessel for the voyage. This proof should be furnished by the ship, when the fact that the crew were put on short allowance is proved. But as the demand in this instance is a stale one, I think it was no more than reasonable that the libellant was required to give evidence importing that the ship was insufficiently provisioned. This was done, and then clearly the burden of proof is upon the ship to show by clear evidence that she had placed on board all the provisions required by law. This justification has not been made by the respondent, and I shall accordingly allow forty days extra wages to the libellant therefor, at the rate of ten dollars per month, being thirteen dollars and thirty-three cents.

The remaining and most litigated point between the parties relates to the alleged desertion of the libellant at Buenos Ayres. It was decided, upon the first hearing of the case, that the absence of the libellant from the ship at Buenos Ayres did not amount to a desertion which forfeited the wages due to him, particularly so if the defence of desertion was placed by the respondent on the contract of the libellant in the shipping articles, because the voyage to Buenos Ayres was palpably not embraced in that contract, but was a deviation from it, and the libellant was not bound by the articles to perform it.

The defence, accordingly, was to be governed by the character of the agreement made by the libellant at Hamburgh. That was a parol engagement on a different consideration, and for a voyage not contemplated in the original articles. After so long a period, it is difficult to find clear evidence of the circumstances connected with the transactions of that voyage, and the absence of the libellant from the ship; and I was disposed to regard his leaving the vessel the result of timidity and dread of the dangers of returning to her in a small boat in the night time, and not a wilful desertion, and to hold the blame of his continued absence to be mutual between him and the master. But upon further reflection, I am convinced that view was incorrect, upon the facts and circumstances of the case, and that even if his leaving the boat for that night might be attributable to alarm at the perils of rowing her out to the vessel, still there is nothing to excuse the libellant in concealing himself on shore, and continuing his absence from the vessel until her departure from Buenos Ayres. The vessel remained seven or eight days longer at that port; and it is proved that the master inquired where the libellant could be found. This was all that should be required of him in discharge of his duty; and there was ample time for the libellant to have returned to his service on board, had he desired to do so. The lodgings of the master on shore were well known to him, where he could have reported himself at once. It must be presumed he avoided doing either, because he intended to abandon the vessel. It appears, from the testimony, that he had previously contemplated leaving her at Buenos Ayres, and endeavored to persuade some of his shipmates to join him, assuring them that they could obtain very high wages at that port; and whether the expectation of such increased remuneration induced him to disregard his wages in arrear, or whether motives of resentment, pique or personal fear actuated him, I feel bound to hold that he voluntarily left the vessel at Buenos Ayres without leave, and without intending to return to her. Such abandonment of the ship is a desertion which works a forfeiture of the wages then due him on that voyage (3 Kent, Comm. 198), whether his agreement was by regular shipping articles or verbal. Desertion incurs a forfeiture of wages, without the aid of stiplations in shipping articles; and the argument that the engagements in those articles do not em-

brace this voyage, is of no avail against this defence. It is valid and efficient, whether the shipping contract is verbal or written. It, therefore, matters not on this evidence whether the libellant was sailing under his shipping articles or a new and verbal contract. Had the libellant refused to proceed on this voyage, because it was one not designated by the articles, he could not be charged with desertion. The Eliza, 1 Hagg. Adm. 182, 184; The Minerva, Id. 347. But the new contract was obligatory upon him, and he is responsible for its violation. Having broken it by wilful abandonment of the vessel, without intending to return to her, he forfeits all wages earned during its continuance. This forfeiture does not retro-act and include the wages earned on the outward voyage to Hamburgh. That voyage terminated there by the new arrangement between the master and libellant for the present one.

I accordingly decree that the libellant receive for eight months' service on board the vessel, up to the close of the voyage at Hamburgh, eighty dollars, and for short allowance during that period, thirteen $^{33}/_{100}$ dollars, being, in the whole, ninety-three dollars thirty-three cents, deducting therefrom the advance of twelve dollars, and nine dollars paid at that port, and his costs to be taxed; and that the libellant's wages, earned on the subsequent voyage from Hamburgh to Buenos Ayres, be deemed forfeited for desertion at the latter port.

Case No. 11,138.

PIEK et al. v. CHICAGO & N. W. RY. CO. et al.

[6 Biss. 177;[1] 6 Chi. Leg. News, 333.]

Circuit Court, W. D. Wisconsin. July, 1874.[2]

JURISDICTION — ALTERING WISCONSIN RAILROAD CHARTERS—RIGHTS OF CREDITORS—CONGRESSIONAL GRANTS OF LAND.

1. The United States circuit court has jurisdiction of a bill by non-resident creditors to restrain the railroad commissioners from actions injurious to their rights. It is not necessary to wait until the commissioners have taken positive action.

[Cited in Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 871.]

2. Acts of March 12, 1874, do not repeal the act of March 11, 1874 [Laws 1874, p. 559].

3. The provision of the Wisconsin constitution, that railroad charters "may be altered or repealed by the legislature at any time after their passage" underlies all the grants of rights and franchises to the Northwestern Railway Company, and all its stock and securities were taken and are held subject to this paramount condition, of which in law all holders had notice.

4. The corporation cannot clothe its creditors with greater rights, as against the state, than it possesses itself; and this principle is not changed by authority from the legislature to consolidate with other roads.

5. The Wisconsin legislature has the power to regulate railroad charges for transit of persons and property within the state, and the fact that the exercise of such power might affect the value of the railroad's property and franchises cannot touch the question of the power.

6. Congressional grants of land to the state cannot change the rights of the corporation or its creditors.

This was a bill in equity by William Frederick Piek, of the kingdom of Holland, and an alien, Henry R. Pierson and Moses Taylor, citizens of the state of New York, holders of certain bonds issued or guaranteed by the Chicago & Northwestern Railway Company, filed on behalf of themselves and others similarly situated, and also by the Farmers' Loan and Trust Co., and the Union Trust Co., corporations organized under the laws of New York, and citizens of that state, being severally trustees under mortgages executed by said railway company to secure the aforesaid bonds, against the said Chicago & Northwestern Railway Company, George H. Paul, Joseph H. Osborne and John N. Hoyt, citizens of the state of Wisconsin, and railroad commissioners of that state, and also against A. Scott Sloan, a resident of and the attorney-general of said state. The bill was filed to restrain the said railway company from submitting to or accepting, and to prevent the other defendants from enforcing, the provisions of an act of the legislature of the state of Wisconsin, passed March 11, 1874, entitled "An act in relation to railroad, express and telegraph companies, in the state of Wisconsin" [Laws Wis. 1874, p. 559], upon the ground that the act impaired the obligation of the contracts entered into by said railroad company with said bondholders and trustees, and was therefore unconstitutional and void. The defendant corporation was created by the consolidation of several railroad companies organized under the laws of Illinois and Wisconsin respectively, the new corporation being confirmed by the act of the legislature of Wisconsin, approved March 8, 1862. By Act Cong. June 3, 1856 [11 Stat. 20], there was granted to the state of Wisconsin certain alternate sections of land within the state for the purpose of aiding in the construction of railroads. The state accepted the lands, and on the 11th of October, 1856, passed an act professedly in execution of the trust created by this act of congress, and incorporating the Wisconsin and Superior Railroad Company, and granting a portion of said lands thereto. This corporation was finally merged into the Chicago & Northwestern Railway Company. The act complained of in the bill, is that of the legislature of Wisconsin, approved March 11, 1874, applicable to all the roads within the state, owned, operated, managed or leased by the Chicago & Northwestern Railway Company, limiting the compensation to be paid for the

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

[2] [Affirmed in 94 U. S. 164.]

carriage of passengers and freight to the sums in the act mentioned, prohibiting under heavy penalties any demand or receipt of compensation beyond the rates so fixed, and providing for the appointment of three persons as railroad commissioners, who should neither be in the employment of any railroad, nor in any manner interested in railroads, who should at all times have access to the books and papers of railroad companies throughout the state, and authorizing them in their discretion to reduce such rates of compensation below those prescribed by the act whenever in their judgment, or in the judgment of a majority of them, it could be done without injury to the railroad company, and also providing that such companies should be bound by the decision of such railroad commissioners, or a majority of them, with reference to such rates, and should observe their requirements in that respect, under heavy penalties. Under this act the defendants, Paul, Osborne and Hoyt, had been appointed the railroad commissioners for the state, had entered upon the duties of their office, prepared a schedule of rates for transportation of freight and passengers, and were preparing to enforce the observance thereof, while the defendant Sloan, as attorney-general was preparing to prosecute the company for the penalties prescribed for the violation of the act, the company having made no change in their rates on account of the act.

The question came up on a motion for a temporary injunction on the bill and affidavits filed, and was elaborately argued.

C. B. Lawrence, B. C. Cook, and E. W. Stoughton, for complainants.

A. Scott Sloan, J. C. Sloan, and L. S. Dixon, for defendants.

Before DAVIS, Circuit Justice, DRUMMOND, Circuit Judge, and HOPKINS, District Judge.

DRUMMOND, Circuit Judge. We have not had time to prepare any formal opinion in the case, but as it was thought desirable that there should be a decision upon the motion for an injunction, I am instructed by the court to present the following as its conclusions upon the points made for a preliminary injunction:

1. On the assumption that the act of March 11, 1874, "relating to railroads, express and telegraph companies in the state of Wisconsin," is invalid, we think the court has jurisdiction of the case. The bill is filed on behalf of citizens of Europe, and of other states, to enforce equitable rights, and to prevent action by the railroad commissioners which may result, as is alleged, in serious injury to those rights. It was not necessary to wait until the commissioners had put the law in full operation, and its effects upon the railroad company had become complete, before the application against them was made to a court of equity. A very important function of that court is to prevent threatened wrong to the rights of property.

2. We are of opinion that the act of the 11th of March, mentioned above, was not repealed by the act of the 12th of March, 1874, the second section of which declares "all existing corporations within this state shall have and possess all the powers and privileges contained * * in their respective charters;" and the act also of the 12th of March, 1874, the ninth section of which imposes a penalty for extortionate charges. There are apparent inconsistencies between these two last named acts and that of the 11th of March; but it becomes a question of intendment on the part of the legislature. On the same day, March 12, a joint resolution was passed directing the secretary of state not to publish the act of the 11th of March until the 28th of April. In this state no general law is in force until after publication. We may consider the joint resolution, in order to determine whether the ambiguous legislature intended that the two acts passed on the same day should repeal the act of the 11th of March, and from that it is manifest such was not the intention of the legislature. Of the three acts, that of the 11th of March took effect last.

3. The charters of railroad corporations under the constitution of Wisconsin "may be altered or repealed by the legislature at any time after their passage." In legal effect, therefore, there was incorporated in all the numerous grants under which the Northwestern Railway Company now claims its rights of franchise and property in this state, the foregoing condition contained in the constitution. It became by operation of law, a part of every contract or mortgage made by the company, or by any of its numerous predecessors, under which it claims. The share and bond holders took their stock or their securities subject to this paramount condition, and of which they, in law, had notice. If the corporation, by making a contract or deed of trust on its property, could clothe its creditors with an absolute, unchangeable right, it would enable the corporation, by its own act, to abrogate one of the provisions of the fundamental law of the state.

4. This principle is not changed because authority is given by the legislature of the state to a corporation to consolidate with a corporation of another state. The corporation of this state is still subject to the constitution of Wisconsin, and there is no power anywhere to remove it beyond the reach of its authority.

5. As to the rates for the transit of persons and property exclusively within the limits of this state, the legislature had the right to alter the terms of the charter of the Northwestern Railway Company, and the fact that such alteration might affect the value of its property or franchises cannot touch the

question of power in the legislature. The repeal of its franchises would have seriously impaired the value of its tangible property; and while the latter, as such, could not be taken, still its essential value for mere use on the railroad would be gone.

6. The fact that grants of land were made by congress to the state cannot change the rights of the corporation or of the creditors. If the state has not performed the trust it must answer to the United States.

7. The act of the 11th of March, 1874, while not interfering with the rates of freight on property transported entirely through the state to and from other states, includes within its terms property and persons transported on railroads from other states into Wisconsin, and from Wisconsin into other states. This act either establishes or authorises the railroad commissioners to establish fixed rates of freight and fare on such persons and property. The case of State Freight Tax, in 15 Wall. [82 U. S.] 232, decides that this last-described traffic constitutes "commerce between the several states," and that the regulation thereof belongs exclusively to congress. It becomes, therefore, a very grave question whether it is competent for the state arbitrarily to fix certain rates for the transportation of persons and property of this inter-state commerce, as the right to reduce rates implies also the right to raise them. There may be serious doubts whether this can be done. This point was not fully argued, and scarcely at all by the counsel of the defendants; and under the circumstances, we do not at present feel warranted, on this ground alone, to order the issue of an injunction. If desired by the plaintiffs, it may be further considered at a future time, either on demurrer to the bill or in such other form as may fairly present the question for our consideration.

The motion for an injunction is overruled.

[On appeal to the supreme court the decree of this court was affirmed. 94 U. S. 164.]

NOTE. An act in 1856 reserving power to amend or repeal future charters and other laws is constitutional, and does not affect the mere power to repeal the franchise, notwithstanding the clause that "no amendment or repeal shall impair other rights previously vested." Therefore an act of 1868, repealing one incorporating a company in 1865, is constitutional, notwithstanding the act of 1865 reserved no repealing power in itself. Griffin v. Kentucky Ins. Co., 3 Bush, 592. The exercise of a reservation by the state of the power to repeal, alter or amend acts of incorporation, does not impair the contract of which it forms a part. Com. v. Fayette Co. R. Co., 55 Pa. St. 452.

The constitution of Wisconsin contains the following clause: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage." Const. Wis. art. 11, § 1.

Case No. 11,139.

In re PIERCE et al.

[7 Biss. 426: 15 N. B. R. 449; 9 Chi. Leg. News, 300; 15 Alb. Law J. 517.] [1]

Circuit Court, E. D. Wisconsin. April, 1877.

GIFT OF PERSONAL PROPERTY BY INSOLVENT HUSBAND TO WIFE—SUMMARY JURISDICTION OF BANKRUPTCY COURT—PRACTICE.

1. Gift of personal property by insolvent husband to wife, without any visible change of possession, does not constitute an adverse interest in the wife so as to compel the institution of separate proceedings for the purpose of litigating the rights of the parties.

2. On a petition by the assignee of the husband for the possession of the property, an affidavit by the husband, that the property is in possession of his wife is not a sufficient answer; and the bankruptcy court can compel the property to be turned over to the assignee.

[Cited in Re M'Kenna, 9 Fed. 29.]

3. Upon such a petition by the assignee, the court should require the bankrupt to answer.

[The bankrupt and his wife were examined, and their testimony fully taken touching this property. The assignee claimed it as the property of the bankrupts, or of one of them.] [2]

This was a petition by the assignee of the district court for the possession of personal property which it was alleged was in the hands of the bankrupts [Charles L. Pierce and James M. Whaling]. The petition remained unanswered except by the affidavit referred to in the opinion.

D. S. Ordway, for assignee.

James G. Jenkins, for bankrupts.

DRUMMOND, Circuit Judge. The facts set forth in the petition to the district court were substantially these:

That the bankrupts, some time ago, had entered into business with a very small capital; that they became indebted for large quantities of goods purchased; that the indebtedness continued and increased; that they were actually insolvent, the insolvency growing greater in amount all the time; that they did a very large business, incurred enormous debts, particularly to one firm, who had advanced them large sums of money from time to time, the indebtedness being between $300,000 and $400,000; that they lived in an expensive manner; had extravagant furniture considering their actual pecuniary condition when they commenced the business, and at periods afterward. Articles of luxury and expensive furniture were purchased by Mr. Pierce and placed in his house; and the statement is in the petition, which we have to take as true, that he gave those things (after he had purchased them, being then insolvent, and using other people's money, the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 15 Alb. Law J. 517, contains only a partial report.]

[2] [From 15 N. B. R. 449, and 9 Chi. Leg. News, 300.]

product of the goods which may be said to to have belonged to others) to his wife, saying, "I give these to you."

He remained in the house; he had bought the property; there was no separation between man and wife, no severance of possession; they were both living in the house, and he having made use of the few simple words as above, it is claimed that his wife now owns this property, or that she has an adverse interest in it, and therefore that there must be a bill in chancery or a suit at law to determine the rights of the wife. Smith v. Mason, 14 Wall. [81 U. S.] 419; Marshall v. Knox, 16 Wall. [83 U. S.] 551.

Now, if it had been an article of apparel, or simply the wardrobe of the wife, or jewels, or any expensive personal articles which in a sense might be said to be appropriated to the use of the wife, it possibly might be different. But here was property in common between the husband and wife, of which there could not be a distinct, separate appropriation to the wife, unless the mere use of the words, "I give this to you," shall constitute a separate and distinct property, shall sever the possession, and from thenceforth the property shall be considered as the separate and independent property of the wife.

Can we tolerate such things as this? Can it be true that an insolvent merchant can fill his house with all sorts of extravagant furniture, and then say to his wife, "I give it to you," they remaining in the house and living together, and then compel the creditors, or assignee representing the creditors, to solemnly go through with what I cannot help calling the farce of filing a bill in chancery to deprive the wife of such a right as this?

I admit that wherever there appears to be an adverse interest in any one who is not before the court, the bankrupt court cannot adjudicate on the same without that person being properly before it, without setting in motion the machinery of a court for the purpose of litigating any supposed rights. But this is not an adverse interest. Does the mere fact that the husband says to the wife, "This property which I have bought and placed in my house is yours," constitute an adverse interest in the wife? I know of no law that leads to such a conclusion. There is not even an equity in the wife under such circumstances. The right of property and the possession of the property are absolutely unchanged. The statute of this state declares, I admit, as the statutes of most of the states now declare, that the wife can receive and hold as her own independent property that which she obtains from a source other than that of her husband. But it does not change the rule of law that unless it does not come from another source it still is the property of the husband.

In this case the petition alleges that the wife had no property, never has had any except her wardrobe and the usual presents made on a wedding day. It therefore rebuts the idea that any of this property whatever was purchased with the money of the wife. It was all purchased with the money of the husband, or rather the money of his creditors.

And then, again, a portion of this property was not even given by the husband to the wife. It was put upon premises, the title to which was apparently in the wife, and it is claimed to belong to the wife, because the husband bought the furniture or other articles of personal property, and put them upon the premises which the wife seemed to own. So that, whenever personal property is put by the owner upon real property owned by another, it transfers, under this view, the personal property to the owner of the real property. That certainly is a new doctrine in the law.

There is an affidavit put in, in answer to the petition to the district court, in which the husband alleges that he cannot deliver this property to the assignee because it is in the possession of his wife. Now, if he had shown in this affidavit that there was any possession in his wife, different from his own possession, there might be something in it. But he must rebut the presumption which arises from all the facts in the case, for they are both occupying, as man and wife, jointly, a house in which this furniture is placed. It is a necessary inference, as they are thus living together, that whatever possession the wife has, she has simply because she is living with her husband in the same house, and that he has said to her, "This property is yours."

The district court thought that there was in this case an adverse interest in the wife, and therefore, under some of the decisions of the supreme court, her right must be litigated in an independent action.

Now, if there did really appear to be an adverse right, I admit the binding authority of these decisions. But for the reasons I have already stated, it is most manifest that there is no adverse right in the wife. I know of no law or equity that, under these facts, gives her the slightest adverse right to the property. There certainly has not been any cited in this case. I think, therefore, that the bankrupt must meet the case made by the assignee in some other way than by such an affidavit as this, before the district court could of right hold that this woman can retain the property. I must say I have very little patience with transactions of this kind. If courts of justice are made to accomplish any object, it certainly is one of the very highest to protect, in the speediest possible way, the right of creditors attacked, as this case shows they have been here, and to sweep away, as a mere cobweb, such a transparent fraud as is shown in this case.

Therefore I shall remit the case to the district court, with instructions to that court to require the bankrupt to answer the petition, and then, when he has so answered, if it shall appear that there is really any adverse

interest in the wife, then, of course, she will be permitted to have her right ascertained in an independent proceeding.

[For a bill in equity by Augustus F. Cady, assignee, against the bankrupts, and Ella M. Whaling, the wife of one of them, to set aside certain alleged fraudulent transfers of property, real and personal, heard upon demurrer to bill, see Case No. 2,285.]

Case No. 11,140.

In re PIERCE et al.

Ex parte WHITE.

[2 Lowell, 343.][1]

District Court, D. Massachusetts. Nov., 1874.

BANKRUPT—SECURITY TO SURETY.

1. A mortgage given to a surety to indemnify him for undertaking to secure debts of a mortgagor, who afterwards became bankrupt, will be *held*, by a court of bankruptcy, to inure to the benefit of the creditors to whom the surety became bound; and the trust for the benefit of such creditors will be enforced by those courts.

2. Where such a mortgage is assigned to a purchaser, with notice of the trust, he takes the property upon the same trusts.

3. Where the money paid by such a purchaser is, in fact, applied to the payment of the debts which the mortgage was given to secure, the purchaser may have the benefit of such application.

4. But if the purchaser is himself a creditor under the mortgage, he has no priority over the other creditors, but must share with them if the security is inadequate to full payment.

5. An assignee in bankruptcy, who has taken chattels subject to such a mortgage, has no prior lien on it for rent of the place in which they were kept, if, being notified of the mortgage, he refused to deliver them to the mortgagee, and the rent accrued after such notice.

The bankrupt firm carried on business in Boston under the style of the Boston Drug Mills, as the successors of an earlier firm, consisting of the two bankrupts and one Lincoln. When the latter retired from the firm in December, 1872, the new firm undertook to pay the joint debts of the old firm, and they procured one Kendall to become bound with them to Lincoln in an obligation conditioned to pay all said debts as shown on the books of account of the firm, and especially six certain promissory notes, amounting to $3,400 signed by said Lincoln and indorsed by the Boston Drug Mills, and to save harmless said Lincoln against all said debts, liabilities, and notes. As security for this obligation, the new firm gave Kendall, the surety, a mortgage upon certain machinery, tools, and other chattels, which was conditioned to pay all the debts of the old firm, and to indemnify Kendall from his liability on the bond. In February, 1873, the new firm applied to E. A. White, the petitioner, to advance them $1,500, promising to procure him as security therefor an assignment of Kendall's mortgage. He advanced the money and received the assignment. After the bankruptcy of E. C. Pierce and others, White applied to have the mortgaged property sold, which was ordered, subject to the rights of all parties, and the assignee filed an account, showing a balance of about $1,000 as the net proceeds of sale. At the hearing there was evidence tending to show that the money thus obtained from Mr. White was applied to pay debts of the old firm. There was evidence that the notes for $3,400, mentioned in the mortgage to Kendall, had not been paid, and that there were other debts outstanding of the old firm; that Kendall and Lincoln were both bankrupt, and the interests of their creditors were insisted on by their assignees.

B. C. Moulton, for assignee.

G. W. Estabrook, for secured creditors.

LOWELL, District Judge. It is well settled that a mortgage by a principal to a surety to indemnify him for his undertaking, will inure to the benefit of the creditors to whom the surety has become bound, and that if the parties are bankrupt, the court of bankruptcy or a court of equity will enforce the trust for the benefit of such creditors. I refer to the very elaborate opinion of the late Judge Hall, in Re Jaycox [Case No. 7,242], where the authorities are reviewed, and the principle upheld; and in which the character of such a transaction as a trust is fully set out. In England this equity appears at the present day to be confined to cases in which both the principal and his surety are bankrupt or insolvent, and is held not to inure to the benefit of the class of creditors as such, but to be an incidental advantage which they obtain in working out the settlements of the two bankrupt estates. The earlier English doctrine of Maure v. Harrison, 1 Eq. Cas. Abr. 93, pl. 5, has been more closely followed in this country, and the better opinion here is, that when the principal is insolvent, the creditors may at once require the application of the security. Kendall's mortgage, however, was conditioned to pay the debts of the old firm, as well as to save him harmless therefrom, which would create a trust, even before bankruptcy; and both parties are now bankrupt. Kendall assigned this mortgage to a person who was lending money to the new firm. It is clear that such an assignment, for such a purpose, of a mortgage which clearly expresses the trust, is void in equity, and that White became merely the trustee in the place of Kendall. No layman even, reading such a mortgage, could for a moment suppose that it was intended, or could be used, as a security for new debts, at least until the old debts were all paid; and White made no inquiry concerning the old debts.

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

Fortunately for him the money appears to have been used to pay old debts; and this being the case, he may fairly claim to stand in the place of the creditors who were paid with the money which he lent. But his possession of the mortgage gives him no better right than all the other creditors of the old firm, because it was not assigned him for any such purpose. He was not responsible for the old debts, and did not undertake to pay them, and can only by subrogation claim the rights of a creditor.

If Kendall had paid certain debts without notice of the insolvency of the new firm, no doubt he might hold the mortgaged property, first to indemnify himself, and next to divide the proceeds of the property pro rata among the remaining creditors. But White was not in this position. He advanced money on a security which was not directly available to him, and he can derive no priority by the fact that he held a legal title.

It was argued that the holders of the notes mentioned in the mortgage are to have precedence of the other creditors of the old firm, by reason of the notes being specially referred to. But it is evident that these debts were not mentioned for that purpose, but merely to make sure that they were acknowledged as debts by the old firm. The bond and mortgage cannot be misunderstood. They are for all the debts, whether mentioned in the mortgage or shown in the books.

The assignee argued that he had a lien upon the mortgaged property for rent. It seems that the drug mills were in his possession for some time, and that the landlord makes some claim against him which is in suit; and the suggestion is, that if the machinery and tools conveyed by the mortgage had been removed, he would not have kept the premises so long as he did. If the assignee has become liable for rent, he has usually the right to pay it out of the assets in his hands; but, so far as this mortgaged property can be called assets, he has no claim of this sort upon it, because he resisted the mortgagee's right to sell or remove it, gave him no notice of any such possible claim, and has acted throughout adversely, taking his chance of setting aside the mortgage. Besides, the occupation of the premises was optional with the assignee. He was not bound to take the lease unless he pleased, and he might have taken care to secure himself by a guarantee from the creditors or otherwise against personal liability for the rent. If he did become liable he cannot call upon the mortgagee, or rather on the creditors of the old firm whom the mortgagee represents, to pay any part of this charge.

The order is, that the net proceeds of sale of the mortgaged property be divided among the creditors of the old firm, known as the Boston Drug Mills, pro rata.

Case No. 11,141.

In re PIERCE et al.

[3 N. B. R. 258 (Quarto, 61);[1] 26 Leg. Int. 332; 16 Pittsb. Leg. J. 204.]

District Court, E. D. Pennsylvania. Oct. 8, 1869.

BANKRUPTCY—DISCHARGE—EFFECT OF PRIOR ASSIGNMENT—ACT OF BANKRUPTCY.

1. An assignment for the benefit of creditors, without any preference, sixteen days before the filing of the debtor's petition in bankruptcy, and when a creditor proceeding adversely was about to obtain a judgment, *held*, not to preclude the discharge of the bankrupt.

2. That such an assignment would be an act of bankruptcy under the 39th section of the bankrupt law [of 1867 (14 Stat. 536)], if adversary proceedings were instituted within six months, does not make it, in the absence of actual fraud, a bar to a discharge, under the 29th section.

3. Such an assignment, though voidable by the assignee in bankruptcy, is not void.

[Cited in Re Seeley, Case No. 12,628.]

The petition in this case was filed on December 31, 1869. The bankrupts [Pierce & Holbrook] having applied for their discharge, on the day appointed to show cause, October 8, 1869—

CADWALADER, District Judge, said:—Should the discharge of these gentlemen be unopposed, it will, nevertheless, be my duty, under the 32d section of the act of congress, to consider whether their execution of a general assignment for the benefit of their creditors, without any preference, sixteen days before their original petition in bankruptcy was filed, and when a creditor was about to obtain a judgment against them, constituted such a breach of their duty under the act, as to preclude their discharge. According to a decision in Goldschmidt's Case [Case No. 5,520], in the Southern district of New York, the discharge could not be granted, even though the assignment had been made more than six months before the commencement of proceedings in bankruptcy; and, if I were to follow that decision, the present case of an assignment of this kind, made within that period, would be more unfavorable to those bankrupts. The decision is, however, contrary to the views upon which I have acted in many former cases, and to views which I still entertain. I have in several cases adjudged such an assignment an act of bankruptcy under the 39th section of the act, if adversary proceedings under that section were instituted within the period of six months therein limited. But, even in such a case, I have not, in absence of actual fraud, considered the execution of such an assignment a bar to a discharge. Even where the assignment has been the sole foundation of the proceedings in bankruptcy, I have considered it not a void act, but an act voidable

[1] [Reprinted from 3 N. B. R. 258 (Quarto, 61), by permission.]

by the assignee in bankruptcy, under a bill in equity, filed for the purpose of avoiding it; and have sustained acts done under it previously in good faith. In one case I refused an injunction under such a bill, because the injunction would have prevented the working out of an equity beneficial to the creditors. In another case, I suspended granting an injunction and appointing a receiver until the completion of a beneficial sale by the assignee under a previous deed. In a third case, of a very suspicious kind, where a sale had apparently been forced by the assignee under the previous deed, at a sacrifice, and the bill was at the suit of the petitioning creditor, before the appointment of an assignee in bankruptcy, as the previous assignee was of unquestioned solvency, and might be liable for the full value of what had been sacrificed, I made a qualified and guarded order for a receiver and injunction, in such a form as would not interfere with the recourse of of the future assignee.

I am ready to hear an argument of any counsel who may desire the subject reviewed; but for the present am unable to follow the New York decision.

The forms prescribed by the judges of the supreme court contain a provision, that "if all or any of the debtor's property has been conveyed by word, or deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same." This must be set forth as far as possible under one of the heads of Schedule B, annexed to the original petition. In the present case, the deed was too recently executed for the fulfillment of all those conditions in the original petition. But when the bankrupts came to pass their last examination, the deficiencies ought to have been supplied. This, if they believed the trustee under the previous assignment to have executed his duty faithfully, might have required only the exhibition of a copy of the inventory and account.

But the duty of the bankrupts, and of the assignee in bankruptcy, did not begin or stop here. It is altogether unaccountable that the assignee in bankruptcy has made no report as to how he has settled, or why he has not settled, accounts with the previous voluntary assignee. If the whole estate went into the hands of the assignee in bankruptcy, as may be inferred from his inventory, he ought to have so reported; and he should now so report.

In the early part of the present century, when all English bankruptcies were still, in form, compulsory, a frequent, if not the most frequent, act of bankruptcy in England, was the execution by the debtor of a deed of composition. If all the creditors came in under it he was released, and they took his whole estate. If they did not, one of them petitioned in the adversary form, and the debtor was adjudged a bankrupt for having executed the deed. But in the absence of actual fraud, no debtor was ever precluded from a discharge by having made such an assignment. This continued until the year 1825. It had become an ordinary substitute for the former usual act of bankruptcy by denial to a creditor. Of course, if the assignee under the composition deed had received any part of the estate, it was accounted for to the assignee in bankruptcy.

In the present case, I think it may be reasonable to suspend granting a discharge, until the assignee in bankruptcy shall have filed and settled his account. It was part of the bankrupt's duty to his creditors, to see that the assignee's account was exhibited in proper season; and, in this case, there appears to have been either a large amount of assets, or a great necessity for a full report and explanation.

But if there is any reason against such delay counsel will be heard.

The voluntary assignment contains a provision to except from its operation "the separate property" of the wife of one of the bankrupts. If there was any property as to which such a statement was at all necessary, there should be a statement and explanation. They should, therefore, be furnished.

Case No. 11,142.

PIERCE et al v. The ALBERTO.

[Hoff. Op. 441.]

District Court, D. California. Sept. 3, 1857.

ADMIRALTY — ADJUDICATION BY FOREIGN PRIZE COURT—HOW PROVEN—EFFECT OF CONDEMNATION UPON LIENS — CONVERSION INTO PUBLIC VESSEL.

[1. Our courts cannot question the condemnation by a foreign prize court sitting within the territory of its sovereign of a res sub potestate of said sovereign.]

[2. To bar a maritime lien, a foreign condemnation in prize may be proved without producing the decree.]

[3. A foreign sovereign's conversion of a piratical ship into a public vessel conclusively proves her condemnation as prize.]

[4. A foreign condemnation in prize destroys maritime liens.]

[This was a libel by Nelson Pierce and others against the bark Alberto for materials and supplies.]

Pratt & Bowlin, for libellants.

R. C. & D. Rogers, for claimants.

HOFFMAN, District Judge. The libel in this case is for materials and supplies furnished to the bark Alberto, at this port, in the year 1853. The suit is defended on the grounds: First, that the libellants have not produced sufficient and competent proof to show that the supplies sued for were actually furnished; and, secondly, that the mari-

time lien claimed by them cannot now be enforced against the present owner of the vessel.

It is alleged by the claimants that the Alberto was formerly the bark Caroline; that she conveyed from this port Walker and his companions, on their expedition against the Mexican territory; that she was by the Mexican authorities confiscated for engaging in a piratical attack upon their territory and inhabitants, and for a breach of their municipal revenue laws; that she was converted into and for a long time retained as a public vessel of the Mexican nation; that having been dismasted and otherwise injured by a hurricane, she was by the Mexican government sold at auction to the present owner, by whom she has at great expense been repaired. If these allegations be proved, the defence to this suit is complete.

The principal evidence on which the claimant relies, was obtained on letters rogatory issued out of this court, and duly executed by the Mexican authorities, to whom they were addressed. No judicial sentence of condemnation has been produced—either from the fact, that no sentence was pronounced by a regularly constituted court, or because the records of Mexican tribunals are not kept in a manner to be subsequently produced and authenticated. It is shown, however, by the parol evidence taken under the letters rogatory, that the Caroline arrived at La Paz, Lower California, in October or November, 1853, having left San Francisco under command of Capt. Snow, with Walker and his party on board, with the intention of invading Mexico; that she was abandoned by Capt. Snow, after he had landed his party at La Paz, seized Governor Espinosa and Col. Robollendo, and conveyed the former in the vessel to Todos Santos; and that she was taken by the mate to Guaymas, where she was seized by the Mexican government and confiscated. It is further proved that the vessel was, soon after her seizure, converted by the government into a vessel of war, under the name of the "General Santa Anna;" that she remained in that service until the end of 1854, when she was totally dismantled by a hurricane; that the hull, without masts, remained at San Blas until she was sold by the Mexican government to the present claimant for the sum of $800; and that she has since been refitted by him at his own expense. It is also proved that the seizure and confiscation of the bark and her conversion into a Mexican vessel were notorious, and that she was then owned by an individual of the family of John A. Robinson, U. S. consul at Guaymas; that he made no claim and resorted to no means to save her.

The truth of these facts has not been questioned on the part of the libellants and the identity of the Alberto with the Caroline is not only admitted but proved by them. The question, then, to be determined is, whether the production of the Mexican sentence of condemnation is indispensably requisite to change the status of the vessel, or to divest any previously existing liens upon her—and can the present libellants, after an interval of four years, enforce their claim against the vessel in the hands of an innocent purchaser?

It was observed by Sir Wm. Scott that a court of admiralty is "disposed to pay particular respect to derivative titles when fairly possessed, and it does this on the plain and general ground that there must be a sequel of transactions continued in a course of time which shall be held conclusive to cure antecedent defects, and to give security to the title of a bona fide purchaser." In the case in which these observations were made, a former British owner sued to recover a vessel which had been captured and sold by the Algerines. It was objected that the seizure was piratical. No decree of condemnation was produced, but it appeared that the Dey of Algiers had directly sanctioned the sale. Sir Wm. Scott says: "As to the mode of confiscation which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the established custom of that part of the world. That the act of capture and condemnation was not a mere private act of depredation is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel, at least he intervenes to guarantee the transfer of the ship in question to the Spanish purchaser. * * * Had there been any demand for justice in that country on the part of the owners, there might perhaps have been something more like a reasonable ground to induce this court to look into the transaction, but no such application appears to have been made. The Dey intervened in the transaction as legalizing the act." The court decreed the possession of the ship to be delivered to the purchaser. The Helena, 4 C. Rob. Adm. 4. The case at bar is much stronger, for the piratical attack was here committed by the vessel and her company, and is not imputed to the captors. The vessel was not merely sold with the sanction of the Mexican government, but it was formally adopted into its national marine. The owner was present, and made no reclamation or demand for justice, and the purchaser has bought, at a public sale by the government, a public vessel which had been dismantled by a tempest, and to which his expenditures have imparted its principal value.

It is objected on the part of the libellants that the sentence of condemnation should be produced, in order that it may be seen whether the court pronouncing it had jurisdiction. The force of this objection will be best appreciated by recurring to the nature and object of proceedings before prize courts. A seizure on the high seas by an unauthorized individual is a mere trespass, and produces no change of right; but a seizure by sovereign authority vests the

thing seized in the sovereign; for the fact of possession must have all the beneficial effects of the right of possession, as the justice or propriety of it cannot be inquired into by courts of other nations. But, as all civilized nations pretend to the character of justice and moderation, they have constituted courts with power to inquire into the correctness of captures made under color of their own authority, and to give redress to those who have unmeritedly been injured. These are denominated "prize courts," and the primary object of their institution is, to inquire whether a taking as prize is sanctioned by the authority of their sovereign, or is the unauthorized act of the individual. The decisions of such courts do not, therefore, derive their effect from their abstract justice. They were conclusive, because nowhere subject to revision, and because they establish that the seizure was the act of the sovereign authority, which has, by its prize courts, sanctioned and adopted it. The correctness of the decision, or the propriety of the seizure and condemnation, may become the subject of executive or diplomatic discussion; but the equality of nations forbids the idea that the conduct of one sovereign, or the correctness of the principles upon which he acts, should be submitted to the courts of another. The decisions, therefore, of such courts, are recognized as universally binding.

There are circumstances, however, material to the effect of the sentences of foreign prize courts, into which the other courts may inquire. These are (1) whether the court is held in the territory of the sovereign who constitutes it; and (2) whether the res is sub potestate of the sovereign whose courts condemned it. These circumstances have an immediate relation to the exercise of the court, and its power of acting on the subject; but within its legitimate scope of action, the correctness of its proceedings, or of the rules of decision by which it is governed, cannot be subjected to the review of other courts. Per Mr. Justice Johnson, in Rose v. Himely, 4 Cranch [8 U. S.] 280, from whose opinion the above remarks have been taken. It is apparent that, to give to the libellant the full benefit of every objection which he could urge to the sentence of a foreign prize court, its formal sentence need not necessarily be produced. For the fact whether the court was held in the territory of the sovereign who constituted it, or in that of his ally, and the fact whether the res was sub potestate of the sovereign whose courts condemned it, can be as well inquired into without the production of the formal sentence as with it; and to these inquiries the courts of other nations would seem to be limited. Now, it clearly appears in this case, not only that the vessel was seized under color of the authority of the Mexican sovereignty, but that act was sanctioned and adopted. For the vessel was converted, under the name of the "Gen. Santa Anna," into a Mexican public vessel, and so continued for a considerable time, and until sold. A sentence of condemnation, by a tribunal properly authorized by the Mexican laws or usages, may justly, and in favor of an innocent purchaser, ought to, be presumed. There is no pretence that the tribunal was not held within the territory of the sovereign who constituted it; and the res was at the time of the seizure and condemnation, and for long afterwards, sub potestate of the sovereign by whom it was condemned. If a sale by the authority of the Dey of Algiers, after capture by one of his cruisers, was held sufficient to divest the rights of former British owners, and to warrant the presumption of a sentence of condemnation, the facts of this case surely warrant a similar presumption, especially as no doubt can be entertained of the crime committed by the vessel, and the entire justice of her seizure and condemnation. The fact that the vessel was adopted as a national vessel proves as conclusively as the sale by the Dey of Algiers that the government sanctioned the seizure; and though the sentence of the court is, ordinarily, the only legal organ through which the sanction of the sovereign under color of whose authority the seizure is made can be ascertained, yet, when that sanction clearly and unequivocally appears, as in this case, such a sentence ought to be presumed.

I have thus far considered this case as if the libellant were the former owner of the vessel. He is, however, a material man claiming a lien for supplies. The supplies were furnished in 1853. The libel is filed in 1857. It may well be doubted whether, under the circumstances of this case, the lien has not been lost by prescription. Courts of admiralty must be governed by equitable principles. They are the courts of chancery for the sea. [Carrington v. Merchants' Ins. Co.] 8 Pet. [33 U. S.] 525; Packard v. The Louisa [Case No. 10,652]; Joy v. Allen [Id. 7,552]. The lien now set up is raised by construction of law as collateral security to the contract. It is not regulated by express contract or positive statute. It should therefore be limited to equitable period, considering its nature, the employment of the vessel, and the changes of interest happening in her. It is not alleged that the libellants were not aware of the fate of the vessel. The expedition of Walker, and the circumstances attending it, were of public notoriety. The seizure of the vessel by the Mexican authorities was either known to the libellants, or it could readily have become so. It was naturally to be expected; no effort was made by them to assert their lien before the Mexican tribunals; they allow the vessel to remain more than a year in the public service of Mexico, and finally to be sold to an innocent purchaser, by

whom the greater part of her present value has been imparted to her, and they now libel her in the hands of that purchaser. I am of opinion that the equities of the latter are superior and should prevail. If the fact that she has not been in this port since the supplies were furnished be urged as enough to give a right to maintain this suit, then a similar right could be urged at any distance of time, and no matter how numerous the transfers of property may have been.

As to the time within which maritime liens will be barred, all depends on the circumstances and the equities of the case. Blaine v. The Ch. Carter, 4 Cranch [8 U. S.] 328; 3 Hagg. Adm. 238; The Sarah Ann [Case No. 12,342]; Trump v. The Thomas [Id. 14,206]; The Mary [Id. 9,186]. As a general rule, the lien for mariner's wages ceases if not enforced soon after the end of the voyage; yet circumstances may enlarge the time. Sheppard v. Taylor, 5 Pet. [30 U. S.] 675. When the vessel continues in existence and employed, or is sold without notice, no case has been found, says Mr. J. Woodbury, where the lien for seamen's wages has been extended beyond the end of the next voyage. See Packard v. The Louisa [supra].

It is not shown that, since the transfer to the claimant, the vessel has made a voyage; but it may be presumed that she has done so, as she was purchased by him about three years ago. So far, then, as there are general rules upon this subject, the present case seems to come fully within them; and the particular circumstance of this case, as well as the general disposition of admiralty courts "to pay particular respect to derivative titles," lead to the same conclusion.

I have not thought it necessary to consider other points made by the advocate for the claimants; the reasons already given being sufficient, in my opinion, to determine the judgment of the court. The libel must be dismissed.

PIERCE (BROOKLYN WHITE LEAD CO. v.). See Case No. 1,940.

Case No. 11,143.

PIERCE et al. v. BROWN et al.

[8 Biss. 534.] [1]

Circuit Court, N. D. Illinois. May, 1879.

POWER OF ATTORNEY TO COMPROMISE — SATISFACTION OF JUDGMENT—WHEN SET ASIDE.

An attorney was employed to bring suit and collect the amount due. After obtaining judgment against the defendant, the attorney compromised with the defendant and accepted less than the full amount—and entered the judgment fully satisfied. The attorney failed to turn over the amount received: *Held*, that plaintiffs were entitled to have the satisfaction set aside, on condition that they would indorse on the judgment the amount received by the attorney.

[This was an action by Albert A. Pierce and others against James G. Brown and others.] Motion to set aside satisfaction of judgment.

Dent & Black, in support of motion.
Tuley, Stiles & Lewis, contra.

BLODGETT, District Judge. At the October term, 1876, of this court, on the 15th of November, the plaintiffs recovered a judgment against the defendants for the sum of $4,730 and costs. One D. E. K. Stewart was the attorney for the plaintiffs, and shortly after the recovery of the judgment negotiations were opened between the defendant Hawkins, and Stewart for a settlement of the matter, which resulted in a compromise, by which Hawkins paid Stewart, as the plaintiffs' attorney, the sum of $4,150, and Stewart entered a satisfaction of the judgment, the amount paid being $640 less than the amount for which the judgment was recovered. The plaintiffs now move to set aside this satisfaction on the ground that Stewart had no authority to make the compromise. No part of the money received by Stewart was ever paid to the plaintiffs, it being admitted, as part of the facts of the case, that Stewart absconded, and did not account to his clients for the money which he had received under this compromise. There is no dispute really about the facts in the case. Stewart was simply employed to bring this suit to collect the amount due. He was not expressly, nor impliedly, so far as the proof shows, authorized to accept less than the amount due in full satisfaction.

It is conceded by the defendants' attorney that the entry of full satisfaction is, under the facts, void and inoperative, at least voidable on the motion of the plaintiffs; but it is also insisted that the payment made to Stewart should be applied, so far as it would go, to the satisfaction, and that the court should now direct an entry to be made setting aside the satisfaction as to the unpaid $640.

The plaintiffs in support of the motion cited a large number of cases which go clearly to maintain the proposition that an attorney authorized to collect simply, has no authority to compromise, and there is no dispute about that question, in the state of Illinois especially, as there is a large number of cases sustaining the plaintiffs' proposition; but the question in this case is, whether the plaintiffs are entitled to have the satisfaction set aside entirely, and be authorized to collect the full amount of the judgment. The contest in this motion has been in reference to the extent to which this payment should be treated as a satisfaction.

There is no evidence in the case that there was any fraudulent collusion between Hawkins, the defendant who made the settlement, and Stewart; but on the contrary whatever

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

evidence there is bearing on that point shows that Hawkins was acting in good faith; that Stewart was threatening to issue an execution, and interfere with real estate Hawkins had in the city of Chicago; and Hawkins stood in reference to this whole claim merely in the light of surety, and under the circumstances entered into this negotiation for a settlement which resulted in a deduction of $640 from a claim of over $4,700, and on Stewart proposing to make that deduction which he claimed he had a right to make, and representing to Hawkins he was authorized by his clients to make a settlement, Hawkins paid him the money in satisfaction of the judgment.

It is admitted by the attorney for the plaintiffs that if the money had been paid to Stewart on account, it would be a good payment, no matter if Stewart did fail to respond to his clients. It is conceded that Stewart, under his powers to collect, could have received less than the full amount, and applied any payment as far as it went. He had power to receive money, and apply it on the judgment. The receipt of the money, therefore, was within the authority of the attorney, but he had no authority to release, and the attempt on his part to make the release was an act in excess of his power. The complaint of the plaintiffs, therefore, against Hawkins, that he paid Stewart the money, but that Stewart failed to pay it over to the plaintiffs, might have followed, as far as that is concerned, as readily if he had paid him the full amount, as if he had only paid part of it. But it is conceded that if Hawkins had paid Stewart the full amount, the satisfaction would have been binding. I think, then, under all the circumstances of the case, without quoting the authorities which have been cited on the part of the defendant, that the plaintiffs are entitled to have this satisfaction set aside; but at the same time only on condition that they shall indorse the amount which was received by Stewart on the judgment, so that the judgment will remain in force as to the unpaid portion.

I have been somewhat embarrassed in regard to the case because the court is asked to pass upon the rights of parties upon affidavits, and without that investigation of the facts in the case which can be made on a trial, and where, perhaps, it may be a question whether the plaintiffs, if they wished to do so, could assign error to the ruling of the court. There are some authorities, however, one in Massachusetts, which I have examined, where error was assigned upon the refusal of the court to set aside a satisfaction; and it may be that the plaintiffs can get this question before the supreme court on the record as it now stands.

PIERCE (GILLET v.). See Case No. 5,437.

PIERCE (INDSETH v.). See Case No. 7,026.

PIERCE (JENNINGS v.). See Case No. 7,283.

Case No. 11,144.

PIERCE v. LANG.

[1 Lowell, 65.] [1]

District Court, D. Massachusetts. April, 1866.

COLLISION—VESSEL AT ANCHOR—PRESUMPTION AS TO FAULT—LOCAL PORT REGULATIONS—MOVING VESSELS AT DOCK—NOTICE TO WHARFINGER.

1. When a moving vessel comes in collision, in the daytime and calm weather, with one that is moored in a fit place and manner, the presumption is that the former is in fault.

[Cited in The Echo, 19 Fed. 454.]

2. There is no rule of law, and appears to be no regulation of the harbor of Boston, which requires a vessel, lying wholly inside a dock, to have her yards braced up or cockbilled.

3. It appears to be usual for the master or person in charge of a vessel, which is to be moved near other vessels lying in the same dock, to give notice to the wharfinger who will see to it that all necessary precautions are taken by such other vessels.

4. Where a steamer was warped out of a dock in Boston, and came in collision with and damaged another vessel moored in the dock, and the steamer's men gave no notice to the shipkeeper of the injured vessel, nor to the wharfinger, before moving her: *Held*, the steamer was alone in fault, although the other vessel had her yards squared, and the collision was occasioned by this state of the yards.

Libel by [J. G. Pierce and others] the owners of the brig Transit against [J. H. B. Lang and others], the owners of the steamer Oriental, for damage. The brig was lying at the head of the dock at Bartlett's wharf, in Boston, and the steamer in the corresponding position on the opposite side of the dock. The persons in charge of the steamer undertook to warp her down towards the harbor, and, while carrying out this operation, her foreyard came in contact with and carried away the brig's maintopsail yard, and scraped her hull. The defence was, that the brig should have had her yards braced up fore and aft, or cockbilled. The evidence tended to show, that an ordinance of the city of Boston requires vessels, lying at the end of a wharf, which abuts on the channel, to keep their yards cockbilled and their jib-booms rigged in; but that, when they were lying wholly within a dock, they were, by usage, subject to the orders of the wharfinger, and that it was usual, at this wharf and many others, for vessels about to be moved to give notice to the wharfinger. No such notice was proved in this case, nor was it shown that any hail or other communication was had with the libellant's shipkeeper.

J. C. Dodge, for libellants.

J. F. Barrett, for respondents.

LOWELL, District Judge. Upon the facts proved in this case, I must hold the steamer solely responsible for this collision. First, because the fact of a moving vessel, coming

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

in contact in the daytime and calm weather with one lying at her dock, affords a presumption of negligence on the part of the former. Secondly, because it appears affirmatively, that the agents of the respondents neglected to give notice to the wharfinger and to the libellants' shipkeeper, or either of them, and gave no warning of any kind. Thirdly, the respondents are not shown to have neglected any usual and proper precaution in the mode of mooring and keeping their vessel. The ordinance does not seem to apply to ships lying wholly within a dock, and no usage is proved which regulates the subject.

Damage pronounced for.

PIERCE (MANDELL v.). See Case No. 9,008.

PIERCE (NATIONAL STATE BANK v.). See Case No. 10,052.

Case No. 11,145.

PIERCE v. PATTON.

[Gilp. 435.] [1]

District Court, E. D. Pennsylvania. May Term, 1833.

SEAMEN — DETENTION IN JAIL — DEDUCTION FROM WAGES—EXPENSE OF MEDICAL ATTENDANCE ON SHORE—DISEASE CONTRACTED BY VICE.

1. Where a seaman is detained in gaol under the provisions of the act of 20th July, 1790, the cost of his commitment and support there, and also the charge for a person employed in his place, are to be deducted from his wages.

2. Where a seaman, in a foreign port, is taken on shore at his own solicitation, from a vessel properly provided with a chest of medicines, and there receives medical attendance and advice, the expenses thereof are to be deducted from his wages.

[Cited in Richardson v. The Juillette, Case No. 11,784.]

[Cited in Holt v. Cummings, 102 Pa. St. 215.]

3. Where a seaman contracts disease by his own vices or faults, and in defiance of the counsel and command of his superior officers, the vessel is not chargeable for the expenses of his cure.

[Cited in The Ben Flint, Case No. 1,299.]

This was a claim by [William Pierce] the libellant for wages, amounting to seventy-nine dollars and seventy-eight cents, earned, as he alleged, during a voyage in the brig Enterprise [James Patton, owner], from Philadelphia to St. Jago and back. It appeared that on the outward voyage the vessel touched at Wilmington, in North Carolina, where the libellant was detained a few days in gaol, under the provisions of the act of 20th July, 1790. It also appeared, that by the indulgence of his own vices and gross negligence, in opposition to repeated warnings, he became so ill, that while at St. Jago, although there were excellent medicines on board the brig, he desired he might be taken on shore and receive the advice and attendance of a physician in the place. For the expenses incurred in consequence of these circumstances, the respondent claimed a deduction from the wages.

Mr. Grinnell, for respondent.

It is contended: 1. That the wages were all forfeited by desertion. 2. That there were a payment and set off, arising from moneys laid out for the libellant exceeding the amount of wages. They occurred in consequence of his desertion and misconduct. The account leaves a balance of two dollars and ninety-two cents due to the respondent, even admitting that there was no forfeiture by the desertion. The physician's bill, charged by him to the libellant, is thirty dollars, and the expenses of the boarding and nursing on shore were twenty-two dollars and twenty-five cents, making together fifty-two dollars and twenty-five cents, all paid by the captain of the brig. Other payments and charges are claimed amounting in the whole to seventy-eight dollars and seventy cents.

Mr. Randall, for libellant.

There is no evidence of some of the items charged to be paid to libellant at St. Jago. We do not dispute the gaol fees paid at Wilmington, North Carolina; nor the charge for hiring a man in his place. As to the charges for medical attendance and nursing, the libellant denies his liability for them. All the decisions say that the ship must find a nurse for a sick seaman. The charge for nursing and boarding fall on the ship. 1 Pet. Adm. Dec. lxxiv.; Laws of Wisbuy, art. 19; Laws of the Hanse Town, art. 45.

Mr. Grinnell, for respondent, in reply.

If there are good and sufficient accommodations on board the vessel for a sick seaman, that is the place where he should be nursed and attended. Even in the case of a contagious disease, if he is put on shore at his own request, and not by the captain for the convenience or safety of the ship, the seaman is chargeable with the expenses incurred by his removal, for boarding, medical attendance, and nursing. So if the seaman engaged to pay the expenses; or if it can be gathered that such was the understanding of the parties, when he was put on shore, they shall be charged to him. There is, in this case, satisfactory evidence that such was the understanding. But the sickness of the libellant was brought upon him by his own default and obstinacy. The men who slept on deck, as the libellant, contrary to orders, would do, were sick; those who slept below were not so. This is fully proved.

HOPKINSON, District Judge. The payment of the wages, in this case, is resisted on two grounds. 1. An alleged desertion of the libellant, by leaving the ship before she was discharged, and her cargo delivered.

[1] [Reported by Henry D. Gilpin, Esq.]

2. A set off or credit is claimed by the respondent, for moneys paid for the libellant, for medical attendance upon and nursing him during a sickness at St. Jago, exceeding, with some other charges, the amount of his wages.

The medical and nursing bill amounts to	$52 25
Gaol fees and labour hired in the place of the libellant, at Wilmington, not disputed	11 25
Advance of wages and hospital fees	15 20
	$78 70

There is a charge of two dollars and sixty-nine cents, of which no exact proof is given, but the mate of the brig, the only witness examined, says that the captain advanced some money to Pierce at St. Jago, but he cannot say to what amount. The wages, from 15th May to 5th November, at fourteen dollars a month, will amount to seventy-nine dollars and seventy-eight cents. The charges made by respondent are seventy-eight dollars and seventy cents, exclusive of the two dollars and sixty-nine cents. This would leave a balance of but one dollar and eight cents due to libellant; but as the mate swears to an advance of some money at St. Jago, and the captain has charged two dollars and sixty-nine cents, we may reasonably consider this small balance to be absorbed in that payment; provided the other charges against the libellant are admissible.

Of the first ground of defence, the alleged desertion of the libellant before the brig was discharged, I shall say nothing; it is not necessary. The decision of the case will turn on the legality of the charge of fifty-two dollars and twenty-five cents for medicine, medical attendance, and boarding the libellant while sick on shore at St. Jago. It is clearly proved that the brig had a medicine chest fully supplied with the requisite and usual medicines. It is also fully proved that the libellant was taken on shore by his own desire and request; and that he seemed to consider that it was to be at his own charge. The bill was charged to him, and not to the captain or ship, and when shown to him he made no objection to it or to his liability, but that it was too high. Being told that these charges absorbed all his wages, he made no demand of them, but acquiesced from the 5th of November, when the voyage ended, until the 20th of February, when he commenced this suit. These are strong circumstances to show that he knew or believed that the extraordinary expenses of his going on shore to be nursed and attended by a physician, were to be charged to himself. I shall not, however, rest my decision upon this point. The circumstances in which a ship is liable for curing a sick seaman, have frequently come under the consideration of courts of admiralty. Although some judges have inclined to be a little more liberal to mariners than others, the main principles are well settled, and generally adopted. Certainly on one point there is no doubt or difference, and that is, that when a seaman has contracted the disease by his own vices or fault, the ship is not chargeable with his cure. This then is the question in this case; a question of fact. We have no evidence but that of Mr. Thomas, the mate of the brig, who has not been impeached, and seems to be worthy of full credit. From his testimony it is undeniable that the libellant contracted the sickness in question by the indulgence of his vices; by gross negligence in opposition to repeated warnings; and by a determined obstinacy which resisted at once counsel and command.

Decree: That the libel be dismissed.

Case No. 11,146.

PIERCE v. PENNSYLVANIA CO.

[3 Cin. Law Bul. 925.]

Circuit Court, N. D. Ohio. Nov. 9, 1878.

CARRIERS OF PASSENGERS — THROUGH TICKET — RIGHT TO STOP OVER.

Railroad ticket at reduced rate, entitling holder to one continuous trip betwen two points, does not entitle holder to stop over at an intermediate station.

[This was an action by George M. Pierce against the Pennsylvania Railroad Company for damages for being ejected from defendant's train. Heard on demurrer to answer.]

WELKER, District Judge. The plaintiff sues the defendant, who manages and runs the Ashtabula, Youngstown and Pittsburg Railroad, for ejecting him from one of its passenger trains in January, 1878. The pleadings distinctly raise the issue as to a passenger's right to stop off on a ticket sold at reduced rates in consideration of its being used for "a continuous trip each way only." The defendant alleges in its answer that it sold a round-trip ticket from Orwell to Eagleville and return, good for "a continuous trip each way only;" that a passenger rode on his train from Orwell to Rock Creek, and tendered for the ride a round-trip ticket, as above stated; that the conductor cancelled said ticket to Eagleville; that at Rock Creek the passenger, who had tendered the round-trip ticket, left the train; that plaintiff got on the train at Rock Creek, bound for Eagleville, and tendered for his fare the cancelled round-trip ticket for which defendant's road had carried the original purchaser; that defendant's conductor refused to accept the ticket for fare from the plaintiff, and explained to him that the conditions printed on the back of the ticket were that it was good for a continuous trip only. The plaintiff refused to pay his fare, and was ejected from defendant's cars.

The plaintiff demurs to this answer.

Held: That the facts as stated constitute a good defense to the plaintiff's petition, and that the defendant was not bound to

carry the plaintiff for the cancelled ticket, which was good for a continuous trip only, as plainly set forth in the printed conditions, which were in the nature of a contract. Such tickets were sold by railroads at reduced rates, on condition that they were to be used for a continuous trip only.

Demurrer overruled.

Case No. 11,147.

PIERCE et al. v. STRICKLAND.

[2 Story, 292.] [1]

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

SHERIFF'S RETURN—MISTAKE—AMENDMENT—VALUATION OF GOODS—BURDEN OF PROOF—SUIT FOR OFFICIAL MISFEASANCE.

1. Where an under-sheriff attached certain goods without a schedule, and made return thereof as of the value of $7,000, and obtained a receipt therefor with the consent of the plaintiff's attorney, and afterwards, by leave of the state court, amended his return by reducing the sum to $2,200, the actual value of the goods; it was *held*, that it was within the discretion of the court to allow such an amendment, it being a case of pure mistake; and that the decision by the state court was not revisable by the circuit court.

[Cited in Baker v. Davis, 22 N. H. 35; Bryant v. Osgood, 52 N. H. 187.]

2. *Held*, also, that in cases of special attachment, the plaintiff's attorney has an implied authority to do all acts, which the interests of his clients may require, and that, in the present case, his assent to the appointment of a receiptor was conclusive.

[Cited in Clark v. Randall, 9 Wis. 138; Moulton v. Bowker, 115 Mass. 40.]

3. Where an officer, with the creditor's consent, makes a valuation of goods, without taking an inventory, such valuation is to be considered, prima facie, as fair and just, and the burthen of proof is on the officer to establish the contrary; but it does not operate as an estoppel.

4. Where an officer is sued for any official misfeasance, the plaintiff can recover only his actual loss, arising therefrom.

5. The consent of the creditor to the bailment to a receiptor of goods attached, only exempts the attaching officer for losses not occasioned by his neglect or misfeasance.

6. In this case, the original declaration was upon a refusal to deliver up, upon an execution, goods valued at $7,000, and upon leave to amend, granted by the court, a new count was introduced, claiming them at $2,200; and it was *held*, that although it was within the discretion of the court to allow the new count, yet since the line of defence was thereby materially changed, it ought only be granted upon payment of the defendant's costs up to the time when the offer to file such count was made.

Case by the plaintiffs [Peter H. Pierce and others] against the defendant [Hastings Strickland], a deputy sheriff of the county of Penobscot, Maine, for an official neglect and misfeasance in not satisfying an execution in favor of the plaintiffs against one Dwight Allen, out of certain goods, which had been attached upon the mesne process in the same suit. The original declaration contained various counts. The first was for not safely keeping the goods. The second for falsely and fraudulently altering the return upon the original writ as to the value of the goods. The third was for falsely and fraudulently altering a receipt given for the goods. The case came before the court upon the following facts: The plaintiffs, by their attorney, Enoch Brown, instituted a suit against Dwight Allen; the writ was delivered to the defendant, a deputy sheriff, for service, and he made return thereon of an attachment of "sundry goods, wares, and merchandize, as the property of the said Allen, being all the goods in the store, of the value of $7,000." No inventory was taken, but a valued receipt was given, corresponding to the return, which was approved by the plaintiff's attorney. The defendant, while the action was pending, and after he had ceased to be an officer, altered the return and the receipt, by changing the estimated value therein from $7,000 to $2,200, the latter sum being the actual value of the goods. This amendment was made by him under leave to amend, granted to him by the state court, the plaintiff's attorney consenting to such an alteration, as should reduce the valuation to the actual worth of the goods attached. Judgment was recovered in the suit, and execution issued for $7,000, but the defendant refused to deliver goods of such a value.

Rogers & Greenleaf, for plaintiffs.

The argument for the plaintiffs was, in substance, as follows:

1. The defendant having affixed, in his original return, and in his original receipt, a certain valuation of the personal property attached by him, is concluded thereby. If he would have avoided such a liability, he should have taken an inventory of the goods, and then parol evidence would have been admissible to show their value. But not having done so, there is nothing whereby to correct the return; and as no other rule or measure of ascertaining the damages was agreed upon, than the return, the value stated therein is to be taken as the liquidated amount of damages, which the debtor, the sheriff, the receiptor, and the plaintiff, are estopped from disputing. Where a sum is named, and the damages are incapable of ascertainment by any satisfactory or known rule, it is considered as liquidated damages, and concludes all parties. Fletcher v. Dyche, 2 Term R. 32; Lowe v. Peers, 4 Burrows, 2225; Pierce v. Fuller, 8 Mass. 223; Nobles v. Bates, 7 Cow. 307; Smith v. Smith, 4 Wend. 468; Jones v. Green, 3 Younge & J. 298; Woodward v. Gyles, 2 Vern. 119; Brooks v. Hubbard, 3 Conn. 58. The reason, why an estimated value is thus conclusively taken, is stated in Story, Bailm. 254. That the receiptor is conclusively bound by the value expressed in the receipt, if no inventory is taken, was settled in Jewett v. Torrey, 11 Mass. 219. See, also, Drown v. Smith, 3 N.

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

H. 299. So, also, where a sheriff returns, that his bailiff had seized goods on a fieri facias, to the value of £160, which were rescued; it was held, on scire facias, against him, that he was liable for the amount returned. Mildmay v. Smith, 2 Saund. 343; Clerk v. Withers, 2 Ld. Raym. 1072, 1 Salk. 322; 6 Mod. 290; Holt, 303, 646. See, also, as to the conclusiveness of the return, Drown v. Smith, 3 N. H. 299; Bridge v. Wyman, 14 Mass. 195; Wakefield v. Stedman, 12 Pick. 562. The receipt is conclusive evidence of the attachment, and of property in the debtor. Lyman v. Lyman, 11 Mass. 317; Spencer v. Williams, 2 Vt. 212; Bursley v. Hamilton, 15 Pick. 40. And the creditor has also an interest therein. See Clark v. Clough, 3 Greenl. 357; Cooper v. Mowry, 16 Mass. 8. Here, the plaintiffs waived their right to have an inventory taken in consideration of the receipt, as originally shown to their attorney, and of the officer's return of the gross amount. They reposed upon this security, and had no means, subsequently, of ascertaining the nature or value of the goods; and, therefore, the sheriff cannot deny, that he attached goods to the value of $7,000, and the plaintiffs have a vested right against him for that amount, and also in the receipt, as collateral security therefor:—

2d. Have these rights ever been destroyed? The sheriff has, by leave granted by order of court, amended his return by substituting 2,000 for 7,000; but what is the effect of such an amendment upon the right of parties? The discretionary power of the court to allow amendments, is limited in its operation to remedies and forms of proceeding. The leave to amend an officer's return is never granted, unless there is something to amend by. Haven v. Snow, 14 Pick. 28. When leave is given to amend, its effect is only to protect the officer from punishment criminally, for misdemeanor or for forgery, to which he would be liable, if an alteration were made without authority. But the effect of the amendment, when made, is an open question. Emerson v. Upton, 9 Pick. 167, 170. And it cannot be permitted to disturb or devest rights already vested; since this would be to give greater effect to the order of a judge at nisi prius, without a hearing, than to a solemn judgment in bank; inasmuch as an order of leave to amend is not open to revision, nor revisable on error. However the amendment be made, it is made at the peril of the officer. Thatcher v. Miller, 11 Mass. 413; Welles v. Battelle, 11 Mass. 481. The general course of the courts is, first, to ascertain the nature of a proposed amendment, and if it will disturb vested rights to refuse permission to amend. Williams v. Brackett, 8 Mass. 240; Freeman v. Paul, 3 Greenl. 260; Means v. Osgood, 7 Greenl. 146. But whether this prudent forecast be exercised or not, the principle is the same. Vested rights cannot be taken away nor impaired.

3d. The plaintiffs have done nothing to impair the rights vested in them. Neither the sheriff, nor the court, as we have seen, could impair or modify such rights; nor had the attorney, Mr. Brown, any right to consent to any modification thereof. An attorney, it is true, has power to control the proceedings, and to do all acts necessary and conducive to the collection of the debt. But he cannot defeat it; nor compound it (Lewis v. Gamage, 1 Pick. 347); nor assume it, if the judgment debtor is his own creditor to the same, or a greater amount; nor can he receive pay by securities against other persons to be collected and accounted for (Langdon v. Potter, 13 Mass. 319). If, therefore, the return had been altered with Mr. Brown's consent, the alteration would have had no legal effect. But he did not give such consent. His approval of the sheriff's doings goes only to indemnify the sheriff against any action for making the attachment. The paper cannot have the effect of releasing the officer from all liability with regard to the care of the goods, and the solvency of the receiptors, for this would be to make the plaintiffs themselves responsible as bailees, which he could not do; Langdon v. Potter, 13 Mass. 319. Nor is there any usage, anterior to this receipt, which would give validity to the acts of the plaintiff's attorney in the approval of the receipt; and if there were, its being in contravention of law, it could not legalize the act. So, also, the plaintiffs have not approved of the alteration, nor in any wise confirmed it.

4th. If the officer, by virtue of his original return, rendered himself liable to the plaintiffs for the amount of the debt, and if the plaintiff be presumed to know the law, as we say he must be, then the alteration is a fraud upon the plaintiffs, within the allegations of the second count, because it diminishes his liability. At all events, the defendant is liable on the last count. This count does not introduce a new cause of action, because the preceding counts show the nature of the claim, and the latter simply confirms the declaration and the disclosures in the other counts, and could not operate as a surprise upon the defendants. It is only the same cause of action, differently set forth.

Mr. Appleton (with whom were Fessenden & Deblois), for defendant.

The argument for defendants was as follows:

1. The first count is for not safely keeping certain goods, wares, and merchandize, attached in the writ. Pierce v. Allen [unreported]. The defence is, that the attachment was made by direction of the plaintiff's attorney, and that, by the same authority, a receipt was taken, and the officer thereby released from his responsibility for the safe keeping of the goods attached. It is well established, that the officer is discharged when he acts by the authority of the plaintiff. Donham v. Wild, 19 Pick. 520. He is

equally so, when he acts in pursuance of directions given by the attorney to the plaintiff. The sheriff is not bound to make a special service by attachment, without directions to that effect. Betts v. Norris, 3 Shep. [15 Me.] 469. If the attorney may direct an attachment, and if the sheriff be not bound to make one without such directions, it would seem to follow, that if he direct one to be made, he might likewise direct as to the mode and manner of such attachment, and as to the custody of the goods so attached. The powers of an attorney are much more extensive in this country than in England. He may refer an action. Buckland v. Conway, 16 Mass. 396. He may bind his client by entering into a recognizance. 1 Pick. 462. He may admit facts or confess judgment. 5 N. H. 393; 2 N. H. 520. He may release the right of review. 5 N. H. 393. His agreement that the plaintiff shall release bail, operates as a discharge. 1 Murph. 146. He may be a party to an assignment. Gordon v. Coolidge [Case No. 5,606]. He may consent to be defaulted or may discontinue an action. 2 Ld. Raym. 1142. The court will enforce his agreements against his principal. Union Bank v. Geary, 5 Pet. [30 U. S.] 99. Even his compromises will be enforced, though strictly he may have no authority to make any. Holker v. Parker, 7 Cranch [11 U. S.] 436. His directions as to the mode of enforcing an execution will be binding on the sheriff. 7 Cow. 739. His instructions as to time and method of selling on an execution are a sufficient justification to the sheriff. Lynch v. Com., 16 Serg. & R. 368; Scott v. Seiler, 5 Watts, 235. If then by a discontinuance or by a reference of all demands he may entirely vacate the attachment, why may he not modify it? The greater includes the less. If the attorney may not give directions as to the mode in which property attached may be kept, it would seem that he could not direct the surrender of property attached, even though satisfied that it did not belong to the judgment debtor. Indeed, it is equally the interest of all parties that the attorney should have this authority.

2. In the second count, the plaintiff claims on the ground of a false and fraudulent alteration of the return, in relation to the value of the property attached. Claiming the amendment (or alteration) of the return to have been made falsely and fraudulently, the plaintiff would seem to concede the right to amend. The plaintiffs by the record of the proceedings in the suit, Pierce v. Allen, to which they were parties, show, that whatever was done was done by leave of court. They are estopped to contest whatever is therein alleged to have been done under the sanction of the court, whose records they produce. But the court had full authority to authorize the amendment, it being to correct a mistake. The court even after the lapse of twenty years, will allow an officer to amend his return for the purpose of correcting an error. Gilman v. Stetson, 4 Shep. [16 Me.] 125; Eveleth v. Little, Id. 374; Thatcher v. Miller, 11 Mass. 413; Buck v. Hardy, 6 Greenl. 162. The town clerk may amend a record, though others may have contracted upon the faith of it. Chamberlain v. Inhabitants of Dover, 1 Shep. [13 Me.] 466. The granting or refusing leave to amend was purely a matter of discretion in the court, and their determination is conclusive on all parties. Foster v. Haines, 1 Shep. [13 Me.] 307; Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253; Wyman v. Dorr, 3 Greenl. 183; Clapp v. Balch, Id. 216. Leave to amend was granted by a court having competent jurisdiction. So long as a judgment remains in full force, it is in itself evidence of the right of a party to the thing adjudged. Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 449. Until reversed, the judgments of a court, whether correct or not, are binding on every other court. Elliot v. Piersol, 1 Pet. [26 U. S.] 340; Haskell v. Sumner, 1 Pick. 460.

The plaintiffs claim for a false and fraudulent alteration of a return made by the officer. It was done in pursuance of leave granted by the court. The allegation is, that the officer altered the estimated value of the property attached from the true to a diminished and false value. The alteration does not effect a change in the property attached; that remains identically the same after, as before the amendment. The only alteration is in the estimated value, and for the purpose of correcting a mistake. This may be considered as substantially an action against the defendant for a false return. The burthen, then, is on the plaintiffs to show, that the return is false. The truth of the return is a legal presumption. Clarke v. Lyman, 10 Pick. 47; Boynton v. Willard, Id. 169; Bruce v. Holden, 21 Pick. 189. The amended return, as it stands on the place of the original return, is equally to be presumed true. Chamberlain v. Inhabitants of Dover, 1 Shep. [13 Me.] 472. The evidence offered does not control this presumption of law. The plaintiff has, therefore, made out no claim for damage. Besides, the amendment does not vary the liability of the officer. The extent of the sheriff's liability is the damage actually sustained. Had the officer made no attachment, or falsely returned that he could find no goods, the actual loss arising from such false return would be the measure of damage. Weld v. Bartlett, 10 Mass. 475; Eaton v. Ogier, 2 Greenl. 49; Brooks v. Hoyt, 6 Pick. 469; Woods v. Varnum, 21 Pick. 169; Norton v. Valentine, 3 Shep. [15 Me.] 37; Clark v. Smith, 10 Conn. 1; Weld v. Green, 1 Fairf. [10 Me.] 20. Had there been no amendment, the officer might have shown that the property attached was not the judgment debtor's. Bursley v. Hamilton, 15 Pick. 40; Townsend v. Newell, 14 Pick. 332; 12 Pick. 557. The estimate of value can

no more operate as an estoppel than the assertion of ownership in the receipt. The plaintiff then has sustained no damage by the alteration, as the same facts might have been shown in reduction of damage.

3. The third count alleges that the plaintiff has sustained damage from the alteration of the receipt taken by the officer. But this affords no legal ground of complaint. The receiptor's liability is coextensive with that of the officer. The amendment of the return having been legally made, the alteration of the receipt follows as a necessary consequence. Norris v. Bridgham, 2 Shep. [14 Me.] 431.

4. The amendment, by which the plaintiffs claim to recover for the goods attached according to the amended return should not be allowed. The original writ was for a different cause of action; as different as a claim for seven thousand dollars is different from one for twenty-two hundred dollars. This is substituting a new cause of action, which, under the circumstances of the case, the court will not allow. Eaton v. Ogier, 2 Greenl. 46; Tryon v. Miller, 1 Wheat. [14 U. S.] 11.

STORY, Circuit Justice. In the present case, the property in controversy was attached upon the original writ, and consisted of all the goods in the store of the judgment debtor, Dwight Allen; and at the time when the attachment was made they were estimated in the gross to be of the value of $7,000, and were receipted for to the officer, with the approval of the plaintiff's attorney, by Messrs Appleton and Hill accordingly; and the officer made due return thereof, as of the value of $7,000 upon the writ. Afterwards, upon a discovery, that the value of the goods had been greatly mistaken, and that they did not, in fact, exceed in value the sum of $2,200, the officer made an application to the state court, where the suit was brought, to amend his return, which was granted by the court; and the officer accordingly amended his return, so as to state the value at $2,200, which it is not now denied was the fair value. When the amendment of the return was made, the officer had ceased to be in office; but he was in office when the liberty to amend the return was granted. It is under these circumstances, that the present suit was brought. All the counts in the original declaration proceed upon the ground, that the officer was bound by his return to have the goods forthcoming to the value of the $7,000, stated in the original return. A new count has since been offered to be introduced, under the leave granted by this court to amend the declaration, in which count the value of the goods is stated to be $2,200, and the gravamen is the refusal of the officer to deliver up the same to the new officer, to whom was entrusted the execution, in order to satisfy the same. And one point is, whether this count does not contain substantially a new cause of action; and, if so, then that it is not admissible under the leave to amend. I think, that the amendment is within the range of that class of cases in which this court has been accustomed to exercise in its discretion the power to amend; for it amounts in legal effect merely to cutting down the claim of the plaintiffs from $7,000 to $2,200. Still, however, it does so materially vary the line of defence, that it must operate as a surprise upon the defendant. I am satisfied that it ought not to be granted, except upon the payment of the costs of the defendant up to the time when the amended count was offered to be filed. So that, if the verdict and judgment of the court shall solely turn upon the new count, it seems to me clear, that the defendant ought to be placed in the same situation, as if he had been apprized of the restricted claim at the commencement of the suit, and had been at liberty, upon paying the $2,200, to escape from all subsequent costs. This is a matter, however, of discretion in the court, as to the terms of granting the amendment.

The real questions however, upon the merits of the case are: (1) Whether the original return of the officer was absolutely conclusive and binding upon him and upon the receiptors as to the value of the goods attached, notwithstanding that valuation was founded on a gross mistake of all the parties, innocently made and without fraud. (2.) If it would, per se, have been so conclusive and binding upon him, whether the case is helped by the amendment made in conformity with the real facts by the authority and leave of the state court. (3.) Whether the plaintiff's attorney, either in virtue of his general authority, as attorney in the suit, or under the special circumstances of this case, had a right to bind his clients by the approval of the receipt.

The last point is mainly dependent upon local habits, usages, and practice in the state, rather than upon any well-defined principles of law, applicable to the general rights, duties, and powers of an attorney; for these necessarily vary in different states, and are governed by such local habits, usages, and practice. By the general principles of law (independent of any statute regulation), the sheriff, or other officer, making an attachment of goods, is bound, as nearly as it reasonably can be done, to give in his return, or in a schedule or inventory annexed thereto, a specific description of the goods attached, their quantity, size and number, and any other circumstances proper to ascertain their identity. But I do not know, that he is absolutely bound to affix any valuation thereto; or that, if he should, that valuation would be conclusive or binding upon the attaching creditor, or upon the debtor, or even upon himself, in all cases;

for he is to have the identical goods forthcoming to meet the exigencies of the execution, and the value of the goods is, or may be, then ascertained by the sale thereof on the execution. In no just sense is the sheriff or other officer at liberty to substitute his own valuation of the goods in lieu of the production of the goods themselves. When, therefore, he chooses to deliver over the goods to any person, who shall agree to hold the same, and to have them forthcoming to meet the exigency of the execution, the party so receipting is but his own bailee, and not the bailee of the attaching creditor. As between himself and his bailee, the sheriff, or other officer may, for his own indemnity, in case the goods are lost, or never returned by the bailee, affix a value to the goods; which value will be conclusive between them, unless there has been some gross mistake or error in the valuation. But if such mistake or error be shown, the sheriff or other officer would not be entitled to recover more from his bailee than he was liable for to the attaching creditor and to the debtor; for he would then have received a full indemnity. In no case, whatsoever, has the attaching creditor any thing to do with the property, after it is attached by the sheriff or other officer; and of course the bailment is res inter alios acta. But it may readily be conceived, that, in many cases, the sheriff, or other officer, might not choose to place the goods attached in the hands of a bailee, or friend of the debtor, for safe custody, without the assent of the creditor; for if he did, and the goods were lost, or wasted, or the bailee should become insolvent, he would be responsible therefor to the creditor. Hence, I presume, the practice has grown up, and it is not an unnatural one for the sheriff or other officer, in cases where the goods are delivered to a bailee on his receipt, to require the consent of the attaching creditor thereto, the effect of which consent must be, that the creditor thereby waives any claim against the sheriff, or other officer, in case the goods should not be forthcoming beyond the amount, which the sheriff or other officer himself is able by the exercise of due diligence to obtain from the bailee or receiptor. The case of Donham v. Wild, 19 Pick. 520, fully recognizes this doctrine; and proceeds upon principles which are entirely satisfactory. But that case by no means establishes the proposition, which has been pressed at the present argument, that the creditor thereby waives all remedy against the sheriff or other officer by assenting to the bailment. In that case, the bailee made a direct contract, not only with the officer, but with the creditor, to deliver back the goods; and the court held, that the officer was not responsible for the sufficiency or the fidelity of the bailee. But it there appeared, that the goods were lost, and that the bailee was insolvent; so that any suit by the officer would have been utterly nugatory. But if the bailee wrongfully withhold the goods, and is not insolvent, I apprehend that it is the duty of the sheriff, or other officer, to pursue the remedy which, under the bailment, he has against him; and if he neglect that duty, the creditor has his remedy over against the sheriff, or other officer. All that the creditor, by his consent to the bailment, is supposed to agree to, is to exonerate the sheriff, or other officer, from all liability for losses occasioned by the insolvency or want of fidelity of the bailee; but not for losses occasioned by the neglect of the sheriff to enforce his own rights and remedies against his bailee. If the cases of De Moranda v. Dunkin, 4 Term R. 119, and Hamilton v. Dalziel, 2 W. Bl. 952, furnish, as they may fairly be deemed to do, an analogy to support the exemption of the officer from responsibility for the solvency or fidelity of the bailee, appointed by the consent of the creditor, the case of Taylor v. Richardson, 8 Term R. 505, qualifies the doctrine, and establishes, that it does not exempt the officer from any other consequences resulting from his own default.

But passing from this to the other consideration of the right and authority of the attorney in the suit to give such consent, on behalf of the creditor, to the delivery of the goods attached to a bailee, or receiptor, I have already suggested, that it must mainly depend upon the local habits, usages and practice in the particular case. If it be, as I take it to be, a very common practice in states, where attachments of property are authorized upon mesne process, to deliver the property to some suitable bailee or receiptor, it is doubtless for the interest, both of the sheriff, or other officer, making the attachment, and of the creditor, that such person should be above exception as to property and solvency. The powers and authorities of attorneys in suits in Massachusetts, and Maine, and probably in many other states, are far more extensive, than they are deemed to be in England. The cases cited at the bar in behalf of the defendant, clearly establish this point. By the law of Maine the officer is not bound to make a special attachment of property, unless directed to do so by the plaintiff or his attorney. Betts v. Norris, 3 Shep. [15 Me.] 469. And the attorney, to whom is intrusted the authority to commence and conduct a suit, is generally understood, in the absence of all special instruction from his client, to possess the authority to make such attachments or not, in his discretion. If he be instructed to make an attachment, it would seem to be a natural incident thereto, that he should act in reference to it throughout, in the manner which he should deem most beneficial to his client; for cases may arise, in which the nature of the property, or its situation (as being perishable, or otherwise subjected to loss or injury) may require, that the attorney should possess authority to give directions, and to make arrangements accord-

ingly with the officer, for the purpose of protecting and preserving the interest of his client. My own opinion strongly is, that the attorney with us is by implication clothed with authority, in all cases of this sort, to do all the acts, which are usual and proper to protect the interests of his client in any attachment, as a part of his ordinary duty. It is for the interest of all clients, that this authority should exist; for it would otherwise be impracticable in many cases, without great expenses and delays, to do many acts, which might be indispensable to the security of the clients; and for any abuse or misuse of his authority, the attorney would doubtless be liable to his client. In short, upon this point, I would apply and follow the doctrine laid down by Lord Kenyon, in De Moranda v. Dunkin, 4 Term R. 120, and say, "The agent was empowered to put the writ in force, which certainly includes the form and mode of executing it;" and I would add, of making it most effectual and secure for his principal, for all purposes of the suit. If, therefore, the question were entirely new, I should not hesitate to say, that, upon the general analogies in our state jurisprudence, the attorney had an implied authority in cases of special attachment to prove and give his consent to the appointment of a bailee or receiptor, if he should deem it most for the interest of his client. But, a fortiori, the doctrine ought to apply, where the practice has become common for the officer to make such bailments, and to take such receipts, with the approval of the attorney; for under such circumstances, if not specially objected to, it may be presumed to be left to the discretion of the attorney by his client. I understand, moreover, that in point of fact, this very question has come several times under the cognizance of the state courts, by whose adjudications upon it I should certainly feel myself bound; and that it has received the very interpretation, which I have maintained.

Then, as to the amendment allowed to be made on the officer's return by the state court: it appears to me, that this court has no authority to revise the decision of the state court upon such a subject. It was incident to the exercise of the general jurisdiction of that court, of the nature and extent and propriety of which, the state court was the exclusive judge. But if it were otherwise, I am far from thinking upon general principles, applicable to amendments, as authorized and allowed in most, if not all the New England states, that it was an undue and unjustifiable exercise of the authority of the power to allow amendments. What was its object? Not to state facts, which were untrue and unfounded in the case; but to make the return conform exactly to the real facts, where, by mistake, an egregious error had occurred, injurious to the rights of the officer, and to the benefit of which error the plaintiffs were in no just sense entitled. It is said, that courts of law have no just authority to allow amendments to be made, which are or may be injurious to the rights or interests of third persons. If by this position be meant their real rights and true interests, positively and absolutely vested in them by law, I agree to that proposition. But if it be meant, that the power of amendment cannot and ought not to be exercised by the court to correct a positive mistake, and to conform the return to the true state of the facts, I am by no means prepared to admit either the correctness, or the validity, of the proposition, in point of law. On the contrary, as I understand it, it is the duty of the court, in fit cases, as an exercise of sound discretion, to allow such amendments, where they are in furtherance of public justice, and to remedy mischiefs, resulting from accident or mistake. In the present case, the attachment was made of a shop of goods, in general terms, valued, in gross, at $7,000. Suppose its real value were only $2,200, and the creditor's debt should be $2,200 only, as finally fixed by the judgment. Could a second creditor, attaching the same property, be entitled to hold, under the second attachment, the supposed surplus beyond the first judgment, when, in fact, there was none? And might not the court allow an amendment to be made in the first return, so as to conform to the admitted facts? But the present case is not that of a third person; but of the plaintiff in the suit. As to him, the court has, in my judgment, a perfect authority to allow such amendments to be made in the return, as shall conform to the truth and justice of the case, and correct an innocent mistake and mischievous error. The court are not bound to allow the amendment as of course; but it is an exercise of sound discretion under all the circumstances of the case. If there be fraud, or gross laches, or reasonable ground to suspect that the creditor may be unjustly damaged in his rights thereby, the court ought certainly to refuse the amendment. And if the officer acts fraudulently in procuring the amendment, the creditor will certainly be entitled to his full remedy for the fraud, notwithstanding the amendment.

The argument upon the other point is, that the return is an estoppel both to the officer and to the receiptor as to the value of the goods attached; and that it is conclusive upon all the parties. It was certainly a very loose and incorrect mode of making this attachment, to make a return of a shop of goods, without any schedule or inventory of the quantity, quality, or nature of the goods; and the officer (as has been already suggested), had, strictly speaking, no right to affix any value thereto. It was no part of his duty. That duty was to return a schedule or inventory of the goods, with an appropriate description, so as to have them forthcoming, and identified, to satisfy the execution. The very nature of such a valuation, so set upon a store of goods, must necessarily be deemed to be merely conjectural, and liable to mis-

take and error. The creditor is not obliged to agree to any such valuation, but may insist on a schedule or inventory of the goods. If he does consent to the valuation, he takes it subject to all the natural consequences. Prima facie, it will be taken to be a fair and just valuation; and the onus probandi is on the officer to establish the contrary. But in no just sense can it be deemed an estoppel, without producing manifest and irretrievable injustice. The plaintiff can never be injured, if he was returned, to satisfy the execution, all the goods, or their entire value. Suppose the shop of goods had been forthcoming, and delivered up in satisfaction of the execution; what ground can there be to say, that the creditor is entitled to more than the goods? Surely he could have no legal right to say, that he would reject the goods, and insist upon the $7,000. It may be said, that if the return can thus be amended, or the return of the value be controverted, that it may lead to frauds. It may be so; but cases of fraud will take care of themselves; and courts of justice are not to create estoppels, always odious in the law, upon the ground of the possibility of fraud. If it be said, that the creditor may be by the valuation lulled into security, and prevented from attaching other property, that suggestion admits of a ready answer. If the creditor is thus misled by the fraud or imprudence of the officer, and other property might have been attached to cover the deficiency, if the true value of the goods attached had been known, upon proof of such facts, the creditor would be entitled to an adequate remedy against the officer. But if it was a mutual and innocent mistake on both sides, what ground is there to say, that the creditor should profit by it, since it has been an involuntary error. It is as much the laches of the creditor as of the officer not to have exercised more vigilance. The case of Wakefield v. Stedman, 12 Pick. 562, considered with reference to the facts (it was the case of a horse, valued in the receipt of the receiptor at fifty dollars), does not appear to me necessarily to inculcate any different doctrine. The court there admit, that the value would not be conclusive in case of fraud; and I think it would not be in cases of gross mistake. But where the value is conjectural, and is presumed to be fairly stated, it ought to prevail, unless there be a gross over valuation. The case of Mildmay v. Smith, 2 Saund. 343, is distinguishable. The question there arose upon a writ of error, where the sheriff had returned, that he had seized goods in execution to the amount of £160, which had been rescued from him. There was nothing on the record to show that this was not the true value; and the court held the sheriff concluded by it. But in the same case, the court held, that it would have been different if the sheriff had returned the goods with their value, and that they remained in his hands for want of buyers; for the sheriff would then have done his duty, and there would be no default in him; and he is not liable for the value returned. To the same effect is the doctrine stated by Lord Holt in Clerk v. Withers, 2 Ld. Raym. 1072, 1075, where he recognizes the authority of Mildmay v. Smith. Now, the very distinction taken in the latter, is precisely that on which I rely. In an action on the case, the officer is not liable for the value returned, unless he has been guilty of some default or negligence.

There is no doubt, that, notwithstanding the officer's return, that the property attached is the debtor's, he and the receiptor may each show, that, in point of fact, it belonged to a third person; and yet this may be said to contradict his return. Indeed, in all cases, where an officer is sued for a false return, or for not having goods attached forthcoming to satisfy the execution, or for any other official misfeasance or negligence, the rule is clear, that the plaintiff is entitled to recover no more than what he has actually lost by such misfeasance or negligence. The case of Weld v. Green, 1 Fairf. [10 Me.] 20, fully recognized this doctrine. So that, after all, in my judgment, the present case comes to this, what damage has the creditor actually sustained by the amendment of the return? To that he is entitled; and that is the true value of the goods attached, and nothing more. It is admitted, indeed, in the present case, that the true value is $2,200 only, and not $7,000.

In the view, therefore, which I take of the case, the merits of the controversy, upon the points already suggested, are with the defendant. He is liable to the plaintiffs for the true value of the goods, $2,200, and no more.

I have not adverted to other points or facts relied upon by the defendant as in the cause, because upon those already stated, the whole merits are, in my judgment, exhausted; unless, indeed, so far as the point is concerned, that no demand was made upon the officer within thirty days after the execution issued for the goods by the new officer, to whom the execution was committed. Whether this be so or not, I do not know; nor is it agreed by the parties. It is a matter of fact, which must be ascertained, if controverted by the jury. If no demand was, in fact, made within the thirty days, then the right of the plaintiffs seems to me entirely gone. Norris v. Bridgham, 2 Shep. [14 Me.] 481. I do not think, that it is indispensable, that that fact should appear upon the return of the officer under this execution; or if necessary, I know of no reason why the return may not now be amended by leave of the court, to conform to the facts.

Case No. 11,148.

PIERCE v. TURNER.

[1 Cranch, C. C. 433.] [1]

Circuit Court, District of Columbia. July Term, 1807.

JUDGMENTS — MISTAKE — AMENDMENT AT SUBSEQUENT TERM.

A clerical mistake in entering a judgment may be amended at a subsequent term, and an execution issued thereon may be quashed.

This was a motion to set aside a judgment of last term, obtained by mistake of the clerk in entering an appearance of R. I. Taylor, and a confession of judgment in this suit, instead of another, and to quash the execution thereon, there being a good defence—the defendant being sued as executrix de son tort for holding negroes under a marriage settlement.

Mr. Swann, for plaintiff, admitted the facts.

Judgment set aside, and execution quashed.

But DUCKETT, Circuit Judge, doubted whether the court could, at this term, set aside a judgment of the last term, even upon a clerical mistake.

[NOTE. This action was subsequently heard on the question whether the slaves were a part of the personal property of Charles Turner at his death, and whether the widow can be charged, as executrix de son tort, in respect thereof. Judgment was rendered for defendant. Case No. 11,149. Affirmed by the supreme court in 5 Cranch (9 U. S.) 154.]

Case No. 11,149.

PIERCE v. TURNER.

[1 Cranch, C. C. 462.] [1]

Circuit Court, District of Columbia. Jan. 7, 1808.[2]

HUSBAND AND WIFE—RECORDING MARRIAGE SETTLEMENT—HUSBAND'S CREDITORS.

A marriage settlement of the intended wife's goods, although not recorded, protects the goods from the creditors of the husband.

This was an action brought by a creditor of Charles Turner, deceased, charging the defendant [Rebecca Turner], as executrix de son tort, under the circumstances stated in a special verdict (set forth in 5 Cranch [9 U. S.] 154,) the substance of which was, that the defendant, before her intermarriage with her late husband, Charles Turner, executed a deed to certain trustees, by which the slaves in question were settled on her and her husband during their joint lives and the life of the survivor, remainder to her heirs, &c., which deed was not proved and recorded within the time prescribed by the fourth section of the act of assembly of Virginia, of December 13th, 1792 (chapter 90, p. 157), whereby it became void, "as to all creditors and subsequent purchasers;" by virtue of which deed and the consent of the trustees the slaves continued in the possession of Charles Turner during his life, and in that of the defendant afterwards. No person having applied for administration, it was, by the county court of Northumberland, committed to the sheriff of that county, where he died, and where the slaves then were. The sheriff administered the assets, but never claimed these slaves as the estate of the deceased.

The principal question arising upon this special verdict was, whether these slaves were a part of the personal estate of Charles Turner, at his death, and whether the widow can be charged, as executrix de son tort, in respect thereof.

On behalf of the plaintiff it was contended by Mr. Taylor, Mr. Swann, and E. J. Lee, that this property is liable to every creditor to whom it would have been liable if the deed had not been executed; and that if the deed had not been executed the property would, by the marriage, have been vested absolutely in the husband and liable for his debts. That the deed being void, it is as if it had never been executed; and they cited Edwards v. Harben, 2 Term R. 587; 2 Bac. Abr. 605; Bull. N. P. 258; Hawes v. Leader, Cro. Jac. 271, Yelv. 196; Padget v. Priest, 2 Term R. 97; Toll. Ex'rs, 17; 11 Vin. Abr. 211; Read's Case, 5 Coke, 33; Ferrars v. Cherry, 2 Vern. 384; Mertins v. Jolliffe, Amb. 313; Forrester, 187; Lowther v. Carlton, 2 Atk. 242; Sugd. Vend. 488.

F. L. Lee, contra, contended, that if the deed was void as to creditors, it could be void only as to the creditors of Rebecca Kenner, (Mrs. Turner,) not of her husband; for the deed was good between the parties, and effectually prevented the title from vesting in the husband by the marriage. The creditors mentioned in the statute are the creditors of the grantor, not of the grantee. He cited Co. Litt. 351; 4 Vin. Abr. 45, 46; Lady Strathmore's Case, 2 Brown. Ch. 351; 6 Bac. Abr. 386, 391; 1 Inst. 281; 16 Vin. Abr. 203, 205; Miles v. Williams, 1 P. Wms. 257, 258; 4 Vin. Abr. 132; Norton v. Turvill, 2 P. Wms. 144; Bethel v. Stanhope, Cro. Eliz. 810; 1 Fonb. Eq. c. 2, § 6; Prec. Ch. 22; and Eppes v. Randolph, 2 Call. 103.

THE COURT (DUCKETT, Circuit Judge, absent) rendered judgment upon this special verdict, for the defendant.

Judgment affirmed in supreme court of the United States. 5 Cranch [9 U. S.] 154.

PIERCE (UNION IRON CO. v.). See Case No. 14,367.

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

[2] [Affirmed in 5 Cranch (9 U. S.) 154.]

Case No. 11,149a.

PIERCE v. The VICTORY.

[4 Betts, D. C. 43.]

District Court, S. D. New York. Feb. 19, 1844.

SEAMEN'S WAGES—VESSEL PLYING ON HUDSON RIVER—WRONGFUL DISCHARGE.

[1. A lien for wages arises from maritime services to a boat plying upon the tide-waters of Hudson river.]

[2. The damages of a mariner wrongfully discharged from a boat plying on Hudson river are not measured by the agreed wages for the full time for which he was employed.]

[This was a libel for seamen's wages by Charles Pierce against the steamboat Victory.]

BETTS, District Judge. This cause having been heard upon the proofs and allegations of the respective parties and the premises being considered: and it being made to appear to the court that the libellant contracted with the master of said boat to perform services of a maritime character on board thereof on navigable tide waters, and in pursuance of such contract entered on board said boat and there continued until discharged therefrom by the master, on the 3d day of May, 1843, and then and there offered and tendered to continue his services thereon in fulfilment of his contract: It is therefore considered that the said agreement was a maritime contract upon which the libellant is entitled to sue in this court in rem against the said boat for such compensation as he is entitled to by occasion of the premises: And it further appearing to the court that the agreement aforesaid secured the libellant's pay or wages at the rate of $20 per month for a period of ten months, together with his board: and that the discharge aforesaid by the master of said boat was a violation of said agreement: But it appearing to the court that the employment of the said boat was not on foreign or sea voyages, but only on short trips or runs between Kingston (or Rondout) on the North river and the city of New York, for the transportation of freight and passengers: It is considered by the court that the libellant is not entitled to recover the entire wages contracted to be paid him for the whole period of service, but only compensatory damages for the breach or violation of said contract, and that the agreed wages for the term aforesaid are not the legal or just measure of such damages:—Wherefore it is ruled and adjudged by the court that the libellant recover for his damages by means of the premises at and after the required rate of wages to the time of his discharge aforesaid, and from then to the time of filing his libel in this suit, and also at and after the rate of $3 per week for his board during such last mentioned period, to wit, from the third day of May to the eighth day of June, 1843, being one month and five days: And it is ordered and adjudged that the said libellant recover therefor in the aggregate the sum of $52.80, that is to say, $15.33 for services up to the time of his discharge from the said boat, and $23.33 for loss of time, and $14.14 for board, from the time of his said discharge to the commencement of this action together with his costs to be taxed: but subject to the allowance of $15.33 admitted to have been paid him on his discharge from the said boat.

PIERCE (WILSON v.). See Case No. 17,826.

Case No. 11,150.

PIERCE v. WINSOR et al.

[2 Cliff. 18; 2 Am. Law Reg. (N. S.) 139.]

Circuit Court, D. Massachusetts. Oct. Term, 1861.[1]

SHIPPING—DANGEROUS ARTICLES OF COMMERCE—DAMAGE TO CARGO—INEVITABLE ACCIDENT—LOSS.

1. Where damage is sustained in a case not falling within the category of an inevitable accident, and neither party is in actual fault, the loss must fall on him who, from the relation he bears to the transaction, is supposed to be possessed of the necessary knowledge to have avoided the difficulty.

[Cited in Parrott v. Barney, Case No. 10,773.]

2. Respondents chartered a vessel, and put her up as a general ship. Among other freight was an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and involved an increased expenditure in discharging. The dangerous character of the article was unknown either to the shippers or the owners, and no actual fault was imputed to either. *Held*, that the damage and expenses occasioned by the peculiar character of the article must be borne by the shippers.

[Cited in Parrott v. Barney, Case No. 10,773; Mainwaring v. The Carrie Delap, 1 Fed. 878; The T. A. Goddard, 12 Fed. 179.]

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

This was an admiralty appeal. The respondents [Nathaniel Winsor and others] chartered of the libellant [Henry A. Pierce] the ship Golden City, for a voyage to San Francisco, and then put her up as a general ship. A quantity of mastic was shipped as freight by the United States government from their works in New York to the fort at Fort Point, San Francisco. The mastic was in casks, and was stowed in bulk in the run. Upon the arrival of the ship out it was found that the mastic had run together and among the cargo next to it, and had then hardened in a solid mass, adhering to the sides of the ship and the other adjacent portions of the cargo. The damage done to the rest of the cargo, which was paid by the master on account of the ship, and the extra expense in breaking out the mastic with drills and

[1] [Affirming Case No. 11,151.]

chisels, amounted to $1,900. Two other ships, the Dashaway and Fleetwing, which sailed shortly after the Golden City, had also some mastic, shipped in the same way, which arrived out in the same condition. These cargoes, with one shipped in casks, after the news of the state in which the earlier cargoes had arrived out had been received, were all the cargoes ever shipped by the United States, or, so far as known, by anybody, to San Francisco, or on any long voyage. The article was manufactured by the United States government at New York, and is used on fortifications, and had been repeatedly shipped to the various forts on our Atlantic coast and in the Gulf, and had always been shipped in bulk, without giving any indications that the heat in the hold of a vessel would, under any circumstances, affect it.

The suit was brought by the owner of the ship against the charterers, to recover the damages sustained by him in payment to other shippers for injury to their goods, and for extra expense in discharging. Mastic was then a new article in commerce. It was not pretended that the defendants had any knowledge of the dangerous character of this article, and, so far as anything was known of the article, it was thought perfectly safe to ship it in this way. The libellant claimed to recover upon the ground that there is always an implied contract on the part of the charterer or general shipper of goods that the goods shipped shall not be of a character dangerous to the ship and the residue of the cargo, and that the want of knowledge of the true character of the goods will not release such charterer or shipper of the goods from this responsibility. A decree was entered in the district court in favor of the libellant for money paid by him for other goods damaged, and for the extra expense in taking out the mastic. [Case No. 11,151.]

Sidney Bartlett and D. Thaxter, for libellant.

The case discloses the charter of libellant's ship by the respondents for a voyage from Boston to San Francisco, and an agreement of libellant that "the whole of said vessel shall be at the sole use and disposal of respondents during the voyage," and to "take and receive on board said vessel all such lawful goods and merchandise as respondents may think proper to ship." It further shows that an article called mastic, comparatively new to commerce, was laden on board the ship by the respondents. It may be assumed that the effect of the hot weather of the tropics during a voyage of the length and character of that in question was unknown to either party, and even to the manufacturer of the article (the government), since the mode of transport in cakes was changed to packing in barrels, after the result of this and two other contemporaneous voyages of the same character became known. The effect of this shipment upon other cargo for which the master had given bills of lading, and upon the ship herself, is undisputed.

The single question thus raised is, upon whom is the loss thus occasioned to fall, whether upon the owner who has thus put his ship "at the sole use and disposal" of the charterer, or upon the party having that sole use and disposal? Treated as the case of a general ship put up for freight, the case seems to have been decided by Brass v. Maitland, 6 El. & Bl. 470. Lord Campbell states the principle thus: "When the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver to be carried on the voyage packages of goods of a dangerous nature, which those employed on behalf of the ship-owner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature." Page 481. Again: "Although those employed on behalf of the ship-owner have no reasonable means, during the loading of a general ship, to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of the goods, the shippers have such means, and it seems much more just and expedient that, although they were ignorant of the dangerous quality of the goods, or the insufficiency of the packing, the loss occasioned thereby should be cast upon the shipper than upon the ship-owners." Page 483. Again: "The defendants, and not the plaintiffs, must suffer, if from the ignorance of the defendants a notice was not given to the plaintiffs, which the plaintiffs were entitled to receive, and from the want of notice a loss has arisen which must fall either on plaintiffs or defendants." Page 486.

The soundness of this decision will be apparent, when it is considered that here is a loss which must fall upon one of two parties, and which cannot be classed with cases of mere misfortune, where neither party is in fault, and where the loss must rest where it happens to fall; for such a rule, applied to this case, would be equivalent to deciding that the loss must, in all cases, fall upon the ship-owner; or, to truly carry out such doctrine, the loss must, as to goods, be borne by the shipper whose goods are injured by the dangerous article stowed with them. The principle on which the rule in Brass v. Maitland rests is founded on well-settled analogies, derived from commercial law, which principle is this: Although, in a given case, neither the shipper nor the owner can, by inquiry, find or know the dangerous character of the article shipped, yet the law, which deals with general rules, and not with special cases, fixes the liability upon the shipper, because, under ordinary circumstances, he is best able to make the investigation and know the facts, and because this rule will best protect the innocent ship-owner from

experiments or frauds by the shipper, which are difficult of discovery and proof. The most striking analogy in support of this principle is drawn from the law of insurance, by which the owner of a ship has forced upon him the agreement that she is seaworthy, although there be latent defects which he could not discover; and this rests upon the ground that, in a great majority of instances, he may know the facts. Baron Parke states it thus (Gibson v. Small, 24 Eng. Law & Eq. 40): "Hence, the usual course being that the assured can and may secure the sea-worthiness of the ship, it is by no means unreasonable to imply such a contract in a policy in a ship on a voyage, and so the law most clearly has implied it. It may happen, indeed, in some cases, that from want of proper materials, of skilful artisans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of the defects, the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage; but the law cannot regard the exceptional cases ad ea quæ frequentius accidunt jura adaptantur; and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of voyage policies." The case of this charter is stronger than that of a general ship, for there the owner retains some control over shipments. Here that control passed into the hands of the charterers. It was their duty to make inquiries if any were necessary. If, by reason of goods shipped by their authority, the owners of the ship suffer, they ought to make it good, whether they were in fault or not.

A. A. Ranney, for respondents.

The respondents had a right to ship the mastic under the charter-party. Libellant was bound "to take and receive on board all such lawful goods and merchandise as the respondents or their agents might think proper to ship." Mastic was a lawful shipment certainly. The ship was put up as a general ship, and was so chartered and intended. This would not exclude goods even which come within the class designated dangerous, although it might impose obligations for the exercise of greater care in some cases. It is respectfully submitted, therefore, that respondents are not liable on this ground. Respondents were perfectly innocent in the premises, and guilty of no negligence whatever. It is urged that there was an implied warranty on the part of respondents, that the mastic was fit to be shipped to San Francisco. To which they answer:—No such warranty is set forth in the libel, and this ground is not open to libellant. No such warranty existed under the circumstances. Courts have been inclined, of late, to restrict rather than extend this doctrine of implied warranty, and with reason; for it imposes obligations of a most serious nature, under a contract which the parties never understood nor ever dreamed they were making. Dutton v. Gerrish, 9 Cush. 89; Chanter v. Hopkins, 4 Mees. & W. 399; Whitmore v. South Boston Iron Co., 2 Allen, 52; Morley v. Attenborough, 3 Exch. 500. It has never been extended to, or applied in, a case like this. The contract in this case as between the shipowner and respondents was in writing, and the written contract must govern. It is not competent to add to or vary or explain it, by parol or any such implication of law. Chanter v. Hopkins, 4 Mees. & W. 399; Randall v. Rhoades [Case No. 11,556]; Dickson v. Zizinia, 2 Eng. Law & Eq. 314; 3 Greenl. Ev. § 421, note 3; Gibbon v. Young, 2 Moore, 224; Johnson v. Miln, 14 Wend. 195. The proposition must go to the extent, that there was an absolute warranty, without qualification, that the goods were fit for shipment on the voyage, and that they were not dangerous even in any extraordinary degree of heat to be apprehended as possible in the hold on the voyage.

The counsel rely on Brass v. Maitland, 6 El. & Bl. 470, as an authority for their doctrine. This is perhaps the only case which seems to sanction such a principle. Lord Campbell, C. J., in giving his opinion (page 481), says: "I am of opinion that the shippers undertake that they will not deliver to be carried in the voyage packages or goods of a dangerous nature, which those employed on behalf of the ship-owner may not on inspection be reasonably expected to know to be of a dangerous nature." Again (page 483): "Although those employed on behalf of the ship-owner have no reasonable means, during the loading of a general ship, to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of goods, the shippers have such means," &c. Wightman, J., concurred in the opinion. Crompton, J., combatted the doctrine laid down by the other judges in giving the opinion, contending that the implied undertaking of the shipper did not extend beyond the obligation to take proper care not to deliver dangerous goods without notice. Now, that case is clearly distinguishable from the case at bar, and when closely scrutinized is no authority for the libellant. The doctrine there laid down must be much extended and perverted to meet this case. That case was discussed entirely upon questions raised on the pleadings, which is never quite so satisfactory as when the questions arise on a full statement of facts in the development of the case, which a trial presents. The exact case decided is alone a competent authority, and the language of the court used in discussing the matter must be distinguished from the thing decided. In that case the first count in the declaration alleged that defendants knew that the bleaching-powder shipped was composed of chloride of lime, and was dangerous, and defendants in the third plea do not traverse this averment. Besides, the powder was well known to be dangerous,

and to require safe packing. It might properly be claimed that the shipper with such knowledge was bound to see that it was suitably packed when shipped. The only excuse offered was that defendants procured the article of other parties who furnished it upon their order, and neither knew or had reason to believe it was not suitably packed. Now this was no excuse, perhaps, for the defendants were bound, knowing the dangerous nature of the article, to see to it that it was shipped in proper condition, and the third parties of whom it was ordered stood only in the light of agents of the defendants, there being no relation or privity between these and the ship-owner. Campbell, C. J., 6 El. & Bl. 485. The defendants were without fraud, but not without fault, having violated a duty imposed upon them in regard to packing. The powder was concealed by being in barrels, and the ship and its agents did not know what was in them, and had no opportunity to judge of their safety or otherwise. The name of "bleaching-powder" did not indicate or disclose the existence of chloride of lime, a well-known dangerous substance. It was virtually a deception, although not so intended. The suit was between the ship-owner and the shipper.

In the case at bar the facts are entirely otherwise in every one of these respects. The defendants did not know, and could not know, that there was any danger. No one knew it, but everybody, or those who knew most about it, believed, and had the best reason to believe, the contrary thereof. The article was shipped under the name of "mastic," which indicated the general nature. It was uncovered and open to inspection. It was seen and examined by the master and owner. The former actually made full inquiry of the United States engineers and others, and satisfied himself on the very points where the danger arose, which was then suspected by him. The respondents are the charterers of the ship, not the shippers of the goods. It is a contract of affreightment, where the ship-owner victuals, mans, and navigates the ship, and is to load, discharge, and run the ship at his expense. The bill of lading runs from the ship to the shippers, making thereby a contract between them, and raising all the obligations expressed and implied between them. The ship has a lien on the cargo for freight, and the shipper can sue or libel the ship on the bill of lading, and hold it to the usual obligations arising in such a relation. The respondents are to pay a round sum as freight, and are to have all the ship makes in freight above that sum. They act rather as agents for the ship in getting the cargo, and the contract of the ship is merely a covenant that, as a compensation for their labor and risk, they shall have all the money received as freight above a specified sum. Such a relation is entirely different from that of a shipper and ship-owner. Drinkwater v. The Spartan [Case No. 4,085]; Paul v. Birch, 2 Atk. 621; Holt, Shipp. 471; Christie v. Lewis, 2 Brod. & B. 410; Faith v. East India Co., 4 Barn. & Ald. 630; 3 Greenl. Ev. § 421, and notes. The respondents were not only without fraud, but without fault. They acted with the utmost possible care and skill. The ship-owner and his master could not have been deceived and misled. They saw, examined, and inquired, and, relying on their own judgment and the information gained on inquiry, accepted and carried the goods without protest or objection. Respondents were not responsible for the wrong information they received. There could be no warranty implied under such circumstances. Such an undertaking is never implied only where, from what is done and said, the court can say that one party so agreed, and the other party so understood, and relied upon it. The mastic was required and taken as ballast, not under the usual obligations of a regular cargo. It was shipped in the usual way, just as all had shipped it, and others were willing to take and carry it again.

Brass v. Maitland [supra] was a case of insufficient and improper packing only, and the shippers violated a duty in this regard, that is all. The right to ship the powder was not denied. And here respondents had a right to engage the mastic, and it is too much to require them to be held responsible for the packing of the goods which merchants might send to the ship. The master and stevedore, the agents of the ship, were the proper parties to look to this, and the ship could and must hold the merchants to their responsibility about the packing. The privity of contract was between the ship and the shipper in this regard, not between the ship and the charterer. It cannot be said that there are two implied contracts of this kind.

Again: Suppose that there is a new article of commerce which neither shippers nor ship-owners know to be dangerous, is the innocent shipper to be liable? Lord Ellenborough's dictum, in Williams v. East India Co., 3 East, 192, would tend to show that knowledge of the party shipping is an essential ingredient. Mastic, being new to commerce, is just the case where it was assumed that the shipper would not be liable. But being known to be new to commerce, and accepted as such without objection, when it was seen and examined by all parties, this was notice sufficient, and takes the case out of the principle laid down in Abbott, and throws the risk on the ship-owner. This is equivalent to giving notice to, or knowledge on the part of, the master, the effect of which was decided in Brass v. Maitland, 6 El. & Bl. 485. If liable at all, respondents are not liable to reimburse the libellant for what he paid out to make good the damage occasioned to other goods; nor to pay for the other damages claimed. The mastic was shipped in a general ship, in the usual way, and the ship was not liable. Clark v. Barnwell, 12 How. [53 U. S.] 272; Lamb v. Parkman [Case No. 8,020]; Baxter v. Leland [Id. 1,125]; Abb. Shipp. 348. The ship paid the damages without suit and voluntarily, giving the respondents no opportunity to defend the claims

preferred, if any. It does not appear that anybody claimed the damages. Neither does it appear that the ship was liable. Whether the ship gave bills of lading in these cases does not appear in evidence.

CLIFFORD, Circuit Justice. [2] [This is an appeal in admiralty from the decree of the district court of the United States for this district, in a cause of contract, civil and maritime. The libellant was the owner of the ship Golden City, and the respondents were the charterers for a voyage from Boston to San Francisco. Charter-party bears date on the 4th day of May, 1858, and the libel was filed on the 10th day of November, 1859. The respondents chartered the whole ship, with the usual exceptions of the cabin and necessary room for the accommodation of the crew and stowage of the sails, cables, and provisions; and the stipulation was that the ship should be at the sole use and disposal of her charterers for the voyage, and that no goods or merchandise should be laden on board otherwise than from the charterers or their agent. The owners engaged to make necessary repairs, man, and victual the ship, and take and receive on board the vessel during the voyage all such lawful goods and merchandise as the charterers or their agent might think proper to ship. Among other things the libellant alleged that the respondents, as the charterers of the ship, while she was lying at New York, delivered or caused to be delivered on board the ship to the master, to be carried to Boston, and thence to San Francisco, on the voyage under the charter-party, one thousand and four cakes of an article called mastic; that the article is composed of bitumen and earthy matter, and at a certain degree of heat will soften and melt, and will then set so as to become very hard and flinty; that on a voyage such as that from Boston to San Francisco, the tendency on that behalf is so great that, unless the article is properly and skilfully packed, the cakes are liable to melt and run together, and among the other goods stowed in contact with the same, and to diffuse itself in the hold of the ship, and then to set and harden so as to injure and destroy the other goods, and to cause great and unusual expense in discharging the other goods and the mastic out of the ship; that the article was then new in commerce, and that the effect of a voyage upon it was unknown to the master and to the libellant; that the respondents did not give to the master or to the libellant any notice of the character of the article or of its liability or tendency to melt and do damage as aforesaid, and that neither the master nor himself had any knowledge or means of knowledge upon the subject, or that the mastic might not properly be stowed in the way that goods are usually stowed for such voyages; and he also alleged that the mastic did soften and melt on the voyage, and that the cakes did run together and among the other goods placed in contact with the mastic, diffusing itself in the hold of the ship, and did then set and become hard and flinty, whereby the goods were injured and destroyed, and the libellant was compelled under the bills of lading to make good the loss and damage, and was put to additional expense in discharging the goods and freeing the ship of the mastic.

[Most of] the material allegations of the libel are denied in the answer. The respondents deny that the mastic was a new article of commerce, or that they were bound to ascertain any further respecting the mastic, or give any notice to the libellant as to its character or the manner in which it should be stowed, or that they were in that particular or in any other respect at fault in the premises, as alleged by the libellant. Lawful goods and merchandise they had a right to ship; and they allege that the mastic was such under the charter-party, and that they shipped the same without any fault, and that the same was received by the consignees, paying freight on the same, and that the mastic was put to the purposes for which it was designed, and consequently they allege that if the libellant was put to any expense or suffered any damage, it was through his own fault, and that of his agents. Both parties took testimony in the district court, and, after the hearing, the court entered a decree in favor of the libellant, and the respondents appealed to this court. The mastic, as alleged, was shipped by the government of the United States from their works at New York to the fortification at Fort Point at San Francisco. When delivered on board it was in cakes, and was stowed in bulk in the run. Upon the arrival of the ship at the port of destination, it was found that the mastic had melted on the voyage, and that the cakes had run together and among the cargo stowed in contact with it, and had hardened as alleged in the libel, and in that state was adhering to the sides of the ship and to certain portions of the cargo. The amount of damage done to the cargo, which was paid by the master on account of the ship, including the extra expense in discharging the mastic, exceeded nineteen hundred dollars. Two other ships, the Dashaway and the Fleetwing, which sailed shortly after the Golden City, also had mastic on board, shipped in the same way, and the proofs show that when the vessels arrived out it was in the same condition. These cargoes, with one shipped in casks at a later period, and after the facts respecting the earlier shipments had become known, were all the cargoes, so far as known, ever shipped by the United States to San Francisco, or on any long voyage. Such mastic is manufactured by the government at New York, and is used on fortifications, and has been repeatedly shipped to the various forts on the Atlantic coast and in the Gulf, and had always been

[2] [From 2 Am. Law Reg. (N. S.) 139.]

shipped in bulk without its being known that it was liable to be so affected by the heat in the hold of the vessel. Suit is brought by the owners of the vessel against the charterers to recover the damage and expense as already explained. The libellant does not allege or prove that the respondent had any knowledge of the dangerous character of the article, but he claims to recover upon the ground that there is always an implied contract on the part of the charterer or general shipper of the merchandise that the goods shipped shall not be of a character dangerous to the ship or the rest of the cargo, and that the want of knowledge of the true character of the article will not release such charterer or shipper from the responsibility which the law imposes upon him as incidental to his contract.] [2]

Two propositions may be assumed as beyond dispute: first, that the case is not one of inevitable accident; and, secondly, that the owner of the ship is without any actual fault arising out of any act of his own, or that of the master or his agents. Inevitable accident is not pretended, and if the pretence were set up, it could not be supported for a moment. Union S. S. Co. v. New York & Virginia S. S. Co., 24 How. [65 U. S.] 313.

Some attempt was made to impute fault to the owner of the vessel, because she was delayed in Boston for the purpose of repairs, but the explanations are satisfactory, and the position wholly unsupported.

Neither party had any knowledge of the dangerous character of the article, so that it may be said that there was no actual fault on either side, except such, if any, as the law implies from the nature of the transaction. The charterers put up the ship as a general ship, and under the terms of the charter-party the ship was at their sole use and disposal, to ship such lawful goods as they might think proper; and it was expressly stipulated that their stevedore should be employed by the owner, in Boston. The stowage of the mastic was made in the usual way, and it is not disputed it would have been proper, if the article had been what it was supposed to be when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no knowledge or means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods. The proper precautions in respect to loss in the vessel, therefore, had been taken, if the goods had not been of a dangerous character, which was wholly unknown to the master or the owner of the ship, or his agents. But damage was occasioned, and loss and expense were incurred, and the only question is, Who must suffer? Where the owners of a general ship undertook that they would receive the goods, and safely carry and deliver them at the destined port, it was held in Brass v. Maitland, 6 El. & Bl. 481, that the shippers undertook that they would not deliver to be carried on the voyage packages of goods of a dangerous nature, which those employed on behalf of the ship-owner might not, on inspection, be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they were of a dangerous nature. Such was the principle laid down in that case, but the reasoning of the court in support of the rule is even more applicable to the present case. Although those employed on behalf of the ship-owner have no reasonable means, during the loading of a general ship, to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of the goods, the shippers, says Lord Campbell, have such means, and it seems more just and expedient that, although they were ignorant of the dangerous quality of the goods, or the insufficiency of the packing, the loss occasioned thereby should fall upon the shippers than upon the ship-owner. Accordingly, he held that the shippers, and not the ship-owners, must suffer, if, from the ignorance of the former, a notice was not given to the latter, which they were entitled to receive, and from the want of notice a loss had arisen, which must fall on either the shipper or the owner of the vessel.

Undoubtedly that rule, as is well contended by the libellant, rests upon the same principle as that which is applied in other commercial transactions of an analogous character. Where damage is sustained in a case not falling within the category of an inevitable accident, and neither party is in actual fault, the loss shall fall on him who, from the relation he bears to the transaction, is supposed to be possessed of the necessary knowledge to have avoided the difficulty. Baron Parke applied that rule in the case of Gibson v. Small, 24 Eng. Law & Eq. 40, with great force and vigor, in the case of a voyage policy, holding that the law did not regard exceptional cases, but wisely laid down a general rule, which is a most reasonable one in the vast majority of voyage policies, that the assured impliedly contracts to do that which he ought to do before the commencement of the voyage. Judge Sprague approved the rule, upon the ground that it ordained that the loss should fall upon the party who generally had the best means of informing himself as to the condition of the article to be shipped, which undoubtedly is the foundation principle on which the liability rests.

Were the rule otherwise, it might, as was well said by the district judge, encourage negligence, and even induce the general shipper or charterer to try experiments with articles unknown to commerce, at the expense of his ship-owner. In view of the whole case, I am of the opinion that there is no error in the record. The decree of the district court is accordingly affirmed, with costs.

[2] [From 2 Am. Law Reg. (N. S.) 139.]

Case No. 11,151.

PIERCE v. WINSOR et al.

[2 Spr. 35.] [1]

District Court, D. Massachusetts. May, 1861.[2]

SHIPPING — LIABILITY OF CHARTERER TO OWNER —DAMAGE TO CARGO—EXTRA EXPENSES.

1. A charterer of a vessel who puts her up as a general ship is liable to the owner of the ship for damages which the latter has to pay other shippers for injury to their goods caused by goods put on board by the charterer, although the charterer did not know that his goods would do any damage.

2. The charterer is also liable in such a case for the extra expense of getting his goods out of the ship.

The defendants [Nathaniel Winsor and others] chartered of the libellant [Henry A. Pierce] the ship Golden City for a voyage to San Francisco, and then put her up as a general ship. A quantity of mastic was shipped on freight by the United States government from their works at New York to the fort at Fort Point, San Francisco. The mastic was in cakes, and was stowed in bulk in the run. Upon the arrival of the ship out, it was found that the mastic had run together and among the cargo, and had then hardened in one solid mass, adhering to the sides of the ship and to the cargo next to it. The damage done to the rest of the cargo, which was paid by the master on account of the ship, and the extra expense in breaking the mastic out with drills and chisels, amounted to from $1,700 to $2,000. Two other ships, the Dashaway and Fleet Wing, which sailed shortly after the Golden City, also had some mastic shipped in the same way, which arrived out in the same condition. These cargoes, with one other shipped in casks,—after the news of the condition in which the earlier cargoes had arrived out had reached here,—were all the cargoes ever shipped by the United States, or, so far as known by anybody, to San Francisco, or on any long voyage. The article is manufactured by the United States government at New York, and is used on fortifications; and had been repeatedly shipped to the various forts on the Atlantic coast, and in the Gulf, and had always been shipped in bulk, without giving any indications that the heat in the hold of a vessel would, under any circumstances, affect it. This suit was brought by the owner of the ship against the charterers, to recover the damages sustained by him in payment to other shippers for injury to their goods and for the extra expense in discharging. It was not pretended that the defendants had any knowledge of the dangerous character of this article; and so far as any thing was known of the article, it was thought perfectly safe to ship it in this way. The libellant claimed to recover, upon the ground that there is always an implied contract, on the part of the charterer or general shipper of goods, that the goods shipped shall not be of a character dangerous to the ship and the residue of the cargo; and that the want of knowledge of the true character of the goods will not release such charterer or shipper of the goods from this responsibility.

S. Bartlett and D. Thaxter, for libellant.
A. A. Ranney, for respondents.

SPRAGUE, District Judge. In Brass v. Maitland, 6 El. & Bl. 470, the chief justice evidently took the view that the shipper of goods in a general ship impliedly contracts that the goods shipped shall not be injurious to other goods shipped in the usual course of lading a ship, and that this rule is not affected by the fact that the shipper had innocently shipped dangerous goods without knowledge of their true character. This principle is a sound one. It throws the loss upon the party who generally has the best means of informing himself as to the character of the article shipped. A different rule might encourage negligence on the part of the shipper, and even induce him to try experiments with articles unknown to commerce, if he could set up his ignorance of the real character of the articles as a defence to any damage caused by the shipment. This case is not between the shipper and the shipowner; but the rule applies equally well to the case of a charterer. He hires the whole ship, and has a right to put on board a full cargo, and he must not put on board goods which will injure the ship, and cause her owners to become responsible to other shippers for damage done. Decree for libellant for money paid by him for other goods damaged, and for extra expense incurred in getting out the mastic.

[On appeal to the circuit court this decree was affirmed. Case No. 11,150.]

See Hutchinson v. Guion, 5 C. B. (N. S.) 149; Alston v. Herring, 11 Exch. 822; Farrant v. Barnes, 11 C. B. (N. S.) 553; Ohrloff v. Briscall, L. R. 1 P. C. 231.

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 11,150.]

PIERCE, The HELEN M. See Case No. 6,332.

Case No. 11,152.

PIERPONT v. FOWLE.

[2 Woodb. & M. 23.] [1]

Circuit Court, D. Massachusetts. Oct., 1846.

EQUITY—DEMURRER TO PART OF BILL FOLLOWED BY ANSWER—COPYRIGHT—BILL FOR DISCLOSURE AND ACCOUNT OF SALES—JURISDICTION—REMEDY AT LAW — INJUNCTION — TITLE — AUTHOR'S RIGHT TO SECOND TERM.

1. A demurrer in part to a bill, followed by an answer as to the rest, is not thus overruled or

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

withdrawn by the rules of the court here, though it might be in England. And the rules of the court in that respect do not violate any law as to private rights, but merely change the practice of the court.

2. The acts of congress as to copyrights, do not give any relief in this court, which could not before be had, either in law or equity, in the state or United States court.

[Cited in Palmer v. De Witt, 47 N. Y. 536.]

3. A bill in chancery, asking a disclosure, and an account of sales, under the disposal of a copyright alleged to belong to the complainant, and praying an injunction against further sales, gives, on its face, jurisdiction appropriate to chancery, and about which a remedy at law would not be so complete as accounting here and an injunction. Chancery cannot grant relief on the ground, that a right exists, which the party has failed to redress at law; but proper matters for the exercise of its jurisdiction, must be set out and sustained.

[Cited in Jewett v. Cunard, Case No. 7,310; Sawyer v. Gill, Id. 12,399; Almy v. Wilbur, Id. 256.]

[Cited in Wallace v. Harris, 32 Mich. 392.]

4. If no benefit or advantage whatever appears to be gained by proceedings in equity, rather than at law, the bill will be dismissed without prejudice, in order that the rights of the parties may be adjusted at law.

[Cited in Teft v. Stewart, 31 Mich. 372.]

5. An injunction in chancery, as a preventive remedy merely, in case of an alleged encroachment on a copyright, is a more ample and appropriate remedy than any suit at law; and hence, when it is asked, and an account and disclosure of facts desired, they will be required, in order to settle the question in controversy.

6. In England where the power in chancery is concurrent with that at law over the matter, the former may, in its discretion, proceed to act in it; but in this court it is otherwise, under the judiciary act of 1789 [1 Stat. 73], if the remedy be as full and perfect at law as in chancery; and the objection may sometimes be taken here under the answer, and at the hearing, as well as by demurrer.

[Cited in Orr v. Merrill, Case No. 10,591; Foster v. Swasey, Id. 4,984; Allen v. Blunt, Id. 215; Berry v. Ginaca, 5 Fed. 481; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 38.]

7. In this case the title to the copyright under a contract of sale was also in dispute, and it was *held*, that this question might be settled under this bill, and the case proceed in chancery, rather than send the parties to the law side of this court to settle the title.

8. The reason for a different rule often in England, that the judges to settle the question at law are different, does not apply to this court; and this court might not proceed to settle it, if all the facts in a written contract were not already before it, and the law on them the same on the equity as on the law side of this court.

9. When A employs B to compile a school book, and gives him some suggestions as to its character and form, and agrees to pay him $500, and B conveys to A the copyright, and it is published by A, calling B the author on the title-page, it was held, that only the usual copyright for fourteen years passes under the contract; the author being alive at the end thereof, has the sole interest in the additional term then allowed to authors in such cases.

[Cited in Clum v. Brewer, Case No. 2,909; Lawrence v. Dana, Id. 8,136.]

10. A usage among booksellers to consider the second term as passing with the first, does not control the rights of B, who was not a bookseller, nor shown to be conversant of such usage.

[Cited in Taylor v. Carpenter, Case No. 13,784; Marye v. Strouse, 5 Fed. 488.]

11. The construction of all such contracts and laws, in respect to copyrights, should be favorable to authors, as the laws were intended for their benefit; and when they assign their rights to others, no more must be considered as passing than was contemplated at the time by the parties, and paid for, and clearly indicated in the contract.

[12. Cited in Brooks v. Norcross, Case No. 1,957, to the point that the allowance of a jury to settle at law the question of infringement arising in a suit in equity is not a right, but is a matter in the sound discretion of the court.]

This was a bill in equity [by John Pierpont against William B. Fowle], asking for certain disclosures to interrogatories concerning the title, and printing, and sale of the American First Class Book, and the National Reader. It averred, that the copyright in both belonged to the complainant, of the first one for fourteen years from the 22d of June, A. D. 1837; and of the last one, for fourteen years from the 11th of June, 1841. Besides the disclosures asked, the bill requested, that the respondent be enjoined from publishing or selling copies of either of those books during the terms before mentioned, and that he be made to account for all the money, notes, and promises he may have received from one Bowen, for leave to print or sell said books during any part of those terms. The answer of Fowle denied the exclusive copyright in those books to be in the complainant, and questioned his liability to answer most of all the interrogatories put, as he is not charged in the bill with having himself unlawfully printed or sold copies of those books, but only with claiming some interest in them. He then proceeded to set out the different contracts between himself and the complainant, as to the books or copyrights, and denied that the plaintiff was entitled to the copyright in them as claimed, but, on the contrary, insisted it had been assigned to himself. He next averred, as to the contracts between himself and Bowen, that the plaintiff had no right to inquire into or receive any account of the profits and payments thereon. The complainant filed several exceptions to this answer, four of which related to the refusal to disclose the transactions between Fowle and Bowen, in respect to these books, and to furnish an account of the receipts; and another related to its being in part a demurrer to the bill, and in part an answer. The contracts referred to in the bill and answer, as well as other parts of the latter, will be given, so far as material, in the opinion of the court.

Sewall & Fletcher, for complainant.
B. R. Curtis, for respondent.

WOODBURY, Circuit Justice. The informalities in this answer, as a demurrer in

part and a reply in part, would probably be open to the exceptions taken, and be bad under the English system of pleading in chancery. Thus, if an answer is put in after a demurrer, the answer prevails and overrules the demurrer. 1 Mont. Eq. Pl. 99; 2 Dickens, 712; 6 Paige, Ch. 333; 3 Mylne & C. 653. So it overrules a plea; and both of these doctrines rest on the principle, that the demurrer and plea, giving reasons why the respondent need not answer, are withdrawn virtually or waived, by afterwards proceeding to make an answer. Story, Eq. Pl. § 688. If they are relied on, the respondent should stop with them alone. Id. §§ 606, 846. But the rules of the supreme court of the United States have rendered less strictness in this matter sufficient, and allow a plea to part and a demurrer to part, and seem intended to remedy any objection in such case for duplicity or uncertainty. See rules 32, 37, 39. The power to make such a rule is questioned by the complainant, and there might be some ground for exception to it, if the rule violated any provision of the constitution or any act of congress. See proviso in judiciary act (section 17). So too, perhaps, if violating any principle of established law in equity as to private rights. But when, as here, the rule merely regulates a matter of practice, it seems to be clearly within the power of the supreme court, under the 11th section of the judiciary act of 1789. And as to the expediency of the rule, if within the power of that court, there is no use nor propriety in my offering an opinion, it being the duty of this tribunal to enforce it, whether expedient or inexpedient. So, if it was a mere personal objection, sought to be reached in the answer, the rule might not be justified. Wood v. Mann [Case No. 17,951]; Livingston v. Story, 11 Pet. [36 U. S.] 393.

The other exceptions taken to the answer, on the ground that the respondent declines to make disclosures of the amount of money received of Bowen for a sale to him of the copyrights in these books for some period, or to some extent, and which the complainant alleges to belong exclusively to himself, are of a different character. They go to the merits of the controversy. Because if the complainant is thus the owner of those copyrights, and has a power to make others, in a court of equity, desist from the sale or use of them, it would seem to follow, that he might make others disclose the sums received for such use and sales, and account for the same, as a part of the equitable relief connected with such a power.

I do not proceed in this view, on the ground claimed by the plaintiff, to redress the owners of copyrights or patents in this court under the acts of 1790 or 1829, in any cases where they could not before have had relief in some court, either of equity or law. Those acts merely enabled them to prosecute such claims in this court as they legally had done before, without going to the state tribunals; because the claimants held all their rights under acts of congress, and the public interest required a uniform construction to be placed by one tribunal on all important questions connected with rights so held. Does the complainant then bring himself by his case within the ordinary jurisdiction of this court on its equity side? One of the branches of equity jurisdiction is to issue injunctions, another to compel disclosures, and another still to require an account in proper cases. All of these claims to sustain jurisdiction on the equity side of this court, are interposed here, and are doubtless sufficient to justify the court in proceeding to settle the rights of these parties, without turning them over to a court of law, unless we are prevented by two objections. 1 Story, Eq. Jur. § 67. It is not that this court, on its equity side can, as seems to be supposed at the bar, give relief in all cases, where a party is unable to obtain it at law. So far from being invested with powers to remedy every wrong and sustain every right, not relievable at law, this court on its equity side is as much restricted as on its law side. In neither, can it go beyond the settled principles belonging to each, and those principles have their limits and rules, in chancery as well as at law. Howe v. Sheppard [Case No. 6,773]. But here the bill, as before seen, does in fact, contain allegations, bringing the case within those settled principles and rules. And the question, whether this court in equity has jurisdiction or not in the first instance, over the matter prayed for, must be adjudged for the plaintiff. The numerous cases, where bills in equity have been dismissed, and further proceedings stopped, because no sufficient reasons for jurisdiction in equity are alleged, are, therefore, no precedents here, though such cases may be good law in a state of facts where they apply.

What then are the two objections which require more detailed consideration? One is, that this court in equity will not proceed with a bill, although enough is alleged to give jurisdiction, provided it appears that a full and ample remedy can be sustained at law; and that such an one exists here. And the other is, that the title of each to the copyrights is in dispute between these parties, and it has been argued, that this circumstance is a sufficient ground to prevent us from going further till that controversy is settled at law. The principle involved in the first point is, that a party has a right to a trial by a jury, and by common law principles, and by more than one judge usually, in matters or controversies, not in their character exclusively maritime, or peculiarly of equity cognizance. Hence cases should not, if the respondent objects seasonably, proceed in equity or admiralty, (where no jury trial can be claimed as a right,) unless clear-

ly and exclusively belonging to them. Equity power is also limited here and placed in courts of limited jurisdiction; whereas in England it is more general, and depends on usage, and is not restricted by positive statute. Baker v. Biddle [Case No. 764]. When we advert to the cases, supposed to control this point, they will be found full of discriminations and diversities as to the facts, which, if duly attended to, will show how far they ought to govern here, but which, if overlooked, are likely to mislead. I think they will show, that this case being at first begun here properly as of equity jurisdiction, can be finished under it, without violating any principles of chancery, or any act of congress. The 16th section of the judiciary act is the one chiefly relied on. "And be it further enacted, that suits in equity shall not be sustained in either of the courts of the United States, in any case, where plain, adequate, and complete remedy may be had at law." 1 Stat. 82. It is true, also, that a court of chancery in England will not relieve, generally, where the plaintiff has the same relief at law. Com. Dig. "Chancery," 3, F, 9; 1 Vern. 71; Bunb. 18; 1 Ves. Jr. 161, 341; 2 Ves. Jr. 38; 1 Hayw. 233, 370; 2 Hayw. 136; 1 Johns. Ch. 463; 4 Johns. Ch. 352; 5 Johns. Ch. 232; 1 Hen. & M. 100; 4 Hen. & M. 470, 471. Nor if the damages at law are ample for the injury. Hansbury v. Baker, 1 Pet. [26 U. S.] 236; [Boyce v. Grundy] 3 Pet. [28 U. S.] 215; M'Ray v. Carrington [Case No. 8,841]; Baker v. Biddle [supra]; [Hepburn v. Dunlop] 1 Wheat. [14 U. S.] 197; Russel v. Clark, 7 Cranch [11 U. S.] 69; Bean v. Smith [Case No. 1,174]; [Dade v. Irwin] 2 How. [43 U. S.] 383. So when a bill was on a policy, giving jurisdiction by asking a reform of the contract, and it is refused, the court will dismiss the bill, though there is a right to recover on the policy, because it is ample at law. Graves v. Boston Marine Ins. Co., 2 Cranch [6 U. S.] 419. So if a discovery has been refused, and a party dies, the court will not revive the case. 10 Ves. 31; 1 Mad. 217; [Russel v. Clark] 7 Cranch [11 U. S.] 69. But in many other cases well commenced in equity, the court will proceed to finish it there on matters concurrent at law. See [Hepburn v. Dunlop] 1 Wheat. [14 U. S.] 179; Bunb. 29; U. S. v. Myers [Case No. 15,844]. Or if the remedy existing at law is doubtful. 2 Caines, Cas. 1; 10 Johns. 587; 1 Paige, Ch. 90; 2 Stew. 420. But the remedy at law is now deemed sufficient, if it be appropriate and effectual. 1 Spence, Eq. Jur. 699. Especially since new trials are so extended by petition as well as motion, and correct much before remediable only in chancery (Id. 670), and since courts of law have adopted so many of the principles of equity. Usually, too, chancery will not go on, if the remedy at law be clear, and the case is stale, and the title is questioned. Dade v. Irwin's Ex'r, 2 How. [43 U. S.] 383. And not unless the subject-matter is still one of chancery jurisdiction, and a disclosure is obtained. Pratt v. Northam [Case No. 11,376]; [Russell v. Clark] 7 Cranch [11 U. S.] 89. This may not be the course of practice in England and in the States, as in New York, where no limitation has been affixed, as by the judiciary act here, to redress in chancery. But where the case at law is concurrent throughout in the courts of the United States, and relief is as complete at law as in equity, unless necessarily begun in equity, and a disclosure is obtained there, equity will not proceed. Such is the doctrine in Smith v. McIver, 9 Wheat. [22 U. S.] 532, besides several of the other cases before cited. Yet, when proceedings are commenced in equity, for a peculiar reason, as for a discovery of assets, you may often complete them there, and therefore may complete probate cases there. 2 Atk. 360-363; 3 Atk. 262, 263; 4 Johns. Ch. 619; U. S. v. Aborn [Case No. 14,418]; Bean v. Smith [supra]; 4 Cow. 718; Hardy v. Cramar, 17 Johns. 288. Hence it follows, that a case will not always be allowed to go on in chancery, merely because the power there is concurrent with that at law. But it must be fuller, more appropriate, or better. Harrison v. Rowan [Case No. 6,143]; Baker v. Biddle [Id. 764]; Boyce's Ex'r v. Grundy, 3 Pet. [28 U. S.] 215; [Wilson v. Mason] 1 Cranch [5 U. S.] 98; 1 Schoales & L. 205; 17 Johns. 384. This is the case often in respect to an injunction, which may prevent litigation, or a multiplicity of suits, and give preventive redress in some cases, when remedies at law can do neither. So in U. S. v. Myers [Case No. 15,844], it is held, if a perfect remedy at law exists, a party should not go to equity, but if a trust exists besides, it may be prosecuted in equity. As a farther illustration of this principle, it is in many chancery bills specially averred, that no relief exists at law. See Heriot v. Davis [Id. 6,404]. It has been said also, that the court of chancery grants relief only where courts of law do not. 1 Spence, Eq. Jur. 408, note; 4 Inst. 84, 443, 625, 693; 1 Edw. Ch. 218. This was one class where relief was given in chancery, but is not now, probably, the only one. But in Pratt v. Northam [supra], the judge seems to hold, that the court may execute concurrent powers with courts of law, when the relief is identical. I apprehend this last is not the correct view here under the judiciary act, any more than in England, unless there be some substantial reason and advantage in going to chancery, or in going on, after at first having properly begun there. A party must not go to chancery to settle a question of law alone. 2 Johns. Ch. 371.

Some cases, cited to show, that the United States courts here will proceed to sustain suits in equity, when the relief is entirely ample at law, rest on a different principle when analyzed. Thus in U. S. v. Howland, 4 Wheat. [17 U. S.] 115, a trust was relied on to retain the case in equity; and Harrison v.

Rowan [Case No. 6,143], goes on the ground, that relief at law was not in them so adequate and complete as in chancery; and [Vattier v. Hinde] 7 Pet. [32 U. S.] 274, relates only to a rule of practice. In the following cases, fraud likewise existed, and was not only to be relieved against, but in a manner peculiar to chancery, by rescinding the contract: [Gregg v. Sayre] 8 Pet. [33 U. S.] 244; Smith v. McIver, 9 Wheat. [22 U. S.] 532; 5 Munf. 183, 219; [Boyce v. Grundy] 3 Pet. [28 U. S.] 219. In others the matter was a trust, or the remedy peculiar, as by an injunction. 2 Story, Eq. Jur. § 1256; Id. §§ 74, 91; Briggs v. French [Case No. 1,870]; Gass v. Stinson [Id. 5,260]; [U. S. v. Howland] 4 Wheat. [17 U. S.] 115. In Pratt v. Northam [supra], it was held, that though a remedy existed at law, it was not so ample as in equity. So Bean v. Smith [Case No. 1,174]; [Herbert v. Wren] 7 Cranch [11 U. S.] 370–376. And if it was as ample, yet being a mere local remedy at law in that state, and not a general one, it did not bar jurisdiction in equity. [Boyce v. Grundy] 3 Wheat. [16 U. S.] 212; [U. S. v. Howland] 4 Wheat. [17 U. S.] 115. So the remedy in equity is sometimes concurrent with one at law, as in cases of fraud, dower, and accident, and then it is said it may be followed in equity, though no better than at law, (page 105); Smith v. McIver, 9 Wheat. [22 U. S.] 532; Cooper, Eq. Pl. 28. But in some respects it should be better.

Chancery does not decide contrary to law, but goes beyond it sometimes. 1 Spence, Eq. Jur. 418; Amb. 810, Append. It gives relief in some cases, where courts of law do generally, but, from forms or otherwise, cannot do it so well, if at all; as relief to one corporator, co-partner, or executor, against another. 1 Spence, Eq. Jur. 432. So sometimes in frauds. Id. 625; 2 Ves. Sr. 155; 1 Burrows, 396. Asking a discovery, separately or with other matter, was thus often enough to give jurisdiction in chancery. 1 Spence, Eq. Jur. 694. But quære, unless the other matter was of a chancery character. In Herbert v. Wren, 7 Cranch [11 U. S.] 370, allegations were made not only for dower, but partition, discovery, and account, which belong more appropriately to equity. Harrison v. Rowan [supra]. In U. S. v. Howland, 4 Wheat. [17 U. S.] 108, the government was one party, and hence could prosecute in its own circuit courts, though it might in local courts have relief at law. Yet, as before suggested, I doubt some the correctness of this idea in common cases, that a remedy may be pursued here in equity whenever concurrent. Relief should first be sought in equity, or some ground alleged for its remaining there, as being superior to the remedy at law, or that it began there for relief not existing at law, e. g., for a discovery. Bean v. Smith [Case No. 1,174]. Whether the rule is here different or not from what it is in England, in such cases, does not then seem to be fully settled. Some cases appear to regard the power in chancery here, if full relief can be had at law, as more limited than in England, and not enabling the court to go on, because possessing merely concurrent powers. While others regard it as the same, and this clause in the judiciary act as merely declaratory. Gordon v. Hobart [Id. 5,609]. But it is difficult to see a reason for passing the law here if merely declaratory, unless the rule or usage in England was unsettled, and in some cases chancery courts exercised a concurrent power with a court of law in a particular instance, and gave merely a similar relief; while in other instances, it declined to proceed, (though having jurisdiction over the matter and case set out,) if it could do nothing in aid of perfect justice between the parties, which could not be accomplished in a court of law. My own impression is, that from a strong fondness for a trial by jury, the common law and all its principles and forms, rather than those in equity, it was the design of our fathers, in that clause of the judiciary act, not to permit proceedings to go on in chancery if it turned out in the progress of the inquiry, that full and adequate relief could be had at law, and therefore no necessity existed to go into chancery, or, after being in, to proceed further there. And a bill in such case is dismissed, not because equitable grounds of jurisdiction are not set out, as that would belong to another class of objections to the jurisdiction, but because under our system, though a court of chancery could give relief in the particular case, and in England would possess jurisdiction to proceed and finish the case if it pleased; yet as a court of common law appears to be able to render as full and efficient redress as a court of chancery, the jealousy as to the latter requires it, under the 16th section of the judiciary act, not to proceed farther. In the present case, however, powers are asked to be exercised, and redress given, of a kind which do not exist at law. A court of law cannot give as ample redress for a past violation of a copyright, or one anticipated in future, as courts of equity. The latter can not only compel disclosures as to the number and an account of sales, which it is more difficult to prove at common law, but require an account between principal and agent or quasi agent, or between quasi partners, that cannot be so effectually opened to light by other modes of evidence. So, too, the prevention of a multiplicity of suits by an injunction, a great and good object of chancery powers as well as preventive redress, being much better than retrospective, and much fuller and more accurate than at law, are both attained by such proceedings as these in chancery. Attorney General v. Burridge, 10 Price, 374; Gaines v. Chew, 2 How. [43 U. S.] 619.

We are, therefore, forced to the conclusion, that this court had in this case jurisdiction to begin and to proceed, notwithstanding a remedy existed at law, which is less appropriate and less efficient or ample. This objec-

tion, then, is overruled on the merits, and not for another reason urged by the complainant, that it was taken too late.

In respect to the proper time and mode of taking an objection of this kind, (that the complainant has an ample relief at law,) it is laid down, that it must in England be by a demurrer. Bunb. 29. The respondent cannot object, it is said, after the case is set down for a hearing. 2 Hayw. 127; Grandin v. Le Roy, 2 Paige, 509. Nor after an answer or joinder of issue. 2 Johns. Ch. 339. But the correct rule probably is, that a respondent may and usually should demur, if it appears on the face of the bill, that nothing is sought which might not be had at law. Baker v. Biddle [Case No. 764]; 22 Pick. 237; 23 Pick. 148. If, however, a disclosure is asked, it would be premature to take the objection till an answer is put in. Id.

I shall now proceed to examine the other objection to proceeding farther in chancery, that the title to the copyright is in dispute between these parties, and should be settled first at law. Let us advert a moment to the powers upon this, that do clearly exist here, and the structure of this court, before disposing of the question finally. A court of equity can restrain a future violation of a copyright, as well as require an account for a past one, and this remedy is often better than damages, which alone can be had at law. 2 Story, Eq. Jur. §§ 210, 223, 933; 10 Ves. 132; Jeremy, Eq. Jur. 327; 6 Madd. 10; Mitf. Eq. Pl. 138; 1 Russ. & M. 73, 159; Jac. 341, 471. See other cases cited in these. And the conscience of the defendant, by a disclosure asked, can be probed as to every thing material to the sale or use.

Now it is conceded, that the exercise of extraordinary powers in forwarding such ends in favor of a party, must of course depend on his right being acknowledged or decided first. But though not acknowledged here, as is often the case when an injunction or account is prayed for, why should the parties be sent to law first to try it there? Are not all the necessary facts now before this court? Is not the question to be settled by the same judge and on the same principles as at law? And hence, is not the reason much stronger for settling it here than in England, where the judges in the courts of law are different persons? And this last is the reason assigned at times for allowing the law courts to settle the titles, in order to have the decisions uniform. Bramwell v. Halcomb, 3 Mylne & C. 739. It is conceded, that in England, when there is an application to chancery to order a writing to be given up, and the title to it is still in controversy, or where an injunction is asked quia timet, and the title to the land, or a patent is still disputed, chancery will generally require the unsettled rights of the parties to be first adjudged at law. Because the judges at law are different, the rules on some points unlike, and the use of a jury exists in one tribunal and not in the other. [Grivin v. Breedlove] 2 How. [43 U. S.] 38. Chancery may form an issue to be tried at law to settle the title and continue the bill (4 Dru. & War. 80), or it may dismiss the case till the parties settle their rights at law (Jervis v. White, 7 Ves. 415; 2 Ves. 486, 487, note; 1 Johns. Ch. 517). It is a matter in its discretion. 2 Ves. 483; 5 Johns. Ch. 118; [Miller v. McIntyre] 6 Pet. [31 U. S.] 65. But the parties will usually be sent to law to try the question. 3 Daniell, Ch. Pr. 1863; 1 Jac. 311; 2 Johns. Ch. 281, 371; 2 Story, Eq. Jur. §§ 852, 853; [Alexander v. Pendleton] 8 Cranch [12 U. S.] 462. So in cases of nuisance, if the title and right as to the subject-matter is disputed bonâ fide, the court will not enjoin till the title is settled at law. Spooner v. McConnell [Case No. 13,245]; Mohawk Bridge Case, 6 Paige, 563; 7 Johns. Ch. 315; Case of Parker in rem, 12 Pet. [37 U. S.] 98. Nor enjoin even temporarily against the use of a patent, unless there has been a recovery on it, or long possession. Case of Orr v. Littlefield [Case No. 10,590]. But it will try the right before a permanent injunction, either in chancery or at law, as most convenient, making up at times a proper issue, if in chancery, for the jury, in order to settle any disputed facts. But it is a question of discretion with the court, whether to interfere or not by injunction before the legal right is established. Saunders v. Smith, 3 Mylne & C. 735.

Equity is to aid law usually by an injunction, and here parties usually settle the law first, whether a right exists or not. There is, however, no general rule, but the circumstances of each case govern the discretion. And in respect to principle concerning the powers, which are usually exercised by chancery in settling disputed titles or rights, I can see no objection to its being done in that court, when it is a necessary or appropriate incident to settling the merits in an equity matter, over which it has peculiar jurisdiction, or can give a peculiar and more effective remedy than at law. Thus we have before stated, that a party will not be allowed to go into chancery to settle a disputed law point alone (2 Johns. Ch. 371); though if he wants a discovery also, or relief on other matters belonging peculiarly to that court, the law point may be there settled. 3 Atk. 336; Cathcart v. Robinson, 5 Pet. [30 U. S.] 278. So, when instruments are asked to be surrendered, as clouding a title, or void for forgery, or other illegality, the power to impound or return them to the proper party will be exercised. It is the duty as well as practice of late for chancery to decide most questions of law for itself. 1 Spence, Eq. Jur. 517; Blundell v. Gladstone, 11 Sim. 489; Muddle v. Fry, 6 Madd. & Gel. 270; 7 Ves. 17; Nelson, 17. So the courts of law now enforce many principles, once maintained only in chancery. 1 Spence, Eq. Jur. 683, 638. But this furnishes no reason why chancery should abandon the jurisdiction over them. Hawk-

shaw v. Parkins, 2 Swanst. 545; 1 Spence, Eq. Jur. 638, 639. Such are the cases of relief to sureties, and holding purchasers of trust property by trustees voidable, half of what is called common law. Another distinction is, that a court of chancery will decide a question of law, which arises in exercising its undoubted jurisdiction, though it is usual, in questions as to real estate, to send the case to a court of law if desired, on such a point, to get its opinion for chancery. 8 Ves. 272; Cholmondeley v. Clinton, 4 Bligh, 109; 1 Spence, Eq. Jur. 489. The rules of construction being the same in both courts, and chancery asks advice of common law judges only in grave doubts, or sends a case to law, retaining the bill in the mean time. Houston v. Hughes, 6 Barn. & C. 420; 4 Dru. & War. 80. Precedents are to govern conscience in chancery as well as at law. It is not conscience naturalis et interna, but civilis and politica. It is not making the law, but declaring what it has been established to be. 1 Spence, Eq. Jur. 417; 1 Vern. 77. It is not making new principles, but applying old ones to new facts or cases. 1 Spence, Eq. Jur. 417, note; and Gee v. Pritchard, 2 Swanst. 414; 3 Bl. Comm. 434. Indeed it seems to be conceded, that chancery will not send parties to a court of law, if facts enough are before chancery, to decide the law, and no reasonable doubt exists with the court as to the title on those facts. 10 Price, 374, 412. So in respect to copyrights, the course has been so liberal as to enjoin, if an equitable or a clear title exists. Mawman v. Tegg, 2 Russ. 385; Eden, Inj. 286; 3 Swanst. 679; Jeremy, Eq. Jur. 326. And if the title be free from doubt, the court will always enjoin. Amb. 694; 2 Swanst. 428, note. Here the circumstances are peculiar, and take the case out of some general rules. There is no doubt as to originality or piracy, copyright good or not, plaintiff one owner or not, but a naked question of a transfer of title or not by a written contract, which is made a part of the case. Now as that written contract is to be construed in a court of equity as in a court of law, and in this tribunal is to be construed by the same judges, whether at equity or law, and no fact is pretended to exist, which either party wants to be submitted to a jury in a trial at law, I can hardly see any utility or necessity of turning the case over to the law side, and the more especially when by asking for a discovery, as well as injunction and account, matters are asked for, which give to this court clear jurisdiction in equity, and which, so far as regards an injunction, furnish a remedy more full and efficient than any one at law. Briggs v. French [Case No. 1,870].

There are other cases, where for cogent reasons chancery will settle disputed titles. In cases of bills of peace and quia timet, the party may be in possession, and not able to sue at law, yet still there may be an outstanding deed or claim, a mischievous and injurious claim; and if illegal for fraud, or any other cause, the other party may possess a right to have it surrendered or enjoined. Briggs v. French [supra]; [Peirsoll v. Elliott] 6 Pet. [31 U. S.] 95; [Massie v. Watts] 6 Cranch [10 U. S.] 148; Drew. Inj. 218, 219. And then courts of chancery will frequently decide such disputed questions for themselves. 5 Jur. (London) 58; Drew. Inj. 211; Binns v. Woodruff [Case No. 1,424]; Story, Eq. Pl. § 847, note. So, where there is other matter proper for equity, the title can be settled as an incident to that. In U. S. v. Howland, 4 Wheat. [17 U. S.] 115, a trust was alleged, and the court held, that it could there decide a disputed title to the property, though this might be tried at law in their discretion. Here the injunction and accounting are both proper, if the title is in the plaintiff. So where, in chancery, fraud was averred in a bond to give jurisdiction to order it to be given up. Jackman v. Mitchell, 13 Ves. 587. It may then be ordered to be given up, though invalid at law as well as in equity. There is a concurrent power to settle the dispute as to title in chancery in such case, if not void on its face, but is in truth void. Colman v. Sarrel, 1 Ves. Jr. 50; 4 Ves. 129; 5 Ves. 235.

Under the existing circumstances, then, a controversy like this as to the title to the copyright, may be as well settled by this court on its chancery as on its law side, the jurisdiction being clear on both sides, both courts being to both parties, and the merits of the title in the particular in controversy—identical. It seems absurd, when all the facts are agreed, for the same court to postpone a bill on its equity side till a trial of a title can be had on the law side, and which here is to be settled by the same judges and on the same principles. These two prominent objections, then, being surmounted, does the complainant show a title, on the contracts and facts before us, to these copyrights, or does the respondent do it? On this, there is a decided balance of facts and law in favor of the complainant. It is conceded, that the complainant was the author of both the books, however the respondent may have employed him, and furnished valuable suggestions as to the plan and the materials. Of one, he admits, on the title-page, that the complainant was the author. It is of little consequence how it would have been without this. In respect to the other book, the defendant made not even suggestions nor supplied means; and the author and publisher were the same person, and being the plaintiff, he alone took out the copyright. Of neither did Pierpont make any assignment, except during the first term of fourteen years, and of both he, as author, was entitled, being alive when the first term expired, to fourteen years more. See Acts May 31, 1790 [1 Stat. 124], and February 3, 1831 [4 Stat. 436]. The words in the first act were: "And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident

therein, the same exclusive right shall be continued to him, or them, his or their executors, administrators, or assigns, for the further term of fourteen years: provided, he or they shall cause the title thereof to be a second time recorded, and published in the same manner as is hereinafter directed, and that within six months before the expiration of the first term of fourteen years aforesaid." 1 Stat. 124, § 1. The words of the second act, as applicable, were: "And be it further enacted, that, whenever a copyright has been heretofore obtained by an author or authors, inventor, designer, or engraver, of any book, map, chart, print, cut, or engraving, or by a proprietor of the same, if such author or authors, or either of them, such inventor, designer, or engraver, be living at the passage of this act, then such author or authors, or the survivor of them, such inventor, engraver, or designer, shall continue to have the same exclusive right to his book, chart, map, print, cut, or engraving, with the benefit of each and all the provisions of this act, for the security thereof, for such additional period of time as will, together with the time which shall have elapsed from the first entry of such copyright, make up the term of twenty-eight years, with the same right to his widow, child, or children, to renew the copyright, at the expiration thereof, as is above provided in relation to copyrights originally secured under this act." 4 Stat. 439, § 16. Both refer to authors alone, and not their assigns, as entitled. They do not even embrace in terms, express assignees of a second term, made before the second term begins, and the last act does not name assigns at all. So the extension allowed under the act of 1831, of a copyright taken out under that act, looks entirely to the author and his family, and not to assignees. "And be it further enacted, that if, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such widow and child, or children, for the further term of fourteen years: provided, that the title of the work so secured shall be a second time recorded, and all such other regulations as are herein required in regard to original copyrights, be complied with in respect to such renewed copyright, and within six months before the expiration of the first term." Id. § 2.

In respect to both copyrights also, the complainant conveyed, eo nomine, not a term of twenty-eight years; nor one, as long as he should be entitled; nor all his interest of every kind in the book or its manuscript; but simply as to the first, "the copyright of said book," and as to the last, the copyright of it "shall be considered the joint and equal property of said P. and F." The only copyright then existing or taken out for either was for fourteen years only. One contract was dated July 21st, 1823, and one July 12th, 1827. That copyright, which had been then taken out, was the subject-matter of the contracts; no words are used looking beyond that; no consideration was paid or talked of beyond that. There was no mutuality beyond that. For the payment of the last was made in another copyright, in another book, where the author might not secure the first term, or, if he did, might not be willing to renew the copyright. The renewal of the copyright in either of these, was then uncertain, and not, to appearance, contemplated by either side. When the assignment was made, it doubtless referred to what was in existence, and not to any future contingency, nor to what was personal for the author, if spared to old age, nor for what any compensation was specially either asked or made.

It is said, that a usage existed among booksellers, to regard the renewed term as passing with the first one, as a matter of course under the mere assignment of the copyright. But if such a usage could apply at all, it would be only among those acquainted with the usage, or belonging to the fraternity of booksellers. 9 Pick. 198; 15 Mass. 431; 21 Pick. 483; 1 Taunt. 347; 14 Mass. 303; Brown v. Brown, 8 Metc. 573, 576. See 1 Greenl. Ev. §§ 336–338, and cases. An usage is not admissible, unless so notorious that it is known to both parties. U. S. v. Duval [Case No. 15,015], and Davis v. A New Brig [Id. 3,643]. And a party is not allowed to explain a writing by an usage, unless certain words in it have two senses. The Reeside [Case No. 11,657.]

In the next place, it is the author and not the assignee, to whom the extension of the right is eo nomine given, by the statute of Anne, as well as the acts of congress. Jeremy, Eq. Jur. p. 318. By that, "the sole right shall return to the author for fourteen years more, if then living." So by 54 Geo. III., after the enlarged term of twenty-eight years is conferred on an author or his assigns, it is he alone on whom fourteen years more is conferred, if he be then living. Id. So here the copyright is in the act of 1790 and 1831, given to the author alone, and to others, only, who purchase it from him. By construction, then, we should not extend it beyond the words and design of the statute, made to benefit authors, unless it seems to be actually meant by the author to be transferred forever, and including any future contingency, and a clear and adequate consideration paid for the extended term. See Wilson v. Rousseau, 4 How. [45 U. S.] 677, opinion of minority; and Washburn v. Gould [Case No. 17,214]; Woodworth v. Sherman [Id. 18,019]. It was the genius which conceived and the toil which compiled the book that is to be rewarded by even the first copyright, and no one ever dreamed that an as-

signee could alone take out the second or extended term, unless he has paid for it, clearly contracted for it, and in equity, rather than by any technical law, is to be protected in it. Here the assignee has neither, manifestly and distinctly, in his favor; nor has he filed any caveat to prevent a renewal by the author alone (Maugh. Lit. Prop. 70); nor used other references to the renewal in his contracts (Id. 73; Carnan v. Bowles, 2 Brown, Ch. 80). In Rundell v. Murray, 1 Jac. 316, the court seems to admit that a general assignment in writing of a copyright, will make it endure for only fourteen years. All the cases which seem to militate with this, are where the contract of sale or assignment uses language, looking beyond the existing copyright, such as referring to all the interest in the matter. 1 Hawk. P. C. (6th Dub. Ed.) 477; 2 Brown, Ch. 80. Or to the manuscript or book itself, as to which there may be a right at common law. Wheaton v. Peters, 8 Pet. [33 U. S.] 591. Or using some other expression more comprehensive than the word "copyright," as here, and which standing alone meant naturally, as the facts doubtless were, only the copyright then taken out for only one term. Brooke v. Clarke, 1 Barn. & Ald. 396; Rundell v. Murray, 1 Jac. 311. Thus in the case of Nesmith v. Calvert [Case No. 10,123], the inventor assigned all the patent right he had or should procure and mature on the subject of clearing or burring wool; and it was held, that, under such particular expressions, a patent subsequently obtained on this subject passed to the assignee.

The act of parliament of 5 & 6 Vict. c. 45, § 2, which in certain cases confers the copyright on the employer rather than the employed, when writing for him under contract, and paid as for a job, conflicts with this view, if that provision be declaratory of what was law before. See Burke, Copyright, Append.; 1 Cox, 283; 1 Barn. & Ald. 396. If it was not declaratory, but new, it operates for the complainant, as showing that the law was different before. I am inclined to think it is a new provision, and not entirely unjust in its operation in such a state of facts, if the parties do nothing indicating some right of authorship to belong to the writer. If such a mere hirer of another to write or compile was before entitled to the copyright, why was this act of Victoria necessary? And if such a hirer of others was entitled before to take out a copyright, how does this act encourage and aid genius? It rather aids those kinds of patrons, who fatten on the labors of genius. It has been settled here, that one who gets others to engrave, and conceives the idea, but does not execute it himself, is not entitled to take out the copyright. Ambler, 164; Binns v. Woodruff [Case No. 1,424]. So it has recently been adjudged in the New York circuit court, that one, who does not himself compile, but hires another to do it for him, is not entitled to a copyright. But as the defendant did advise and plan some concerning the first book, and paid the true author of it for the copyright, rather than claiming it on his own account, independent of that purchase and that payment, the plaintiff, from these facts, stands in a more doubtful position as to the extended copyright in the first book than in the second, and would have been in a position still more questionable, and hardly tenable, if the first book had not been published by the respondent with the plaintiff's name as author on its face, and, of course, admitting him prima facie to be entitled to an author's rights and privileges. But as to the second book, it does not appear to have been projected by the respondent or made by his procurement.

It may be remarked, in conclusion, that the taking out of the second term in each copyright, does not seem to be that to which it was likened by counsel, i. e., the strengthening of a defective title by one part owner. Co. Litt. 195; 5 Johns. Ch. 388; Flagg v. Mann [Case No. 4,847]. But it is rather like a new interest obtained by one after the original interest had expired. I do not propose to decide what should be the rule of damages here, till after a full disclosure. But as it has been somewhat discussed, I would throw out on it a few suggestions, which may be useful in this stage of the cause. As the bill does not set up printing and sales of copies by the respondent, but only a sale of licenses to others to do it, his counsel here argued, that nothing has been done or is anticipated, which violates the plaintiff's rights, if entitled to the second term alone; and I do not see how the respondent can be made to account for those sales, except by treating him like an agent or trustee of the plaintiff in making them. The purchasers of the right from him and the actual publishers would also be made to account, either under a new bill or as parties to this, if within our jurisdiction. There would, however, be but one satisfaction allowed for the same sales. Yet, so far as regards a sale of what Fowle is not entitled to, and taking pay therefor, that is a positive, an actual intermeddling with the plaintiff's property; an injury, by inducing others to publish under him and not under the plaintiff; and is to be checked, not as merely fearing an injury, quia timet, but as an actual conversion of another's property to his use. It sells the rights of the plaintiff and pockets the gains, and lessens the value in the market to the plaintiff of what is left. And why should he not be treated as an agent or trustee for what he takes for my property, a copyright to so much, and for so long? The respondent has got money, which ex æquo et bono belongs to the plaintiff, and he is a sort of trustee to account for it. It would exonerate the buyer pro tanto if he does, and hence only one be liable for the same use. And it is an incident to the injunction against what is wrong, that the

respondent should pay for all he has realized from the copyrights illegally.

It appearing to me then, that the title to these second copyrights belongs to the complainant, that the respondent has undertaken to sell them as if his own, in some cases, and declines to disclose to whom and for what amounts, his answer seems to be exceptionable in not making that disclosure; he must, therefore, proceed and state the facts in relation to them, and if they turn out to be as now supposed, he will be liable to account for what he has received, and an injunction must issue against his further use or sale of the last terms of the copyrights. If, on a further disclosure, it should turn out, that any of the receipts were more than six years before this bill was filed, a recovery for them may be barred by the length of time, as the statute of limitations is interposed by the respondent. There are cases, where, in matters of account, the statute does not apply at all; but whether this is one of them or not, cannot be seen till more is disclosed.

NOTE. All the title remains in a writer of an article or book, which he does not clearly convey or part with. See case of Bishop of Hereford v. Griffin [16 Sim. 190].

PIERREZ (MARSHALL v.). See Case No. 9,130.

Case No. 11,153.

In re PIERSON.

[10 N. B. R. 107.] [1]

District Court, D. Delaware. 1874.

BANKRUPTCY—WHEN ASSIGNMENT TAKES EFFECT—REGISTER'S MISTAKE—FAILURE OF ASSIGNEE TO RECORD DEED — DISCHARGE — PREFERENCES — PARTNERSHIP — INTENTION—SALARY MEASURED BY PROFITS.

1. The assignment of the bankrupt's property will, by operation of law, relate to the commencement of proceedings in bankruptcy, uncontrolled by any mistake in the register in stating the time from which the deed should operate.

[Cited in brief in Re Watson, Case No. 17,273; Re Watson, Id. 17,275.]

2. When an assignee has formally accepted his appointment as assignee, and given bonds, his neglect to take into his own custody the deed of assignment and have the same recorded, when he knew that no property passed by the assignment, is no ground for withholding a discharge.

[Cited in Re Carrier, 47 Fed. 440.]

3. Only those preferences which are forbidden and made void by the 35th section of the bankrupt act [of 1867 (14 Stat. 534)], and the clause of the 29th section which refers to preferences in contemplation of becoming bankrupt, are considered grounds for withholding the bankrupt's discharge.

[Cited in Re Lowenstein, Case No. 8,573; Re Wolfskill, Id. 17 930; Re Carrier, 47 Fed. 444.]

4. No partnership inter sese can exist unless with the intention of the parties.

5. An agreement to give and take a salary, to be measured by the net profits received, does not create a partnership—the distinction stated between a salary measured by the profits, and a share of the profits as such.

6. A transfer of property, made at or about the time of advances, and in payment therefor, will not subject the debtor to proceedings in involuntary bankruptcy; but if made some time before the advances, it is a preference which will subject him to such proceedings.

7. A preference may be given which will subject the debtor to proceedings in involuntary bankruptcy, and yet be no bar to his discharge.

Opinion and decision upon the hearing of the specifications filed by John A. Harris and Isaac L. Devou, certain creditors of the bankrupt [William H. Pierson] against his discharge.

S. M. Harrington and W. Cummins, for creditors.

B. Fields, for bankrupt.

BRADFORD, District Judge. The first specification is as follows, viz.: "That the said bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, and inventory, in relation to material facts concerning his estate and debts, in this—That he willfully and fraudulently omitted the name of the said Isaac L. Devou, a creditor, from his schedule of debts filed in this cause. In that he has willfully and fraudulently stated in his schedule of debts filed in this cause, that the debt of John A. Harris & Son was contracted prior to the 1st day of January, A. D. 1869, that is, in the year 1868, when in truth and in fact, the said debt was contracted with John A. Harris in his individual capacity subsequent to the 1st day of January, A. D. 1869." Upon the argument of the first part of this specification, the court, while giving attention to a long argument in behalf of the petitioning creditors, declined hearing the counsel for the bankrupt. The court then saw no ground whatever to suppose that any willful or fraudulent omission had been made by the bankrupt; and it remains of the same opinion now, although a contrary view has been zealously maintained by the counsel for the opposing creditors.

First. While it is evident now, after all we have heard of the testimony (and might have been ascertained by the bankrupt had there been any motive to inquire particularly), that Isaac L. Devou had the beneficial or equitable interest in the sum of money paid to the firm of Joseph D. Pierson & Brother out of the funds in possession of James L. Devou, and on his own individual check, it is not, under all the circumstances, at all surprising that the bankrupt should have really supposed James L. Devou was the owner of the claim. His active and sole management of the loan; his appearance to represent the claim among the creditors; the undenied representation of one of

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the counsel for the opposing creditors, to whom he applied for his legal services for the purpose of obtaining the benefit of the bankrupt act, that the release of Mr. James L. Devou of his claim was first necessary; together with many other circumstances, might, the court thinks, mislead the mind of the bankrupt as to the real ownership of the claim. Besides, an idea by the bankrupt that Isaac L. Devou had a beneficial or equitable interest in the money loaned and secured by the notes afterwards given by the firm (the bankrupt having had no part in the finances or money arrangements of the firm), was not absolutely inconsistent with the idea that James L. Devou was the legal owner of the claim, and could maintain suit for it. Nor was the employment of Isaac by the firm inconsistent with this idea, for, being the brother of James, he might have been employed by the firm as a favor to the one who was supposed to be the influential (and indeed, was the influential) one who had effected the loan.

Second. He filed the name of James L. Devou for the amount of about the principal of the notes; the difference between the amount of the first proven claim and the amended claim, being the interest on the notes, which was compounded with the principal at the time of obtaining judgment. He did not omit the debt, he may have made a mistake in the name of the creditor. It is not pretended that he did not return James as a creditor for the amount of the principal of the notes, and it is not pretended that the debt afterwards returned as that of Isaac, was not the same debt reduced to judgment. Leaving out the difference of amount (the mistake in which is easily accounted for), where was the wrong done? where was the deception? where the fraud? It was altogether to the interest of the bankrupt to return every creditor in his schedule; an omission would have deprived him of the benefit of the bankrupt act, as far as the omitted creditor was concerned. And as James L. Devou was the persistent creditor refusing his assent to the discharge, the argument is irresistible, that he especially wished a discharge from that debt; and as he could be discharged from that debt only by returning the name of the real creditor, it is to be presumed he returned the name of the one he thought was the real creditor.

Third. While a creditor who has not been returned at all on the schedule of the bankrupt, original or amended, as such creditor, may, especially if there have been assets (his share of which he may have been deprived of by want of notice), object to discharge by reason of willful and fraudulent omission. Can a creditor, when there are no assets, whose name has been put on an amended schedule, object to discharge for such former omission which has been subsequently remedied? This question may be raised, though the point is decided on the explicit ground that there is no evidence whatever of a fraudulent or willful omission. The second branch of the first specification is in these words, viz.: "That he has willfully and fraudulently stated * * *." From all the evidence in this cause the court cannot arrive at the conclusion that there was any fraud or intended wrong in the return of the debt of John A. Harris, contracted January 1, 1869, as the debt of Harris & Son, contracted in 1868. The circumstances under which the debt was contracted and the situation of the bankrupt in the firm of Joseph D. Pierson & Brother sufficiently account for what the court thinks an innocent mistake. The first specification is therefore overruled.

The second specification is as follows, viz.: "That although all of the debts named in the said bankrupt's schedule are stated to be the debts contracted with the firm of Joseph D. Pierson & Brother, yet the petitioner does not, either in his original petition to be adjudicated a bankrupt, or in his petition for a discharge, ask to be adjudicated a bankrupt with reference to, or to be discharged from, the partnership debts of the firm of Joseph D. Pierson & Brother." We know of no provision of law which requires a petition to pray for discharge from partnership debts in precise words. He does pray to be discharged from all his debts provable under the bankrupt law, and therefore he does virtually pray for discharge from partnership debts, as they, as well as individual debts, are provable under the bankrupt law. The second specification is overruled.

The third specification is as follows, viz.: "That the said bankrupt, being a tradesman, has not, subsequently to the passage of the act, entitled, 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867, kept proper or intelligible books of account of his business." It will be remembered that the bankrupt files his individual petition to be discharged from all debts provable under the bankrupt act; that the firm of Joseph D. Pierson & Brother was dissolved on the 6th day of August, 1869, by the death of Joseph D. Pierson, and that William H. Pierson has been seeking a support by his own personal labor from that day to the day of filing his petition in bankruptcy, viz., the 12th day of July, 1872. Inasmuch as the books of the firm were produced at the hearing, it may fairly be presumed that the return of "none" in his schedule was, in the bankrupt's mind, referable to books showing his individual business at the time of filing his petition, and not partnership business. Be that as it may, however, the court does not consider that an omission or mere oversight in reference to returning the books of business, which were thought by the bankrupt as of no possible benefit or use to any

creditor, in itself a ground for refusing a discharge, especially when that omission is cured by their voluntary production in court afterwards.

The act of congress requires that every merchant and tradesman, subsequently to the passage of the bankrupt act, should keep proper books of account, and forbids a discharge if such books are not kept. A surviving partner seeking a discharge from partnership debts is as much bound to show that his firm has conformed to the provisions of the act, as if the firm, as a firm, were applying for discharge. The rights of the creditors to all the aid for discovery from these books is the same in either case. It matters not that William H. Pierson was a junior member of the firm, not the keeper of the books, he is seeking a discharge from partnership debts, and must be bound by the obligations imposed by law on the partnership. If Joseph D. Pierson & Brother did not keep proper books of account, that fact stands as a bar to the discharge of William H. Pierson. Did Joseph D. Pierson & Brother keep such books as are required by the act of congress?

Certain books of account have been produced at the hearing, purporting to be the books of account of Joseph D. Pierson & Brother; some of them are in a mutilated condition, a condition which demands an explanation not yet given. They consist of four books, two day-books and two ledgers; the first day-book and corresponding ledger embracing entries from March 1st, 1867, to June 30th, 1868; the second day-book and corresponding ledger from the latter date to the date of the dissolution of the partnership, viz., on the date of the death of Joseph D. Pierson, on the 6th of August, 1869. These two day-books are daily memoranda of debits for work done, goods sold, etc., credits for moneys paid the firm, and are transferred to the ledger in all cases with more than ordinary accuracy, except where the mutilation of the day-book for 1867 prevents the comparison of articles and amounts. Indeed, these entries from day-book to ledger are so uniformly correct that the inference is very strong, unless there is some suspicion of fraud in the particular accounts, that the entries in the ledgers have been correctly made of dates, sums, and items from those pages that have been mutilated, and in some cases obliterated and destroyed. One is strengthened in this view when there has been no suggestion of wrong done any creditor by falsifying books, by the fact, that upon a minute examination of the books it will be discovered in instances where the sums total in the last column have been clipped off in one strip from the side of the book, leaving the separate items not added standing, that the amounts transferred to the ledger under the precise dates, and the precise articles sold, correspond exactly with all that remained in the day-book, and the sums total in the ledger are the same as is made by the addition of items in the day-book. This view is further strengthened by the character of the mutilations; they are senseless and meaningless; they are of old accounts of the year 1867, and either closed in that year or carried into the accounts of the following year. There are no mutilations of accounts whatever from the 1st of July, 1868. In these ledgers, or books used as ledgers, were kept with care an exact expense account, showing all moneys paid out by the establishment, and a cash account, showing all moneys received for the establishment, from whatever source. Assuming that the obliterations and mutilations of the two books, viz., the day-book and ledger from the year 1867 to July 1st, 1868, were not done by the firm, or a member of the firm of Joseph D. Pierson & Brother, before the dissolution of the partnership, then, in the judgment of the court, the bankrupt has kept proper books of account.

The question now to be considered is not whether these books appear in a mutilated condition, but whether the court has, from the evidence adduced, reason to believe that the entries in the ledgers are any other than correct entries of sums, dates, items, and prices on pages of day-book mutilated and obliterated; or, has any reason to believe that the obliteration and destruction of some accounts in the latter part of the ledger ending June 30th, 1868, was a destruction and obliteration or alteration of items and accounts which were not already entered in the corresponding day-book. The books kept were not on the scale of those in larger establishments, or as numerous, yet they were proper in form—usual in form—affording an intelligible means of knowing the condition of the partnership. These books were kept during the whole period of the partnership; and while the mutilation must be explained—because it is made by congress a separate and distinct ground of offense—a separate and distinct objection to a discharge, independent of the idea of falsifying books—yet the opposing creditors have failed to prove that Pierson & Brother did not keep proper books of account. If, after those books had been written up—finished or "kept"—the firm, after a dissolution of the partnership, for the purpose of destroying the evidence of credits, or defeating or defrauding creditors in any form, had obliterated or mutilated true entries or accounts, then they would have come under the operation of the provision for mutilating books; but it could not be said in any true sense, that they had not kept proper books of accounts. If it is argued that the books being found in this mutilated condition, it is the business of the bankrupt, in whose possession they have been, to give a satisfactory explanation of this fact, it is answered, this is true, and he must do so before he can obtain a discharge. But while this is true,

the opposing creditors have failed to show that during the partnership proper books were not kept; for they have not shown that such mutilation was made during the partnership, and I cannot assume as true that the time of the mutilation was during the partnership, when the examination of the bankrupt hereafter as to this subject of mutilation, and the examination of others, may disclose the time and all the circumstances connected with it. This specification must therefore be overruled.

The fourth specification is as follows, viz.: "That according to the schedule and inventory filed by said bankrupt in this case, he, being a tradesman, has no books, papers, deeds, or writings relating to the trade or business of the said Joseph D. Pierson & Brother." This is overruled and covered by the opinion of the court in the preceding specification.

The fifth specification is as follows, viz.: "That there are no entries, accounts, or books of any kind shown to have been kept by said firm, the members thereof being tradesmen, since the passage of said act, showing what moneys were received by said firm, or what disposition was made of the same." This is overruled and covered by the opinion given in the third specification.

The sixth specification is as follows, viz.: "No books, accounts, or papers relating to the business of the said firm, the members being tradesmen, were placed by said bankrupt in the hands or possession of his assignee." The evidence under this specification shows that nearly three years before the filing of the petition in bankruptcy, this firm of Joseph D. Pierson & Brother were in a state of hopeless insolvency; that in the fall after the death of Joseph D. Pierson every dollar's worth of property which could be reached by the most vigilant creditors was taken in execution; that the assignee had been thoroughly acquainted with the concerns of the partnership; that such book as might show the full condition of the partnership, viz., the ledger into which all the accounts of the firm had been transferred, together with the expense account and cash account, had been in the hands of the assignee, and still remained there. Any transfer of any number of books could not create assets. It was perfectly well known to the assignee that the bankrupt was insolvent by several thousands of dollars—he had examined and was familiar with the accounts of the firm—and a possession of day-books and a ledger which had become nearly obsolete by reason of its accounts having been transferred to the last ledger, would have been useless to the assignee. A neglect on the part of the bankrupt, not founded in fraud or design to injure his creditors, the court thinks could not be, in justice, a ground for objecting to the bankrupt's discharge. And in connection with these books, let it be remembered that they were the books of a firm all of whose property had been long since exhausted by executions, and that no suggestion has been made by any creditor, that he has been damaged by any want of knowledge which the books would afford to him, or that any fraud or falsification has been ever practiced in regard to them. The sixth specification is therefore overruled.

The seventh specification is as follows, viz.: "That the assignee has not duly inquired into the assets of said bankrupt, or of said firm, nor has he had the means of so doing. Nor has said bankrupt, being a tradesman, furnished him any books or accounts to enable him to ascertain what has become of said firm's property, what were the causes of its failure, and the nature of its dealings with its creditors." The opinions given on the former specifications will cause this specification to be overruled.

The eighth specification is as follows, viz.: "That the said bankrupt has not complied with the requirements of said act, and is not, therefore, entitled to his discharge, in the following particulars: First. That he has not disclosed whether or not the firm of Joseph D. Pierson & Brother had, on the 13th day of July, A. D. 1872, when said petition was filed, any assets, real or personal property, or interest in any property of any kind, either standing in the firm's name, or held in trust for them. Second. That the schedules of said bankrupt are materially defective and incomplete, and do not comply with the requirements of the law, in that they do not show that either he or the said firm had, when said petition to be adjudicated a bankrupt was filed, any stock in trade in his or their business, or any property, real or personal, in trust for said bankrupt, or said firm, or any books, papers, deeds, or writings belonging to him or said firm, the members thereof being tradesmen, or held in trust for him or said firm."

It appears to the court that the schedules are very full, and that there is full denial of the possession of any property or interest which could be assets for the creditors. If there were assets at the time of filing the petition, they should have been stated; but the court does not perceive that he should have stated specially that he had no property belonging to the late firm of Joseph D. Pierson & Brother. Any interest as surviving partner would have been assets, and should have been mentioned in his schedules. The fact that there is no such mention, is evidence that he considered there were no such assets in existence.

To the second branch of the eighth specification it is replied that this petition was filed by an individual nearly three years after the dissolution of a partnership of which he had been a member; and that the filing in his schedule of his assets is sufficiently wide, and would embrace whatever

residuum of partnership property there may have been in his possession at the time of filing his petition. The part of this specification referring to books, papers, deeds, and writings, is already disposed of by opinions in reference to former specifications. This specification is overruled.

The ninth specification is as follows, viz.: "That at and before the time of filing said petition the said bankrupt was, as the undersigned believe, entitled to an interest in the stock in trade, goods on hand, machinery, business, debts, and other property of a certain sash and planing-mill in the city of Wilmington aforesaid, and that the same was in part held by other persons, to the undersigned unknown, in trust for him or for his benefit; and that in this particular the undersigned aver and specify that the said bankrupt has willfully and intentionally concealed a part of his estate or effects, and the books and writings relating thereto." Under this specification a prolonged and elaborate attempt was made to prove that the bankrupt was a partner with Thomas Y. De Normandie, the assignee, in the sash and planing business in this city before and at the time of filing his petition in bankruptcy; that there was a balance due from the assignee to the bankrupt at the time of filing his petition; and that he committed a fraud in not returning that balance or interest as assets.

The court thinks, on the evidence, that there was no partnership existing between the parties; that the relation was that of agent, clerk, or servant, on a salary to be measured by the net profits received on the business; that there was no idea or intention on the part of these men to create a partnership, inter sese—and without such idea or intention such a partnership cannot exist. Liability to third persons as partners may often arise from causes which will not constitute a partnership inter sese, but as between themselves the distinction is settled (however unsatisfactory it may seem) between taking money as net profits, and taking money as a salary, to be measured by the net profits received. If this view of the law be correct, there was no partnership between De Normandie and the bankrupt. Again, supposing a partnership to have existed at the time of the filing of the petition in bankruptcy, there is such an uncertainty as to any balance, or if any, as to how much was due—in the teeth of the positive declarations both of the bankrupt and the assignee that there was nothing due—as to amount to a failure on the part of the opposing creditors to show that there were any assets. This specification is therefore overruled.

The tenth specification is as follows, viz.: "That the said bankrupt has been guilty of negligence in not delivering to his assignee the property belonging to said bankrupt at the time of the presentation of his petition and inventory; in that he withheld from said assignee his interest in the business, stock, and property and machinery used in said business of planing and sash-making, and the books, accounts, and papers relating thereto; and, also, in not delivering any books, papers, or accounts in his hands at such time and belonging to the firm of Joseph D. Pierson & Brother—he, the said bankrupt, and the said firm having been, prior to filing said petition, tradesmen." As this specification relates, in part, to the subject-matter of the last specification, it has been answered by the opinion in reference to that specification; and that portion which relates to the books, papers, and accounts of Joseph D. Pierson & Brother has already been answered. This specification is overruled.

The eleventh specification is as follows, viz.: "That the said bankrupt is not entitled to his discharge, for the reason that the assets of the said bankrupt are not equal to fifty per centum of the claims proved against his estate, and contracted since the 1st day of January, A. D. 1869, upon which he is liable as principal debtor; and that the assent in writing of a majority in number and value of his creditors, to whom he has become liable as a principal debtor for debts contracted since the 1st day of January, A. D. 1869, and who have proved their claims against his estate, has not been filed in this case." The court thinks that the proper number of the proper class of creditors have filed their assent in writing to the discharge, and consequently that the bankrupt may (all other things being in due form and order) be entitled to his discharge without the payment of fifty per centum of his indebtedness. This specification is overruled.

The twelfth specification is as follows, viz.: "that the petition of said bankrupt for a discharge from his debts was not filed within one year from the adjudication of bankruptcy in this case." The record discloses the reason of the petition not having been filed within a year from the adjudication in bankruptcy, and the permission of the court to file the petition for discharge which is now before the court. The proceedings of the bankrupt in this respect are regular and proper. This specification is overruled.

The thirteenth specification is as follows, viz.: "That the proceedings in this case are irregular, defective, and illegal, in that the assignment of the property of said bankrupt relates only to the property held by the said bankrupt on the 3d day of June, A. D. 1873, when it should have related to all the property held or owned by said bankrupt, or said firm, or in trust for him or it, at the commencement of proceedings in this case, to wit, the 13th of July, A. D. 1872; and in that the assignment of the bankrupt's effects had never been delivered to the assignee; and in that the said assignment has not been

recorded as required by law." By the provisions of the act of congress, the "assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." This is the language of the act, and would not be controlled or modified by any inadvertence or mistake in the register in stating the time from which the deed should operate. In reference to the latter clauses of this specification, viz., that the assignee has not had possession of the deed of assignment, and that it has not been recorded, it is a sufficient answer that the assignee has formally accepted his appointment as assignee and given bond; that the assignee had neglected to take into his own custody the deed of assignment, and have the same recorded, when he well knew that nothing, in point of fact, passed by the assignment, is no ground for withholding the bankrupt's discharge. This specification must therefore be overruled.

This disposes of all the specifications filed, and I might stop here, but there were facts brought forward and matters discussed as grounds of refusing the discharge to the bankrupt, which I might refuse now to pass on under these specifications—yet as they were much relied on by the opposing creditors, I will dispose of the chief points made.

It is alleged and admitted that the bankrupt must state in his schedule of property, if he seeks discharge from partnership debts, all partnership assets which belonged to him as surviving partner at the time of filing his petition in bankruptcy. It is admitted that in February, 1869, Daniel H. Kent owed to Joseph D. Pierson & Brother about the sum of two thousand five hundred dollars, for sash furnished for a row of houses Kent was then building. That Kent, on the request of Joseph D. Pierson, made a deed of one of these houses to George W. Pierson (a brother) for the sum of two thousand five hundred dollars—the amount of the bill due Joseph D. Pierson & Brother, for which they gave their receipt to Kent as for cash paid—and the further sum of fifteen hundred dollars, or thereabouts, paid by George W. Pierson. It appears that the house was to be George W. Pierson's house, for his home. Now, it is claimed by the opposing creditors that this money was a loan by the firm to George W. Pierson; that he held the house subject to a trust to repay that amount; that the amount was not repaid, and the house not sold to Mr. Pierson till after the filing of the petition for discharge; and that therefore there were equitable assets in the hands of George W. Pierson, as trustee, at the time of filing the bankrupt's petition; and as such assets have not been mentioned in the bankrupt's schedules, he must be refused his discharge. And it is further argued, that if this was not a loan made at the time, it must have been the payment of a previous debt under such circumstances of insolvency, or apprehended insolvency, as to make it a preference against the policy and prohibitions of the bankrupt law, and a bar to this bankrupt's discharge; of which the court will have to take notice, without any application by the parties to do so.

On considerable reflection and examination of the testimony, the court is of the opinion that this money (two thousand five hundred dollars) was transferred by arrangement of the parties concerned to George W. Pierson, in payment of debts then and before contracted; and this opinion is grounded on the explicit and unwavering statement of the bankrupt, that the transfer of this interest in the house (that is, the right to so much of the purchase-money as was represented by Kent's debt to them—two thousand five hundred dollars) was to pay an existing debt. And secondly, that the circumstances of Joseph D. Pierson & Brother were not such, that in their embarrassed situation they could loan and lay out of the use of two thousand five hundred dollars, so much needed in their business operations.

But even if it was a loan made by Pierson & Brother to George W. Pierson, what was the real nature of the transaction? Pierson & Brother loaned George W. Pierson two thousand five hundred dollars to help him purchase a house—George W. Pierson furnishing the balance of the purchase-money, viz.: fifteen hundred dollars, or thereabouts. The deed was, by request, given to George W. Pierson, Pierson & Brother taking no security for the money lent—George W. Pierson gave no mortgage, no judgment, or lien of any kind on the land. How, in any sense, was George W. Pierson a trustee of this land to pay this debt? We will assume that he owed the debt, but how was the land held in trust to pay the debt?—the house was not bought for Pierson & Brother. It is not the case of an individual taking the deed of land bought with partnership funds; it was in substance (if a loan at all) a loan by Pierson & Brother to their brother, George W. Pierson, to raise part of the purchase-money, without taking any security therefor. Suppose a firm, instead of buying for firm purposes in an individual name, loans an individual money to make up purchase-money for a house to be bought in his own name and for his own individual purposes—we ask again, how does the individual become a trustee of the land for the payment of the borrowed money? Such a thing cannot be. If this was a loan, then there could arise no such trust as is contended for. And as, by the bankrupt's testimony, all the money must have been paid by George W. Pierson to enable him to become the creditor at the time of filing the bankrupt's petition, he must have discharged his trust, as he had a right to do, if any trust ever existed. No doubt, where land is bought in whole or in part with the money of A, B taking the title as a

matter of convenience, a trust is raised in favor of A, wholly or in part, as he may have paid all or part of the purchase-money; and this is a trust of the realty, and of the proceeds of the realty, if it has been disposed of to a bona fide purchaser for valuable consideration, without notice. Such, the court thinks, cannot be the result when the intention of A's taking any interest in the corpus of the land is negatived by the understanding of the parties. This was a large sum of money; the transaction was easy of investigation; there were many creditors pressing for payment of their claims; every inquiry as to possible assets had been made, and the non-discovery of these alleged assets up to this time, is the strongest argument for their non-existence. As the court has concluded that this transfer was in payment of an existing debt at the time, all further speculations on a different hypothesis are useless.

This act was, then, the payment of an existing creditor of the firm. How far was that payment a preference which will operate as a bar to the discharge of the bankrupt? The payment was made by a firm in February, 1869; which firm was dissolved in August of the same year; the bankrupt filing his petition on July 12th, 1872. This refusal to discharge would be in the nature of punishment for a wrongful act. How far a junior partner, confessedly not the managing one of the firm, should be punished for an act over which he had little or no actual control, might present an interesting inquiry, were the court disposed to follow out that line of thought. But the case will be treated as if the act were the act alone of William H. Pierson, the bankrupt. The act certainly did constitute a preference of a creditor by persons who, it is now proven, were at the time insolvent, in the sense of not having assets sufficient to pay off their liabilities. Was this such a preference as to prevent the bankrupt's discharge?

Congress has, in the 39th section of the present bankrupt law, stated the kind of preference which a debtor will not be permitted to show to a creditor, without subjecting himself to the process of involuntary bankruptcy. If one "who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money, or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors," etc., he can, on the petition of one or more creditors, be declared a bankrupt. This was the kind of preference which congress considered inconsistent with the proper and just conduct of his own business by the bankrupt, and when it occurred gave to his creditors the privilege of taking the management of his own business into their hands by their assignee, and the more equal and equitable distribution of his assets among themselves.

Now, by the 35th section there is another class of preferences, which are not only of such a character as to subject the debtor to be declared a bankrupt, but which are absolutely void, and give the right to the assignee to recover back for the use of the general creditors, the advantage gained in fraud of the law by a combination between the debtor and the favored creditor; they are in these words, viz.: "If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited," etc. Now, these preferences are void. The knowledge of insolvency by the creditor, and his knowledge of the intent on the part of the debtor to commit a fraud on the bankrupt act, stamp his action as of such a character as, in the judgment of congress, to make it proper not only to avoid the preference, but to forbid him from proving his claim against the estate. There is another provision or clause in the 29th section which speaks of preferences in these words, viz.: "No discharge shall be granted, or if granted, be valid, if the bankrupt * * * * has given any fraudulent preference contrary to the provisions of this act; or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property; or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him," etc. Now, in this 29th section are to be found all the grounds of objection to the bankrupt's discharge, as regards preference.

The courts have given a construction to these clauses in reference to preference, and the result is, that only those preferences which are forbidden and made void by the 35th section, and the clause of the 29th section which refers to preferences in contemplation of becoming bankrupt, are considered grounds for withholding the bankrupt's discharge. The two classes of cases in the 35th section do not embrace the case before the court, for they concern preferences within

four and six months before proceedings in bankruptcy; whereas this was between two and three years before proceedings in bankruptcy. Nor does the class of cases mentioned in one of the latter clauses in the 29th section apply, for that preference must be made in contemplation of becoming bankrupt —that is, of taking proceedings in bankruptcy. And however insolvent the firm may be considered to have been at that time, there is no pretense that there was then any "contemplation" of bankruptcy.

This is the construction which has been given to the words "fraudulent preference contrary to the provisions of the act," and "fraudulent payment;" it is such preference as is declared fraudulent by the 35th section. Such preferences are a bar to the discharge, as are also the preferences in "contemplation" of becoming bankrupt, mentioned as a bar to discharge in the 29th section, and above quoted. These positions will find full authority and support in Re Locke [Case No. 8,439], where the questions are fully considered by Justice Lowell of the Massachusetts district. It will be observed that a preference may be of such a character as to subject a debtor to proceedings in involuntary bankruptcy, and not such a preference as will be a bar to his discharge; this distinction is fully recognized in the above-cited case. In Re Burgess [Id. 2,153], Justice Lowell reiterates the same principles. And in Re Freeman [Id. 5,082], Judge Blatchford (Southern district of New York) also affirms them. It appears to the court that this construction is a reasonable and proper one; and that as this case does not fall either within the classes mentioned in the 35th section as fraudulent, or the clause in the 29th section, making a preference in contemplation of bankruptcy a bar to discharge; and as, by judicial construction, it appears that these sections embrace all the valid grounds of opposition to discharge, the court is of the opinion that this preference (if illegal preference there were) constitutes no valid ground of opposition to discharge.

And lastly, was there such a preference as would have subjected the debtor to proceedings in involuntary bankruptcy? This will depend upon evidence not as yet introduced into this cause. This transfer of property was given to pay for advances—when made? If made some time before, then it was a preference which would have subjected the debtor to proceedings in bankruptcy; but if made at or about the time of the advances, and in payment therefor, then it was a perfectly proper preference, and would not subject the debtor to the proceedings aforesaid. Now, upon the point when this advance was made, the evidence is silent, except that it was made before the transfer of the property. The court will not presume in the absence of testimony that this transfer was made for a prior debt, a debt some time due, but rather that the act was a legal and proper one than an illegal and improper one. The United States supreme court, in some late cases, have laid down the law on the subject of assistance given to struggling debtors by parties receiving security for this assistance. See Tiffany v. Lucas [15 Wall. (82 U. S.) 410]. Admitting, for the sake of argument, that the preference was such as to subject the debtor to proceedings of involuntary bankruptcy, yet the court, as before stated, does not conceive that the preference is of such a character as to be a bar to discharge in bankruptcy.

It afterwards appeared to the court, upon the testimony of witnesses, that the mutilation of the books occurred after the partnership was dissolved, and was done without the knowledge of the bankrupt, by persons who had no knowledge that the books were of any value or importance to any one. The court therefore granted a discharge.

[For subsequent proceedings in this litigation, see Case No. 11,154.]

Case No. 11,154.

In re PIERSON.

[10 N. B. R. 193.] [1]

District Court, D. Delaware. 1874.

BANKRUPTCY — DISCHARGE — ESTATE LESS THAN FIFTY PER CENTUM OF CLAIMS — ASSENT OF CREDITORS — CLAIMS CONTRACTED PRIOR TO JANUARY 1ST, 1869—AMENDMENT.

1. Where the estate of a bankrupt does not produce fifty per cent. of the proven claims, it is necessary that creditors of a certain class who have proven their claims, should file their assent in writing within a limited time, before the hearing of the specifications filed against the discharge of the bankrupt, in order that he may be discharged from debts contracted since January 1st, 1869.

2. No assent of any class of creditors is necessary to a discharged bankrupt from debts contracted before January 1st, 1869.

3. Creditors of debts contracted before January 1st, 1869, have no voice in opposing discharge of bankrupt from debts contracted since January 1st, 1869.

4. The only class of creditors who can oppose discharge of bankrupt, or withhold their assent from such discharge, on the ground that fifty per centum has not been realized, are those whose debts were contracted since January 1st, 1869.

5. Where there is a majority in number of these creditors and the amounts of value of these debts—filing assent to discharge, this is all the assent of creditors required under the act [of 1867 (14 Stat. 517)] to be given as a condition precedent to discharge of the bankrupt, where fifty per centum is not realized.

6. Where the record does not disclose that there is the requisite number of the proper class of creditors filing assent to discharge, but that issue is made in the specifications against discharge, it is not too late, on a hearing of the specifications, to prove the fact in issue, viz., the existence of the proper number of the right class of creditors filing assent.

[1] [Reprinted by permission.]

7. While the court might not make an order on the creditors to amend their proofs so as to show the time of the origination of their various claims and parts of claims, it will not refuse the process of the court to the bankrupt to prove a fact on which his discharge depends.

8. There is an active duty imposed on the judge outside and beyond the action and efforts of counsel, to see that thorough justice is done to all the parties concerned—in furtherance of the purposes and policy of the bankrupt act.

9. To this end there is great latitude of amendment permitted, up to the final discharge in bankruptcy.

[In the matter of William H. Pierson, a bankrupt. For the hearing of the specifications of certain creditors of the bankrupt against his discharge, see Case No. 11,153.]

BRADFORD, District Judge. The precise question under discussion on the last day of the hearing of this cause was: should Bauduy Simmons, of the firm of Simmons & Co., creditors of the bankrupt, be permitted to produce his books of original entries, and be otherwise examined as a witness for the purpose of satisfying the court as to the time when the debt of the said firm was contracted. The eleventh specification is in these words: "That the said bankrupt is not entitled to his discharge for the reason that the assets of the said bankrupt are not equal to fifty per centum of the claims proved against his estate and contracted since the 1st day of January, A. D. 1869, upon which he is liable as principal debtor. And that the assent in writing of a majority in number and value of his creditors, to whom he has become liable as a principal debtor for debts contracted since the 1st day of January, A. D. 1869, and who have proved their claims against his estate, has not been filed in this case." The latter part of this specification is traversed or denied in the following words; he says "that the assent in writing of a majority in number and value of his creditors, to whom he has become liable for debts contracted since the 1st day of January, 1869, and who have proved their claims against his estate, has been filed in this cause, as appears by certificates of said creditors filed in the cause." Now, here is a direct and specific issue joined, viz., whether the majority in number and value of creditors, of a certain class, having proven their claims, had filed their assent to the discharge of the bankrupt. There are conflicting decisions on this point, viz., whether a creditor whose debt was contracted before the 1st day of January, 1869, has any voice or can be counted in assenting to or withholding his assent from a discharge, where assets of the bankrupt do not equal fifty per centum of the claims proven against him. Now, while by the act of July 14, 1870 [16 Stat. 276], the act of July 27, 1868 [15 Stat. 227], was amended so as to apply the fifty per centum clause, aforesaid, only to those debts contracted for before January 1st, 1869, yet the provision of law was not formally repealed, providing for the mode and the persons by whom assent should be given to or withheld from this discharge, if the fifty per centum were not raised by the bankrupt. Justice Ballard, of Kentucky, in Re Shower [Case No. 12,816], decides that all the creditors have a voice in such discharge, and stands on what he considers the unrepealed letter of the law; while Justice Cadwalader, in Re Hershman [Id. 6,430], decides that a majority in number and value of creditors whose claims were contracted since January 1st, 1869, are sufficient to give assent to discharge, where assets are not sufficient to give the right to such discharge without such assent. It is supposed in this case that there was a virtual repeal of the power of creditors whose debts had been contracted before January 1st, 1869, to give or withhold their assent to the discharge of the bankrupt, and that the power had been confined to creditors whose claims were contracted since that time; and it suggested that it would appear contrary to the policy and intention of the bankrupt law, if creditors from whose debts the bankrupt could be discharged without any assets whatever, should have a right to prevent his discharge from other debts of creditors of another class, when a majority in number and value of such creditors have filed such assent. Now, if Judge Ballard is right in his decision, there is an end of the question before the court; for, without distinguishing between the two classes, there is a majority in number and value of the creditors who have filed assent; the question, then, of the time of the contracting of the debts is absolutely immaterial.

Without deciding on the merits of these two conflicting decisions, I shall adopt Judge Cadwalader's as the correct one; and I shall assume, then, for the purposes of this case, that the creditors having proven their claims, who are entitled to give their assent to his discharge, notwithstanding the insufficiency of the estate to equal the fifty per centum aforesaid, are creditors of a certain class or description only, viz., creditors whose debts have been contracted since January 1st, 1869; and if it appears that there are any debts, however small, contracted since that time, in the absence of assets amounting to fifty per centum of claims proven against the estate, the bankrupt cannot be discharged unless the assent of creditors having right to give assent appears to be proven in the cause. It does appear of record that there are claims contracted since that date, and the estate has not produced the fifty per centum, aforesaid. The record, so far, does not disclose the fact that these creditors who have proved their claim and filed their assent, are of that class having the right to give the assent required. Now, direct issue is joined on that question, in ipsissimis verbis. The objection, therefore, that the evidence sought to be introduced is

not admissible because it does not sustain the issue, must be abandoned.

Waiving, for the present, all matters as to the sufficiency of proof of claim by the creditors before the register, the question arises: If it be true, in point of fact, that these creditors who filed their assent were entitled to do so, were of the class whose debts had been contracted since January 1st, 1869—on what principle, and for what valid reason, should not that fact be proven? It is admitted by the opposing creditors, that this fact should be proven, for the eleventh specification is grounded on the supposition, not simply that it has not been proven, but that the allegation is not true in point of fact; and the objection is, not that the fact might not be proven true in the course of this trial if evidence were allowed to prove it, but that the time is past for such proof. If the fact of the time of contracting the debts of the creditors having proved their claims and filed their assent, is not determined by the proof in the cause before this hearing—say the opposing creditors—it cannot be aided or supplemented by any proof taken now. That is to say, that, although it is true that the creditors of the right class did file assent, and such assent is essential to the discharge of the bankrupt, and such creditors have proven their claims in a proper maner, yet that the said creditors cannot now, after specifications against the discharge have made this a precise issue to be settled on this trial of fact, give evidence to sustain this issue, because the fact sought to be proven has not been fully proven before—is a proposition to which I cannot give my assent.

If the law requires the existence of a certain state of facts as conditions precedent, the parties to be affected by the performance of those conditions must stand or fall by the actual state of fact which constitute the conditions precedent. Now, one condition precedent to the bankrupt's discharge in certain circumstances, is filing the assent of creditors of a certain class, and, all other requisite acts performed and objections removed, he is entitled to his discharge, if the assent of such a class of creditors is filed. There is no attempt to alter any state of facts constituting conditions precedent, by the performance or non-performance of which the rights of any of the parties concerned are affected. It is only proposed judicially to ascertain the existence or non-existence of a given fact—that fact essential to the discharge of the bankrupt. Astute and able as was the argument of the counsel for the opposing creditors, it has failed to convince me of the impropriety or illegality of the evidence proposed to be offered by Mr. Bauduy Simmons.

I shall notice somewhat in detail the arguments of counsel:

First. It is alleged that the evidence is improper, because it is not applicable or confined to the issue. As already said, an examination of the specifications and answers—the pleadings in the case—will be sufficient to clear up that point.

Second. It is objected that the bankrupt is bound by his statements in his schedule of debts, and is estopped from denying its absolute correctness. When we consider that this was the declaration of a partner made as to the existence of debts against the firm, in reference to the time of its being contracted, in which he makes a statement, "so far as it was possible for him to ascertain" (using his own language); and when we further consider that he was not the active financial member of the firm, as has been proven, it would be contrary to all equitable principles and the policy of the bankrupt law, which permits the correction of all mistakes up to the latest period before discharge, to hold him unalterably to such statement. Nor do we think that any principle of estoppel can have any just application in this place. There has been no positive statement of his own knowledge as to the time of the contracting of the debts; he only stated so far as it was "possible for him to ascertain." The principle of estoppel is, that some one must have acted on the faith of a declaration, which declaration shall not be permitted to be withdrawn, to the injury of the person who has acted upon it. Now, supposing the statement of time had been an absolute one made of his own knowledge, what have Messrs. Harris & Devou done on the faith of that statement by which they would be damaged if the bankrupt should be permitted to withdraw the statement? We cannot see, and therefore cannot see the operation of the principle of estoppel.

It is alleged that the issue in this case is made out of the condition of the record at or before the time of hearing; that nothing can be done to perfect or amend it. Now, this is precisely the question to be determined, and not assumed. The issue is not whether the record discloses the fact of the time of contracting those debts; but whether the debts were, in point of fact, contracted at a particular time or not. The issue is one of fact, not one of law. The record, so far, does not disclose the fact. Can we now prove the fact, and let the record disclose such proof hereafter? We cannot now invest a creditor with power of which he was not possessed at the time of filing assent to discharge. But I have no doubt we can prove that fact, if it exist, and place the proof on record.

It is objected that Simmons cannot be examined as a witness, because it is arriving at the same result as would have been arrived at by an order of the court on the creditors to come in and perfect their proof—which order the court indicated that it would refuse. The answer to this is a simple one. It by no means follows that because a court would not make an order for the purpose

above stated, it would deny the use of process to the bankrupt to prove by witnesses facts necessary to maintain the issue joined, and facts necessary to his discharge.

It is objected that "the assent proven in the cause must have reference to the claim as proven at the time of filing the assent; and the record must stand as evidence of what the party assented to, at the time of filing his assent." The assent filed in the cause must have been given by a creditor entitled to give it. The proofs of claim made by Simmons & Co., Lane & Weldin, and Tatnall & Co., disclose claims originating in 1868; but not excluding the fact that a portion of the indebtedness might have originated since the 1st of January, 1869. Now, we do not think that the record of proofs filed is a conclusive statement that no portion of those claims originated since January 1st, 1869; and even if the creditors believed at the time of proving claims and filing assent, that such was the fact, do we think that it is inadmissible now, to correct such a mistake, if it be one. The right to file assent depended on the creditor's belonging to a certain class, and his assent is operative according to the fact of his belonging, or not belonging, to that class; and not dependent on a mistaken statement as to time of the contracting of the debt, when he filed his formal proof of debt as a creditor.

Objection is made to supplying fatal defect in record by oral proof. I think such proof can be made, that it will explain and make clear a part of the record which is doubtful as to its full meaning, and that this proof can be incorporated into and made part of the record in this case.

It is further objected that the creditor has had his day in court, and it is too late to amend his proof. Even if the creditor were seeking to amend his proof for his own benefit in the fund to be distributed were there assets, it would not be too late; for the bankrupt law contemplates all amendments to the last stage up to the discharge in bankruptcy, which will accomplish the purposes and objects of the law. But this is not a matter in which it can be properly said that these creditors have, or have not, a day in court. Shall they obey the process of the court to testify on a matter in behalf of the bankrupt which is involved in the issue joined?—that is the question.

It is said the creditors cannot be here to avoid a result fatal to the bankrupt, already incurred. The answer to this may be made by the following quære: Has this fatal result been incurred? If the assent filed has been the assent only of creditors before 1869, then the fatal result has been incurred; if not, it has not been incurred, and the present inquiry is to determine that question.

It is also objected that no assent of creditors who have proved their claims, has been filed; for said claims were not itemized, as might have been required on a contest between the creditors or assignee in case of assets. I have no doubt whatever, that these claims have been sufficiently proven to lay the ground of right in the creditor to file his assent. And supposing the result of this testimony is to discharge the bankrupt, and thus affect the prospective rights of those creditors to collect their debts, the court is not to be deterred from giving what it conceives a proper construction to the act, to avoid that result—this is the result of every discharge in bankruptcy.

These proceedings are not simply and alone in the hands of counsel employed in the cause—the court has an active duty imposed on it. It is to see that the rights of all parties, creditors and bankrupts, are preserved. The widest powers, legal and equitable, are vested in the court for this purpose; and a latitude of amendments is permitted to effect the purposes of the act up to the discharge in bankruptcy. I should, therefore, have no hesitation, were it not done at the suggestion of counsel, to have the written deposition of these proving creditors taken and filed in this cause as forming grounds for basing the future action of the court thereon.

Case No. 11,155.

PIERSON et al. v. BANK OF WASHINGTON.

[3 Cranch, C. C. 363.] [1]

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

BANKS AND BANKING—TRANSFER OF STOCK BY DEBTOR.

The Bank of Washington has a right, under the 11th section of its charter, to prevent a transfer upon its books, of a part of the bank stock of its debtor, until the debt should be paid, although the value of the stock should greatly exceed the amount of the debt.

Action on the case for damages for not permitting the plaintiffs [Pierson and Brent], as executors of Robert Brent, to transfer to one John Coyle, 20 shares of stock in the Bank of Washington, standing in the name of their testator, which they had sold to Coyle for $1,000. The defendants justified under the 11th section of their charter of February 15, 1811, which enacts that the shares of the capital stock shall be transferable only on the books of the bank, "but all debts actually due and payable to the bank, (days of grace for payment being past,) by a stockholder requesting a transfer, must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary." At the trial the plaintiffs took a bill of exceptions, which stated, that the defendants gave in evidence their charter of February 15, 1811, and a judgment in their favor against the plaintiffs, as ex-

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

ecutors of the said Robert Brent, for $1,001.75, with interest from the 18th of May, 1819, and offered evidence to prove that the bank at the time of the application for a transfer of the stock, claimed of the plaintiffs, as executors of the said R. Brent, more than the amount of the judgment, namely, about $1,600, for which additional sum a suit in equity was then pending against the plaintiffs as executors. That when the plaintiffs demanded the transfer, they requested the bank to retain as much of the stock as would be amply sufficient to cover the debt which the bank claimed; but the bank refused to permit the transfer, believing that they had a right to do so by the 11th section of their charter. The plaintiffs then gave in evidence the record of the proceedings, in which a decree was made in favor of the United States against them as executors of the said Robert Brent. It was admitted, upon the trial, that the said Robert Brent, at the time of his death, held in the said bank the stock in the declaration mentioned, of the par value of $13,000, and that "he died indebted to the United States in more than he was worth, and was at the time of his death insolvent." Upon which the counsel for the defendants prayed the court to instruct the jury, that if they believed the evidence aforesaid to be true, the plaintiff had no right to recover in this suit.

Mr. Worthington and Mr. Swann, for plaintiffs, contended that it was unreasonable in the bank to refuse the transfer of $1,000 only of stock, while they held stock to the amount of $13,000; and that, as they demanded payment of more than was due, they could not make the payment of that whole claim the condition of permitting the transfer.

THE COURT (nem. con.) refused to give the instruction as prayed; but instructed the jury that the evidence aforesaid was not sufficient in law to entitle the plaintiffs to recover in this action; and further instructed the jury, that if they should be satisfied by the evidence that the plaintiffs, as executors of the said Robert Brent, were, at the time when they demanded the transfer, indebted to the bank, the latter had a right, under the eleventh section of their charter, to refuse to suffer the transfer to be made. And although the bank may, at that time, have claimed more than was due, yet, if any thing was due, the plaintiffs should have tendered what they admitted to be due; and if nothing more was due than the amount tendered, the bank was wrong in refusing the transfer; if more was due, the bank was right.

Mr. Worthington and Mr. Swann, for the plaintiffs, moved for a new trial; because the court had refused evidence of malice in the defendants; and because the plaintiff's testator died insolvent, and indebted to the United States, as a receiver of public money. And cited Warne v. Varley, 6 Term R. 443; Seaman v. Patten, 2 Caines, 312; Imlay v. Sands, 1 Caines, 566.

But THE COURT stopped Mr. Wallach, in reply, and overruled the motion. (See Panton v. Holland, 17 Johns. 98, 99.)

PIERSON (BANK OF WASHINGTON v.). See Case No. 953.

Case No. 11,156.

PIERSON v. EAGLE SCREW CO.

[3 Story, 402; [1] 2 Robb, Pat. Cas. 268.]

Circuit Court, D. Rhode Island. June Term, 1844.

PATENTS—DAMAGES FOR INFRINGEMENT—ACT OF 1839—PURCHASER UNDER WRONG-DOER.

1. To entitle a person to claim the benefit of the 7th section of the patent act of 1839, c. 88 [5 Stat. 353], he must be a person, who is a purchaser, or who has used the patented invention before the patent was issued, by a license or grant, or by the consent of the inventor, and not be a purchaser under a mere wrong-doer.

[Cited in Allen v. Blunt, Case No. 217; Teese v. Phelps, Id. 13,819; Beach v. Tucker, Id. 1,153; Bates v. Coe, 98 U. S. 46; Kelleher v. Darling, Case No. 7,653; Brickill v. Mayor, etc., of New York, 7 Fed. 482; Wade v. Metcalf, 16 Fed. 132; Andrews v. Hovey, 124 U. S. 703, 713, 8 Sup. Ct. 678, 683.]

2. The case of McClurg v. Kingsland, 1 How. [42 U. S.] 202, commented on and explained.

3. In causes for violation of a patent, the jury are at liberty to give such reasonable damages as shall vindicate the rights of the patentee, and shall indemnify him for all expenditures necessarily accrued in the suit beyond what the taxable costs will repay.

[Cited in Allen v. Blunt, Case No. 217.]

[See Bancroft v. Acton, Case No. 833.]

This was an action of the case brought by the plaintiff [Jeremiah H. Pierson], as assignee of a patent "for an improvement in the machine for cutting the threads of wood and other screws," for an infringement of the patent. The patent under which the plaintiff claimed was taken out by one Henry Crum, as the inventor, and bore date November 14th, 1836 [No. 79]. The assignment was made by Crum to the plaintiff on the 20th of January, 1838. No question was made at the trial as to the substantial identity of the machines used by the Eagle Screw Company, with the improvement patented by Crum, which improvement consisted mainly in a feeding-wheel, called the wheel (D,) in Crum's specification, of a tambourine shape, which supplied, with regularity and precision, the blanks to the cutters or dies, for the purpose of cutting the threads of the screws.

At the trial, John P. Knowles and Richard W. Greene, for defendants, rested their defence mainly upon two grounds. First, they denied that Crum was the original and first inventor of the feeding-wheel of the machine, and claimed to use it under a patent taken out for a similar cutting machine, which embraced a feeding wheel substantially the

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

same, which patent was taken out by one Clement O. Read, on December 15th, 1837, and had been by mesne assignment vested in them. The testimony, however, clearly proved, that Crum was prior in time in his invention as well as in his patent: and, indeed, the counsel for the defendant, upon the coming in of the proof at the trial, did not contend before the jury for the priority of Read's invention, but rather, in reference to the question of damages, that it was an independent invention of Read's prior to Crum's patent or application for a patent, though posterior in point of time to Crum's invention.

The second point of defence was, that the Eagle Screw Company had purchased a right to use a certain number of cutting machines, embracing the improvement in question, of the Providence Screw Company, as assignees of Read, an independent inventor, prior to Crum's application for his patent; and that, notwithstanding Crum was first inventor and patentee of the improvement, they had a right to use the machines actually in operation in their works, under and by virtue of the 7th section of the patent act of 1839, without accountability to Crum or his assignee. They cited the case of McClurg v. Kingsland, 1 How. [42 U. S.] 202, and insisted, that the opinion of the supreme court in that case, and, especially, that portion of it (pages 208, 209) in which they say, "The object of this provision (7th section of the act, 1839) is evidently two-fold. First, to protect the person who has used the thing patented, by having purchased, constructed, or made the machine, &c. to which the invention is applied, from any liability to the patentee or his assigns. Second, to protect the rights granted to the patentee against any infringement by any other person, &c."

Samuel Ames and Seth P. Staples, in behalf of the plaintiff contended, that the case cited was to be distinguished from the case at bar in this, that, in the case cited, the purchase of the machine or right was from the first inventor and only patentee, made, it is true, prior to his obtaining his patent, whereas in the case before the court, the purchase by the defendants was from one whose invention and patent were subsequent in point of time to the invention and patent of the plaintiff, and could vest no greater right than he had—and that the defence was therefore nothing more than the setting up a subsequent invention and patent against a prior invention and patent, which, if permitted to prevail, would operate as a virtual repeal of the patent law, and take away all protection from inventors. It was said, that the general language of the court in McClurg v. Kingsland [supra] was of course to be construed in reference to the facts before them.

They farther contended, that Crum's patent, under which the plaintiff claimed, was taken out in 1836, nearly three years prior to the passage of the act of 1839, and that rights had vested under it prior to that act: and that, in the case of McClurg v. Kingsland the court say (page 206) that acts of congress "may be retrospective in their operation, and that is not a sound objection to their validity: the powers of congress to legislate upon the subject of patents is plenary by the terms of the constitution, and as there are no restraints in its exercise, there can be no limitation of their rights to modify them at their pleasure, so that they do not take away the rights of property in existing patents." In McClurg v. Kingsland the patent was destroyed by public use of the thing patented prior to the application for the patent, and could be sustained only by the help of the seventh section of the act of 1839, passed subsequently to the issuing of the patent. The same seventh section, which held up the patent in that case, killed the case itself; so that though retroacting, it could not be said in this case to take away the rights of property in existing patents.

STORY, Circuit Justice (summing up to the jury). I have already in the course of the discussion at the bar had occasion to express my opinion upon the second point made at the bar, as a matter of law; for there is no dispute as to the facts. I shall now, therefore, merely recapitulate it. For the defendants the argument is, that the Eagle Screw Company had a right to use the machines purchased by them from Read before Crum's patent was obtained, although Crum was the prior and true inventor and patentee under the 7th section of the patent act of 1839, c. 88; and great reliance is placed upon the case of McClurg v. Kingsland, 1 How. [42 U. S.] 202. In my opinion, neither the act of congress, nor the case of M'Clurg v. Kingsland, justifies such a doctrine. Supposing the argument to be well founded, what would be the legal result? Why, that a mere wrong-doer, who by fraud or artifice, or gross misconduct, had gotten knowledge of the patentee's invention before he could obtain his patent, without any laches on his part, could confer upon a purchaser under him—bonâ fide and without notice—a title to the patented machine, which he himself could not exercise or possess. Certainly there is no ground to say, that a person, who pirates the invention of any party prior in point of time and right, can make any valid claim thereto against the prior and true inventor. How, then, can he confer on others a title, which he himself does not possess? Upon general principles, the assignee can ordinarily claim no more than his assignor can lawfully grant. But it is said, that the 7th section of the act of 1839, c. 88, declares, "that every person or corporation, who has or shall have purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use and vend to others to be used the specific

machine, manufacture or composition of matter, so made or purchased, without liability therefor to the inventor, or any other person interested in the invention; and no patent shall be held to be invalid by reason of such purchase, sale or use, prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale or prior use has been for more than two years prior to such application for a patent." Certainly the language in the first clause of this section is very general, not to say loose, in its texture. But if it stood alone, a first interpretation of it might fairly lead to the conclusion, that the purchaser there spoken of was a purchaser, not from a mere wrong-doer, but from the first and true inventor, before he had obtained his patent. The language of the clause does not even include the qualification, that the purchaser should be a bonâ fide purchaser for a valuable consideration, without notice of the claim or title of the inventor, or of any fraud of the vendor upon that claim or title. Yet, surely, it could never have been the intention of this clause to confer on a fraudulent purchaser, or a purchaser with full notice, a right to use an invention pirated from the original inventor, by wrong. If, on the other hand, we interpret the language to mean a purchaser from the inventor himself, before his application for a patent, the omission of such qualifying words is at once material and consistent with the apparent objects of the section. But the remaining clauses of the section render this interpretation perfectly clear and right. These clauses point solely to the inventor, and demonstrate, that the purchaser before spoken of was a purchaser from the inventor himself. The language is, "and no patent shall be held to be invalid by reason of any such purchase, sale, or use prior to the application for a patent, as aforesaid, except on proof of an abandonment of such invention to the public." Now, the inventor, and the inventor alone, is competent to abandon his invention to the public, and no use by the public except with his knowledge and consent can be deemed an abandonment of his invention to the public. It is, therefore, put as an exception carved out of the preceding words; and if the purchase, sale, or prior use were from or under the inventor, and with his consent and knowledge, the exception would have its appropriate effect. It is an exception ejusdem generis. The clause would then read in legal effect thus—the patent shall not be held invalid by reason, that the inventor has sold or allowed his invention to be used prior to the application for a patent, unless he has abandoned it to the public. Then follows the remaining clause, "Or that such purchase, sale, or prior use, has been for more than two years prior to such application for a patent;" which also imports another exception, limiting the right to make application for a patent to the period of two years after the inventor has sold or allowed his invention to be used by others. Any other construction of these clauses would lead to this extraordinary conclusion, that the inventor would be deprived of the benefit of his invention and his right to a patent without any laches, or misconduct on his own part, by the mere acts of a wrong-doer without his knowledge or against his will; and the exceptions, in a practical sense, would become nullities. But construed, as we construe them, and they have a plain, appropriate, and satisfactory meaning. This view of the matter is in entire coincidence with the whole theory and enactments of all the other patent acts, and with the judicial interpretations, which have been constantly put upon them. It has been the uniform doctrine of the courts of the United States, that no fraudulent or wrongful use of an invention, and no public use without the consent or knowledge or sanction of the inventor, would deprive him of his right to a patent. See Pennock v. Dialogue, 2 Pet. [27 U. S.] 1; Grant v. Raymond, 6 Pet. [31 U. S.] 248, 249; Shaw v. Cooper, 7 Pet. [32 U. S.] 292; McClurg v. Kingsland, 1 How. [42 U. S.] 202, 207. See Act 3d July, 1832, c. 162, § 3 [4 Stat. 559]; Act 1836, c. 357, § 15 [5 Stat. 123].

The case of McClurg v. Kingsland, 1 How. [42 U. S.] 202, properly considered, contains nothing in conflict with this doctrine. The learned judge (Mr. Justice Baldwin) who delivered the opinion of the court, in commenting upon the 7th section of the act of 1839, said: "The object of this provision is evidently twofold; first, to protect the person, who used the thing patented by having purchased, constructed, or used the machine, &c. to which the invention is applied, from any liability to the patentee, or his assignee; second, to protect the rights granted to the patentee against any infringement by any other persons." This language is certainly general; but then, in order to understand it correctly, we must apply it to the very case then before the court; and in this view, it was perfectly accurate and appropriate. What was that case? It was a case, where the patentee, before he attained his patent, allowed the defendants to use for their own profit the very improvements invented by him; and indeed, the improvement was invented by the patentee, while he was in their employment and receiving wages from them, and he freely allowed them to use it. Afterwards, the assignee of the patentee brought the suit against the defendants for using the improvement after the patent was granted. The circuit court held, that the facts justified the jury in presuming, that the defendants used the improvement under a license or privilege originally granted to them by the inventor, and that the facts of the case brought it directly within the 7th section of the act of 1839. Mr. Justice Baldwin presided in the circuit court at the trial, and he also delivered the opinion in the supreme

court. So that, putting both opinions together on the points in controversy, it is plain, that the learned judge, by the language above stated, meant to affirm no more than that where the invention had, before the patent, been used under a license or grant of the patentee, that license or grant being a purchase, or sale, or use with the consent of the patentee, was within the provision of the 7th section of the patent act of 1839. It seems to us, that no reasonable objection exists to this doctrine; and it is in conformity to and in illustration of the very doctrine already stated by us as the true meaning of the section. Indeed, the context immediately following the passage here cited from the opinion of the learned judge shows this to have been his meaning. In the former part of the opinion he had endeavored to show, that, under the prior acts of congress, if the patentee allowed not merely the public use, but even a free individual use of his invention before he obtained a patent, that would deprive him of his right to a patent; and that the 7th section of the act of 1839 was intended to cure this inconvenience and defect in the law. "This," (section) says the learned judge, "relieved him (the patentee) from the effect of the former laws and their constructions by this court, &c. &c., while it puts the person who has had such prior use on the same footing, as if he had a special license from the inventor to use his invention; which, if given before the application for a patent, would justify the continued use after it issued without liability." So that here we have expressed in a pointed manner the true object and intent of the 7th section of the act of 1839, which was to give validity to the patent, and yet to secure to a purchaser from him before the patent, the same right to use the same after the patent which he previously possessed.

The other point of the defence is so completely met by the evidence, that it is unnecessary to comment on it. It seems to be admitted that the evidence is too strong in favor of the plaintiff, and against the defendant, to admit of any reasonable doubt; and accordingly the counsel for the defendants, considering the law upon the other point ruled against them, have confined themselves mainly in the closing argument to the question of damages. I shall leave the whole evidence for your consideration without remark. But upon the question of damages I would upon this occasion state (what I have often ruled before) that if the plaintiff has established the validity of his patent, and that the defendants have violated it, he is entitled to such reasonable damages as shall vindicate his right, and reimburse him for all such expenditures as have been necessarily incurred by him beyond what the taxable costs will repay, in order to establish that right. It might otherwise happen, that he would go out of court with a verdict in his favor, and yet have received no compensation for the loss and wrong sustained by him. Indeed, he might be ruined by a succession of suits in each of which he might, notwithstanding, be the successful party, so far as the verdict and judgment should go. My understanding of the law is, that the jury are at liberty, in the exercise of a sound discretion, if they see fit (I do not say that they are positively and absolutely bound under all circumstances) to give the plaintiff such damages, not in their nature vindictive, as shall compensate the plaintiff fully for all his actual losses and injuries occasioned by the violation of the patent by the defendants.

Verdict for the plaintiff, $2,000.

Case No. 11,157.

PIERSON v. ELGAR et al.

[4 Cranch, C. C. 454.] [1]

Circuit Court, District of Columbia. March Term, 1834.

MILL PRIVILEGES — SURRENDER — PRESCRIPTION — INJUNCTION.

1. Notley Young, at the time of his death, had, and the complainant claiming under him had, a right to the water privilege attached to his mill in the city of Washington; but the complainant lost it by rebuilding the mill on a new site; and by cutting a new race, taking the water out higher up, the right of the public to the streets having intervened before the rebuilding and change of location of the mill.

2. No prescription runs against a public right, nor is the possession and use for twenty years, evidence of a grant from the United States.

3. The court will not grant an injunction to prevent the water from being diverted from its natural course, unless serious damage, actually incurred or impending, be shown; but the party complaining will be left to his remedy at law.

[This was a bill in equity by Joseph G. Pierson against Joseph Elgar and G. Ennis.]

Motion to dissolve an injunction which had been granted by the chief judge, out of court, to prevent the defendant, Elgar, the commissioner of the public buildings, from laying water pipes through the complainant's lots in the city of Washington, and to prevent him from taking water, for the capitol, from a spring which supplied water to the complainant's mill in Washington.

Mr. Jones and R. S. Coxe, for complainant.

Mr. Key, for defendants.

Before CRANCH, Chief Judge, and THRUSTON, Circuit Judge.

THE COURT (MORSELL, Circuit Judge, not sitting in the cause) dissolved the injunction.

CRANCH, Chief Judge, after stating the substance of the bill and answers, the orig-

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

inal deeds of trust, the proceedings of the commissioners, and the act of Maryland of 1791, c. 45, and the arguments of the counsel, said: I am, therefore, of opinion, that Mr. Young, at the time of his death, had, and those claiming under him, have, a right to the water privilege attached to the mill, and that they cannot be deprived thereof, for the benefit of the public, without just compensation. This opinion, however, applies to the mill as it was on the 18th of November, 1796, when it was allotted to Mr. Young by the commissioners, and when he became seized of, and held the same in his former estate and interest. It is still to be considered whether it applies to the present mill and the new race. If the new mill had been erected on the old site, and the old race had remained, it would have been entitled to the old water right, as appears by Luttrel's Case, 4 Coke, 86.

It is admitted by the complainant, in his bill, that immediately after his purchase of the mill from Mrs. Casanave, which was in May, 1811, he commenced, and in the following year completed, extensive alterations in the mill and its appendages. That he rebuilt the mill, which was removed from about ten to twenty feet above its former site; and at the same time cut a new race, taking the water out of the eastern branch of the Tiber, higher up than before. By thus abandoning the old site of the mill, and the old race, and taking the water out of the Tiber at a different place, it seems to me that the complainant has lost the prescriptive right to the water which he held under Mr. Young; and if he has now any right to conduct the water to his present mill, it must depend upon his ownership of the land contiguous to the Tiber, below the place where he takes the water out of its natural channel, and of the land through which the race passes, or upon actual or presumed grants from the owners of such land. The complainant has not shown himself to be the owner of all the land through which the Tiber passes between the place where the mill water is taken out, and the place where it is returned into the Tiber; nor of the whole of the land through which the race passes; nor has he shown actual grants from the owners of such land. But he relies upon the presumption of such a grant arising from twenty years uninterrupted occupation and use of the water without objection or complaint. This use and occupation began in 1811 or 1812, long after the ground, through which the new race runs, was laid out into a city with streets, lots, squares, and parcels, and after they were marked and bounded on the land itself. The public had acquired rights against which no prescription could run. 2 Rolle, Abr. 265, "Prescription" E. By the common law, the rule is "nullum tempus occurrit regi," as to all public rights; and the reason of the rule was the presumption that the king is daily employed in the weighty affairs of the government, and cannot always be on the watch, to guard the public interests at all points. Hence the rule "vigilantibus, non dormientibus jura subveniunt," does not apply to him. Hob. 347. And as the rule of evidence which presumes a grant after twenty years uninterrupted enjoyment of an incorporeal hereditament is founded upon the presumed acquiescence of him whose right would be abridged by such enjoyment if the occupant had no grant, and who had notice of such occupancy, with the legal ability to prevent it; the rule cannot apply to him who is not bound or not able to watch his rights, or redress his wrongs. Hence it is that there can be no occupant against the king. Co. Litt. 41b. That no presumption of a grant arises against a reversioner, by twenty years occupancy as against the tenant for life; or in the case of glebe lands, where occupation, as against the incumbent, cannot affect the right of his successor. In the present case, the public, having had a right to the streets before the complainant constructed his present mill and race, his use and occupation, for twenty years, is no evidence of a grant of right to conduct the water through, over, or across the streets; and if he has no such right and cannot bring the water to his mill without crossing a public street, he can have no right to an injunction to prevent the public from using the water which he has no right to bring to his mill. But the complainant also claims a right to an injunction to prevent the abstraction of the water from the spring, because he is the proprietor of city lots through which the water of the spring flows in its natural course. Whatever his right to the natural flow of the water may be in consequence of his ownership of some of the city lots through which it would naturally flow; and whatever may be his right of action at law for the abstraction of a portion of that water, without showing actual damage thereby, yet, in order to justify an injunction there must be shown serious damage either incurred or impending. No such damage having been averred as resulting or apprehended from the mere abstraction of a portion of the water, so far as the complainant's proprietary right to a part of the natural bed of the stream is affected, the complainant must be left to his remedy at law. Another ground of complaint is that the defendants either had laid or were about to lay, water pipes through the land of the complainant without his authority. It does not appear by the bill whether the pipes were actually laid, at the time of filing the bill; but it appears, by the answer of Mr. Noland, the successor of Mr. Elgar, (if it is to be received as an answer,) that the whole work was completed before the bill was filed; and by the answer of Mr. Ennis that it was completed before the injunction was served. But whether the pipes were laid, or not, before the service of the injunction, if that had been the only cause of complaint it would hardly have supported an injunction as the actual injury by laying the pipes through the complainant's

land, could not be very great, and certainly might be compensated in damages by an action at law. This ground alone does not seem sufficient to sustain the injunction. The injunction is dissolved. And the cause being, by consent, set for final hearing on the bill, answers, and exhibits, the bill is dismissed.

Case No. 11,158.

PIERSON et al. v. LAWRENCE.

[2 Blatchf. 495.] [1]

Circuit Court, S. D. New York. Nov., 1852.

CUSTOMS DUTIES — RECOVERY BACK — SETTING FORTH IRREGULARITIES IN PROTEST — WHAT IS PURCHASE — MANUFACTURE AFTER ACCEPTANCE OF ORDER — ACT AUG. 30, 1842 — DATE OF INVOICE.

1. Where duties paid to a collector are sought to be recovered back, on the ground that the proceedings in the custom house, in initiating or conducting an appraisement of the goods on which the duties were paid, were irregular, the irregularities relied on must be set forth specifically in the protest.

[Cited in Pierson v. Maxwell, Case No. 11,159; Focke v. Lawrence, Id. 4,894; Cornett v. Lawrence, Id. 3,241; Wilson v. Lawrence, Id. 17,816.]

2. The law as settled in Thomson v. Maxwell [Case No. 13,983], in regard to what is requisite in a protest against the payment of duties, again applied.

[Cited in Muser v. Robertson, 17 Fed. 502.]

3. An accepted order for goods, although a purchase in the usage of the particular trade, as between vendor and vendee, is not a purchase under the 16th section of the act of August 30, 1842 (5 Stat. 563), so as to authorize the entry of the goods, when imported, at a dutiable value fixed at the current price of like goods at the time the order was accepted, where the goods are to be manufactured after the acceptance of the order.

4. The date of an invoice, in an entry by the purchaser of goods, is, as against such purchaser, prima-facie evidence of the time of their purchase, and conclusive until a mistake in the date is proved.

This was an action [by Henry L. Pierson and Samuel Hopkins] to recover back an alleged excess of duties paid to the defendant [Cornelius W. Lawrence], as collector of the port of New York, on certain importations of iron. A verdict was taken for the plaintiffs, subject to the opinion of the court.

Elias H. Ely, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. This cause was decided by the court at the last term, but, at the instance of the counsel for the plaintiffs, the opinion of the court was withheld, and leave was given to the plaintiffs to apply to the court at the present term for a re-hearing, upon the suggestion that important facts had been overlooked by the court, or had not been properly presented to their attention. The court consented to receive an argument on paper and to reconsider the case. The United States attorney declined offering any further argument. The counsel for the plaintiffs has presented his views in a carefully prepared statement of facts and law, and the court has reviewed, with close attention, these suggestions. The result is, that we have not been able to discover any error in our conclusions at the last term.

The case upon the facts is this: On the 7th of May, 1849, the plaintiffs made an entry, at the custom house in New-York, of 870 bundles of hoop iron, valued at £174 10s. 9d. sterling, commissions, 2½ per cent., £4 7s. 3d, and charges, £1 1s. 5d., total, £179 19s. 5d., with an affidavit of one of the plaintiffs that the invoice accompanying the entry was true. That invoice is dated March 14th, 1849, and is from the Coalbrookdale Company to the plaintiffs. The iron was imported from Liverpool to New-York in the ship St. Lawrence, and the date of the invoice, for the purposes of this case, may be taken to be the time of the departure of the ship from Liverpool, and that of the entry the time of her arrival in New-York. On the 9th of May, 1849, one of the principal appraisers wrote on the face of the invoice: "Add 10s. per ton, to make market value, with chgs. and coms. as per invoice." This raised the entry to £191 2s. 3d., upon which sum duties were exacted. On the 10th of May, 1849, the plaintiffs wrote upon the face of the entry the following protest, addressed to the defendant: "We hereby protest against the payment of 30 per cent. duty on £191 2s. 3d., charged on 870 bundles of hoop-iron contained in this entry, claiming that, under existing laws, said goods are only liable to a duty of 30 per cent. on £179 19s. 5d., because that was the actual cost of the goods, and was the full market value at the time of purchase, and, if any delay occurred in the shipment, it was contrary to our express wishes and directions and owing to circumstances entirely beyond our control. We pay the amount exacted, in order to get possession of the goods, claiming to have the difference refunded."

Another entry was made by the plaintiffs, the same day, of 346 bundles of hoop-iron and 175 bundles of bar-iron, invoiced by the Coalbrookdale Company, March 14th, 1849, imported in the ship Blanche, from Liverpool, invoiced and entered at £120 7s. 5d., and, as in the preceding case, raised by appraisement to £128 4s. 8d. On the 10th of May, 1849, a protest, in the same terms as in that case, was written by the plaintiffs on the entry. The oath of the owner and the order of the appraiser were the same in this instance as in the preceding one.

On the same day, a third entry was made, in like manner, by the plaintiffs, of 974 bars

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

and 40 bundles of iron, imported in the ship E. E. Perkins, from Liverpool, invoiced by the Coalbrookdale Company, March 16th, 1849, at £198 5s. 2d. As in the preceding cases, the invoice valuation was raised by appraisement to £226 15s. 8d. The duties imposed thereon were paid by the plaintiffs under a written protest, dated May 10th, 1849, in the same terms as the one before set forth.

On the 21st of May, 1849, three other entries were made by the plaintiffs. One was of 839 bundles of bar-iron, imported in the ship N. H. Wolfe, invoiced March 27th, 1849, by the same company, at £200 7s. 8d., and raised by appraisement to £233 7s. 6d. The second was of 3,449 bars and 20 bundles of iron, imported in the ship Liberty, invoiced April 19th, 1849, at £277 7s. 3d., and appraised at £329 12s. 0d. The third entry was on two invoices from the same company, one dated April 6th, 1849, the other dated April 12th, 1849, imported in the ship Garrick. The joint invoice value was £786 5s. 4d. The appraised value was £866 6s. 9d. Duties were imposed and paid on the appraised values in all the cases, and like written protests were made by the plaintiffs.

On the trial, the plaintiffs proved the purchase-price or actual cost of the iron, by giving in evidence a correspondence between themselves and the Coalbrookdale Company, of Liverpool, by which it appeared that the iron charged in the invoices was ordered by the plaintiffs, by letters dated in New-York in the months of November and December, 1848, and January, 1849, with specifications of the description and quality of the iron required. When those orders were received in Liverpool, the Coalbrookdale Company booked them, charging the various kinds of iron specified at the then current prices, and advised the plaintiffs that the orders were accepted. It was proved that this constituted a purchase, in the usage of the trade. The vendors then proceeded to prepare the iron conformably to the orders, and, when it was shipped, the invoices were made out at the prices prevailing at the time the orders were received, and without regard to the price or market value when the iron was delivered or shipped. Ordinarily, on the purchase of iron from manufacturers, some time elapses after the iron ordered is booked, before it can be rolled and prepared for shipping. Manufacturers are not accustomed to keep large stocks on hand awaiting orders, but to manufacture it to conform to the description ordered. The iron in the present case was ordered previously to the period it was expected to be shipped, to give time to have it manufactured. It is to be assumed that the appraisement made by the appraisers exhibits the true market value of the iron at the times it was invoiced and shipped, for there is no evidence contradicting that valuation.

The plaintiffs protested against the duties exacted on the valuations of the appraisers, claiming that the iron was subject to duty only on the invoice prices, because these represented the actual cost and full market value at the time of purchase. They now insist that the evidence produced by them on the trial proves that the market value and purchase-prices of the iron were according to the charges on the invoices and entries; and, further, that they have now made it evident, that the action of the appraisers and collector, in valuing the iron and imposing the additional duties, were irregular and without authority of law.

In support of the latter branch of this proposition, the counsel for the plaintiffs has gone into a minute and labored analysis of the provisions of the revenue laws in relation to the entry and appraisement of goods, and assumes, in maintenance of the first branch, as a principle of law, that, under the correspondence between the plaintiffs and the Coalbrookdale Company, there was a purchase of the iron by the plaintiffs at the time their orders were booked by the company at Liverpool.

This latter position was the one most considered by the court on the former argument, and we disposed of it adversely to the claim of the plaintiffs. We supposed that the reargument was intended chiefly to reinforce the views of the plaintiffs and remove the difficulties of the court on that point; but we are no less ready to review both points, under the advantage of the present argument, than if the same relative importance had been maintained between them as on the previous hearing.

We do not think that the plaintiffs have placed themselves in a position for questioning, in this action, the regularity of the proceedings in the custom house in initiating or conducting the appraisements complained of, because they did not make objections of that character a ground of their protests. They dealt with the appraisement as being one right in form and even in substance, provided the time of shipment was properly taken as the time of purchase, and they cannot now charge upon the collector any defective or unauthorized exercise of power, not designated in their protests as grounds of objection. Mason v. Kane [Case No. 9,241]. The same position was taken by this court, in the case of Thomson v. Maxwell [Id. 13,983]. In that case, and in others decided about the same time, this point was carefully considered, and it was held that the importer could not maintain an action against the collector, to recover back duties paid, without proving that the moneys remained in his hands when the action was brought, or that a protest in writing was made at the time of payment, "setting forth distinctly and specifically the grounds of objection to the payment thereof."

We find that our construction of the statute in this particular has been sustained by

the highest authority, in decisions published since our opinions were delivered. In Norcross v. Greely [Case No. 10,294], a commission of 2½ per cent. (with other charges) was added by the collector to the invoice value of an importation of crockery. The importers protested that they "pay no such commissions" as were added. The circuit court in Massachusetts decided that the plaintiffs were not entitled under the protest to recover back the payment. The objections taken at the bar were, that commissions were not usually paid in the trade of importing crockery-ware from England; that, if paid, there was no usual rate; and that 2½ per cent. was not an usual rate of commissions; but the court ruled that the plaintiffs could not avail themselves of those objections in the action, without setting them forth distinctly and specifically in the protest. Duties are not, in judgment of law, illegally exacted, so as to afford a right to the importer to recover them back, when the protest required by the act of 1845 [5 Stat. 750] is not made (Lawrence v. Caswell, 13 How. [54 U. S.] 488); and the act in terms fixes the requisites of the protest.

The counsel for the plaintiffs has gone through a labored research of the tariff acts from their earliest enactment, and has argued from them that congress has placed the whole system upon such a footing, that the oath made under the circumstances presented in this case, together with the sworn invoice, determined the purchase-price and dutiable value of the importation, and that, even if the acts could bear the construction that goods imported by the purchaser and owner could be subjected to an appraisement, yet an appraisement not ordered by the collector on his suspicion of an undervaluation in the invoice, and not conducted in all particulars by the appraisers pursuant to the direction of the acts of congress, was utterly void, and afforded no authority to the collector for increasing the duties.

We do not concur entirely with the counsel in the inferences he has drawn from the statutes he has examined, but we forbear from all discussion of the subject, for the reasons before indicated. These particulars of objection should have been pointed out to the collector in the protests, so that, if any error existed, he might have protected himself or the government from the consequences, by having it rectified, or have relieved the plaintiffs without litigation. They cannot, under a proper understanding and enforcement of the act of 1845, reserve such objections until the trial of their suit against the collector, and then make them available to charge him and the government with the repayment of the duties collected. In our opinion, this branch of the case also falls within the provisions of the act of 1845; and, as the protests did not set forth, distinctly and specifically, these objections to the payment of duties, they cannot now be regarded.

The particular point upon which we understood that a review of our former decision was sought was, whether the plaintiffs were entitled to enter the iron at the prices it bore when the contracts of purchase were closed, or whether it was liable to duties on its value at the times of its shipment. We listened to the application for a rehearing, under the impression that the point might involve the construction of the tariff acts in a particular which does not seem to have yet been made the subject of judicial exposition; and, although satisfied with the construction we first gave to the law in this respect, we were anxious to see if any reasons, satisfactory to us, could be shown against our conclusions, in order that, if erroneous, they might be corrected before they should be promulgated.

For the purposes of this decision, it is assumed that the proofs show that the iron imported conforms entirely to the articles stipulated, in the correspondence between the vendors and the plaintiffs, to be furnished under the orders given, and also that the usage of that trade regards the orders given by the plaintiffs, and their acceptance on being booked by the manufacturers, as a completed contract of purchase and sale. Under the equity of such a contract, if not by its legal effect, the iron, when manufactured, may be regarded as the property of the plaintiffs. We state these propositions in the strongest form in favor of the plaintiffs, in order that the point arising out of them, and in contest in this action, may be fully met and covered by our decision.

Assuming that the invoices were made up as of the times the iron was contracted for, and that they set forth correctly the prices agreed to be paid for the iron, we do not think that the contract between the parties constituted the purchase contemplated and provided for by the revenue acts, so as to fix the dutiable value of the goods or even justify their entry by those prices. It is to be observed that the tariff and revenue laws, in all their enactments of duties specific or ad valorem, have relation to the res, to property itself, and not to legal or equitable rights of property. Iron in bars or hoops is subjected to a duty of 30 per cent. ad valorem, and that tax fastens upon the commodity, not from the time it is manufactured for a particular purchaser, but from the time it is acquired by him for the purpose of importation. This was the effect of the law prior to the act of March 3, 1851 (9 Stat. 629). Greely v. Thompson, 10 How. [51 U. S.] 225.

The 16th section of the act of August 30, 1842 (5 Stat. 563), declares that "it shall be the duty of the collector," when ad valorem duties are imposed "on any goods, wares or merchandize imported into the United States," "to cause the actual market value or wholesale price thereof, at the time when purchased, in the principal markets of the country from which the same shall have

been imported," to be ascertained, &c. This language points significantly to things in being, to commodities having a market value and price in the principal markets of a country, and is in no way adapted to express the idea that a prospective contract of purchase with a manufacturer who is afterwards to make the article, shall fix the value or price at an indefinite period subsequently, when the purchaser may obtain the merchandise. The 35th section of the act of March 2, 1799 (1 Stat. 654), in describing the invoices required and the oaths to be taken by importers, manifestly applies both to the merchandise in the condition in which it is imported. And the act of March 1, 1823 (3 Stat. 729), so strongly relied upon by the plaintiffs' counsel on the argument, has relation, in its enacting sections and in the form of the oath prescribed to the owner, consignee or manufacturer, to the property imported, in the state and condition in which it was exported from its place of production, and most plainly contemplates the ordinary dealing between buyer and seller in market. The 4th section of that act (Id. 731) enacts that, where goods imported shall be entered by invoice, the owner shall make oath that the entry contains a just and true account of all the goods, and that the invoice contains a just and faithful account of the actual cost of the said goods. The terms employed in the same section, in the manufacturer's oath (Id. 732) that "the goods were not actually bought" "in the ordinary mode of bargain and sale," supplies an interpretation of the sense in which congress used the phrase actual cost, in the owner's oath, and plainly indicates the meaning to be that the goods, then owned by others, were acquired at the prices stated in the invoice. So, in connection with the manufacturer's oath, the requirements of the 5th section of the same act (Id. 732) tend to confirm this construction; because, the word "procured," there used, imports an actual possession of the property, and, "actual purchase" being so placed in juxtaposition with "procurement," the same legal signification must be given to either expression in respect to possession of the goods.

That this consideration is entitled to weight, in determining the intention of congress in the whole provision, may be strongly illustrated by supposing that the Coalbrookdale Company had, at the time they received the orders of the plaintiffs, resolved to ship the iron called for on their own account, and registered the rates on their books and directed the quantities to be shipped by their works. It is obvious they could not have invoiced the iron at those rates and prices, but must have charged the market price at the time the iron was produced by them, that is, when it came to their ownership manufactured, in a state for exportation. Upon the same principle, we think that the plaintiffs cannot be regarded as having been actual purchasers of the iron, within the meaning of the revenue laws, until they became owners of the thing itself—the subject-matter made liable to duties. Whatever in law would constitute a delivery and legal ownership might satisfy the purpose of the revenue acts in respect to possession; but, manifestly, the property must be in a state and condition that it may pass by delivery to the purchaser.

Chancellor Kent (2 Comm. 468, and notes) states accurately the constituents of a valid contract of sale. The thing sold must have an actual or potential existence, and be specific or identified, and capable of delivery; otherwise, it is not strictly a contract of sale, but a special or executory agreement. Admitting the arrangement between the plaintiffs and the Coalbrookdale Company to have had all the essential properties of a contract of sale, it by no means follows that, as such, it became an actual purchase of the goods and merchandize, within the meaning and policy of the tariff acts. Indeed, without laying emphasis upon the obvious design of congress that the property imported should in kind be the subject of sale and delivery, to constitute a purchase, it may well be doubted, upon the authorities, whether the contract set up by the plaintiffs could carry with it any title or right in the plaintiffs to the iron after it was manufactured. Chit. Cont. (Ed. 1851) 336; Add. Cont. 45, 46; Smith, Merc. Law, 292–294. The sale was not in præsenti, and every thing, even the creation of the goods by the vendor, was to be done before delivery. Upon these qualities of the contract, it would be difficult for the plaintiffs to maintain an existing property in them to the iron, coeval with the making of the contract. It is to that date they refer their purchase or acquisition of it.

Suppose the value of iron had depreciated largely between the date of this contract and the time of the shipment—could the collector have directed a valuation of the iron as of the time of the order? And, in a stronger point of view, could the plaintiffs have been assessed or taxed on the amount of the purchase-price of the iron, as for so much property actually purchased by them? In our opinion, the term "actual purchase," used in the revenue laws, is stronger, in its ordinary import and legal signification, than the phrase "contract of sale," and necessarily implies the acquisition of the thing as actual property. We think, therefore, that on the fair construction of the statute, the plaintiffs are not permitted to claim the date of their contract as the time of the actual purchase of the iron.

We have given this part of the case an enlarged consideration, more to satisfy the counsel that no part of his elaborate and well-reasoned argument on this point has

been disregarded by the court, than to obviate any real difficulty presented in supporting the judgment before rendered by the court. For, conceding that the plaintiff's were actual owners of the iron at the time alleged by them, and that its price then coincided exactly with their invoices, we think they cannot support this action, either for an overvaluation of the goods at the custom house and the imposition of duties upon that valuation, or because of any irregularity or want of authority on the part of the appraisers or other officers of the custom house, in appraising the iron or raising its invoice and entry valuation. To lay a foundation for the action, they must show that the duties were illegally exacted by the collector, and that they are entitled to appeal to the judicial tribunals for relief. Lawrence v. Caswell, 13 How. [54 U. S.] 488.

Laying out of view the form of the protests, and considering the plaintiffs as entitled to prove their allegation that the iron ought not to pay duties on the valuation put upon it at the custom house, and that they were entitled to enter it at the purchase-price, the invoices are, as against the plaintiffs, prima facie evidence of the times of purchase, and become conclusive evidence on that point, unless a mistake of date therein is pointed out and proved by them. Marriott v. Brune, 9 How. [50 U. S.] 619. These invoices all bear dates concurrently with the shipments of the iron—March and April, 1849—and the plaintiffs show that the price of iron at Liverpool was then from 2s. 6d. to £1 7s. 6d. sterling, or more, higher per ton than the prices charged upon the invoices; and it was conceded on the argument, that the valuation upon which duties were imposed corresponded with the correct market value of the iron when shipped. There is no proof in the case, that any notice in fact was given to the collector that the invoices were incorrect in dates, and, under that state of facts, we think that the plaintiffs were legally concluded by their entries and oaths and by the invoices, from claiming a valuation of the invoices at periods anterior to those dates.

It is thus manifest that this action could not be supported, even if the form of the protests was not interposed as an objection by the defendant. We are, however, not at liberty, in deciding the case, to disregard that objection, and are of opinion that the protests made to the collector do not authorize the plaintiffs to take any exceptions to the authority of the appraisers to act in the valuation of the iron, nor to prove it was purchased at the times their orders for it were received and accepted by the Coalbrookdale Company, or at any time antecedent to the dates of their invoices. Judgment must accordingly be entered for the defendant.

Case No. 11,159.

PIERSON et al. v. MAXWELL.

[2 Blatchf. 507.] [1]

Circuit Court, S. D. New York. Nov., 1852.

CUSTOMS DUTIES—SUFFICIENCY OF PROTEST.

1. The insufficiency of the protest against the payment of duties in this case, pointed out.

[Cited in Crowley v. Maxwell, Case No. 3,449.]

2. The doctrine of the case of Pierson v. Lawrence [Case No. 11,158] applied.

[Cited in Cornett v. Lawrence, Case No. 3,241; Focke v. Lawrence, Id. 4,894; Wilson v. Lawrence, Id. 17,816.]

[This was an action by Henry L. Pierson and Samuel Hopkins against Hugh Maxwell, collector of the port of New York, to recover an alleged excess of duties.]

This was an action substantially like the case of Pierson v. Lawrence [Case No. 11,158].

Elias H. Ely, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. This case rests essentially upon the same class of facts as that of Pierson v. Lawrence [supra]. It is a suit to recover back an excess of duties exacted by the present collector on the importation of several invoices of iron from Liverpool. The invoices were from the Coalbrookdale Company and Bailey, Brothers & Co., to the plaintiffs, dated in April, May and June, 1849, and the iron was shipped concurrently with the dates of the invoices. The protests, written on the respective entries, are "against the payment of duty on (the increased valuation specified) added to the entry value by the appraisers, because the original entry was the actual cost and full value at the time of purchase." The protests designate no time of purchase different from that indicated by the invoices, at which the value is to be estimated, and there is no evidence impeaching the correctness of the valuation made by the appraisers in reference to the invoice dates. The plaintiffs cannot, under the protests, set up a different and long antecedent period of purchase, nor can they impugn the appraisement by giving proof of any irregular acts of the appraisers or other officers in making it. Those particulars should have been distinctly and specifically pointed out to the collector by the protests, in order to enable him to rectify any thing erroneous in the manner of determining the value of the goods, or in the selection of the period at which that value was to be determined. Judgment must be rendered for the defendant.

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Case No. 11,160.

PIERSON et al. v. OGDEN.

[31 Hunt, Mer. Mag. 328; 2 Liv. Law Mag. 703.]

District Court, S. D. New York. 1854.[1]

SHIPPING—CHARTER PARTY—DEMURRAGE—BEGINNING OF LAY DAYS—FOREIGN CUSTOMS LAWS.

[A shipmaster cannot report himself "ready to receive cargo" before he is permitted by the revenue laws of the port to receive it.]

[This was a libel by Jonathan Pierson and others against David Ogden for breach of charter party.]

Mr. Donohue and Mr. Parsons, for libelant.
Mr. Owen, for respondent.

INGERSOLL, District Judge. On the 28th of April, 1851, the respondent chartered the ship Hemisphere, then in this port, of the libelants, her owners, for a voyage from Liverpool to the port of New York. By the charter party it was agreed that the ship should receive on board at Liverpool a full cargo of general merchandise, and not exceeding 513 passengers, and that the ship should not be obliged to take on board an amount of iron exceeding her registered tonnage. The respondent was to provide water, provisions, and berths, and all other expenses connected with the passengers, and to pay hospital and commutation fees in New York, and quarantine expenses. If the ship provided berths, the respondent was to pay the usual price for them, and he was to buy the passenger stores then on board at their value in Liverpool. The lay days for loading at Liverpool were to be as follows: "Commencing from the time the captain reports himself ready to receive cargo, fifteen running lay days; and for each and every day's detention, by default of the respondent or agent, one hundred silver dollars per day to be paid by respondent." The libelants now sue to recover the charter money, which was agreed upon at £1,500, the value of the passengers' stores on board, and seven days' demurrage at Liverpool. The respondent denies that they are entitled to demurrage, and objects to paying the charter money, on the ground that the ship did not bring a full cargo.

By the act of 3 & 4 Wm. IV. c. 52, entitled "An act for the general regulation of the customs," it is provided, among other things, that no goods shall be shipped, or waterborne to be shipped, on board any ship in any port or place in the United Kingdom, to be carried beyond seas, before due entry outwards of such ship, and due entry of such goods, shall be made and cocket granted, nor before such goods shall be duly cleared for shipment, in manner therein directed, under pain of forfeiture. It is also provided that, before any goods be taken on board any outwardbound ship, the master shall deliver to the collector or controller a certificate from the proper officer of the clearance inwards of such ship on her last voyage, and also an account signed by the master or his agent, of the entry outwards of such ship for the outward voyage, etc. If, however, it becomes necessary to lade any heavy goods before the whole of the inward cargo is discharged, in order to stiffen or ballast the ship, it is lawful for the collector or controller to issue to the master what is called a "stiffening note," being a permit to receive such goods for that purpose. After the whole of the inward cargo is discharged, the collector issues to the master what is called a "jerk note," being a permit which authorizes him to receive on board goods for his outward cargo.

The Hemisphere set sail from this port soon after the execution of the charter party. She arrived at Liverpool in June, and soon after commenced discharging. On the 24th of June, having discharged a part of her cargo, her master obtained from the collector a "stiffening note," authorizing him to receive on board railroad iron only. On the 28th of June all her cargo was discharged, but the "jerk note," authorizing him to receive his outward cargo, was not obtained till the 30th. Some railroad iron was furnished previous to this, and before July 15th the whole cargo was furnished, consisting of railroad and other iron, crates, boxes of dry goods, etc., making up a cargo of general merchandise. The captain, on the 23d day of June, reported to the agent of the respondent that he was ready to receive cargo.

The libelants allege that the lay days commenced on the receipt of the "stiffening note," on the 24th of June, which would give them seven days' demurrage; while the respondent claims that they did not commence until the receipt of the "jerk note," on the 30th, in which case they would be entitled to no demurrage. The expression in the charter party is, that the lay days commenced "from the time the master reports himself ready to receive cargo." They do not commence, however, until he has a right to report himself ready, and he has no such right until the ship is actually ready; and she is not ready as long as she is prohibited by law from receiving cargo, in consequence of the nonperformance of certain things to be done on her part, and there can be no delay on the part of the charterer until she has been so made ready. The construction of that part of the charter party relating to lay days is that the charterer shall have the right to detain the ship, in order to put on board a cargo of general merchandise, fifteen days after she shall have been placed at his disposal, and not detained on business of the owner or prior charterer, and after she shall have been put in such a condition that he can put on board such a cargo. She was not detained by the charterer before June 30th, but by the owner for the purpose of discharging her inward cargo. Till that time no goods could have

[1] [Modified in Case No. 10,781. Decree of circuit court affirmed by supreme court in 23 How. (64 U. S.) 167.]

been put on board of her except railroad iron. The respondent was not bound to put any railroad or other iron on board under the charter party. He could [not][2] put on board a cargo of general merchandise without putting on board any iron. Till the 30th of June, then, she was not ready to receive a cargo of general merchandise, and the lay days do not commence till that time. This also agrees with the custom of the port of Liverpool, as shown by the weight of the evidence in the cause.

No delay was occasioned to the ship in consequence of the passengers. The weight of testimony is that she was fully and properly loaded, and the respondent has no ground for claiming that she did not bring a full cargo. Nor has he any ground of complaint as to the number of passengers. The charter party did not require that 513 passengers should be brought at all events. A portion of the cargo was so placed between decks that so many could not have been brought without violating the act of congress on that subject. Only 350 berths were provided by the ship, and none by the charterer; and only 350 passengers were tendered to the ship, and these she brought. The agent of the respondent did not claim that more berths should be furnished, and thereby assented that no more passengers should be brought.

The respondent is also, by the terms of the charter party, liable for the hospital and commutation fees in New York, for quarantine expenses, and for the passenger stores furnished by the libelant.

Decree, therefore, that the libelants recover the charter money, less what they have been paid, besides the hospital money, etc., and the price of the stores, and reference to a commissioner to ascertain the amount.

[NOTE. On appeal to the circuit court the decree of this court was modified by deducting from the freight the sum of $1,200, for damages sustained on account of the noncompliance with the charter party. Case No. 10,781. This decree was affirmed by the supreme court, where it was taken on appeal. 23 How. (64 U. S.) 167.]

PIERSON v. RICHARDSON. See Case No. 13,743.

PIGNEL (UNITED STATES v.). See Case No. 16,049.

Case No. 11,161.

PIGOU v. FRENCH.

[1 Wash. C. C. 278.][1]

Circuit Court, D. Pennsylvania. April Term, 1805.

PRINCIPAL AND SURETY—RECOVERY BY SURETY—PAYMENT.

One who has become surety for another, cannot recover the amount of his responsibility, without showing that he had paid it, before action brought.

[Cited in Edgerly v. Emerson, 23 N. H. 560.]

The plaintiff proved his account, by evidence of the defendant's acknowledgment of all the items; but, two of them were for the plaintiff's guarantees for the defendant's engagements in England, in which the plaintiff, as his surety, had become liable to pay before the bringing of this action: but, no proof of payment was offered, and the plaintiff's counsel insisted, that the jury ought to presume it. The defendant had endorsed to the plaintiff a bill of exchange, endorsed to him by Dusar; which the plaintiff, by the endorsement, was to receive for the use of the defendant. The plaintiff had brought suit on the bill, but had not received the amount. The defendant insisted, that the plaintiff, not having returned the bill, he was entitled to a credit for the amount.

WASHINGTON, Circuit Justice. The plaintiff cannot recover the two sums for which he became surety for the defendant, without showing that he had paid them before action brought; and, the jury ought not to presume it, from the circumstance of his having before become liable to pay, and the good character of the plaintiff. Indeed, the presumption would be otherwise; since his liability arose in October, and, if he had paid those sums, it would have been easy to prove it at this day. As to the bill of exchange, the plaintiff holds it as an agent and creditor of the defendant; and so it is plain that the plaintiff understood it. It is a collateral security, which he is entitled to retain; and, he will not be accountable for the amount of it, until he has received it.

Case No. 11,162.

PIKE v. POTTER.

[3 Fish. Pat. Cas. 55.][1]

Circuit Court, D. Rhode Island. July, 1859.

PATENTS—PROCESS—EXTENDING GRANT BEYOND INTENTION OF PARTIES—CORRESPONDENCE BETWEEN INVENTOR AND PATENT OFFICE AS EVIDENCE—PROPOSITION NOT ACCEPTED BY COMMISSIONERS.

1. The invention of John C. Schooley, as set forth in his patent of March 13, 1855, for "improvement in processes for curing meats," is not for a machine, but for a process or method of curing meats and preserving fruits and provisions by means of circulating currents of air, artificially dried by ice or its equivalent, through the room where the curing takes place, substantially as set forth in the specification.

2. If the patent was issued by the commissioner upon an agreement by the patentee that it should not extend to certain articles, it would be a fraud upon the government to extend the grant beyond the original intention of the parties.

3. The correspondence between the office and the patentee is evidence, at least in a court of

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[2] [2 Liv. Law Mag. 703, gives "not."]

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

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

equity, for the purpose of showing the limitation placed by the patentee upon his claims.

4. If a patent claiming the invention of a process applicable to pork houses and also to domestic refrigerators, can not, for want of novelty, be extended to the former, it can not be extended to the latter.

5. A proposition to limit the claim made by the patentee to the commissioner, but not accepted by the latter, does not bind the patentee.

6. If a process of curing meats designed for pork houses be applicable, without substantial variation, to domestic refrigerators, then it can not be used by others in domestic refrigerators without infringing the patent.

7. The patentee is not obliged to state everything to which his invention is applicable in order to be protected in the enjoyment of the exclusive right to such things.

This was a trial before Judge Pitman and a jury, of issues of fact, arising in a suit in equity brought to restrain the defendant [Asa K. Potter] from infringing upon letters patent [No. 12,530], for an "improvement in processes for curing meats," granted to John C. Schooley, March 13, 1835, and assigned to complainant [Charles F. Pike]. The patent described a pork house constructed with two compartments, in one of which was placed the meat to be cured or preserved, and in the other a quantity of ice. These compartments communicated with each other, and each, by openings, with the external air. The air passing over the ice was cooled and dried and descended into the apartment containing the meat, from which it took up heat and moisture, and rising, passed out by the external opening, thus creating a circulation in which cold and dry air was continually introduced into the provision-chamber, and warm and moist air was continually expelled. The claim of the patent was as follows: "The process of curing meat, and preserving fruit and provisions, by means of circulating currents of air artificially dried by ice, or its equivalent, through the room wherein the curing takes place, substantially as and for the purposes set forth." The defendant was charged with using the process, in domestic refrigerators of the ordinary size, but constructed with two compartments and employing a circulation substantially the same as that described in Schooley's patent.

W. H. Potter, C. M. Keller, and B. R. Curtis, for plaintiff.

A. Payne, J. S. Beach, and T. A. Jenckes, for defendant.

PITMAN, District Judge. The object of the patent laws is to secure to inventors the exclusive right, for a definite period, to their inventions and discoveries. To enable a person to obtain a patent, he must make application to a commissioner, and deliver to him a written description of his invention or discovery, so carefully explained as to enable others, skilled in the art or science to which it appertains, to make, construct, compound, and use the same; and in case of any machine, he must explain the principle, and the several modes of its application, so as to distinguish it from other inventions, and shall particularly specify the part or combination which he claims as his invention or discovery. This specification is annexed to, and is made part of, the patent. What the patent is for, is ascertained by the construction of the language of the specification by the court; and it is the duty of the court to give it such a liberal construction as will secure to the inventor the exclusive right to his invention and discovery as stated and described in the specification.

In this case, as his specification states, the invention of Mr. Schooley is not for a machine, but for a process or method of curing meats, and preserving fruit and provisions by means of circulating currents of air, artificially dried by ice or its equivalent, through the room where the curing takes place, and substantially as set forth in this specification, and for the purposes therein stated.

I have no doubt of what the invention is, or that it is sufficiently described. It is stated in the specification that the improvement "is particularly applicable to the construction of pork houses, for the purpose of curing meats in the summer season," etc., and it is contended by the defendant that it is for nothing else. It is so contended, not only from the language of the specification, but also from the correspondence between the commissioner and Mr. Schooley, from which it appears that the commissioner refused to grant a patent under the original specification, because it had already been discovered as applicable to domestic refrigerators, and that Mr. Schooley then agreed that his patent should only be for curing meats in pork houses, as described in the specification, and an offer was made to produce the correspondence. It was objected to by the plaintiff, but I admitted it on the ground that if the patent was issued with such an agreement (not to extend it to domestic refrigerators), to extend it to domestic refrigerators would be a fraud upon the government, and extend their grant beyond what was the original intention of the parties; and if at law such evidence is not admissible, certain I am that a court of equity would not grant an injunction in the face of such evidence. The testimony, therefore, has been admitted by me, and the question is whether it proves that the commissioner refused to grant this patent because it was claimed to be applicable to domestic refrigerators; and whether Mr. Schooley admitted that he had no right to extend it to domestic refrigerators, for want of novelty in that department, and that he obtained the grant with that understanding, and that it ought not to be extended to domestic refrigerators, it is obvious, and it must be apparent to all lawyers, that if it could not, for

want of novelty, be extended to domestic refrigerators, it could not be extended to pork houses; and that may help us somewhat in the construction of this correspondence.

An application was made (as appears from the letter that accompanied it), on January 19, 1855; and this letter states that it was "an application for an improvement in curing meats and for preserving all kinds of fruits and provisions," and this is so stated in the first specification of Mr. Schooley. This specification is almost verbatim, like the one annexed to the patent, in all those parts that have been criticised by the defendant as going to show that the patent was granted only for curing as described in the one for pork houses, and it contains this clause: "My improvement is applicable to ice chests and refrigerators of any and every form heretofore invented, and is particularly applicable to pork houses, for the purpose of curing meats," etc. The words "is applicable to ice chests and refrigerators of any and every form heretofore invented," are not to be found in the new specification; but they have been stricken out as appears from the evidence, or rather, lines have been drawn through them, and the phrase is left now "is particularly applicable to the construction of pork houses."

On February 2, 1855, a letter was written from the patent office, and signed by the commissioner of patents, to Mr. Schooley, in which he says: "Your application for alleged improvement in apparatus for preserving meats, etc., has been examined and is found not to contain any patentable novelty. For substantially the same device, you are referred to the application of Thaddeus Fairbanks for a refrigerator, rejected February 26, 1847, and withdrawn September 6, 1847, and also the application of A. S. Lyman, for a patent for a disinfecting ventilator, rejected February 27, 1854." It appears that the application of Lyman was for ventilators and refrigerators, and more particularly for refrigerators. It is apparent from this letter, that their refusal to grant a patent to Mr. Schooley, as applied for, was not because he had stated in his specification that his patent was applicable to ice-chests and refrigerators of every form; but because the same device was found in the application referred to, and therefore contained no patentable novelty, and of course it was the duty of the commissioner to refuse the patents, if such was his opinion.

The answer of Mr. Schooley, by his attorney, Mr. Stoughton, is an argument to show that this was not true, and after an attempt to convince the commissioner of error, he says: "To remove all difficulties on the part of the office, I propose, on the accompanying sheet of amendments, to erase, for the present, from the specifications, all allusions to refrigerators or ice-boxes, but to reserve to myself the right to renew my claim to those under a new application at some future day. My invention will then rest upon what can not be called either a refrigerator or an ice-box."

This is not an admission that his invention can not be extended to refrigerators, on the ground that the same device had already been used, but a denial of this, and a proposition to say nothing about them in his specification, provided that the patent would be granted to him. This proposition was made, he says, "to remove all difficulty on the part of the office;" but this proposition did not remove all difficulties on the part of the office, for the difficulty was not that the specification had been extended to refrigerators, but that the device substantially existed before, and of course was not a novelty; but so far was this from satisfying the office, that in the letter of the commissioner, dated February 22, 1855, he says: "Upon examination, etc., it is still found that your claim covers the device of A. S. Lyman, with the only addition and difference," etc. The difference I will not remark upon, it is not material, whatever may be the opinion of the court; whether there would be a substantial difference or not is of no importance; it seems to have been waived by the opinion of the office afterward. "Currents of air," he says, "produced are no novelty, as is proven by the remarks filed by yourself on the 19th instant (I will observe that I could find no such admission, and therefore there was no such evidence as affecting Mr. Schooley), and therefore all to which you could be admitted to have a claim, provided the device proves new upon further examination, would be for a process of curing meats by means of circulating currents of air, artificially dried by ice, after it is admitted through the room where the curing takes place, substantially as and for the purposes set forth."

As a patent was granted, the office upon further examination, must have been satisfied that the device claimed by Mr. Schooley was new, and the patent was not simply for curing meats, but also for preserving provisions and fruits, as originally claimed.

In the letter of February 14, 1855, of Mr. Stoughton, for John C. Schooley, he says: "I have the honor to acknowledge the receipt of your letter of the 22d (February), returning the specification of John C. Schooley, for corrections, as suggested. I have to request that the following amendments may be substituted for those presented in my letter of the 16th instant." It will be found that those go far beyond what was stated by the commissioner in his letter of February 22, as to what Mr. Schooley would be entitled to; instead of being a process for curing meat only, it is a "process for curing meats, fruits, and other provisions, by means of circulating currents of air artificially dried by ice, or its equivalent, through the room wherein the curing takes place." And then in the claim, having given a full description, he

says: "What in my invention I claim as new, and desire to claim, is a process for curing meats and preserving fruits and provisions by means of currents of air, artificially dried by ice or its equivalents, through the room wherein the curing takes place," which is precisely, I think, as stated in the specification now produced. It is true that Schooley's attorney made the statement that Schooley's improvement, as applicable to ice-chests and refrigerators, was stricken out from the original specification; but was this an admission that it was not applicable to ice-chests and refrigerators? When it was stricken out, does not plainly appear, but I think it must be inferred that it was when he first proposed it, with a view to suit the office and to procure a patent, which, without inserting these words, would, in law, extend to refrigerators, if in fact the invention was applicable to refrigerators. The striking out or inserting of a fact that the improvement was applicable to refrigerators, could not affect the invention particularly. It would rather seem to me to be a device of the attorney, with a hope thereby to overcome the objections of the commissioner.

It is true it is said that the claim will be reserved for a future day, and if this proposition had been then accepted, and the patent granted upon this understanding, there might be some reason to estop Mr. Schooley; but the patent was granted because the office was satisfied that the invention of Schooley to cure meats and preserve fruits and provisions was new, and whether in fact it was applicable to domestic refrigerators, was a question of law depending upon the fact whether it was applicable to domestic refrigerators.

If Mr. Schooley is the inventor of the devices set forth in this patent, and it is applicable to domestic refrigerators, then to protect him in the rights secured to him by the patent, that is, to secure to him a monopoly of this new mode of curing meats and preserving fruits and provisions, as stated in this specification, no person could be allowed to use it in any domestic refrigerator without infringing upon the patent.

It is true that Mr. Schooley afterward made application for a patent to preserve fruits and provisions and other things, in which he sets forth the same mode; and this was shortly after the patent was granted, and no doubt under the advice that if he could obtain such a patent, it would remove all difficulty.

There is no doubt also, that Mr. Schooley had this in contemplation, from what is stated in the original specification, viz: that it was applicable, and he intended to make it applicable, to domestic refrigerators. It is not, therefore, an after-thought on his part, and the application was made as particularly applicable to domestic refrigerators alone, and to portable refrigerators; while the other one was more particularly applicable to pork houses. This latter application was refused by the commissioner, because he had already obtained a patent for the same process as applicable to the curing of meats, and that he could not have two patents for the same process because for different purposes. If, therefore, there has been any fraud, it seems to be a fraud on Mr. Schooley. If there was an agreement, as there was according to the line of argument on the side of the defense, between him and the commissioner, that he should reserve this for a future application, and therefore that it was to be left out of that patent, and the application was made a very short time afterward and refused, because he had already given him a patent for the same process, it would seem to be a fraud on Mr. Schooley; but I do not understand that there was an agreement of this kind between the commissioner and Mr. Schooley. It would be so understood if the objection to granting the patent had been because it had been made applicable in the specification to domestic refrigerators, but it was because it contained no patentable novelty. Therefore, the question is now what this patent is for, and we must decide that upon the construction of the language of the specification itself; it is not to be controlled by this correspondence. I admitted it, with great doubts, but I thought if it was so clear as was stated when it was offered, that I did not see well how I could refuse to admit it. It is so inconclusive, however, that it can not control what appears upon the face of the patent itself.

Again, there is no doubt in my mind, that the invention is fully set forth in the specification; and if that is in fact applicable to domestic refrigerators, then it can not be used in domestic refrigerators by others without infringing upon the rights of the patentee. If the patent avers the invention of Mr. Schooley, it is then for the court and jury to say whether this is an infringement (by Mr. Winship) upon that invention, and that is the question which is sent here to be tried.

I feel one satisfaction, at least, in thus determining; that I do not cut the case short, but leave the questions of novelty and infringement to be tried by the jury. I am satisfied as to what the invention is, and that the patent does sufficiently cover the invention. For me to say that it shall not extend to domestic refrigerators when it may extend to domestic refrigerators, would be stultifying myself, and doing violence to the rights of the parties. The case, therefore, must proceed.

The charge of the court to the jury was in accordance with the foregoing opinion. A single paragraph only is here inserted:

PITMAN, District Judge (charging jury). * * * It was suggested, that although this invention might have previously existed in reference to refrigerators, yet, as ap-

plicable to a pork house, it might be the subject of a patent. I think otherwise, gentlemen, and so I think did the commissioner, who refused the patent at first, because known, as he supposed, in refrigerators, and granted it afterward, as he must have been satisfied, upon further examination, that it was not so. You are therefore to consider this as a patent for a mode of curing meat and preserving fruits and provisions by means of ice, as stated and specified in the specification of the patent, whatever form or structure of boxes may be used, if the same thing that is described in Mr. Schooley's patent is done in substantially the same way. It is not denied that Mr. Schooley is the inventor of a new method as applicable to pork houses, but his patent goes beyond this; he states that it was particularly applicable to pork houses, which is an inference that it was applicable to other things. He was not obliged to state everything to which it is applicable, in order to be protected in the enjoyment of the exclusive right to everything to which it is applicable, as a mode of curing meats and preserving provisions substantially in the mode described.

Case No. 11,163.

PIKE v. PROVIDENCE & W. R. CO. et al.

[1 Holmes, 445;[1] 1 Ban. & A. Pat. Cas. 560; 6 O. G. 575.]

Circuit Court, D. Rhode Island. Oct. 15, 1874.

PATENTS—INFRINGEMENT—SPARK ARRESTER AND CONSUMER.

1. An invention of a spark arrester and consumer for locomotives, which consists in the combination of a blast-pipe with a return-flue, so arranged that the sparks are driven by the blast in a continuous current through the flue from the smoke-pipe back into the fire-chamber without resting, is not anticipated by prior spark-arresters which, though in some respects of construction the same, were not practically effectual to produce a continuous current carrying the sparks into the fire-chamber without resting.

2. A patent for a spark arrester and consumer for locomotives, which consists in the combination of a blast-pipe with a return-flue, so arranged that the sparks, &c., are driven by the blast in a continuous current through the flue from the smoke-pipe back into the fire-chamber, is infringed by the use of a spark arrester and consumer consisting of a blast-pipe and two return-flues, so arranged that the sparks are carried by the blast into the fire-chamber in a continuous current through the flues without resting, although the current is accelerated, and the combustion of the returned sparks is aided, by a current of air brought into the return-flues by an additional device.

[This was a bill in equity by Charles F. Pike against the Providence & Worcester Railroad Company and others, to enjoin the infringement of letters patent No. 120,638, granted to G. H. Griggs, November 7, 1871, reissued September 10, 1872, Nos. 5,050 and 5,051.]

B. F. Thurston, for complainant.

Thomas H. Dodge and W. H. Clifford, for defendants.

SHEPLEY, Circuit Judge. The invention in question in this case relates to improvements in spark-arresters and consumers for locomotive engines.

The complainant is the assignee of letters-patent No. 120,637, granted November 7, 1871, to George H. Griggs, and reissued in two divisions September 10, 1872; division A, No. 5,050, being for the method of controlling, driving, and finally utilizing as fuel the sparks or unconsumed products of combustion, which are driven from a smoke-pipe or smoke-arch by a forced blast discharged therein, by combining a continuous return-flue connecting the smoke-stack with the fire-chamber, with a compound blast-pipe, and by arranging the mouth of the return-flue at the stack adjacent to and coincident with the exit aperture of the blast-pipe, whereby a portion of the compound blast, composed generally of steam, air, gas, smoke, and cinders, may be utilized again as fuel, thus effecting a considerable saving, as a large portion of the material is combustible.

To accomplish this result, Griggs, making use of the compound blast-pipe, which was well known and in common use, places at the exit aperture of the blast-pipe adjacent to, and coincident with it, a bell-shaped mouth of a return-flue, leading downwards and backwards into the fire-chamber, whereby a portion of the compound blast with the sparks is driven into the return-flue, and through that into the fire-chamber, by the force and pressure of succeeding portions of the blast.

The first claim, in division B (No. 5,051), of his patent, is for "the combination of the compound blast-pipe, with a spark or return flue communicating with the fire-chamber, provided with a bell-shaped mouth, which is located above, adjacent to, and coincident with the exit aperture of the blast-pipe, substantially as and for the purpose specified." There was a barrel-netting connecting the compound blast-pipe with the bell-shaped mouth of the spark-flue, for the necessary escape of the smoke, and a portion of the steam and gas from the blast-pipe, and this combination is also the subject of a distinct claim in the patent.

From the history of the art, as proved by the evidence in the record in this case, and as stated by Griggs in the disclaimers in his specifications, it is clear that his invention consisted in the combination with the compound blast-pipe of the described bell-mouthed return-flue, operating together in such a manner that the sparks were driven into the mouth of and through said flue in a continuous current without resting, into the fire-

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

chamber, by the force of the continuous action of the blast. The inventions of David Matthews and William Duff, relied upon by the defendants, did not anticipate the invention of Griggs, for the reason, among others, that neither of them was effectual to secure a continuous current, driving the sparks from the blast-pipe to the fire-chamber without resting. In the Duff contrivance many of the sparks were landed in a chamber at the bottom of the smoke-arch, where they remained, and were never driven into the fire-box. The Matthews contrivance, though having some features in common with the Griggs invention, differed from it in precisely those particulars which distinguish an incomplete and practically unsuccessful attempt from a perfected invention. This is the history of the art in relation to most of the important discoveries and inventions of the present day. The want which the discovery or invention is to supply is first felt, and the genius of invention is aroused, and the thoughts and efforts of inventors are directed in a particular channel. When one achieves success, it not infrequently appears that prior inventors have been travelling in the same path, and in the light of his success we look back with wonder at the omission of those who started earlier in the race to take the last short step which separated them from the goal. But it is the last step in the race of discovery or invention that counts, and he who first crosses the dividing line between experiment and success wins the prize over those who, having started earlier in the race, are but a single step behind at the goal. The inventions other than those of Duff and Matthews, set up in the answer as anticipating the invention of Griggs, were but little relied on at the argument.

The proof of infringement relied upon is in the evidence that defendants use locomotives furnished with spark-consumers constructed under the several letters-patent granted to Hawkes and Paine, under which patents they are licensed. The contrivances used by the defendants to arrest and consume the sparks are a compound blast-pipe substantially like the complainant's, and a return-flue communicating with the fire-chamber. Although this return-flue is not provided with the same bell-shaped mouth located above, adjacent to, and coincident with the exit aperture of the blast-pipe, as in the Griggs patent, it has what is a clear equivalent therefor. In the Griggs patent the current from the blast-pipe is received into the bell-shaped mouth, and deflected in one direction only, into a tubular or cylindrical return-flue. In the spark arresters and consumers used by the defendants, the current from the blast-pipe is received on a cone and deflector, making together a bell-shaped deflector, itself deflected so as to deflect the sparks in all directions outward and downward into an annular chamber surrounding the blast-pipe, which annular chamber terminates in two tubes passing through the boiler and connecting with the fire-box. Connected with these tubes are tubes or pipes with a funnel-shaped opening in front of the engine, through which atmospheric air can enter and pass through the return-flue into the fire-box, to aid in the combustion of the gases and sparks returned through the flue.

It is apparent from this comparison, that the contrivance of Hawkes and Paine is substantially the same as that described in division A, and in the first claim of division B, of the Griggs patent, if the sparks, &c., are driven by the former as in the latter, by the force of the continuous action of the blast without resting, through the flue and into the fire-chamber. Defendants contend that in the Hawkes and Paine "sparker" the sparks are not thus driven through the flue by the continuous action of the blast, but that they fall into the annular chamber, and are drawn down the pipes connecting the annular chamber with the return-flue which passes through the boiler by the action of the current created by the force of the air. If the facts sustain this position, it would in law constitute a good defence to the charge of infringement. The fact that in the Griggs invention the sparks are driven in a continuous current, without resting or accumulating on the way from the compound blast-pipe into and through the return-flue to the fire-chamber, constitutes, as we have before seen, an essential element in the Griggs invention. The question reduces itself, therefore, to one of fact, whether they are so driven in the Hawkes and Paine arrester, as we have already seen that the Hawkes and Paine arrester combines all the other elements of the first claim of division B in the Griggs patent.

That the current is assisted and accelerated in the Hawkes and Paine return-flue by the operation of the current of air introduced from the funnel-shaped openings at the front of the smoke-arch is undoubtedly true. Such introduction of atmospheric air into the return current undoubtedly aids in the combustion of the returned gases and sparks in the fire-box. To that extent it is probably an improvement on the Griggs. But if the sparks are also driven by the continuous action of the compound blast, then it possesses all the elements of the Griggs invention and combination, even if a valuable improvement be added thereto. From the evidence in the record of the results of actual experiments made by running locomotives with the Hawkes and Paine "sparker" attached, and with the current cut off from the funnel-shaped openings, and from the effect of the abrasion produced by the percussive action of the sparks in that portion of the copper tube in the Hawkes and Paine "sparker" against which the current bearing the sparks downward would strike most forcibly, I think it is clearly demonstrated that the sparks are driven downward and backward in a continuous current through the return-flue, without resting, by the continuous action of the blast from the blast-pipe to the

fire-box, and therefore I conclude that the charge of infringement is established. Decree for injunction and account.

Case No. 11,164.

PIKE et al. v. WASSELL et al.

[2 Dill. 555.] [1]

Circuit Court, E. D. Arkansas. 1873.[2]

CONFISCATION ACT—EFFECT OF FORFEITURE OF LIFE ESTATE IN LANDS OF THE OFFENDER.

1. Under the confiscation act of congress of July 17, 1862 (12 Stat. 589), no interest in land could be forfeited which would extend beyond the life of the offender.

2. Where, under said act, a decree was entered condemning as forfeited real estate for and during the life of the owner thereof, his children cannot, during his life-time, file a bill to question the validity of subsequent sales on execution against the father of his reversionary estate in the property.

3. A decree condemning as forfeited an estate for the life of the owner does not immediately cast the entire beneficial estate in the property upon his children so as to make them, while he is still living, his heirs.

The plaintiffs [Luther H. Pike and others] describe themselves in the bill of complaint as "the children and heirs-at-law of Albert Pike, who was formerly a citizen of the state of Arkansas, but is now a citizen of the state of Tennessee, residing in the city of Washington," in the District of Columbia. The bill sets forth that on the 17th day of July, 1862, their father was seized, in fee of certain real estate in the city of Little Rock, and that at the date of the passage by congress of the confiscation act of July 17th, 1862 (12 Stat. 589), and subsequently the said Albert Pike was a general in the Confederate army, and that after his resignation as such officer he afterwards, to-wit, on the 16th day of February, 1865, acted as judge of the supreme court of the state of Arkansas, after the passage by that state of the ordinance of secession, and at a time when the said state was acting under the constitution of the Confederate States; that on the said 16th day of February, 1865, the marshal of the United States seized the real estate of the said Albert Pike, described in the bill, under the said confiscation act, and on due proceedings had the district court of the United States for the Eastern district of Arkansas, on the 5th day of April, 1865, entered a decree condemning and forfeiting to the United States the interest and estate of the said Albert Pike in and to said real estate for and during the natural life of the said Albert Pike, and directing the same to be sold for the benefit of the United States. It is shown that the said life interest was subsequently May 1st, 1865, sold and conveyed by the marshal. About the time said real estate was so seized, several actions at law were commenced by attachment in the state court against Albert Pike, and at the September term, 1865, judgments were rendered therein against him, on an appearance entered by his son, Luther H. one of the present complainants. The bill avers that this appearance was never authorized by the said Albert, and that the defendant, John Wassell, fraudulently induced the said Luther H. to enter it, and waive service by publication. At the April term, 1867, the real estate of the said Albert Pike, which had been seized as aforesaid by the marshal and condemned as forfeited by the United States district court, being the same which had been attached in said actions in the state court, was sold on executions issued on said judgments rendered in the state court, to the defendant. It is averred in the bill that this sale was for an inadequate price, but this is denied in the answer.

The bill contains also averments tending to show an equity or right in favor of Albert Pike or his heirs, if the plaintiffs are such, arising out of an alleged agreement between the defendant, Wassell, and the said Luther H. Pike, acting as attorney of Albert Pike, in respect to the said judgments and execution sales thereunder, but in the view taken by the court it is not necessary to state this portion of the case at any greater length. The defendant subsequently became the owner of the life estate or interest which was sold by the marshal under the confiscation decree, and claims thus to be seized in fee of the whole estate in the lots in controversy. The bill admits the validity of the confiscation proceedings, and that the life estate of the said Albert Pike was sold, and this is also admitted by the defendant. But the bill denies the validity of the judgments against Albert Pike, rendered by the state court, and the validity of the execution sales and sheriff's deeds thereunder. On the other hand, the answer, which is made also a cross bill, insists upon the validity of said judgments and execution sales. The bill proceeds on the theory that the plaintiffs, as the heirs-at-law of Albert Pike, are the owners of the reversion after the determination of the life estate, condemned and sold by the United States, and the object of the bill is to compel the defendant, as the tenant for life, out of the rents, to keep down the taxes, and properly to care for and preserve the property.

The pleadings and exhibits are voluminous, but this outline of the case is sufficient for an understanding of the question decided by the court.

A. H. Garland and Dodge & Johnson, for plaintiffs.

T. D. W. Yonley and Wassell & Moore, for defendants.

DILLON, Circuit Judge. Both parties agree that Albert Pike was seized in fee of

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

[2] [Reversed in 94 U. S. 711.]

the lots in controversy, and that the United States condemned and sold only an estate therein for and during his natural life. Both parties admit that the proceeding was valid, and that to this extent the title of Albert Pike was divested and is now in the defendant. It is stated in the bill that Albert Pike is still living. The substantial point in dispute is as to the ownership of the reversion, or of the estate other than life estate which was forfeited to and sold by the United States under the act of July 17th, 1862. The defendant claims this reversionary estate under the execution sales by the sheriff. The plaintiffs claim the same estate as "the children and heirs-at-law" of their father. As the plaintiffs claim only as heirs, it follows that if they are not now the heirs of Albert Pike, the foundation of the relief sought by the bill fails. Their case rests, and rests alone, upon this proposition. This their counsel concede in argument. They insist that the decree of condemnation and sale, though it was but of the life estate of Albert Pike, deprived him of all beneficial interest in the property and cast the descent or effected a settlement of it upon his lawful heirs, the same as though he were dead, and that it does this so effectually as to disable the father or ancestor from making any conveyance of the reversion to others, or from making any disposition of it by will, and so to prevent his creditors from seizing and selling it upon judicial process. Accordingly the plaintiffs' counsel in their printed argument say: "The theory of the bill is, the confiscation swept away Albert Pike's interest in the property, but in view of the constitutional provision as to attainder, the right of his heirs was protected, and upon them, under this constitutional provision, the confiscation threw the property, after his death, regardless of all events that occurred after he, Albert Pike, entered the army against the United States. In other words, the law not only divests him of his estate for life, but casts the descent and fixes it upon his heirs."

The proceedings to condemn the property were had under the confiscation act, and under that no interest in real estate could be forfeited which would outlast the life of the offender. Bigelow v. Forrest, 9 Wall. [76 U. S.] 339. Not only so, but nothing was condemned and sold, except an interest for the life of Albert Pike.

No authoritative construction of the confiscation act has been produced to sustain the theory upon which the bill rests, and upon the best consideration I have been able to give to the subject, I find nothing to support it, either in the language of the act, or in its policy, or in the general principles of the law. It is a solecism to say that the plaintiffs are the heirs of their father, who is still living; and if they were or could be such heirs, it would be remarkable if they would take the property by operation of law, discharged of their ancestor's debts. But I place my decision upon the sole ground that the plaintiffs, during the life of their father, are not his heirs, and are not now entitled to be considered as the reversioners or possessed of any estate in this property. This view, if sound, is decisive of the case, and on this ground alone the bill will be dismissed. If the judgments in the state court, or the execution sales thereunder, are void, they may be attacked by Albert Pike. And so if there is any equity or right, by reason of the alleged understanding or agreement with the defendant, Wassell, it exists in favor of Albert Pike, and cannot be asserted by the plaintiffs as his heirs during his life.

As the plaintiffs have no present interest in the property, and may never be the heirs of the said Albert Pike, it follows that the cross bill founded upon the asserted validity of the execution sales presents matters which cannot be adjudicated between the parties to this suit. The result is that a decree must be entered dismissing both the original and cross bill. Decree accordingly.

[On appeal to the supreme court, the decree of this court was reversed. 94 U. S. 711.]

As to validity of proceedings and decrees under the act of July 17, 1862, see Brown v. Hiatt [Case No. 2,011]; on appeal, 15 Wall. [82 U. S.] 177.

PIKE, The MARIA. See Case No. 9,081.

Case No. 11,165.

PILES v. PLUM et al.

[2 Cranch, C. C. 32.] [1]

Circuit Court, District of Columbia. Nov. Term, 1811.

WITNESS—COMPETENCY OF PARTIES TO JOINT ACTION.

In a joint action of trespass against two defendants, if they plead severally, they may be mutually examined as witnesses for each other. Quære.

Trespass for beating a mare, and breaking her leg with an axe, so that she died.

The defendants, Plum and Swann, had been taken different times, and had pleaded severally.

Mr. Taylor and E. J. Lee, for defendants, offered to examine the defendant Swann as a witness for Plum, the other defendant.

The plaintiff's counsel, Mr. Swann, objected; and contended that there could be but one judgment, although the verdicts might be several.

THE COURT, with some hesitation (FITZHUGH, Circuit Judge, absent,) permitted the defendant Swann to be examined. See U. S. v. Pawling, in the supreme court of the United States, 4 Cranch [8 U. S.] 221; Harper v. Smith [Case No. 6,092], in this court at July term, 1808; U. S. v. Hunter [Id. 15,425], at

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

November term, 1807; and U. S. v. Abbot [Id. 14,415], in the district court. But see below, Johnson v. Chapman [Id. 7,378].

Case No. 11,166.

The PILGRIM.

[Cited in Pent v. The Ocean Belle, Case No. 10,961. Nowhere reported; opinion not now accessible.]

Case No. 11,167.

PILLOW v. ROBERTS.

[See Case No. 11,909.]

PILLSBURY (WHITHED v.). See Case No. 17,572.

Case No. 11,168.

The PILOT.

[1 Biss. 159.] [1]

Circuit Court, D. Michigan. June Term, 1857.[2]

RULES OF NAVIGATION — EXCEPTIONS — STEAMER MEETING SAIL VESSEL — ANSWER — WHEN SUFFICIENT — WHEN SAILING VESSEL SHOULD CHANGE HER COURSE.

1. There are exceptions to the general rules of navigation, for which no regulations can be provided. Under such circumstances each vessel should be managed with care and skill, to avoid a collision, and if there be a failure to do this, though a vessel be within the rule, she can claim no damages for injuries received. A strict adherence to the rule, which necessarily leads to a collision, affords no excuse to a vessel.

2. A steamer is required to give way to a sail vessel; yet, if she cannot do so without peril, the sail vessel must avoid her. It is no objection to the jurisdiction, that the sail vessel was less than twenty tons burden, nor that the collision was near the Canada shore.

3. An answer which sets up facts constituting negligence is sufficient, though no fault be formally charged. The rules of pleading in admiralty are less technical than at law.

4. The master of a steamer has a right to expect that an approaching sail vessel will change her course if she can do so without risk, and any other course will involve danger of collision.

5. No sail vessel which recklessly attempts to cross the line of a steamer when there is no necessity for doing so, and when the steamer could not give way without encountering peril, can be entitled to recover for an injury received.

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

In admiralty.

Mr. Newberry, for libellant.

Mr. Duffield, for respondent.

McLEAN, Circuit Justice. The schooner Pilot, being on a voyage down the Lakes from Ellen creek, on Lake Huron, to Kingsburgh, on Lake Erie, on the 10th of June, 1856, at about half-past eleven in the forenoon, the wind blowing from the south-east, was beating down the Detroit river, and while steering from the American to the Canada side of the river, a little below Bois Blanc Island, the steamboat Pearl ran into the Pilot, cut through her hull, shear, bulwarks, decks and rigging, and destroyed her cargo in part, and caused her to fill with water so as to be damaged.

It is alleged in the libel that at the time of the collision, it was broad daylight; that the schooner kept her course, as she was bound to do, and that the collision occurred near the Canada bank, there being sufficient space for the Pearl to have passed the schooner, as the channel there is nearly half a mile wide, but she made no effort to avoid the schooner.

The answer states that the Pearl, being on a trip up the Detroit river to Detroit, when near to Malden saw the schooner beating down the river and heading towards the Canada shore, nearly abreast of the buoy, which was upon the shoal off Fort Malden; that the brig America, at the same time, occupied the center of the channel nearly abreast of the schooner, holding up the river, and when the schooner was about five hundred feet from the Pearl, her helm was ported and engine checked, and immediately afterwards her helm was put hard a-port, and her engine stopped; that the Pilot at that time was close upon the channel bank, so that it was supposed she would heave in stays, to avoid running on the shore: that the master of the Pearl intended to run inside of the Pilot, steering close to the channel bank; that he adopted that course because the Pearl was long, sharp, and difficult to steer, and if he had attempted to pass the right side of the Pilot, and it had gone about, a collision between the Pearl and the Pilot, or the brig would have been unavoidable.

The channel at the place of collision is between one-half and a quarter of a mile wide. The master of the Pilot says the brig was in about the middle of the river, sailing up the stream; there might have been, he says, fifteen or twenty rods between us. Had the Pearl put her helm a-starboard, a few minutes before the collision, he says, she would have passed our stern.

John Cary, master of the brig, says: "About mid-day when I was abreast of Fort Malden, I saw a small vessel beating down to the leeward of me. She was by the wind, with her starboard tacks aboard. At that time my vessel was about one-half the way across the channel from the fort. I was not certain from the position of the two vessels, that I should go clear of her. I called to her and asked her to go about. Some kind of an answer was made to me, which I did not understand. He did not go about. He stood along and just cleared our jib-boom. I think the vessel was the Pilot. After passing our bow she came up partly in the wind, and I supposed she intended to go about, but then

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

[2] [Reversing Case No. 8,849.]

he up helm again, and kept her off with a good full on her and sweeping down the current, the steamer Pearl ran foul of her, striking her near her main rigging. At the time of the collision, the Pearl was backing her engine. The two vessels were more than the Pearl's length apart, when the Pearl stopped her engine. Except the backing, he observed no effort of the Pearl to keep out of the way. Prior to the collision, my vessel was between the Pearl and schooner, so that the schooner could not have been seen from the Pearl. The collision occurred in slack water, close to the channel bank. The Pearl was running so close to the bank that she could go no further to the right. The Pilot, I think, was right on the channel bank, near the buoy, at the time of the collision. The Pearl could not have changed her course to the right, and had she passed to the left, when the schooner first came round my bow, by starboarding her helm, it was an even chance to avoid a collision either way. I saw it was a pretty bad smash-up."

The damages in this case are but of small amount, but the decision, it appears to me, involves an important principle. It is whether the facts of the case do not constitute an exception to the general rule of navigation, as laid down by the supreme court. After much reflection I have come to the conclusion, that under the circumstances, the steamer was not in fault in keeping her course.

To all general rules there are exceptions, arising from the nature of the case, and to which a general regulation can have no application. In such a case each master or officer in command is bound to act under the exigencies, with that skillful seamanship which the officers of each vessel are supposed to possess, and especially the masters.

In the case of St. John v. Paine, 10 How. [51 U. S.] 557, the court says, of sailing vessels: "A vessel that has the wind free, or sailing before or with the wind, must get out of the way of a vessel that is close-hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences." And, further: "Steam vessels are regarded in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel going free or with a fair wind would be required to do, under similar circumstances. Their obligation extends still further, because they possess a power to avoid the collision, not belonging to sailing vessels, even with a free wind, the master having the steamer under his command, both by altering the helm and stopping the engines. * * * As a general rule, therefore, when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her."

But in the same case, the court says: "These rules have their exceptions in extreme cases, depending upon the special circumstances of the case; and in respect to which no general rule can be laid down or applied. Either vessel may find herself in a position at the time, when it would be impossible to conform to them, without certain peril to herself or a collision with the approaching vessel. Under such circumstances the master must necessarily be thrown upon the resources of his own judgment and skill, in extricating his own vessel as well as the vessel approaching, from the impending peril. These cases cannot be anticipated, and therefore cannot be provided for by any fixed regulation. They can only be examined, and the management of the vessel approved or condemned, as the case may arise."

In the case of The Hope, 1 W. Rob. Adm. 154, it was argued, that if it was in the power of one of the vessels which came into collision to have avoided the collision by giving way, she was bound to have done so, notwithstanding the rule of navigation. This the court admitted to be true, as a general proposition; and that no vessel should unnecessarily incur the probability of a collision, by a pertinacious adherence to the strict rule of navigation.

In the case of The Lady Anne, 15 Jur. 18, in answer to Dr. Lushington's questions, the Trinity masters said: "We admit that the general rule is, that where two vessels are close-hauled, the one on the larboard tack is to give way, and the one on the starboard tack to keep her luff; this rule does not excuse the vessel on the starboard tack not taking other measures to prevent the collision, if circumstances render it necessary. In this case, we think the Lady Anne should have put her helm down, and have eased off the head sheets. These measures she did not adopt. Had this been done, we think the collision might have been avoided; therefore the Lady Anne is to blame." Dr. Lushington adopted the view of the Trinity masters, and pronounced for the damage and costs.

"The law recognizes no inflexible rule, the neglect of which by one party will dispense with the exercise of ordinary care or caution in the other. A man is not at liberty to cast himself upon an obstruction, which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to be in the right." "Two things must concur to support an action for a collision. It must be a collision by the act of the defendant, and no want of ordinary care to avoid it, on the part of the plaintiff." Sills v. Brown, 9 Car. & P. 601.

On the above principle I assume the ground, that the Pilot did not exercise that caution and skill which were necessary to enable her to recover damages in the case. In the answer, the Pearl does not charge the Pilot with fault in form, but the facts are

stated, from which the court cannot but see it did not avoid the collision when it might and should have done so. The rules of pleading in admiralty are less technical than at law.

The Pearl was ascending the river on the Canada side, close to its channel bank. On the approach of the Pilot, at an angle, perhaps, of about forty-five degrees, crossing the bow of the Pearl, its helm was ported, throwing its starboard wheel on the mud of the channel bank. She stopped her engine, and reversed its action. She could do no more than this with safety.

It is said she might have thrown her helm a-starboard, and passed the stern of the Pilot. This would, in all probability, have caused a collision with the Pilot or the brig, which was only a few hundred feet from the Pearl. The Pilot was heading from the American, towards the Canada shore; she was close-hauled to the wind, and, it is said, could not alter her course. The wind was light. She was beating down the river, and could, in that mode, make progress only by an angular course from one shore of the river to the other. This is admitted; but she could tack or heave in stays in any part of the river with as much ease and more certainty than when near to either shore. She might have drifted out of the river, by throwing her broadside to the current, or by using sufficient sail to keep her head to the current, so as to be carried by it stern first. When the wind is across the current, in tacking, there is great danger of missing stays on the lee shore.

Could the master of the Pearl, under the circumstances, suppose that the Pilot would continue her course across the river until she struck the Canada shore? Her destined port was a long distance below Malden, and she had no occasion to land at that place. Such a supposition could only have been founded on the ignorance or perverseness of the master of the Pilot. On the contrary, the master of the Pearl did expect, and had a right to expect, under the circumstances, that the Pilot would turn about, as she might do without risk, before she approached the shore or came in collision with the Pearl.

The master of the brig is a disinterested and an intelligent witness. A want of skill in the master of the Pilot is shown, by crossing the bow of the brig so slowly as to touch her jib-boom. The master of the brig called on the Pilot to turn about, but he continued his course regardless of consequences. He only escaped a collision with the brig by a few feet. And seeing the position of the Pearl on the shore channel of the Canada side, the master of the brig said, to use his own words, he saw there "would be a pretty bad smash-up." So near was the Pilot to the Pearl, directly after she passed the bow of the brig, that the collision in a few minutes occurred. The master of the Pearl did what he could to avoid a collision, except that of starboarding his helm, which would, in all probability, have brought his vessel in collision with the brig, and certainly with the Pilot, had she gone about, as every competent and prudent seaman would have done.

Had there been no vessel to the larboard side of the Pearl, which would have been endangered by putting her helm hard a-starboard, she should have done so, and passed the stern of the Pilot; but no master of a vessel, however small it may be, can be presumed to be so ignorant or reckless as to run into danger when he could avoid it. No sail vessel which recklessly attempts to cross the bow of a steamer, when there was no necessity for doing so, and when the steamer could not give way without encountering peril, can be entitled to recover damages for an injury so received.

In The Santa Claus [Case No. 12,327], it was said by the court, that the question of culpable negligence is not determinable absolutely by any rule of navigation; that these rules are not inflexible, and a vessel which adheres to them in form may still be at the same time guilty of a tortious injury to another which fails to observe them. It is eminently proper that a strict observance of any of these regulations should be avoided, when there is a plain risk in adhering to them, and it is entirely in the power of either vessel to escape a collision by departing from the methods provided by the rules. In the case of The Friends, 1 W. Rob. Adm. 478, Dr. Lushington discusses the effect of extraordinary contingencies, and holds that they must afford exceptions to the standing rule, however positive its terms may be; and in that case admitted a vessel, though out of the required course, to recover damages sustained from a collision in that situation.

The vessel claiming damages must show that she did not contribute to the collision. Admitting that the other vessel is not within the rule of navigation, she must be avoided if it can be done by the exercise of a reasonable caution and skill. To run on a vessel, because she is not within the rule, taking no care to avoid her, though the colliding vessel be within the rule, is culpable. The rules of navigation are addressed, not only to intelligent persons, but to persons supposed to be skilled in seamanship; and they are to be observed in such manner as not, willingly or negligently, to inflict an injury, under the pretense of observing the rule.

It was objected to the jurisdiction in this case, that the Pilot is a vessel under twenty tons burden as provided in the act of 1845 (5 Stat. 726). That was a special act to authorize the "jurisdiction of the district courts in matters of tort and contract, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, * * * on the lakes and navigable waters connecting said lakes, &c." But the admiralty juris-

diction now exercised between two or more states, over navigable waters, is not derived from the act of 1845, but from the constitution and the act of 1789 [1 Stat. 73], under which act the maritime jurisdiction extends to vessels of ten tons and upwards.

It was also objected that the wrong complained of took place on the Canada shore, and without the jurisdiction of the United States. By our treaty with England, of 1842, it is specially provided, that the channels in the river Detroit on both sides of the Island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties.

For the reasons above stated, the decree in the above case is reversed, at the costs of the libellant.

NOTE. See The Delaware [Case No. 3,760]; The Empire State [Id. 4,474]. If the collision is occasioned by an alteration of the course of the sailing vessel, it devolves upon her to prove the necessity or propriety of such movement. If by changing her course without necessity to cross the bow of a steamer, so near to the latter, that stopping and backing the engine did not avoid a collision, she cannot support an action for the damages thereby occasioned. The William Young [Id. 17,760].

Where a vessel is tacking in a river or narrow channel, a vessel approaching her under the pressure of an obligation to avoid her, has, in general, the right to assume that she will beat out her tack; but this presumption must yield to peculiar exigencies. The Vicksburg [Case No. 16,932.] A vessel has a right to assume that other vessels will act in obedience to statute regulations (The Ariadne [Id. 525]), and will beat out their tack (The Vicksburg [supra]). As to duty of sailing vessel to beat out her tack, see Whitney v. The Empire State [Case No. 17,586]. As to right so to do, The Argus [Id. 521].

Where a steamer and sailing vessel are approaching each other on courses that may lead to a collision, the steamer cannot be excused for holding her way upon the hypothesis and belief, that the sailing vessel cannot with safety to herself keep her tack, but must go about or come into the wind before they meet. The Washington Irving [Case No. 17,243]. A sailing vessel has, however, no right to persist in her course in such a manner as to make a collision probable, or to drive the steamboat into danger or exposure in order to avoid her. The Cornelius C. Vanderbilt [Id. 3,235]. Nor is she entitled to impose upon the steamer the duty to guarantee her against a collision. The New Champion [Id. 10,146].

PILOT, The (GALLATIN v.). See Case No. 5,199.

PILOT-BOAT.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Pilot-Boat Blossom. See Blossom."]

PILOT NO. 2, The (FOSTER v.). See Case No. 4,980.

PINCKNEY, The GENERAL C. C. See Cases Nos. 5,308 and 5,309.

PINE (WEST v.). See Case No. 17,423.

PINGREE (UNITED STATES v.). See Case No. 16,050.

Case No. 11,169.

PINNES et al. v. ELY.

[4 McLean, 173.] [1]

Circuit Court, D. Ohio. July Term, 1846.

BILLS AND NOTES—AGREEMENT TO PAY—CONSIDERATION.

Two notes having been given, signed by Ely and Hawes, payable to Walden, Thomas & Co., the notes were indorsed by them, and also by David J. Ely, in blank. Afterward, David J. Ely agreed with Walden, Thomas & Co. on the delivery of the above notes, to pay the amount, as if he had indorsed the notes. *Held*, that he was liable, the surrender of the notes to him being a valuable consideration.

At law.

Mr. Rankin, for plaintiffs.
Mr. Hunter, for defendant.

OPINION OF THE COURT. This is an action of assumpsit, brought [by Pinnes and Tuttle] against Ely, as indorser of two notes, one dated 10th of February, 1841, for $2,500, payable in twenty-four months, at the Bank of Port Gibson, and signed Ely & Hawes. The note of the same date, for $2,800, payable in thirty-six months, at the same bank, signed Ely & Hawes. Both notes were given, payable to the order of Walden, Thomas & Co. The notes were indorsed by them, and also by David J. Ely, in blank. On the 3d of August, 1841, the following agreement was made by the defendant with Walden, Thomas & Co. After referring to the notes above stated: "Now, in consideration of the above described notes, I have received from the said Walden, Thomas & Co., the following notes of Foster & Ely and David J. Ely, amounting to the sum of the above two notes. And the condition of the delivery of Foster & Ely's and my own individual notes to me, is this, that until the said notes of Ely & Hawes are fully paid, to the holders thereof, I am held and firmly bound to the said Walden, Thomas & Co., and hereby bind myself, my heirs and executors, for the payment of the said two notes of Ely and Hawes, in the same manner and to the same extent in all respects as though the said two promissory notes had been drawn and made payable to my order, and by me indorsed to the said Walden, Thomas & Co."

THE COURT instructed the jury that the above was a binding contract on David J. Ely, the same as if he had indorsed the two notes above stated, it having been entered into for a valuable consideration.

The jury found for the plaintiffs and assessed the damages at $6,735.

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

Case No. 11,170.

In re PINTARD.

[N. Y. Times, Sept. 21, 1859.]

District Court, S. D. New York. Sept. 20, 1859.

BANKRUPTCY — PROCEEDINGS TO DISCOVER ASSETS —COMMENCED AFTER FIFTY YEARS.

[The lapse of fifty years after an assignment in bankruptcy should bar proceedings to discover assets not disposed of by the assignee.]

In the matter of the estate of John Pintard, a bankrupt.

On the 28th day of July, 1800, the commissioners of bankruptcy, under the bankrupt act of 1800 [2 Stat. 19], declared John Pintard a bankrupt, and took possession of his estate, and on May 29, 1807, assigned the same to James Farquhar and Benjamin I. Moore, who on May 30th sold all the lands and tenements of the bankrupt, situate in the counties of Ulster and Orange, in the state of New York, for $750. And now Louise Scroop and Thomas L. Scroop present a petition to the court setting up these facts, and also stating that they are not informed of any further or other action of the commissioners in the matter; that none of the commissioners or assignees are now living; that the bankrupt died June 21, 1844, and by his will devised all his estate to Andrew Warner, in trust for the petitioner Louise H. Scroop, who was a daughter of the bankrupt; and that the said trustee has since conveyed to her all said estate, and that they are informed that the sale of May 30, 1807, was not of all the lands, &c., of the estate of the bankrupt, but that the said trust still remains in part unexecuted. They therefore pray that the court will appoint some suitable persons, in place of said commissioners and assignees, so that any remaining interest and estate of the bankrupt may be disposed of, and the rights of the petitioners be ascertained and determined.

BETTS, District Judge. A cardinal defect in the application is that it avers no fact over which this court can exercise jurisdiction. It appears by an exemplification of conveyances accompanying the petition, that, more than fifty years since, all the estate, interests and equities subsisting in the bankrupt at the time his bankruptcy was declared were, under the most comprehensive and absolute terms of grant, formally conveyed by the commissioners of bankruptcy to regular assignees of the bankrupt, and that they also, at that distant period, divested themselves of specific portions of property by regular and solemn deed of grant. No action of the court, of its officers, of the creditors of the bankrupt, of himself or of his personal representatives, is averred to have been taken in relation to the premises in now a lapse of more than half a century. That long unmoved silence, unexplained, denotes that the interests once connected with the subject matter are now closed and barred forever. Courts of justice will never authorize their powers to be put in motion to resuscitate known rights, after having been allowed to sleep so long; much less can these powers be used in fishing for evidence of claims not shown to have had a legal value or even an existence. The petitioners furnish no semblance of evidence that the assignees took any estate not fully administered upon, or that the bankrupt, at his decease, left any interest by his will which did not belong to his creditors. His heirs or devisees have no right to claim the interposition of the court to enforce, at this time, a performance of the trust cast upon his assignees (supposing there was a dereliction of duty on their part), without first establishing that there is an inheritance yet outstanding, within the reach and control of the court, which the court may have wielded and applied to their benefit, by reviving the bankrupt proceedings, and having them duly carried forward to completion. The prayer of the petitioners is accordingly denied.

Case No. 11,171.

PINTARD v. GOODLOE.

[Hempst. 502.] [1]

Circuit Court, D. Arkansas. April 10, 1847.[2]

VENDOR AND PURCHASER—PURCHASER'S ACQUIRING BETTER TITLE—POSSESSION—VENDOR'S LIEN.

1. The vendor and vendee, and the purchasers from the vendee, stand in the relation of landlord and tenant, and neither the vendee nor those claiming under him, are permitted to disavow the vendor's title.

2. If they buy up a better title, or an outstanding title, where the vendor has been guilty of no fraud, it will enure to the benefit of the vendor, and he can only be compelled to refund the amount paid for the better title.

3. Where a vendee enters into possession under the vendor, he will not be suffered to dispute the title of the latter, unless he yields up the possession.

4. A vendor has a lien on the land for the purchase-money against the vendee, his heirs, privies in estate, and purchasers.

5. This lien rests on the principle, that a person having acquired the estate of another, as between them, ought not in conscience to be allowed to keep it and not pay the consideration money; and the lien attaches as a trust, whether the land be actually conveyed or contracted to be conveyed.

6. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it, without making such payment, for it attaches to him also as a matter of conscience and duty.

7. Where P. in the possession of public land, and having a right of preëmption thereto, sold such land to R., who afterwards sold to G. and the latter agreed with R. to pay P. the purchase-money when P. should make him a good title, and G. afterwards, by virtue of his possession, was able to and did obtain title in his own name, and then refused to pay P. the purchase-money, *held* that G. was responsible to P. for the purchase-money, and that P. also had a lien on the lands therefor, and which were decreed to be sold to discharge it.

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

[2] [Affirmed in 12 How. (53 U. S.) 24.]

Bill in equity determined in the circuit court.

S. H. Hempstead, for complainant.

The case, as made out in the bill, is mostly admitted in the answer of [Archibald W.] Goodloe, and such allegations as he has denied have been proved,—fully and conclusively proved. But Goodloe denies the equity of the bill, resting his defence principally, if not entirely, on the ground that, when [John M.] Pintard sold the lands mentioned in the bill to William Rodes on the 23d day of May, 1835, he had no title thereto,—was a mere trespasser; "inasmuch," says his answer, "as he, Pintard, never settled on said land in time to be entitled to preëmption under the act of the year 1834" [4 Stat. 678], thus conceding, if such settlement was made, that Pintard had a title, subject to sale.

As far as the south-west quarter of section six is concerned, there is no contest as to title. The contest arises upon the south-east quarter of section one, township eighteen south, range one west, containing $168^{96}/_{100}$ acres. This tract of land was originally claimed by Jane Mathers, by virtue of occupation and cultivation, under the preëmption act of the 12th of April, 1814. 3 Stat. 122, § 5. She assigned to Thomas T. Tunstall, and he, as her legal representative, her assignee, purchased it, in due form of law, at the Little Rock land-office, on the 24th of July, 1834, and obtained a patent certificate therefor. On the 24th of February, 1838, without any notice, or any judicial proceeding of any kind, this purchase was ordered to be cancelled by the commissioner of the general land-office, and the purchase-money refunded, on the ground that it was not government land, until the ratification of the Quapaw treaty, on the 24th of August, 1818. It was certainly a strong exercise of power in the commissioner to set aside this entry. Rights had grown up under it; Tunstall, the vendor, and Pintard, his vendee, were resting securely upon it; and it would seem just that some sort of notice should have been given to them, and their rights taken away, if at all, by some kind of formal proceeding, affording an opportunity to be heard. Passing this over, however, I will merely refer to an act of congress of March 1, 1843 (5 Stat. 603) the 3d section of which was intended to confirm claims, under the preëmption act of 1814, to lands south of the Arkansas river, and would be construed, I suppose, to have that effect. It operated by way of confirmation; and certainly, if Pintard had not sold, and had retained the possession of the land, this act alone would have given him a title against all the world, irrespective of the preëmption acts subsequent to 1814; especially the act of 1834, under which he had a perfect right of preëmption to this land, as is amply demonstrated by the proof. Pintard, however, does not entirely rest his right to relief on the validity of the preëmption of Jane Mathers, under the act of 1814; he occupies other ground, and I only refer to that as a part of the history of the case,—a link in the chain of events connected with his title, of no inconsiderable importance.

This tract of land was in fact purchased by Pintard of Tunstall, in the spring of 1833; (the bond of 1834 having been substituted for a previous one;) possession was taken by Pintard through an agent, and the improvement and cultivation thereof commenced, as shown by the evidence, in the spring of that year. The tract is referred to by some of the witnesses as the "first quarter below the meridian line," and was improved and cultivated by Pintard, through agents and his slaves, in 1833, until he removed there himself with his family in the autumn of that year. In December, 1833, I say he was there in person, had ten or twelve slaves on the place, engaged under his own superintendence in clearing land and making fences, and from that time forward, until the sale to Rodes, Pintard improved and cultivated the south-west quarter of section 1, and built houses, cabins, stables, and other fixtures. Early in the spring of 1834, seventy-five or eighty acres of this land had been cleared, and was ready for planting; and upon which he raised corn and cotton that year. He was in possession of it on the 19th June, 1834; was a settler and occupant of it prior to that time, and cultivated it in 1833; thus fully entitling himself to a right of preëmption under the act of June 19, 1834 (4 Stat. 678).

The right of Pintard to a preëmption under this act, is most clearly and conclusively established by the proof. On the 23d March, 1835, he sold this south-west quarter of section 1, and a portion of the south-west quarter of section 6, to a conditional line, supposed to contain together about 200 acres, at the rate of forty dollars per acre, to William Rodes, and Rodes gave his two notes therefor, bearing ten per cent. interest. There were at least eighty acres cleared and fit for cultivation; there were valuable and permanent improvements thereon, put there by the capital and labor of Pintard, and consisting of the buildings and tenements necessary to a plantation; and the land is proved to have been the best in the country, and to have been worth the price agreed to be paid for it per acre. There could be no stronger proof of the fact than the sale by Rodes to Goodloe of this identical land, on the 13th March, 1837, not quite two years afterwards, for sixty-five dollars per acre—an advance of more than fifty per cent on the cost of it. Rodes obtained the peaceable and quiet possession of this land by virtue of the sale made to him by Pintard; and Goodloe expressly admits, in his answer, "that he received possession of both of the said tracts from said Rodes, who received it from said Pintard, and that, by virtue of that possession, he became entitled to a preëmption," under the act of June 22, 1838. In the contract be-

tween William Rodes and Archibald W. Goodloe, of the 13th March, 1837, the land purchased from Pintard is expressly referred to, and the purchase-money due from Rodes to Pintard reserved in the hands of Goodloe, and to be paid by him upon obtaining regular title. Thus Goodloe stepped into the shoes of Rodes, and with his eyes open, and with full notice, assumed, under hand and seal, the payment of the purchase-money to Pintard,—assumed it as a part of the consideration of the contract just alluded to. On the 15th February, 1839, Goodloe proved up a preëmption in his own name, under the act of June 22d, 1838, to the south-east fractional quarter section one, township eighteen south, range one west, containing 16$^{96}/_{100}$ acres, at the land office in Helena, Arkansas.

The bill alleges that Goodloe assured Pintard that he desired nothing more than to perfect his title, and that he was bound and would pay the purchase-money due to Pintard. I beg leave to call the attention of the court, in passing along, to a portion of the answer of Goodloe, in response to this allegation. It is denied, in the face of six of his letters to Pintard, commencing the 6th of January, 1840, and ending the 26th of October, 1841. In three of them the preëmption is expressly referred to. "I will," says he, in the letter of May 1, 1840, "have no difficulty in obtaining the preëmption." In a letter of November 10, 1840, he says: "I have not, as yet, been able to get the land-office department to act on the preëmption for the quarter of land you sold Rodes." I shall not critically analyze these letters, but merely add that all of them contain assurances, promises to pay money to Pintard, either directly or indirectly, upon this preëmption or tract of land. Now Goodloe felt himself obliged to admit that the money spoken of in those letters was the purchase-money due by Rodes to Pintard; but to destroy the effect of this admission and forgetting the inconsistency into which he would fall, he proceeds to refer these promises, and this money so due, to the fractional part of section six, which he informs us did not contain more than ten or eleven acres! Say it was eleven acres; that would amount, at $40 per acre, to $440, although he puts it at one half of that sum, but on what data we are not informed. On the 28th May, 1838, he paid to Pintard, for Rodes, $600, and on the 31st May, 1839, the further sum of $1,363.82, making an aggregate payment up to that time of $1,963.82! According to his account, it not only required near two thousand dollars to discharge four hundred and forty, but further means were required, and to which we must add the trouble of more than a year's correspondence! If his answer is to be credited, he had, on the 31st May, 1839, paid for this eleven acres of section six more than four times over! His answer avers, that "he never made any promises to pay said Pintard than are contained in said letters, and than are stated in his said original answer; and he admits that the money spoken of in said letters was the money due by said Rodes to said Pintard for the purchase of said fractional part of section six, but not for the residue of said lands; which money this respondent had agreed to pay, and never did refuse to pay!" Strange as it may appear, yet it is certainly true, that exhibits C. and D., appended to his original answer and made part thereof, (being vouchers for these payments,) both show that the amounts paid as above stated were regarded and received as partial payments of the purchase-money due for the land sold by Pintard to Rodes, and were credited upon the notes of Rodes held by Pintard, securing the purchase-money.

The agreement on the part of Goodloe, to pay the purchase-money to Pintard, was founded upon a valuable consideration, and necessarily enured to the benefit of the latter, and upon which he might seek a remedy, although the contract was between Rodes and Goodloe alone. Pigott v. Thompson, 3 Bos. & P. 149; Chit. Cont. (5th Ed.) 53; Marchington v. Vernon, 1 Bos. & P. 101, in notes; Martyn v. Hind, Cowp. 438; Dutton v. Poole, 2 Lev. 210; 1 Vent. 318. A preëmption right is property, so regarded by the government and the community at large. In Arkansas, "all improvements on the public lands of the United States are subject to execution." Rev. St. 377. To call a settler upon the public lands a "trespasser," is an outrage upon a policy of the government which has been steadily pursued for more than twenty-five years.

The great point, to which the others are subordinate is, that Goodloe obtained the possession of both parcels of land through Pintard, and by a recognition of his title. By means of that possession, Goodloe was enabled to obtain a preëmption to the principal tract, and which he could not have obtained if Pintard had not sold to Rodes, and Rodes to Goodloe. This fact is admitted in his answer; and indeed it is perfectly manifest that, if Pintard had remained in possession, he could and would have obviated any defect in his title, by availing himself of some confirmatory act of congress, or of the later preëmption acts, i. e. of 1834 or 1838. It was not competent, therefore, for Goodloe to disavow the title of Pintard, because they stood in the relation of landlord and tenant. The purchase of Goodloe from Rodes was made on the 13th of March, 1837. The preëmption of 1814 was ordered to be cancelled on the 28th February, 1838, while Goodloe was in possession; and it was worth while to observe that one of the reasons for allowing him to enter the tract he did, under the act of 1838, was, that he alleged "himself to be the purchaser from the individual who made the first-mentioned entry." It is not pretended that Pintard was guilty of any fraud, or that Rodes was guilty of any; and, if there was

fraudulent conduct, this court will be obliged to attribute it to Goodloe. Of that I say nothing, because the case, as I view it, does not demand it.

The principle stated by the supreme court, in Galloway v. Finley, 12 Pet. [37 U. S.] 295, most strongly and pointedly applies: "That if the vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title." Searcy v. Kirkpatrick, Cooke (Tenn.) 211; Mitchell v. Barry, 4 Hayw. (Tenn.) 136. See Morgan's Heirs v. Boone's Heirs, 4 T. B. Mon. 297. Both the cases of Galloway and Searcy, above cited, must, I think, be regarded as conclusive upon the present. There is, indeed, a strong analogy between the three,—a similarity not often found to exist,—with this difference, as it appears to me, that in the one at bar there are more equitable circumstances in favor of the vendor, and demanding the interposition of a court of equity, than in the others. In the case in 12 Pet. [supra], the court further declare, that "in reforming the contract, equity treats the purchaser as a trustee for the vendor, because he holds under the latter; and acts done to perfect the title by the former, when in possession of the land, enure to the benefit of him under whom the possession was obtained, and through whom the knowledge that a defect in the title existed was derived. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title." Willison v. Watkins, 3 Pet. [28 U. S.] 45; Connelly's Heirs v. Chiles, 2 A. K. Marsh. 242; Wilson v. Smith, 5 Yerg. 398; Blight's Lessee v. Rochester, 7 Wheat. [20 U. S.] 547. The vendor will be obliged to make an abatement in the purchase-money equal to what it cost to clear the title. Officer v. Murphy, 8 Yerg. 502; Meadows v. Hopkins, 1 Meigs, 181; Marshall v. Craig, 1 Bibb, 396. No court will allow a vendee to pry into and discover defects in his own title, with a view to purchase an outstanding claim, to the prejudice of the vendor. He may perfect his title, it is true, but then it must enure to the benefit of the vendor, and all the vendee can conscientiously demand is the cost and expense of procuring the better title. This very case furnishes a striking and forcible illustration of the soundness and justice of the doctrine thus laid down. Goodloe, through Pintard, obtained title to a tract of land by an expenditure of nine hundred dollars, which was worth sixty-five dollars per acre, or more than ten thousand dollars; and if he can escape the payment of the purchase-money due from Rodes to Pintard, and which was assumed by Goodloe, he will pocket the last-mentioned sum, and obtain the rich fruits of Pintard's two years' labor on the land for nothing! Can this be tolerated? Can it be thought of? In Winlock v. Hardy, 4 Litt. (Ky.) 274, it was said, "that a tenant cannot deny the title of his landlord; nor can a person who enters upon land, in virtue of an executory contract of purchase, deny the right of him under whom he enters; for he is quasi a tenant, holding only in virtue of his vendor's title, and by his permission." See Turley v. Rodgers, 1 A. K. Marsh. 245; Logan v. Steele's Heirs, 7 T. B. Mon. 104; Tevis v. Richardson's Heirs, Id. 659; Fowler v. Cravens, 3 J. J. Marsh. 430.

Goodloe never placed himself in a situation to contest the title of Pintard. If upon the discovery of the defect in the title of the latter; if upon the cancellation of the preemption certificate, under the act of 1814, Goodloe had surrendered the land to Pintard, bonâ fide, he might, perhaps, have purchased a better title, and arrayed it in hostility to that of Pintard, and resisted the relief prayed for in the bill. This he did not do. He continued in possession; bought up a better title while in possession; nor is there any proof that he ever disavowed the title of Pintard, until the filing of his answer. 3 A. K. Marsh. 287. The case of Wilson v. Weathersby, 1 Nott & McC. 373, fully sustains this doctrine, and with regard to which it was said, in Willison v. Watkins, 7 Wheat. [20 U. S.] 53: "In the case of Nott & McC. 374, the court decide, that where a defendant enters under a plaintiff he shall not dispute his title while he remains in possession, and that he must first give up his possession and bring his suit to try titles. To the correctness of this principle we yield our assent, not as one professing to be peculiar to South Carolina, but as a rule of common law applicable to the cases of fiduciary possession before notice." Id. 54, 55, 56.

Goodloe, by holding the possession, and proving up a preëmption in his own name, prevented Pintard from complying with his covenant as to making title; and such being the fact, the familiar and well-settled principle applies, that if the obligee shall do any act to obstruct or prevent the obligor from performing his part of the contract, the obligor is thereby discharged from its performance; or, to speak more properly, the contract, as far as he is concerned, is in legal contemplation actually performed, and authorizes him to demand performance at the hands of the other party. Bac. Abr. tit. "Conditions," Q, 3; 3 Com. Dig. tit. "Condition," L, 6; Co. Litt. 207; Pow. Cont. 417, 418, 419; Poth. Obl. 127. In the case of Marshall v. Craig, 1 Bibb, 395, which in many of its features was analogous to the present, it was laid down as a correct principle, abundantly established by authority, "that wherever a man by doing a previous act would acquire a right, if, owing to the conduct of the other party, he is prevented from doing it, he acquires the right as completely as if it had been actually done." See the case, from page 379 to 396, and authorities cited. In the cases of Majors v. Hickman, 2 Bibb, 217, and Carrell v. Collins, Id.

429, it is decided that he who prevents the performance of a condition cannot avail himself of the non-performance. 3 Com. Dig. "Condition," L, 7; Borden v. Borden, 5 Mass. 67; Clendennen v. Paulsel, 3 Mo. 230; Crump v. Mead, Id. 233. "If a purchaser," says Sugden, "takes possession under a contract, and he afterwards rejects the title, he must relinquish the possession." 2 Sugd. Vend. p. 23.

The same principle, as to obstructing or preventing the performance of a covenant, is applicable to the portion of the southwest fractional quarter of section six, township eighteen south, range one east; because Goodloe, by obtaining the bond of Benjamin Taylor from Tunstall, prevented Pintard from getting title to the part embraced in the bond, and which Goodloe says has been found to contain only eleven acres. For this, however, he acknowledges himself liable, and expresses his willingness to pay, and says he "never did refuse to pay." As to title to eleven acres of this section, as to his liability to Pintard therefor, Goodloe makes no contest, does not resist performance; but, on the contrary, recognizes Pintard's right to relief to that extent. Indeed, from the proof we are warranted in believing and assuming it as true, when taken in connection with his answer, that Goodloe has obtained the legal title. In his letter to Peter O'Flynn, employed by him as an agent to procure from Tunstall the bond of Benjamin Taylor, dated June 1, 1840, he says:—"I have purchased a tract of land of John M. Pintard, the same he purchased of Thomas T. Tunstall; the title is all perfect, except about twenty acres of the south-west fractional quarter of section six, township eighteen, range one east. Tunstall holds Benjamin Taylor's obligation to convey to a particular line known to the seller. Taylor is willing tc convey, if Tunstall will send me the obligation. . . . I have the original contract between Pintard and Tunstall, handed to me by Pintard, as an order for the obligation on Taylor. Colonel Taylor's wife resides in Kentucky. If you will see Tunstall and forward me the obligation, directed to Richmond, Ky., I can have a deed acknowledged to bring down with me in September." Now, O'Flynn testifies that the obligation was procured by him from Tunstall and sent to Goodloe, and that Goodloe acknowledged the receipt thereof, and paid him for his services. The same fact is acknowledged in a letter from Goodloe to Pintard, dated November 10, 1840. As Taylor, who held the legal title, was willing to convey to Goodloe, provided Goodloe could obtain this bond from Tunstall; as Goodloe did obtain the bond in 1840; and as at the time of filing his amended answer, near five years afterwards, he acknowledged his liability to this extent, and did not even hint at any inability to obtain title, nor declare that he had not obtained it, I think we are bound to conclude that the deed, which he said he could procure from Taylor, had been procured, or that he had derived a title to this part satisfactory to himself, and thus entitling Pintard to compensation and relief. If he could not or had not obtained title, with the means in his hands to do so, he would most undoubtedly have insisted on it by way of defence in his answer. Under all the circumstances, silence is conclusive against him; but we have something more than that, namely, a distinct admission of liability, contained in his answer.

It may perhaps be said that Taylor ought to have been made a party to the bill. In the first place, I beg leave to remark that he was not materially interested in the suit; if he had any interest at all, it was only nominal, and no beneficial purpose could have been effected by making him a party. He was ready and willing, as Goodloe informs us, to convey, and in fact no decree could have been taken against him; he would have been at best but a passive party; and as he could do nothing necessary to the perfection of the decree, the court was fully warranted in proceeding without him. Joy v. Wirtz [Case No. 7,553]; Van Reimsdyk v. Kane [Id. 16,871]; Mallow v. Hinde, 12 Wheat. [25 U. S.] 193; Hoxie v. Carr [Id. 6,802]; Wormley v. Wormley, 8 Wheat. [21 U. S.] 451. But, in the second place, it is too late to make the objection in this court. It was an objection not taken at the hearing, either by demurrer, plea, or answer; and surely Goodloe cannot be allowed to surprise us with it now. Want of proper parties must be objected to by demurrer, or plea, or answer, and cannot be urged at the hearing. Mitf. Eq. Pl. 146; Milligan v. Milledge, 3 Cranch [7 U. S.] 320.

The next inquiry is as to the lien of Pintard for the unpaid purchase-money. The lien of a vendor of land against it is peculiar to a court of equity, and can be enforced only in that court. It exists as a charge or incumbrance on the land against the vendee and his heirs, and other privies in estate, and also against all subsequent purchasers with notice of the non-payment of the purchase money. It is wholly independent of possession on the part of the vendor, and attaches to the estate as a trust equally, whether it be actually conveyed, or only contracted to be conveyed. 2 Story, Eq. Jur. 462–467. "Where a vendor," says Sugden on Vendors (volume 3, pp. 182, 183, c. 18), "delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be or be not conveyed, and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold, gives the vendor a lien on the land for the money." And he cites, as sustaining these positions, Chapman v. Tanner, 1 Vern. 267; Pollexfen v. Moore, 3 Atk. 272; 1 Brown, Ch. 302, 424; 6 Ves. 483; Mackreth v. Symmons, 15 Ves. 329; Smith v. Hibbard, 2 Dickens, 730;

Charles v. Andrews, 9 Mod. 152; Topham v. Constantine, Tam. 135; Evans v. Tweedy, 1 Beav. 55; Winter v. Lord Anson, 3 Russ. 488. "So, on the other hand," says he, "if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate." 3 Atk. 1; 2 Younge & J. 493: 3 Younge & J. 262. Thus proving that the lien does not arise nor depend upon perfect title. The term "estate" is used, which "imports," says Coke, "the interest which a man has in lands." Co. Litt. 345a; 4 Com. Dig. Estates, A, 1. According to Judge Story, "the principle upon which courts of equity have proceeded in establishing the lien in the nature of a trust is, that a person having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it and not to pay the consideration money. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment, for it attaches to him also as a matter of conscience and duty." 2 Story, Eq. Jur. 465.

Did not Goodloe get the land through Pintard, and with full notice that the purchase-money was unpaid? Nay, did he not engage to pay that purchase-money himself? As long as he held the possession of the land thus acquired, could he resist this lien? It must certainly be manifest that he could not. The proposition is clear, that Pintard has a lien upon the land derived by Goodloe through him, which ought to be recognized and enforced. It is insisted in the answer, that the dwelling-house of Pintard was upon section six, and that he was not entitled to a preëmption under the act of 1834. To this I reply, that whether he was or was not entitled to a preëmption under that act, is not material to the support of his right to relief. But in fact he was so entitled. The dwelling-house which was there when Pintard purchased of Tunstall, in the spring of 1833, was probably situated on or near the meridian line which divides section six and section one; but the proof is clear, that all the other buildings, improvements, and cultivation were upon the southeast quarter of section one, or the large tract, and to which Goodloe subsequently proved up a preëmption and obtained the legal title in his own name. Pintard was a settler or occupant of that tract, within the meaning of the act of 1834 (vide Instructions and Opinions, vol. 2, p. 589, No. 535; Id. p. 597, No. 543), and as such, most unquestionably entitled to a preëmption.

Goodloe insists that of section six, sold to Rodes by Pintard, and by Rodes to himself, there was not enough embraced in the bond of Benjamin Taylor to make, with the other tract, two hundred acres; and that, upon ascertaining the boundaries and lines specified in the bond, it was found that it did not contain more than eleven acres. How it was ascertained, he does not state; and we only have his own assertion, without proof, that there was but eleven acres. From the proof, it appears that the portion of land thus described by boundaries in the bond must have amounted to more than eleven acres. That there was not two hundred acres in the whole, could be no ground for a rescission of the contract, if Goodloe were complainant; nor can it furnish any defence to a specific performance, when he is defendant. He obtained what he principally desired,—obtained the dwelling-house and all the other buildings, all the cleared lands, and all the improvements,—he obtained the principal object of his purchase; and, as there was no fraudulent misrepresentation or concealment on the part of Pintard, the case is a proper one for abatement in the amount of the purchase-money, to the extent of the small deficiency. This is well settled by authority. Newl. Cont. pp. 251, 252, c. 12; 2 Atk. 371; 4 Brown, Ch. 494; Drewe v. Corp, 9 Ves. 368; 7 Ves. 270; 6 Ves. 678; Calcraft v. Roebuck, 1 Ves. Jr. 221; Dyer v. Hargrave, 10 Ves. 505; 2 Story, Eq. Jur. 88; 1 Sugd. Vend. 506–508, 525, 526. If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey. 1 Sugd. Vend. (6th Am. Ed.) pp. 525–535, c. 7, § 3, and notes and cases therein cited. Where the contract rests in fieri, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words more or less, or by estimation. Id. 526; Hill v. Buckley, 17 Ves. 394; 1 Call, 313; Stebbins v. Eddy [Case No. 13,342].

The utmost that Goodloe could claim would be an abatement for the deficiency. Goodloe has waived his right, if any he ever had, to object to Pintard's title. His letters, after having proved up a preëmption in his own name, and especially the payment made by him to Pintard on the 31st of May, 1839, of $1,363.82, amount to a waiver. The preëmption having been proved up on the 15th February, 1839, this payment was made more than three months afterwards. The letters alluded to, beginning in January, 1840, and ending in October, 1841, embrace a period of near two years; and when that payment and these promises to pay are taken into consideration, there could hardly be more conclusive evidence of such waiver. 2 Sugd. Vend. 10–14; Margravine of Anspach v. Noel, 1 Madd. 310; 2 Swanst. 172; 3 Younge & C. 291.[3]

[3] This argument was prepared by Mr. Hempstead, printed, and filed in the supreme court; but as he had not been admitted in that court, it was signed by Mr. Foote and Mr. Sebastian, and appears in the case as positions for which "the counsel for the appellee contended." 12 How. [53 U. S.] 28–36.

F. W. Trapnall and Daniel Ringo, for Tunstall.

Albert Pike, for Goodloe.

We insist, that in this case, this court has no jurisdiction of the subject-matter of the suit; and this upon the ground that it plainly appears to be a case in which a court of equity can have no jurisdiction whatever. The only ground on which the aid of a court of chancery is here invoked, is, that the complainant has a lien on certain lands, sold by him to Rodes, and by Rodes to Goodloe, for the unpaid purchase-money. We think there is no such lien, and that being the case, nothing is presented but a mere legal demand for money, with which a court of equity has nothing to do. The bill alleges, that on the 1st of April, 1834, complainant purchased of the defendant Tunstall the north-east fractional quarter of section twelve, and the south-east quarter of section one, in township eighteen south of range one west, claimed by Tunstall under the preëmption act of 1814; and also a part of the south-west fractional quarter of section six, in township eighteen south of range one east. That in April, 1833, he sent a young man and two negroes on the land, and moved to and settled on it with his family in November, 1833. That on the 23d of March, 1835, he sold to Rodes the north-east quarter of section one, and so much of the south-west fractional quarter of section six, as made with it two hundred acres of land, embracing the front lands, at forty dollars an acre, to be paid in 1836 and 1837; and Rodes gave him his two notes for the purchase-money, on which some payments have been made. That when he sold to Rodes, he gave him possession of the land and the improvements thereon; a dwelling-house being on the land, and part of it cleared prior to April, 1833, and the land being in cultivation in 1833 and 1834. That on the 13th of March, 1837, Rodes sold the same land to Goodloe at sixty-five dollars per acre; and by the contract made between them, Goodloe was to pay complainant the amount due him by Rodes, as soon as a complete title should be made to him. That Goodloe has made some payments on the notes and promised to pay the residue. That the preëmption claimed under the act of 1814, was afterwards decided to be invalid; and Goodloe, of his own motion, proved up and established a preëmption to the south-east quarter of section one, under the act of 1838, in his own name, and by virtue of it, entered and purchased that tract of land. In regard to the south-west quarter of section six, he states that one Benjamin Taylor, of Chicot county, Arkansas, holds the legal title to it. That he gave one John T. Bowie his bond for title to part of it, and Bowie assigned and delivered the bond to Tunstall; that Goodloe has bought the bond from Tunstall, and so prevents complainant from getting legal title to that tract. The bill prays a correction of certain alleged mistakes in the title papers, —that the lands may be subjected to payment of the purchase-money,—and that Taylor's bond may be given up, so that the complainant may procure the legal title, and comply with his contract made with Rodes. Rodes is averred to be a non-resident, and not a citizen of the state of Arkansas; and it is expressly averred that when complainant sold, the title to the south-east quarter of one was in the United States, and is now in Goodloe by purchase from the United States; and the title to the south-west quarter of six was and is in Benjamin Taylor.

The answer of Goodloe admits that Tunstall sold to Pintard, Pintard to Rodes, and Rodes to him, as alleged; that Pintard gave Rodes possession as alleged, and that respondent has paid Pintard $1,963.82 on Rodes's notes. It avers that Pintard had no title to the south-east quarter of one, but a mere claim under the preëmption act of 1814, which was set aside; that he afterwards proved up a preëmption in his own name, and entered the land, and has obtained a patent for it. As to the south-west quarter of six, he alleges that Taylor has the legal title to it; that he never gave John T. Bowie any bond for it, but that he did execute a bond to Resin Bowie; that on getting a patent for that tract, he would convey to Tunstall a patent, supposed to contain about ten acres, more or less, by certain boundaries; by which boundaries the quantity to be conveyed is only eleven acres. The quantity of land in the south-east quarter of one is stated at $16^{89}/_{100}$ acres. He denies that Pintard settled on the place in 1833, nor until 1834, though in 1833 he had a negro on it, and a white man who died there. He admits that Pintard had made improvements on the land when he sold to Rodes; but that he never did reside on the south-east quarter of one, but his dwelling-house and residence was always on the other tract.

The agreement of counsel, and the evidence taken in the case, show that Pintard took possession of the land early in 1833; placed hands upon it, improved and cultivated it, and moved on it in the fall of that year. We have not noticed the allegations or evidence in regard to Goodloe's promises to pay Pintard, because they are not material to the questions which we propose to discuss. We have no objection to admit that Pintard might sustain an action at law against Goodloe for the money due him, after making him complete title to the lands in question. That will only prove that he can have his action in another forum.

The case shows that Pintard sold two tracts of land. The title to one was in the United States, and he never obtained any title whatever to it. He was a mere trespasser on it. Goodloe has since purchased and entered it. That his improvements on it were a good consideration for the notes may or may not be true; with that we have nothing

to do in the present case. The title to the other was in a third person, Taylor. Taylor contracted to convey to Resin Bowie part of that tract, about ten acres; but no bond or deed from Bowie to Tunstall, who sold to Pintard, is shown. The title of Pintard to that tract wholly fails. He now claims by his bill a lien on the first tract, and enough of the second to make up 200 acres, and for a decree of sale of said lands, for payment of his purchase-money. Is he entitled to it? Has he any lien?

As a preliminary matter, he remarked:—First. That there is a want of jurisdiction as to Rodes, because the bill shows him to be a non-resident of Arkansas, and there has been no service on him in the case. Second. That it is a still more fatal objection that the bill seeks a sale of land, the title to which is in Taylor, without making him a party. How can his land be sold unless he be made a defendant? In fact, what land is it? How much, and what part of the tract? His obligation is to convey to Resin Bowie about ten acres. What obligation is shown to rest on him to convey to Pintard? Ought not Resin Bowie to be also a defendant, or is this court to dispose of the rights of both of these parties when neither of them is before it? Again, Goodloe is only bound to pay forty dollars per acre, when complete title is made to him. How can a decree go against him for the purchase-money on the Taylor land, when the title is still, and may perhaps always remain, in Taylor? Does the court even know for how much the decree ought to go? The first business of Pintard should have been to get title to this part of the land, before he could claim to have it sold, or assert a right to any purchase-money for it. As far, therefore, as the south-west quarter of six is concerned, we may spare all further remark. As to that, Taylor should have been a party; so should Bowie. And, as the evidence shows that Pintard never had any title, and that the title is still in Taylor, except Bowie's equitable right to ten or eleven acres, as to this tract the bill cannot be sustained.

Does it show any lien on the other tract, which this court, exercising the ordinary power of a court of chancery, can enforce? Pintard sold government land on which he was a mere trespasser. His claim to it failing, the purchaser's assignee entered and paid for the land. He takes his title through the United States. He may be bound, at law, to pay Pintard a stipulated price, or he may not. That is not the question. His promises may be binding on him; if so, they are binding at law, and give a legal right of action. Has he a lien on the land? If so, how was it created, and on what principles of law does it depend? If there is no lien, there is no equity. A lien is not, in strictness, either a jus in re, or a jus ad rem, that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. Liens necessarily suppose the property to be in some other person, and not in him who sets up the right. See Story, J., in Ex parte Foster [Case No. 4,960]; Lickbarrow v. Mason, 6 East, 21, 24, note. Now certainly there can be no lien without an estate to support it. The lien of a vendor for unpaid purchase-money is in the nature of a reservation. It springs out of the estate of the vendor himself. If he had nothing to convey, if nothing passes by his deed, he can reserve no lien. The lien is a right to have the land sold for payment of the debt. If the land did not belong to the vendor, he certainly could not reserve a right to have it sold. When he undertook to sell the land, it belonged to the United States. Of course, no lien was created at that time. Did any spring up when Goodloe purchased from the United States? If A. sells to B. land which belongs to C., of course he has no lien for the purchase-money. If B. afterwards buys of C., does a lien accrue to A.? Certainly not. Upon what principle? The lien is a reservation. If A. had nothing to grant, he had nothing to reserve. Thus Chancellor Kent says, in Garson v. Green, 1 Johns. Ch. 309: "The vendor has a lien on the estate for the purchase-money, while the estate is in the hands of the vendee, and when there is no contract that the lien by implication was not intended to be reserved." The vendor can have his lien only upon what he sells. In this case he sold no interest in the land, because he had none. If the notes were based on any solid consideration, it was the value of his improvements, and the benefit of his labor which has been enjoyed by the defendant. This is what he sold—his labor and improvements—not any present interest in the land, but something past and done, the fruits of which defendant enjoyed. This is the estate which he sold. Could there be any lien on such an estate? The notes may be sustained, or may not, as based on a solid consideration; but this gives no lien on land in which Pintard had no interest.

No such case as the present is to be found in the books. In every case where the question of lien has arisen, the vendor had conveyed, or contracted to convey, away the estate. Admit that Pintard sold his improvements, and the United States sold the land; by what process can his debt for the improvements descend upon and become a lien on the land? The idea is absurd. The English cases will be found reviewed in Mackreth v. Symmons, 15 Ves. 329. Later cases are Smith v. Hibbard, 2 Dickens, 730; Topham v. Constantine, Tam. 135; Winter v. Lord Anson, 3 Russ. 488; Clarke v. Royle, 3 Sim. 499. They are all considered in Gilman v. Brown [Case No. 5,441]. Other American cases will be found in all the books of reports; and there is not a single case which gives any countenance to the attempt made by this bill. The vendee, say the books, becomes, to the extent of the purchase-money, a trustee for the vendor. 2 Story, Eq. Jur. 463. On what ground shall A. hold in trust for B. an estate

which he did not purchase from or obtain through him? The principle is, that if I part with my property to another, it shall stand charged with the purchase-money. But if the property is not mine, and he has to buy it of another, with what face can I pretend to charge it? The principle on which courts of equity have proceeded, in establishing this lien, in the nature of a trust, is, that a person having gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not to pay the consideration money. Goodloe has not got the estate of Pintard, because the land never was Pintard's. He was a mere trespasser on it without title. Id. 465.

We are aware that the bill has an equitable aspect. But we desire again to remark, lest we may be misunderstood, that we are arguing simply the question whether this is the proper forum in which Pintard should prosecute his claim against Goodloe; and that we are not now denying that he has a legal demand against him. He has clearly mistaken his forum. He is asking this court to give him a lien on property which he never owned, and consequently could never sell. Goodloe has promised Rodes, and perhaps Pintard, to pay the debt due by the former to the latter, whenever he should obtain from Pintard complete title to the land. If he is in default, if his promise is binding on him, and the time for its performance has come and passed, let him be impleaded in the proper forum, and he will answer. But there is clearly no lien, and, therefore, no equity. An application so novel to a court of chancery ought not to be entertained, and this new stride in equity jurisdiction will not, we are sure, be taken by this honorable court.

Before DANIEL, Circuit Justice, and JOHNSON, District Judge.

JOHNSON, District Judge. The material facts shown by the pleadings and evidence in this case are as follows:—

That on the first day of April, 1834, the complainant Pintard purchased of the defendant Tunstall, as evidenced by a writing under the hand and seal of Tunstall, the south-east quarter of section one, in township eighteen south of range one west, and a part of the south-west fractional quarter of section six in township eighteen south of range one east, for the consideration of 1,500 dollars, paid by Pintard to Tunstall. An improvement having been made on the south-east quarter of section one, Tunstall claimed a preëmption right thereto under the preëmption act of 1814, was in the possession thereof, and transferred and delivered possession to Pintard, and bound himself to convey the same by a good and sufficient title, so soon as the patent issued from the president of the United States. That on the 24th day of July, 1834, a preëmption right and a certificate of purchase was granted and issued to said Tunstall for such quarter section of land under the preëmption act of the 12th of April, 1814, by the land-officers at Little Rock. That Pintard resided on said land during the year 1834, built additional houses, extended the clearing, and cultivated seventy or eighty acres during that year. That, being so in possession of said land, Pintard, on the 23d day of March, 1835, bargained and sold to William Rodes the said quarter section of land and so much of said south-west fractional quarter of section six adjoining thereto, as would make the quantity of two hundred acres, at and for the price of forty dollars per acre, binding himself in writing to convey the same by a general warranty deed so soon as the patents could be procured; and, to secure the payment of the purchase-money, said Rodes executed his two promissory notes for $4,000 each, the first due and payable on the 1st of March, 1836, the second due and payable one year thereafter; and thereupon Pintard delivered possession of said land, and improvements thereon, to said Rodes. That subsequently the said Rodes, by a contract in writing, signed by himself and the defendant Goodloe, on the 13th March, 1837, bargained and sold the said tracts of land and improvements thereon to said Goodloe, for the sum of sixty-five dollars per acre, the said Goodloe stipulating in said contract to pay, as part of the price, the purchase-money due by said Rodes to Pintard, as soon as the title with general warranty should be made to him. Rodes thereupon delivered possession of said tracts of land and improvements to Goodloe, who has held the same ever since. That on the 24th of February, 1838, the said preëmption right and certificate of purchase, by Tunstall, was declared to be null and void by the commissioner of the general land-office at the city of Washington, upon the ground that the land was not the property of the United States until the ratification of the treaty with the Quapaw Indians, on the 24th of August, 1818, and directed the land-officers at Little Rock to refund the said Tunstall the purchase-money paid by him. That on the 9th of April, 1840, Goodloe obtained a preëmption right in his own name for said quarter section of land, by virtue of his occupancy thereof, under the preëmption act of the 22d of June, 1838 [5 Stat. 251], and on the 3d day of March, 1841, obtained a patent therefor from the president of the United States. That on the 28th of March, 1838, Goodloe paid to Pintard $600, and on the 31st of May, 1839, the further sum of $1,363.82, for which credits are indorsed on one of the promissory notes executed by Rodes to Pintard, for the purchase-money of said land, and no other or further payments have been made by Rodes or Goodloe in discharge of said two promissory notes. It is admitted that Rodes resides in Kentucky, and is utterly insolvent. From the proof in the case it is difficult to ascertain the precise quantity of land contained in the south-west frac-

tional quarter of section six, which Pintard sold to Rodes, and Rodes to Goodloe; but taking the bond of Benjamin Taylor to Tunstall for its conveyance, and the admission of Goodloe in his answer, as the best evidence, there appears to be about eleven acres; Goodloe having obtained possession of Taylor's bond to Tunstall for the conveyance of said land, he seems to admit his liability to Pintard to that extent, and avers that he has more than paid for the same.

This bill is filed by Pintard, praying a decree against Goodloe for the remainder of the purchase-money due him for said tracts of land, and claiming a lien thereon to have them subjected to sale for the payment of said money. Upon the foregoing facts and circumstances two questions arise: First, is Goodloe personally liable to Pintard for the purchase-money agreed to be paid by Rodes; and secondly, has Pintard a lien upon the lands for the payment of the purchase-money yet unpaid? It may be material to remark, that Goodloe, having purchased and received possession of the land from Rodes, who had purchased and received the possession from Pintard, Goodloe holds the lands under Pintard, and there exists a privity of estate between them. Pintard and Goodloe stand in the relation of vendor and vendee of the estate. The principal ground upon which Goodloe resists the payment of the purchase-money to Pintard is, that Pintard never had any good and valid claim or title to the land, either in law or equity, and therefore is not entitled to demand and receive the consideration agreed to be paid. Pintard purchased the land of Tunstall, who gave him his bond for the conveyance of the legal title so soon as it could be obtained from the United States. Tunstall claimed the land as a preëmption right under the preëmption act of 1814, and on the 24th day of July, 1834; and before Pintard sold to Rodes, a right of preëmption and certificate of purchase was granted and issued to Tunstall for the said south-east quarter of section one, by the land-officers at Little Rock. Subsequently to Pintard's sale to Rodes, and Rodes' sale to Goodloe, namely, on the 24th day of February, 1838, this right of preëmption and certificate of purchase was declared to be null and void by the commissioners of the general land-office. The title, then, under which Pintard held the land, was defective and invalid. But Goodloe, instead of claiming a rescission of his contract, and surrendering possession of the land, which he had a perfect right to do, continued to hold it, applied for and obtained a preëmption right thereto in his own name, by virtue of his occupancy, and has obtained the legal title from the United States.

Under these circumstances, the doctrine is well established that Goodloe is to be considered as a trustee for Pintard, under whom he held the land, and that all acts done by him to perfect the title while in possession, enure to the benefit of Pintard. The vendor and vendee, and assignees and purchasers from the vendee, stand in the relation of landlord and tenant, neither the vendee nor the purchasers from him are permitted to disavow the vendor's title; and where they buy up a better title than that of the vendor, and the latter has been guilty of no fraud, the vendor can only be compelled to refund the amount of money paid for the better title. This doctrine is clearly held by the supreme court of the United States in the case of Galloway v. Finley, 12 Pet. [37 U. S.] 295.

The case of Searcy v. Kirkpatrick (Cooke [Tenn.] 211) decided by the supreme court of Tennessee, is in all its important and material features precisely analogous to the present case. Searcy had made an entry of two hundred and twenty-eight acres of land, by virtue of a military warrant, which land he afterwards sold and covenanted to convey to Kirkpatrick. Some person fraudulently appropriated the warrant to his own use, in consequence of which Searcy was unable to obtain a grant for the land. Upon the sale Searcy delivered the possession of the land to Kirkpatrick, who continued to hold it, and finding out the condition of Searcy's title, he made an entry of this land, as an occupant, in his own name, and obtained the legal title from the state. He afterwards brought a suit at law against Searcy on his covenant to convey, and recovered damages to the amount of $1,700. Searcy filed a bill in chancery to enjoin this judgment, and the court decreed a perpetual injunction thereto, upon the payment by Searcy to Kirkpatrick of the sum he paid and expended in obtaining the title in his own name. Judge White, in giving the opinion of the supreme court, says: "If a man, under the belief that he has a good title to a tract of land, sells it, and either conveys or stipulates to convey it, putting at the same time the vendee in possession, and the vendee discovering a better title in some other person, purchases it with a view to prejudice the vendor, a court of equity will view the purchase as made for the benefit of the vendor, through the agency of his vendee, and will relieve the vendor from the obligation of his covenant by paying the money, with interest, which the vendee has advanced in purchasing up the preferable title." In the present case Goodloe became entitled to a right of preëmption by virtue of his possession and occupancy derived through Rodes from Pintard. Had he surrendered the possession when he discovered the defect in Pintard's title, Pintard might have obtained by his occupancy a valid title to the land. By holding the possession Goodloe has prevented Pintard from acquiring a title to the land, and it would be highly inequitable and unjust to withhold from him also the consideration for which he sold it. Another ground of objection on the part of

the defendant Goodloe, to his liability for the purchase-money to Pintard, is, that his promise to pay was not made to Pintard, but to Rodes. It is true that he entered into no contract with Pintard, but in his written contract with Rodes, by a fair construction of its terms, he expressly bound himself to pay to Pintard the purchase-money due by Rodes, so soon as a good title should be made to him. It can hardly be doubted that this undertaking, made upon a valuable consideration, in discharge of his debt to Rodes, and of Rodes's debt to Pintard, will be enforced in a court of equity. It is consonant to the principles of equity and justice, and I know of no technical objections to its enforcement.

The conclusion at which I have arrived is, that Goodloe is personally bound to Pintard for the payment of the purchase-money due him for the land, after deducting the amount paid by Goodloe for the better title, to the United States, and all expenses incident to the procurement of that title.

The remaining question is, had Pintard a lien on the land sold by him so as to subject it to sale, if necessary, for the payment of the purchase-money due him for sale? No doctrine is more firmly established by a uniform current of decisions, than that the vendor of the land has a lien on the land for the amount of the purchase-money, not only against the vendee himself and his heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase-money remains unpaid. To the extent of the lien, the vendee becomes a trustee for the vendor and his heirs; and all other persons claiming under them, with such notice, are treated as in the same predicament. The principle upon which courts of equity have proceeded in establishing this lien in the nature of a trust is, that a person having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it and not pay the consideration money. A third person having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment, for it attaches to him also as a matter of conscience and duty. It would otherwise happen, that the vendee might put another person into a predicament better than his own, with full knowledge of all the facts. See 2 Story, Eq. Jur. 463, and the authorities there cited. The lien attaches as a trust, whether the land be actually conveyed or contracted to be conveyed. 2 Sugd. Vend. 541; Smith v. Hibbard, 2 Dickens, 730.

Pintard, then, has a lien upon the lands sold by him, in the hands of the defendant Goodloe, for the payment of the purchase-money remaining unpaid with the abatement before stated. The amount paid and expended by Goodloe in obtaining the title to the land from the United States does not definitely appear from the evidence in the cause; and, indeed, it would not be expected that he could show with certainty all the expenses to which he was put in procuring said title. In his answer, he states the sum amounted to nine hundred dollars. I think it reasonable to allow this amount. It appears that on the 26th of January, 1840, Goodloe loaned to Pintard two hundred dollars, for which a note was given, and is filed in this case; and it is admitted by Pintard, as a just credit, to be allowed to Goodloe.

From the bill, answers, exhibits, and proofs in the cause, the court is of opinion that the complainant is entitled to the relief prayed for in his bill of complaint.

Decree: It is ordered and decreed that the said defendant, Archibald W. Goodloe, do pay to said John M. Pintard the sum of ten thousand five hundred and fifty-two dollars, together with ten per cent. interest per annum thereon, from rendition of this decree, till paid; which sums, after deducting all the credits before mentioned, to which said Goodloe is entitled, is found by the court here to be due from said Goodloe to the said Pintard, as the balance of the purchase-money for the lands mentioned in the pleadings in this case. And it is further ordered and decreed, that the said south-east quarter of section one, in township eighteen south of range one west, and eleven acres adjoining thereto, being the same sold by said Pintard to William Rodes, and by Rodes to Goodloe, in the south-west fractional quarter of section six, in township eighteen south of range one east, be and the same is hereby charged with the said sum of ten thousand five hundred and fifty-two dollars, and accruing interest, as a lien for said purchase-money; and that unless the said defendant, Archibald W. Goodloe, shall pay to the complainant, John M. Pintard, the said sum of money, with the accruing interest, on or before the first day of November, then and in that case, it is further ordered and decreed, that the lands just mentioned, or so much thereof as may be necessary to pay the sum before mentioned, be sold by a commissioner appointed by this court, to the highest and best bidder for cash in hand, at the court house, in the town of Columbia, Chicot county, state of Arkansas, after the said commissioner shall have advertised the same four weeks successively, in some newspaper printed in this state, and shall have put up advertisements thereof at the said town of Columbia, and three other public places in said county of Chicot. And that the said commissioner, out of the proceeds of said sale, if sufficient therefor, shall pay, in the first place, all proper and legal expenses attending the execution of this decree. Secondly, shall pay to the complainant, or to his solicitors of record, the amount of principal and interest hereby awarded and decreed to the complainant; and thirdly, shall pay over to the defendant Goodloe, or to his

properly authorized agent, any balance which may remain in his hands after satisfaction of the amount of the principal, interest, and charges aforesaid, and shall moreover deliver to the purchaser possession of the lands, and convey the same to him by and in fee-simple, to him and his heirs for ever, and shall make report of his proceedings in the premises to this court at the next term thereof; and liberty is hereby reserved to the complainant to apply from time to time to the court for such further and other proceedings as may be necessary for the execution and carrying into complete effect the decree herein pronounced. And it is further ordered, that Johnson Chapman, of Columbia, in this state, is hereby appointed a commissioner for the purposes before mentioned, who shall be furnished with a certificate copy of this decree, which shall be to him a sufficient warrant for action in the premises. And the question of costs is reserved until the further order of this court herein.

The bill as to Rodes and Tunstall dismissed.

Mr. Justice DANIEL concurred in the foregoing opinion and decree.

From this decree, Goodloe entered into an appeal bond to stay the execution of the decree, took a transcript, and removed the case into the supreme court. Having departed this life during its pendency there, it was revived against Joseph P. Thudgill, his administrator.

[The decree was affirmed by the supreme court. 12 How. (53 U. S.) 24.]

PINTARD (SESSIONS v.). See Case No. 12,674

Case No. 11,171a.

The PIONEER.

[Blatchf. Pr. Cas. 22.] [1]

District Court, S. D. New York. Aug., 1861.[2]

PRIZE—ENEMY PROPERTY—CONDEMNATION.

Vessel and cargo condemned as enemy property because belonging to resident citizens of the enemy's country.

[Cited in The Amy Warwick, Case No. 341.]

In admiralty.

Before BETTS, District Judge.

The case of the bark Pioneer was the second one brought to hearing. The libel charges, in substance, that the bark, with the cargo laden on board, was, on the 20th of May, 1861, seized by the United States steamship Quaker City, under command of Acting Master T. W. Mathews, as prize of war, for violating the blockade of the port of Richmond, and also, for that the bark, at the time of such seizure, together with the cargo on board, was owned by insurgents and traitors, and public enemies of, and persons engaged in actual hostilities against, the government of the United States, whereby the vessel, with the cargo laden therein, became liable to confiscation and condemnation, as lawful prize. The claim and answer, put in under a test oath by the master, in behalf of her owners, residents in Richmond, Virginia, denies the violation of the blockade alleged, admits the ownership of the vessel and cargo by the claimants, and that they are residents in Richmond, denies that the vessel and cargo thereby became subject to forfeiture, and denies, in effect, the fact of blockade, as also the authority of the president to establish it; and, with the exceptive allegations thereto attached, the pleadings take the general objections, in bar of the suit, which are set up, and have been considered and disposed of by the court, as is above stated, in the decision applicable to the defenses common to the nine other suits heard concurrently with this one at the present sitting of the court. The claim of forfeiture against this vessel and cargo, because of a violation of blockade, is not pressed by the counsel for the United States, and the only charge on which the condemnation is urged is that both are enemy's property.

It appears, upon the preparatory proofs,—and that evidence is uncontradicted,—that the capture of the vessel and cargo was made on the high seas, outside of any harbor of the United States. It being admitted, in the claim and answer, that the claimants were, at the time of the capture, resident citizens of Virginia, and the documentary proofs showing a state of war to have existed at the time between the United States and the place of residence of the claimants, or that part of the state of Virginia then under the power and control of the public authorities of Virginia, who assumed to act, and were not prohibited or restrained from so acting, by the residents therein, in the name and by the authorization, at least, of that particular section and portion of the state, the citizens and residents thereof are parties, in judgment of law, to the acts of their local government, in its hostilities; and a war between the conflicting powers is a war between all the individuals of the one and all the individuals of which the other belligerent power is composed. The inclinations of individuals, in relation to other states, are to be considered as bound by the acts of their government. The doctrine is strongly and clearly stated by Chancellor Kent (1 Kent, Comm. 75; Wheat. Mar. Capt. 40, 41, 102), and excludes the claim of exemption relied on by the owners in this suit. Holding, as the decision of the court does, on these cardinal features of the defenses to these actions, that the United States are armed, in judgment of law, in meeting the Civil War waged upon them, with the same rights and privileges they could claim in respect to the property or exemptions of their enemies, if the war was one between nations independent of each other, it follows that the vessel and cargo proceeded

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

[2] [Affirmed in Cases Nos. 11,174 and 11,175.]

against in this case, belonging to enemies of the United States, and captured at sea, are subject to confiscation to the United States.

It is therefore ordered and decreed by the court that the property arrested and proceeded against in this suit be pronounced prize of war, and be condemned sold, and distributed as such, according to the rules and law of the court in that behalf.

NOTE. The decree in this case was affirmed by the circuit court, on appeal, July 17, 1863. [Case No. 11,174.] Afterwards, further proofs were, on leave, put in by the claimants, in the circuit court, and on a further hearing the decree of the district court was again affirmed by the circuit court, November 25, 1863. [Id. 11,-175.]

[Pending the appeal, the district court, on the consent of all parties, directed the prize commissioners to sell the cargo and vessel, and to bring the proceeds of sale into court. Case No. 11,172.]

Case No. 11,172.

The PIONEER.

[Blatchf. Pr. Cas. 61;[1] 18 Leg. Int. 349.]

District Court, S. D. New York. Oct. 26, 1861.

PRIZE—SALE OF PERISHABLE CARGO PENDING APPEAL—ACT OF MARCH 3, 1849.

1. The vessel and cargo having been condemned, and an appeal taken by the claimants to the circuit court, this court, on evidence that the cargo was perishable, and the vessel and cargo liable to deterioration, and on the consent of all the parties, directed the prize commissioners to sell the vessel and cargo at public auction, and to bring the proceeds of sale into court.

2. The act of March 3, 1849 (9 Stat. p. 378, § 8), commented on, in respect to the disposition of the proceeds of a sale by a marshal.

It appearing to the court that the cargo of the prize vessel herein is of a perishable character, and that both vessel and cargo are suffering, and will be subject to much deterioration in their condition and value, pending the appeal of the claimants from the decree of condemnation [see Case No. 11,171a] thereof, it is ordered that the prize commissioners of this court do forthwith take into their possession the said bark Pioneer, and her cargo laden on board, and procure the unlading and storage of said cargo, if the same or either be requisite for its present safety or advantageous sale, and that the said commissioners do then, and without delay, proceed to make sale of said vessel and cargo at public auction on due notice, unless a consent shall be filed herein, executed by all the parties, that such sale may be otherwise effected by said commissioners; and it is further ordered, that the proceeds of sale, deducting therefrom the necessary expenses thereof, and of such unlading and storage, if any, be forthwith brought into court by the said prize commissioners, to abide the further decree in this suit, together with a report of their proceedings herein, and a detailed account of their sales and expenses, to the end that the court may make such further directions as to the investment of such proceeds, pending this suit, as it may deem proper.

BETTS, District Judge. The counsel for the respective parties moved the court for the decree above stated, in order that the funds might be disposed of by the court intermediate the hearing on appeal, and probably having also in view the object of bringing before the appellate courts the propriety of the distribution made here of the cargo condemned, should its confiscation, as decreed by this court, be sustained in the courts above.

The prize rules provide for a commission of appraisement, to ascertain the value of perishable property captured as prize (rule 25); and there would seem to be reasonable cause for allowing it in the present case, because there may be doubt, under the act of congress of March 3, 1849, § 8 (9 Stat. 378), whether the court can exercise any authority over the funds produced by a marshal's sale, and whether they must not be deposited absolutely in the United States treasury, only to be obtained therefrom by some mode of proceeding independent of the direction and practice of the court. The prayer of the proctors of the parties, supported by their mutual consent in writing, was, therefore, assented to, that the funds might be rescued from a perishing condition, and be so placed as to be made directly available, under orders of the court, to the parties interested in them, without injurious procrastination and expenses.

Case No. 11,173.

The PIONEER.

[Blatchf. Pr. Cas. 163.][1]

District Court, S. D. New York. May, 1862.

PRIZE—ENEMY PROPERTY.

Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured, as prize, on the 20th of February, 1862, at the mouth of the Rio Grande, Texas, by the United States ship of war Portsmouth. It being deemed unsafe to send the vessel into port for adjudication, she was destroyed by order of the commanding officer, and the cargo was transmitted to this port by another vessel, and was here seized and proceeded against by due process of court, regular notice having been given to all parties interested, according to law. The master of the vessel testified that he was present at her capture; that she was sunk, after the arrest, as being unseaworthy, and that

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

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

her cargo was placed on the Rhode Island and brought to New York. The prize sailed under the Confederate flag, and had no other, and was cleared by the Confederate custom-house at New Orleans. Her cargo was tobacco, and she was cleared with it from New Orleans, where she was owned, for Brownsville, Texas. The cargo was owned and laden on board at New Orleans, and was enemy property. The owner of the vessel was also owner of part or the whole of the cargo. All persons on board the vessel knew, when the attempt was made to enter the port of Brownsville, that it was in a state of blockade by the United States, and had been from the time the blockade was imposed. No evidence is produced that the owners of the vessel and cargo had warning or particular notice that the port was then blockaded. The vessel was arrested two or three miles from the Texas shore, while attempting to enter the port of Brownsville. The purpose of the vessel to go from New Orleans to Brownsville, notwithstanding the blockade, is clearly shown to have been entertained by the owners of the cargo and vessel from the time the voyage was undertaken. The proofs are satisfactory that the vessel and cargo were enemy property, and subject to confiscation as such when arrested; and that, if any portion of the property be neutral, it was captured while making the attempt to violate the blockade of the port of Brownsville. Judgment of condemnation is accordingly rendered against both vessel and cargo.

Case No. 11,174.

The PIONEER.

[Blatchf. Pr. Cas. 649.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—ENEMY PROPERTY.

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

The vessel and cargo in this case were condemned by the district court. Case No. 11,171a. Pending this appeal, the district court, by consent of all parties, ordered the prize commissioners to sell the vessel and cargo, and to bring the proceeds into court. Case No. 11,172.

NELSON, Circuit Justice. The vessel and cargo in this case were captured off Cape Henry, by the steamer Quaker City, on the 20th of May, 1861. Both vessel and cargo belonged to De Voss & Co., of Richmond, Virginia, and, according to the ruling in the case of The Hiawatha [Case No. 6,451], they were subject to condemnation as enemy property. Decree below affirmed.

[NOTE. Afterwards, further proofs were, on leave, put in by the claimants, in the circuit court, and on a further hearing the decree of the district court was again affirmed. Case No. 11,175.]

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

[2] [Affirming Case No. 11,171a.]

Case No. 11,175.

The PIONEER.

[Blatchf. Pr. Cas. 666.] [1]

Circuit Court, S. D. New York. Nov. 25, 1863.[2]

PRIZE — ENEMY PROPERTY — VESSEL OWNED BY AUSTRIAN CONSUL RESIDENT AT RICHMOND DURING CIVIL WAR—TRADE WITH ENEMY.

1. Hearing, on further proof, as to the claim by one of the owners of the vessel and cargo that he was at the time of the breaking out of the war, and at the time of the capture, a resident consul at Richmond, of the empire of Austria, recognized by this government; that his interest is not to be regarded as enemy property, inasmuch as he intercepted the vessel and cargo while on their way to a blockaded port of the enemy, and took measures to send them to a loyal port, and had thus done everything in his power to withdraw his property from the enemy's country; that, while in the act of being withdrawn, it was not liable to capture; and that he was not bound to follow it, as his duty as consul, and his right under a treaty between the United States and Austria, justified and satisfactorily explained his continued residence in the enemy's country.

2. Where a foreign consul is carrying on trade as a merchant in the enemy's country, his consular residence and character will not protect that trade from interruption by the seizure and condemnation of his property as enemy's property; and, notwithstanding his consular character, he is to be considered in all commercial transactions as on the same footing with any other resident merchant.

3. If, on the breaking out of the war, he puts an end to his business as a merchant, continuing his residence solely as consul, his property which is intercepted by him on its way to a blockaded port of the enemy, and prevented from entering that port, with a view to send it to a loyal one, should perhaps not be regarded as enemy property.

4. Decree of the district court condemning the property as enemy property affirmed. [Case No. 11,171a.]

In admiralty.

NELSON, Circuit Justice. This case comes up on further proof on the part of the claimant De Voss, one of the owners of the vessel and cargo. The firm of De Voss & Hanniwinkle were residents and engaged in business at Richmond, Virginia, at the date of the proclamation of the president of April, 1861 [12 Stat. 1259], and had been for some twenty years. The Pioneer, with a cargo of tobacco and flour belonging to this firm, sailed from City Point in the fore part of December, 1860, for Liverpool, where, after discharging her cargo, she took in a return cargo of salt for Richmond, and sailed for that port from Liverpool on the 17th of April, 1861. She reached the coast off Hampton Roads on the 20th of May, following, and was met by a pilot with a letter from the owners, advising the captain

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

[2] [Affirming Case No. 11,171a.]

of the proclamation and of the blockade of the port, and instructing him not to attempt to enter, but to change his course to the port of Baltimore. While in the act of obeying these instructions, the vessel was discovered by one of the blockading squadron, and was seized as prize of war, and sent to this port for adjudication. The court below condemned the vessel and cargo, not for breaking the blockade, but as enemy property. [Case No. 11,171a.] On an appeal to this court this decree was affirmed within the rule established in the case of The Hiawatha [Case No. 6,450] and that class of cases, decided in the supreme court of the United States. [Case No. 11,174.]

The new proof now offered, and which was received by consent of the United States district attorney, is, that De Voss, one of the partners, was, at the time of the breaking out of the war, and at the time of the capture, a resident consul at Richmond, of the empire of Austria, recognized by this government. Upon this new fact, in connection with the case as before presented, it is now insisted by the learned counsel for the claimant that the interest of the partner De Voss is not to be regarded as enemy property, inasmuch as, having intercepted the vessel and cargo, and taken measures immediately to send them to a loyal port, and having thus prevented the property from entering the port of the enemy, he had done everything in his power, under the circumstances, to withdraw it from the enemy's country, which he had a right to do within the rules of international law; that, while in the act of being withdrawn, it was not liable to capture; and that he was not bound to follow it, as his duty as consul and his right under a treaty between the United States and Austria justified and satisfactorily explained his continued residence at Richmond, in the enemy's country.

It is admitted that, in the case of a foreign consul who is carrying on trade as a merchant in the enemy's country, his consular residence and character will not protect that trade from interruption by the seizure and condemnation of his property as enemy property; and that, notwithstanding his consular character, he is to be considered, in all commercial transactions, as on the same footing with any other resident merchant. The mere fact, therefore, that De Voss was a resident consul, cannot confer upon him any privileges, so far as concerns his commercial transactions, over any other merchant resident in the enemy's country. He stands on the same footing as his partner, Mr. Hanniwinkle. His property, engaged in a trade which is carried on in the enemy's country, finds no exemption, according to the international code, from the laws of war.

I agree that if, in addition to his consular character, it had been shown that, on the breaking out of the war, he had dissolved his partnership, and put an end to his business as a merchant, continuing his residence solely as consul, there would be great force in the position that his interest in this ship and cargo, which were intercepted and prevented from entering the enemy's port with a view to send them to a loyal one, should not be regarded as enemy property. The case would have presented a strong analogy to that of a resident merchant in the enemy's country, after the commencement of the war, breaking up his business, with all reasonable diligence collecting his effects, and withdrawing both of them from the country. His consular character would have explained the reason for his not leaving the country himself. But in this case, for aught that appears—and if otherwise, it devolved on the claimant to show it, it being a material fact in his case—he has continued his partnership business the same since as before the war. I cannot, from the single fact that he diverted the property in question from the enemy's country, and especially from a blockaded port, where it was liable to capture, and sent it to a loyal one, infer that this was followed up by his putting an end to his business as a merchant at Richmond. If not, I must regard him as I would any other merchant engaged in trade in the enemy's country.

Decree below affirmed.

Case No. 11,176.

The PIONEER.

[1 Deady, 58.] [1]

District Court, D. Oregon. March 8, 1864.

SEAMEN'S WAGES—MISCONDUCT AS CAUSE OF FORFEITURE—IMPERTINENT ALLEGATIONS —EXCEPTIONS.

1. Exception for impertinence to an allegation in an answer which serves no legal purpose, and is a mere slur upon the libellant, allowed.

2. An allegation of misconduct on the part of an engineer as a cause of forfeiture of wages must state the particular acts of misconduct relied on, with the circumstances of time and place.

[Cited in The Maria, Case No. 9,075.]

[See The Almatia, Case No. 254.]

3. C. brought suit against the steamboat P. for wages as engineer; the claimant in its answer set up that prior to the commencement of such suit, it had commenced an action against C. in the territory of Washington, to recover damages for injuries to the steamboat P., caused by the misconduct of the latter as engineer thereon, and caused a garnishee process to be served upon K., the master, and sometime owner of the steamboat P. during the period that C. was employed upon her as engineer: *Held*, on exception that the allegation was impertinent.

[Cited in The Tom Lysle, 48 Fed. 692.]

In admiralty.

E. W. McGraw, for libellant.

Amory Holbrook, for claimant.

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

DEADY, District Judge. The libellant [Patrick J. Conlisk] in this suit seeks to recover the sum of $1,497.25, the balance alleged to be due him for services as engineer upon the steamboat Pioneer, between November 8, 1862, and January 8, 1864. The claimant, the Columbia Transportation Co., a corporation of the territory of Washington, intervening for its interest as owner, answered the libel, to which answer the libellant filed sundry exceptions.

The first exception is taken to the words following: "And because he by neglect and his mismanagement caused great damage to the machinery of said boat." In the answer the fact herein alleged is stated as the reason for discharging libellant. From the pleadings it appears that the libellant was hired by the month, or under such circumstances as that a hiring from month to month would be necessarily implied. Such being the case, the libellant might be discharged from the boat, she being in the home port, at the end of any month. Therefore, it is not necessary upon the part of the claimant to show any reason for his discharge. In fact, the libellant does not sue on account of the discharge, but for wages earned and unpaid. If it was intended to plead this misconduct as a cause of forfeiture or diminution of wages, the particulars of the alleged neglect and mismanagement should have been stated with the circumstances of time and place. The exception is allowed.

The second exception is taken to the words following: "By reason of mutinous and disobedient conduct, incompetence and malicious mischief, causing damage as before stated." This allegation, in conjunction with other matters, in what is called the fifth article of the answer, is pleaded as a cause of forfeiture of wages. What has just been said in passing on the first exception as to the want of certainty, applies to this. The employment of the libellant extended over a period of one year and two months, and when he seeks to recover his wages, it would be a hardship if the question should be made to turn upon the truth or falsity of such a vague and indefinite charge. Besides, the misconduct of the libellant to work a forfeiture of his wages must be gross and serious, though for a less cause there may be a partial forfeiture or diminution. Again, if a seaman is continued on board after an opportunity occurs to discharge him at the home port or the termination of the voyage, the law presumes that his misconduct has been overlooked—forgiven, and such misconduct cannot be set up as a defence to a suit for wages. In what month of the fourteen that the libellant was employed on this boat, "this mutinous conduct and malicious mischief" occurred, is not stated in the answer. Such conduct was a sufficient ground to justify the discharge of the libellant at once, but if the master or owner for any reason saw proper to continue him as engineer, it could not be afterwards set up as a cause of forfeiture of wages subsequently earned. When the hiring is monthly upon a river steamboat or other boat arriving and departing at short periods within that time, each month must be considered as analogous to a separate voyage at sea. The wages earned upon one voyage are not affected by the conduct of the seaman upon a former or subsequent one. So with the monthly wages of the libellant, they are to be considered as the wages of separate voyages, and not affected by his conduct except during the time they were being earned. This exception is allowed.

The third exception is taken to an allegation pleaded in abatement of the suit. It states substantially that from March 20 to November 12, 1863, John T. Kerns—now one of the directors of the C. T. Co., and who as its agent makes the claim and answer herein—was the sole owner and master of the Pioneer, and that said Kerns employed the libellant during that time, at certain wages; that libellant remained on board until January 1, 1864, and during the last month of such employment—meaning, I suppose, December, 1863—he maliciously damaged the boat in the sum of $1,000; that on January 6, 1864, the C. T. Co. brought an action in the district court of the territory of Washington against the libellant for said damages, and caused a summons to be served therein on said Kerns as garnishee; that said action is still pending, and that said court had thereby acquired jurisdiction over the wages alleged to be due the libellant before the filing of the libel in this suit, and that any decree therefor in this court would be a hardship and injustice to the claimant and said Kerns. As an individual, Kerns has no other relation to the subject matter than as a director and agent of the C. T. Co., who is the claimant in this suit and the plaintiff in the alleged garnishee process against himself. It does not appear that the district court of the territory of Washington ever acquired jurisdiction of the person of the libellant in the action said to have been commenced therein. The allegation of the answer is, that the C. T. Co. "commenced a suit against the libellant," but whether he was ever served with process, so as to give the court jurisdiction to proceed, does not appear, and cannot be inferred. There must be a distinct allegation to that effect. Assuming the fact to be as it appears in the answer, that the territorial court never acquired jurisdiction of the person of the libellant, the action alleged to be pending therein in no way affects his right to maintain this suit. The service of the garnishee process, being in advance of the service of the summons upon the libellant seems to have been premature, and at best can only affect Kerns upon the condition that the libellant is brought into the territorial court and

judgment obtained against him. In the meantime, I suppose it would not exonerate him from obeying the order of any other court in relation to such debt, which might first acquire jurisdiction in the premises. Again, upon the face of the answer, Kerns does not appear to be responsible to libellant as master and owner for quite eight months wages, while this suit is brought for the wages of fourteen months. But this suit is brought against the boat, and not Kerns. The seaman has a lien upon the boat for his wages, and this court has jurisdiction to enforce such lien by a suit in rem. Although the master and owner are also personally responsible for the wages of the libellant, it is a question in my mind whether either of them, strictly speaking, owe him a debt that can be garnisheed, at least until he elects to look to them or either of them for his wages, by taking a personal obligation therefor, or commencing a suit against them for the same. Otherwise, the master might be garnisheed in one court, the owner in another, while the seaman was prosecuting a suit in rem, upon the same demand, in a third one. But it not appearing that the libellant has ever been served with process in the action in the territorial court, I do not think the service of the garnishee process upon Kerns in any way affects his liability to the libellant or that of the boats. This exception is allowed.

The matter included in the fourth exception is a mere amplification of the allegations included in the second exception, with the addition of a counter claim of $1,000 for damages caused by the alleged misconduct of the libellant. There is no more certainty or particularity in the allegation in the one case than the other. This exception is also allowed.

[There was a decree in favor of the libellant for $583.33⅓. Case No. 11,177.]

Case No. 11,177.

The PIONEER.

[1 Deady, 72.] [1]

District Court, D. Oregon. March 14, 1864.

SEAMEN'S WAGES—INLAND WATERS—DOUBTFUL CONTRACT—WAGE RATE—MISCONDUCT—PRIOR VOYAGE—CONTRACT PROHIBITED BY STATUTE.

1. Rule of ascertaining rate of wages of seaman, where the contract is doubtful, in case of an engineer on inland waters, commented on and applied.

2. Misconduct by seaman upon one voyage does not enure to the benefit of the owner so as to forfeit wages earned upon another; in this respect the case of monthly hirings, although continuous, upon river boats, likened to separate voyages at sea.

3. A party cannot recover upon a contract prohibited by statute, although the statute contain no express declaration that such contract shall be void; therefore when libellant served as an engineer upon a steamboat from November 8, 1862, to July 13, 1863, without being licensed therefor by the United States inspectors, he could not recover wages for such service, because it was within the prohibition of section 9, subsec. 10, of the act of August 30, 1852 (10 Stat. 67).

[Cited in Harding v. Hagar, 63 Me. 517.]

4. Appropriation of payments—the rule stated and applied.

In admiralty.

E. W. McGraw, for libellant.

Amory Holbrook, for claimant.

DEADY, District Judge. Patrick J. Conlisk brings this suit to recover wages alleged to be due him for services as engineer on the steamboat Pioneer, for the fourteen months between November 8, 1863, and January 8, 1864. The libel was filed January 16, 1864, and alleges that there was no contract as to time of service or rate of wages, but that the current wages of such service during the period mentioned was $150 per month; and that the amount of the wages earned by libellant during this period of fourteen months is $2,100, upon which there has been payments to the amount of $602.75, leaving a balance of $1,497.25 due the libellant for which he prays a decree. The claimant, the Columbia River Transportation Co., a corporation of the territory of Washington, intervening for its interest as owner of the Pioneer, answered the libel on March 7, 1864. The answer admits the performance of the labor by the libellant as alleged except for the five days between February 9 and 16, 1863. It denies that the hiring was without agreement as to the amount of wages, and alleges that libellant was first employed at his own solicitation, upon a representation or promise to the then owner, George Kellog, to work for less than $100 per month; that the master of the Pioneer afterwards promised to pay libellant $100 per month, but the current rate of engineers' wages, on such boats as the Pioneer, was not more than $75 per month; that the libellant was not qualified or authorized to act as engineer, not being duly licensed as such, and did not faithfully perform his duties as such, and that he was paid on account the sum of $680.82. Other defensive allegations in the answer were disposed of by the decree upon the exceptions thereto for impertinence. The Pioneer [Case No. 11,176]. A number of witnesses, including the libellant and the different owners from the commencement of the former's employment to the present, have been examined. With a few unimportant exceptions the witnesses appear to be interested, not only in the event of the suit, but in the controversy; and the statements of the libellant, and owners, are conflicting.

The first question is, to what rate of wages per month is the libellant entitled? There was no written agreement or shipping articles signed. Upon this fact counsel for libel-

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

lant makes the point that the case comes within the provision of the act of July 20, 1790 (1 Stat. 131), concerning the hiring of seamen, and that therefore the libellant is entitled to the highest wages paid engineers within the three months next preceding his employment. I think not. This act is confined by its terms to vessels bound to a foreign port, or of fifty or more tons burthen bound to a port in any other than an adjoining state. From the pleadings it appears that the Pioneer coasted between the ports of this state and such ports, and the ports of the territory of Washington. The libellant swears positively that there was no agreement as to the rate of wages which he was to receive, while the owner of the boat from November 8, 1862, to March 23, 1863, testifies that at the time of employing libellant, he told him that he had been paying $100 per month, and that the libellant replied he was willing to work for less. On March 23, 1863, the master, John T. Kerns, became the sole owner of the boat, and remained so until the sale to the claimant, the C. R. T. Co., of which he is a director. Kerns testifies, that at the time of purchasing the boat he made out libellant's account, crediting him with his wages at $100 per month, and presented it to him, and that the libellant made no objection to it. On the contrary the libellant swears that he did object to it and would not receive it, but the objection he made at the time, was not to the amount of the wages, but that the account was made out against the owner, and not the boat—saying that he did not understand that, and only knew the boat. The reason given for the objection to the account, shows pretty conclusively that it was not made to the rate of wages, but the security. Two witnesses, employed in inferior positions on the boat, testify to conversations with the libellant in which they state that he admitted that he was only getting $100 per month, but that he intended to claim or have $150 thereafter. An engineer testifies to a conversation between libellant and Kerns, in which the former demanded $150 per month, at that time, and in which there was something said about the wages for the time prior thereto, but he could not state particulars. The libellant and Kerns both testify concerning this conversation. The former says that he then demanded $150 per month, and that Kerns did not say whether he would give it or not, but said that libellant was trying to take advantage of the fact that the boat was in debt to him, and unable to pay. Kerns admits this demand for $150 per month, but says that he told libellant he could not pay it. Both these conversations with libellant evidently occurred near the same time; Kerns says the one with him occurred about December 1, 1863, but the other witnesses speak of October in the same year.

These are all the material circumstances bearing on the question of whether there was an agreement as to the rate of wages or not. According to the authorities, where there is a doubt as to the rate of wages due a seaman, it should be resolved in his favor. In general this is a wise and just rule, founded upon correct observation of the relations between seamen and their employers. The latter can always protect themselves by having shipping articles signed, or in the case of steamboats on short routes by payments or settlements at short intervals. But I think the rule ought to be applied in this case with some reference to the circumstances. From these it appears that, in the fall of 1862, George Kellog, a doctor and landsman, was the owner of a small steamboat called the Pioneer. She was propelled by a single engine, and her machinery was cheap and rickety. Her master—Kerns—was practically a landsman. The boat had no established trade or route, but was knocking around on the waters of the lower Columbia and Wallamet rivers, amid a strong force of first-class boats, doing a sort of peddling, desultory, sporadic business. At times, Kerns was acting as master, clerk, "and all hands"—trying to make the boat pay her way. Under these circumstances, the libellant, an old engineer from the lakes, came to this country seeking employment, and at his own solicitation was employed upon the boat as engineer. Knowledge and experience were on his side, and under the circumstances he was as likely to take care of himself in a bargain as any of his employers. Of course the law rates the libellant as a seaman, and he is therefore entitled to the rights of a seaman, particularly in having a lien upon the boat for the wages due him; but in the matter of a bargain with the master or owners of the Pioneer, I think these circumstances show that the parties in fact dealt on about equal terms, and that therefore the rule spoken of should be applied in moderation and with caution. The evidence shows that first-class engineers have been receiving from $125 to $150 per month, but these are principally employed on good paying boats. Others appear to make the best bargain they can, depending somewhat upon the size of the boat and its business. Before the libellant went upon the Pioneer, her engineer was getting $100 per month.

From the premises, I find that the libellant was employed without any express contract as to the rate of wages, but being a stranger and desirous of employment and an opportunity to become acquainted with the rivers and business, he was more anxious to obtain a situation than to obtain the highest wages; that the sum of $100 a month was talked about at the time of the hiring, and subsequently acted upon by the libellant and the master and owners, and that under all the circumstances the law implies a hiring at that rate; that sometime in the fall, or December of 1863, the boat being unable to pay expenses, and being indebted to libellant, he demanded wages at the rate of $150 per month, and Kerns remonstrated against this

demand, telling him that the boat was unable to pay more. The libellant may have thought, as men in such circumstances sometimes do, that as the boat was unable to pay him what was due him, he would take advantage of his power as a creditor to fix the rate of his wages. Be this as it may, Kerns, without admitting or promising anything, put him off the best way he could, hoping to make some disposition of the boat, so as to put her affairs and prospects in a better plight. The demand for higher wages would not constitute a contract and make the boat liable therefor, unless with the assent of Kerns. Considering that the boat was embarrassed, and that the libellant had a large claim against her, I do not think such assent ought lightly to be implied. It was not expressly given, nor do I think there is reason to imply it. The reply of Kerns that the boat was not able to pay the higher wages, was a qualified refusal of the demand. At that time the boat was in port, unemployed half her time, and it seems to me that the libellant was taking the advantage of his claim for past services, to try and compel her owner to raise his wages. If the libellant was not satisfied to work for $100 per month, he might have gone elsewhere. What was due him he could have collected off the boat. I also find that the libellant is entitled to the wages of $100 per month from November 8, 1863, to January 8, 1864, and that he has been paid on account in one way and another, the sum of $671.62, leaving a balance of account in his favor of $728.30.

In coming to this conclusion I have considered the libellant as in the employ of the boat during the five days in February, when the answer alleges he was discharged. It is a small matter. The alleged discharge seems to have been a kind of conditional one, depending somewhat upon the boat's necessities and opportunities to get business. The crew were nominally discharged, but they were to continue to run the boat if they could pick up any jobs. But, of course, I admit that the libellant might have been discharged at that time, without the payment of the wages due. Certainly the libellant could not fasten himself upon this boat against the wishes of her owner, until his accruing wages eat her up, simply because the owner did not, or could not, pay him off. The boat was good for the wages already earned. I have also considered the libellant as entitled to wages until January 8, 1864, although he was actually discharged on January 5. The hiring must be construed to have been monthly, (The Pioneer [Case No. 11,176]), and as the discharge took place three days before the expiration of the month for no reason other than the pleasure or necessities of the owner, the libellant was entitled to his wages for the whole month.

Next, the claimant seeks to diminish whatever sum may be found due the libellant as wages by proof of misconduct on the part of the latter. But the most of the proof in support of this allegation suggests that the claimant, in making it, was trying to keep even with the libellant's charge of $150 per month. The machinery was shown to have been out of order a good deal, but I think this is more likely to have been the fault of the machinery itself, than the libellant. The boat was poor, earning little or nothing much of the time, and the libellant had to make repairs as best he could. As to the disobedience concerning the belt and sawing wood, it was but a single act near the end of his employment. Taylor, who was master at the time, was a landsman and new hand at the wheel, and seems to me to have provoked the engineer by trying to make himself particularly offensive concerning the sawing of this wood. The evidence concerning the working the engines when the boat was at the shore, but not made fast, is the only other proof of misconduct. I am inclined to think the engineer was simply mistaken as to the line being out, and was working the engines to keep steam down. There is also some evidence that the libellant at times was cross and ugly, and had difficulty with the men. With Kerns he seems to have got along pretty well. It is probable that the libellant is not a very agreeable man, and being in charge of poor machinery, often getting out of order, working with a lot of green landsmen trying to run an unlucky boat, it is not remarkable that his temper should sometimes get the better of him. An engineer should be not only obedient, but respectful to the master; but misconduct to forfeit wages should be satisfactorily proven and be of serious import. Again, a sufficient answer to all these charges of misconduct is found in the fact, that the libellant was continued in his employment and position as engineer. The boat was in port every day, and there was no legal or physical necessity for continuing to employ him. By continuing to employ him month after month, the presumption is, that his misconduct, if any, was overlooked and forgiven, and so Kerns says, "I overlooked it." The hiring being monthly, I think each month's service must be considered as a separate voyage at sea. Misconduct during one voyage cannot be made to work a forfeiture of wages earned during another. Piehl v. Balchen [Case No. 11,137]. The owners of a steamboat ordinarily have the power to protect themselves from misconduct of any of the crew, by discharging a man whose conduct is not satisfactory. This doctrine of forfeiture or diminution of wages is particularly applicable to voyages at sea, where it is often impossible to discharge a disobedient or negligent seaman, for months together. I do not think that any such misconduct is proven as entitles the claimant to a diminution of wages, or that

it is a case for diminution of wages, except for some misconduct occurring during the last month of the libellant's employment.

One other question remains to be disposed of. It is alleged in the answer, that the libellant was not authorized to serve as engineer for want of a license. The evidence is, that he was duly licensed by the supervising inspector for the district, on July 13, 1863, and that between November 8, 1862, and the last mentioned date he was not licensed, and that he had been a licensed engineer on the lakes between the years 1857 and 1860. The act of August 30, 1852 (10 Stat. 67), declares that: "It shall be unlawful for any person to employ or any person to serve as engineer or pilot on any such vessel, who is not licensed by the inspectors, and any one so offending shall forfeit $100 for each offense." Upon this provision it is maintained by the claimant that the libellant cannot recover wages for the period he was not licensed. I think such is the effect of the act beyond a question. When a statute makes a certain thing or act unlawful, no contract to do or perform such thing or act is valid, or can be enforced. In Bartlett v. Vinor, cited in Chit. Cont. 599, Holt, C. J., said: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute." See note 1, Chit. Cont. 599, where the American authorities are cited to the same effect. It would make prohibitory statutes nugatory and of no effect, if parties could act and contract in violation of them, and thus require the courts to enforce and uphold such contracts and doings. The law leaves the parties to such contracts where it finds them. It follows that the libellant is not entitled to recover wages for the period in which he served as engineer without a license, and in violation of the act.

This conclusion makes it necessary to ascertain and determine upon what part of the service, the lawful or unlawful, the payments made to the libellant shall be appropriated. Treating the wages earned during these two periods, or even the wages of each separate month, as distinct debts, the law gives the debtor the right to appropriate the payment to either or any of the debts, but he must do so at the time of payment, and by some act, word, or other means, to the knowledge of the creditor. Such an appropriation may be implied from circumstances as a previous refusal on the part of the debtor to pay one of two debts. Taylor v. Sandiford, 7 Wheat. [20 U. S.] 20. But if the debtor makes no appropriation of the payment, then the right attaches to the creditor in the same manner, except that it appears he may make the appropriation at any time thereafter before an action or controversy concerning the same. After this, the authorities differ as to the creditor's right to appropriate, but the weight of them seems to be that he may. Chit. Cont. 645, note 1. If neither the debtor or creditor has appropriated the payment, the court must apply it as appears to be the most equitable and just, other things being equal, giving the preference to the claims with the poorest security. Id. As between a lawful and unlawful contract, the law will appropriate a general payment to the former in preference to the latter, but it seems that the creditor may appropriate such payment upon the unlawful contract, or upon a debt barred by the statute of limitations. Chit. Cont. 646–648.

Appropriating these payments upon these rules and principles, or rather determining what appropriation, if any, was made of them by the parties, there is no doubt that all of the payments made before the lawful hiring commenced, were made and received on account of the wages earned upon the unlawful contract. There was then no other debt to apply them on. There does not appear to have been any express appropriation by either party, but bearing in mind that the parties regarded the wages for each month as equally due the libellant, I think it reasonable to infer that all the payments were made and received on account of the older debts. This conclusion is the more reasonable in this case, because as between the parties, the indebtedness does not present that well defined instance of distinct debts to which the doctrine of appropriation applies. More correctly speaking, this is the case of a running account, or a continuous series of separate accounts, treated by the parties as an entirety. In such cases, the doctrine of appropriation does not apply, and general payments are presumed to have been made in discharge of the earlier items of the account. Chit. Cont. 649, note 2; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 737.

The libellant is entitled to recover his wages at the rate of $100 per month from the date of the lawful hiring—July 13, 1863—until January 8, 1864, a period of six months less five days, amounting to $583.33⅓. The wages for the eight months and five days during which the libellant was employed without license, cannot be recovered, but the payments are presumed to have been made on that account. This leaves the sum of $145.04⅔ of the libellant's account unpaid, and for which he cannot recover. Decree, that the libellant recover the sum of $583.-33⅓, with costs.

PIONEER, The See Case No. 6,451.

Case No. 11,178.

In re PIONEER PAPER CO.

[7 N. B. R. 250.] [1]

District Court, N. D. New York. Oct. 20, 1869.

BANKRUPTCY—POWER OF REGISTER—EXAMINATION OF WITNESS—ORDER OF COURT.

1. The register has power to make the order, under section twenty-six of the bankrupt act [of 1867 (14 Stat. 529)], requiring the bankrupt or a witness to appear and be examined.

2. It is not necessary to apply to the court to obtain such order.

3. On such examination the bankrupt or witness may be examined fully, substantially as under a reference upon a creditor's bill, or in supplementary proceedings under the Code.

An affidavit was made on behalf of certain creditors of the bankrupt, alleging that the First National Bank of Ballston Spa had recovered a large judgment against the bankrupt, shortly before the filing of the petition, and also charging collusion between E. Comstock, W. Wilson, and M. W. Comstock, the trustees of the bankrupt corporation, and said bank, and also attacking the consideration of said judgment.

Upon such affidavit Register SACKETT made the following order:

"On the application of E. W. Murphy and others, creditors of the said bankrupt, it is ordered that the said bankrupt attend before me, at my office, on the fourteenth day of October, eighteen hundred and sixty-nine, at Saratoga Springs, at twelve o'clock, noon, to submit to the examination required by section twenty-six of the bankrupt act, and that a copy of this order be delivered to said bankrupt forthwith. And it is further ordered that Hero Jones, Elisha Comstock, Marcus W. Comstock, and William Wilson, be and appear at the same time and place to be examined as witnesses in regard to the estate of the said bankrupt, or at such other place as said matter may be adjourned to.

"September 25, 1869.

"W. A. Sackett, Register in Bankruptcy."

Annexed Proceedings.

At Saratoga Springs, in said district, on the fourteenth day of October, 1869, before William A. Sackett, register, E. F. Bullard appeared as counsel for creditors; A. Pond, as counsel for witnesses and bankrupt.

Hero Jones, of Milton, Saratoga county, being duly sworn and examined at the time and place aforesaid, upon his oath, says: I reside in Milton, Saratoga county, and am president of the First National Bank of Ballston Spa, in that town, and have been for over four years last past; that bank holds and owns a judgment against the Pioneer Paper Company, above-mentioned, for $9,703.98, entered January 23, 1869, on which interest has run since it was entered. The witness here objects to the regularity of the order in this case, and says, that he is not liable to examination as a witness in this matter, except upon an order of the district court, and that the register has no power to grant such an order. The register overrules the objection, and says, that the witness is bound to testify as a witness under said order.

Question.—What was the consideration of the judgment above referred to in favor of the First National Bank of Ballston Spa against the Pioneer Paper Company?

The counsel for the witness, and the witness, ask the counsel for creditors, who insist on the examination of the witness, "What is the object of this testimony?" The counsel for the prosecuting creditors answers, "that he proposes to show that the judgment in question was obtained upon paper, given by the former trustees of the bankrupt for the benefit of Elisha Comstock, which he proposes to follow up by proving that the said Comstock and his associate trustees, then in charge of said corporation, conspired together and fraudulently voted a salary to the said Comstock of five thousand dollars a year, and to his son Marcus about one thousand five hundred dollars a year, and to his son Abijah about seven hundred dollars a year, for pretended services. And that he intends to show that said judgment is fraudulent and void; with a view of asking the assignee in those proceedings to file a bill in this court to set the same aside; which judgment is an apparent lien upon the bankrupt's real estate." And the said counsel further insists, that he has the right to, and offers to examine the witness fully in regard to the estate of the bankrupt, substantially in the same form as debtors and witnesses are examined in supplemental proceedings under the laws and practice of the state of New York, and as they were formerly examined, in reference to a matter upon creditors' bills. The register rules that parties have no right to make offers upon the record not based upon a question.

The counsel for the witness and the bank objects to the question and the offer on the following grounds: (1) That the subject matter of the inquiry is not embraced in the order of reference to the register, which is limited to the proof of debts and the appointment of an assignee. (2) That the judgment in question, which it is proposed to impeach, has not been proved, or offered to be proved as a debt against the bankrupt in these proceedings, and that the evidence to impeach it is inadmissible on this reference. (3) That the jurisdiction to grant the order specified in section twenty-six of the bankrupt act is vested solely in the court, and not in the register. (4) That the only possible way to impeach the judgment is by bill in this court, and that it cannot be impeached in the summary way proposed.

The register decides that he has, by powers vested in him under the bankrupt act and the rules and practice of this court, the power to grant said order for the ex-

[1] [Reprinted by permission.]

amination of said witness, and that his powers under the order of reference are not limited to the proof of debts and the appointment of assignees. (2) That the judgment in question, though not proved as a debt, is a lien upon the bankrupt's real estate, and that creditors have the right to examine into it before the register, with a view to proceedings before this court in relation to it, by bill or otherwise, as they may be advised. (3) That though the judgment may not be vacated or impeached, without bill or other proper proceedings, there are various rights of parties as to the lien that may be protected under testimony before the register. The objections are, therefore, overruled.

The witness declined to answer the questions and to be further examined under the order in the matter, and insists that the question as to his liability to an examination under said order, and to answer said questions, be submitted to the court.

At Saratoga Springs, in said district, on the fourteenth day of October, eighteen hundred and sixty-nine, before William A. Sackett, Register:

I, William A. Sackett, one of the registers of said court in bankruptcy, certify that in the course of proceedings in said matter, before me, the following questions arose, pertinent to the said proceedings, and were stated and agreed to by the counsel of the opposing parties—Mr. Bullard for certain creditors, and Mr. Pond for the witness and certain other creditors:

First Question.—"What was the consideration of the judgment above referred to, in favor of the First National Bank in Ballston Spa, against the Pioneer Paper Company?" The counsel for the witness duly objected to the question, on the grounds stated in the proceedings annexed hereto. The register overruled the objections, and allowed the question as proposed, on the grounds stated in the annexed proceedings.

The questions submitted are: (1) Has the register the power to grant the order for the examination of the bankrupt and witnesses under the twenty-sixth section of the bankrupt act? (2) Shall the witness answer the question just above-stated? Is the question proper? (3) Is the evidence to sustain the offer, made by the counsel (as stated in the annexed proceedings) for the creditors, to impeach the judgment in favor of the bank, admissible in these proceedings? (4) Can this examination take the scope contended for by the counsel for the creditors? (The fourth point is insisted on. I do not think it a question that has arisen.)

The questions arose in the proceedings annexed. The parties requested that the questions should be certified to the court for its opinion thereon.

HALL, District Judge. The decision of the register is approved and confirmed.

PIONEER TOW LINE (BOWAS v.). See Case No. 1,713.

Case No. 11,179.

PIPER v. BALDY.

[10 N. B. R. 517;[1] 10 Phila. 247; 31 Leg. Int. 316; 22 Pittsb. Leg. J. 29.]

Circuit Court, W. D. Pennsylvania. June 9, 1874.

BANKRUPTCY—JUDGMENT ENTERED ON JUDGMENT NOTE GIVEN BEFORE ADJUDICATION.

Judgment notes given long before the judgment debtor was adjudged a bankrupt, and just previous to bankruptcy, to secure loans of money, and given at the times the money was advanced, are valid; and judgments entered up on such notes within a short time before the filing of the petition in bankruptcy, will not be set aside by the bankrupt court. Bill dismissed with costs.

[Cited in brief in McCormick v. Buckner, Case No. 8,718.]

[This was a bill by Edwin L. Piper, assignee of Levi Berger, a bankrupt, against E. H. Baldy, to set aside certain judgments obtained by the said Baldy against the bankrupt.]

STRONG, Circuit Justice. The object of this bill is to set aside eleven judgments obtained by Edward H. Baldy, the defendant, against Levi Berger, who has been adjudged bankrupt, and the relief asked is based upon the averment that the judgments were entered in fraud of the bankrupt law [of 1867 (14 Stat. 517)]. There is very little controversy in regard to the facts. It appears by the evidence, as well as by the pleadings, that the bankrupt for several years prior to his bankruptcy, carried on business as a builder and lumberman at Danville, in the county of Montour; and in addition to this he was the lessee of a planing-mill in the city of Williamsport during part of the years 1873 and 1874. He bought and sold lumber, and ran a planing-mill at Danville; also at various times during the years he was thus in business, he borrowed from Baldy, the defendant, different sums of money, giving at the time each loan was made a bill single for the sum borrowed, containing a confession of judgment for the debt and interest. The first of these bills was dated April 6, 1869. Three others were given in the same year, five others in the year 1870, one in 1872, and the last, February 6, 1873. Though each of them contained a confession of judgment, no judgment was entered on the record of the court of common pleas until June 26, 1873, thirty-three days before Berger was adjudged a bankrupt. When the petition was filed does not appear. Then the judgments were entered in the common pleas, at the instance of Baldy, without any agency of the debtor, so far as it appears, and without his knowledge. The entry was made in vir-

[1] [Reprinted from 10 N. B. R. by permission.]

tue of an act of the state legislature, enacted February 24, 1806, which empowers the prothonotary of any court of record, on the application of any person, being the original holder (or assignee of such holder) of a note, bond, or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney-at-law or other person to confess judgment, to enter judgment against the person or persons who executed the same, without the agency of an attorney or declaration filed.

Such are the circumstances preceding and attending the entry of the judgments, so far as it is now necessary to state them; and the question to be answered is whether they exhibit a case which would justify me in declaring that the judgments were entered in violation of the letter or spirit of the bankrupt act? and clearly, if they were, it must be because of the provisions of the 35th section of that act. Those provisions are, that "if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge or assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void." I think it quite clear this provision has reference to payments, pledges, assignments, transfers, conveyances, or attachments made to satisfy or secure an antecedently existing debt or liability, and not to debts incurred for which a full consideration was received by the debtor when he gave the pledge or transfer, etc. In the latter cases nothing is withdrawn from the general creditors. The man who borrows money, and gives at the time of the loan a security for the repayment, does no act which can be hurtful to others having claims upon him; and I cannot think the bankrupt act intended to make such a transaction unlawful: so it has been substantially decided in Tiffany v. Boatman's Sav. Inst. [18 Wall. (85 U. S.) 375]. There it was said: "The preference at which the law is directed can only arise in case of an antecedent debt. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and therefore the debtor and creditor are alike prohibited from giving or receiving any security for a debt already incurred, if the creditor has good reason to believe the debtor to be insolvent. But the giving of securities when the debt is created is not within the law; and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid." It is unnecessary to quote the other clause of the 35th section of the act, known as the "Six-Months Clause"; for it is not claimed, nor indeed could it be, that the present case is affected by it.

Now it is to be observed that all the loans made by the defendant to the bankrupt, except one, and all the confessions of judgment except one, were made more than nine months prior to the adjudication of bankruptcy. The exception is of the loan and confession, dated February 6, 1873. The confessions of judgment were all given to secure debts contracted at the time they were given—loans then made to the debtor. It is true the entries of the judgments on the records of the court of common pleas were not made until June 26, 1873. Those entries, however, were not acts of the bankrupt. When they were made he was neither a party nor a privy to them in any such sense, I think, as to render them fraudulent because of collusion with his creditors. To avoid judgments obtained for debts of a bankrupt, under the clause of the thirty-fifth section of the bankrupt act quoted, it is necessary that several things should appear. Not only must the debtor have been insolvent, or contemplating insolvency, but he must have given the judgment, or procured it to be given, within four months before the filing of the petition by or against him, with a view to give a preference, and the creditor must have had reasonable cause to believe that the debtor was insolvent, and that the judgment was given in fraud of the provisions of the act. It seems to me quite evident that the view or intent to give a preference contemplated by the act, must be an intent existing in the mind of the debtor when the preference is attempted, that is, in case of a judgment when the judgment is entered. But how can a debtor be said to intend a wrongful preference at the time a judgment is obtained against him, when he is ignorant of the fact that a judgment is being obtained? That he may, years before, have contemplated the possibility that a judgment might thereafter be obtained against him; that years before he may have given a warrant of attorney to confess a judgment, or by his own confession, as in this case, have put it in the power of his creditor to obtain a judgment is, in my opinion, wholly unimportant to the inquiry, whether he had in view an unlawful preference within four months next prior to his bankruptcy? For it is a fraudulent intent existing within those four months which the act of congress has in view. I cannot, therefore, assent to the doctrine which is said to have been recognized in some cases, that if a debtor has given a bond with a warrant of attorney to confess a judgment, and afterwards, within four months prior to the filing of a petition in bankruptcy, by or against him, a judgment is entered by

virtue of the warrant, he must be regarded as having given the judgment, having in view at the time of its entry a preference for the judgment creditor. I agree that such a confession by his attorney is, in contemplation of law, his act, but I deny that it warrants any inference of an intended fraud on the bankrupt law. The present, however, is not such a case. The judgments were not entered by virtue of any warrant of attorney. They were confessed by the debtor when the loans were made, and the subsequent entries of record were made, not by authority of the bankrupt, but under the sanction of an act of assembly. Neither directly nor indirectly, therefore, was any act done by the bankrupt within four months next prior to his bankruptcy evidence of an intent to give a preference. For this reason, then, if for no other, I must hold there is no evidence before me that Berger had in view, on the 26th of June, 1873, when the eleven judgments were entered of record in the common pleas, a preference of Baldy over other creditors; hence the case is not covered by the 35th section of the act of congress. Nor do I think there is any satisfactory evidence that the defendant either knew or had reasonable cause to believe, that Berger was insolvent at the time the judgments were entered of record, or at any time prior to the entry, that Berger was insolvent in June, 1873, although the fact became quite manifest afterwards. But I do not discover any reason Baldy had for suspecting his solvency, until after the judgments were entered; none, indeed, until later judgments in favor of others were recorded. Berger was carrying on his business as usual, and that business was very large, amounting, as the proof is, to two hundred thousand dollars, between July, 1872, and July, 1873; there is no evidence that his entire solvency was doubted by any one until after the Baldy judgments were put on record. The Danville Bank continued to discount for him large amounts of his business paper until after July 1, 1873; and the bank in Danville did likewise, and in addition gave him accommodation discounts; and that Baldy knew, or even suspected, he was insolvent is incredible, in view of the facts that he suffered the judgments to remain unentered so long, and did not cause executions to be issued after they were entered, though the greater part of the debtor's property was personalty, and his real estate was greatly insufficient to satisfy the debt. No doubt the effect of the entry of the judgments was to precipitate Berger's failure and the stoppage of his business. But I have sought in vain for any evidence of apparent or probable insolvency before the entry. It has been argued that the loans were part due, and that this should have awakened suspicion in the defendant's mind. It would have some importance if the loans were evidenced by commercial paper, but I regard it as of no significance in view of the well-known habits of business in the interior of Pennsylvania.

It is contended also, that the defendant was the attorney of the bankrupt; he had made some collections for him, a very few, and had drafted some mortgages and agreements, but it does not appear that he was a confidential adviser at all, certainly not to such an extent as to warrant the conclusion that he must have known, or might have known, the debtor's pecuniary condition, or the extent of his resources and liabilities, on the whole, therefore, without regard to anything contained in the act of June 22, 1874 [18 Stat. 178], amendatory of the general bankrupt act.

I should be of opinion no case had been presented to justify my holding any of the eleven judgments of the defendant against the bankrupt to be invalid. But the amendatory act, it appears to me, relieves the case from all possibility of debate. Its 11th section enacts, that "nothing in the 35th section of the general act shall be construed to invalidate any loan of actual value, or the security therefor made in good faith, or a security taken in good faith on the occasion of the making of such loan." It is conceded the loans of money made by the defendant were made in good faith. and that the confessions of judgment in the bills single were taken in good faith when the loans were made. Beyond doubt, these confessions authorized the entry of the judgments at the time they were entered of record, unless the authority was invalidated by the 35th section of the bankrupt act; that it was not the amendment determines. The bill must therefore be dismissed with costs.

Case No. 11,180.

PIPER v. BROWN et al.

[Holmes, 20; 4 Fish. Pat. Cas. 175.] [1]

Circuit Court, D. Massachusetts. Oct., 1870.[2]

PATENTS — NEW AND USEFUL ART — METHOD OF PRESERVING FISH—ANTICIPATION—SINGLE EXPERIMENTAL USE—CONSTRUCTION.

1. A patent for a method of preserving fish or other articles in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber, is a patent for an art.

[Cited in Central Trust Co. v. Sheffield & B. Coal, Iron & Railway Co., 42 Fed. 110.]

2. An inventor or discoverer of a new and useful art may have a valid patent for his invention or discovery, although he is ignorant of the philosophical or abstract principle involved in the practice of the art.

3. In defence to a suit on a patent for a process, it is not sufficient to prove the existence

[1] [Reported by Jabez S. Holmes, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are taken from Holmes, 20, and the statement from 4 Fish. Pat. Cas. 175.]

[2] [Reversed in 91 U. S. 37.]

before the patented invention of an apparatus which could have been used so as to practise the patented process. It must appear affirmatively that such apparatus was actually so used.

4. A single experimental use of an apparatus, afterwards destroyed, in such way as to involve the practice of a certain process, does not prevent a subsequent original inventor or discoverer of the same process from having a valid patent therefor.

5. A patent is to be construed without reference to previous correspondence with the patent office in relation thereto or rejected applications therefor.

[This was a bill in equity filed to restrain the defendants from infringing two letters-patent, one for an "improvement in the method of preserving fish, and other articles," granted to complainant [Enoch Piper] March 19, 1861 [No. 31,736], and the other for an "improvement in apparatus for preserving animal and vegetable substances," granted to him August 5, 1862 [No. 36,107]. The nature of the invention, described in the first patent, consisted "in a method of preserving fish and other articles, by placing them within a chamber, and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed." The inventor says: "I do not profess to have invented the means of producing artificial congelation, nor to have discovered the fact that no decay takes place in animal substances so long as they are kept a few degrees below the freezing point of water; but the practical application of these to the art of preserving fish and meats, is a new and very valuable improvement." He then describes a large preserving box, inclosed in a larger box, the space between the two being filled with charcoal, or other non-conducting material. Through the inner box pass metallic tubes, open at the upper ends, for the introduction of the freezing mixture, provided below with escape pipes for the water or brine; and, after declaring that he does not desire to be understood as confining himself to the use of the specific apparatus described, he claims as follows: "Preserving fish or other articles in a close chamber, by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber, substantially as set forth." The second patent described an improvement in the apparatus described in the first; but, upon the hearing, it was not contended that the apparatus, as improved, had been used by the defendants.] [3]

Causten Browne, I. J. Cutter, and Jabez S. Holmes, for complainant.

B. R. Curtis and Edward Avery, for defendants.

SHEPLEY, Circuit Judge. The complainant, in his amended bill, avers: First, that he invented a certain improvement in the method of preserving fish and other articles, for which he obtained letters-patent of the United States, dated March 19, 1861. Second, that he afterwards invented "an improvement in apparatus for preserving animal and vegetable substances," for which he obtained letters-patent, dated Aug. 5, 1862. He also alleges that the respondents, without his permission or knowledge, have erected and used at Charlestown a certain apparatus for preserving fish and other articles, containing substantially the invention patented to him by the letters-patent dated March 19, 1861, and also that patented to him by the letters-patent dated Aug. 5, 1862.

The respondents, in their answer, deny that complainant was the original and first inventor either of the method described in his first, or the apparatus described in his second, patent. They also deny any infringement of the patents of complainant, and claim that the apparatus constructed and used by them at Charlestown was substantially different from complainant's inventions, and was constructed under and according to an invention made by Charles F. Pike, and secured to him by letters-patent dated June 12, 1866. They deny that there is in the Charlestown apparatus "any close chamber," but aver that the air of the preserving chamber comes directly in contact with the ice or freezing mixture.

It is unnecessary to go into a minute examination of that portion of the proof in the record which refers to the second patent of the complainant and the apparatus therein described, as complainant does not contend that the apparatus constructed by the respondents is included in the terms of the claims of the patent of Aug. 5, 1862, even if it does embrace the invention therein described.

The patent of March 19, 1861, is not for the apparatus therein described. It is not a patent for any "machine, manufacture, or composition of matter." It must be sustained, if it be sustained, as a patent for an "art." The statute term "art," used as it is in the statute in the sense of the employment of means to a desired end, or the adaptation of powers in the natural world to the uses of life, is perhaps a better term than the word "method" used by the patentee, or the word "process," the term of description used by the experts. A process eo nomine is not made the subject of a patent in the act of congress. An art may require one or more processes or machines in order to produce a certain result or manufacture. Corning v. Burden, 15 How. [56 U. S.] 252. It is for the discovery or invention of some practical method or means of producing a beneficial result or effect that a patent is granted, not for the result or effect itself. "Process" or "method," when used to represent the means of producing a beneficial result, are in law synonymous with "art," provided the means are not effected by mechanism, or mechanical combinations.

[3] [From 4 Fish. Pat. Cas. 175.]

The term "machine" includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result. But when the result or effect is produced by chemical action, or by the application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. Corning v. Burden, 15 How. [56 U. S.] 252.

It follows, from the law as expounded by the supreme court of the United States in Corning v. Burden [supra] and in O'Reilly v. Morse, 15 How. [56 U. S.] 62,—where the true distinction between a principle and a process is clearly defined in the explanations given by the court of the case of Neilson v. Harford [unreported],—that where a result or effect is produced by mechanical action, the patent can ordinarily only be for the mechanical appliances or means employed: where the result is attained or effect produced by chemical action, by the operation or application of some element or power of nature, or of some property in matter, or of one substance to another, then the patent may be for the art, process, or method. It is essential to the validity of the process as an invention, to show how it may be adapted to practical use. In showing this, the inventor may describe mechanical means of applying, or peculiarly shaped vessels for containing, any of the ingredients used in his process or art. But they constitute no part of his invention. Another person may discover new and useful means of applying or using the inventor's process, and be entitled to a patent for that improvement, without the right to use the process. So the inventor himself may discover such new means or invent new appliances, which may be the subjects of a patent to him, separate and apart from his patent for the art itself.

The complainant's bill claims as his invention an "improvement in the method of preserving fish and other articles." The method claimed is described as "a method of preserving fish or other articles, by placing them within a chamber and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed." The patent describes it as "a new and useful method of preserving fish." The claim in the patent is, "preserving fish or other articles in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber, substantially as set forth."

Although a different construction is contended for by the respondents, and even the expert examined by the complainant seems to construe the claim and describe the invention in some respects inaccurately, the claim appears to the court to describe clearly, and in language incapable of misconstruction, what is claimed as the new and useful art or method. It is not that the patentee claims to have discovered the fact that no decay takes place in animal tissues as long as they are kept a few degrees below the freezing-point of water, nor does he claim to have invented any means of producing artificial congelation. The active agent for producing congelation, and the effect of congelation on animal substances, were well known. But he claims that he was the first to discover and reduce to practice an art of producing and continuing this artificial congelation upon animal substances, enclosed in a chamber with non-conducting walls, which chamber was a close chamber; that is, having no communication with the outer or surrounding atmosphere, and so constructed also that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed. This claim is not limited to a method of supplying and renewing the frigorific mixture without exposing the animal substances in the preserving chamber and the atmosphere itself in the preserving chamber to change of temperature from contact with the outer atmosphere, while the active agent of congelation—the frigorific mixture—is being supplied. It proceeds upon the further and broader ground, that an injurious effect upon the animal substances to be preserved results from the presence in the preserving chamber itself of the salt and ice, or other freezing mixture, affecting the atmosphere of the preserving chamber. The patentee proposes to preserve animal substances in an atmosphere not materially affected by the temperature of the external atmosphere surrounding the chamber, because the atmosphere in which the animal substances are placed is confined by non-conducting walls in a close chamber, and, what is more important, in an atmosphere "freezing," because reduced to a low temperature by contact with the exteriors of the pipes containing the frigorific mixtures, and "dry," because free from contact with the freezing mixture itself. His claim is for the method of "preserving fish or other articles in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber, substantially as set forth."

It becomes necessary to determine the date of the complainant's invention. It clearly appears, from the evidence in the case, that in June, 1858, the complainant devised an apparatus by which the freezing mixture should be kept in such a way as to be separate from the atmosphere of the preserving chamber. The preserving chamber in this apparatus consisted of a hogshead surrounded by a casing of wood, leaving a space of a foot or more between the casing and the hogshead, which was filled with some non-conducting substance. A cast-iron tube of about ten inches in diameter was placed in the centre of each hogshead, fastened to the

lower head by a flange, and making a water-tight joint between the iron and wood where it passed through the head of the hogshead, and also a water-tight joint between the lower end of the vertical iron tube and the bottom of the casing. The upper end of the tube projected six inches beyond the cover of the hogshead when the cover was on.

It is not seriously controverted that the complainant devised and constructed this apparatus in June, 1858. Nor can it be successfully urged that it did not in fact separate the air of the preserving chamber from contact with the freezing mixture. It is, however, claimed that Piper at this time had not conceived the idea of any advantage in such separation, apart from the convenience of renewing the supply of the freezing mixtures without admitting the surrounding atmosphere into the preserving chamber. This is equivalent to saying, that, while his contrivance accomplished the result of preserving fish and animal substances in the mode set forth in his caveat, and subsequently in his specification and claim, a useful result of a new process, he was unacquainted with the philosophy of his discovery. Upon the hypothesis that this were so, that by a series of experiments he had discovered only that this process, applied exactly in the mode described, produced the desired result, and the process was new and the result useful, but that he did not understand why the mixture of salt and ice produced a freezing mixture, or why the effect of contact of that freezing mixture with the atmosphere surrounding the fish to be preserved was injurious; yet if he had discovered the practical mode, and contrived the practical means of accomplishing the result, he might be entitled to a patent for his new and useful art, although ignorant of the philosophical or abstract principle which was involved in the exercise of the art itself. The discovery of the philosophical or abstract principle alone would not have been the subject of a patent. The thing to be patented is not the elementary principle, but the principle applied to some art, machine, manufacture, or composition of matter. Earle v. Sawyer [Case No. 4,247].

Applying these principles to the facts in this case, and after a careful consideration of the evidence, we are not satisfied that there is any sufficient proof in the case that any other party had anticipated the complainant's invention. In the months of June and July, 1858, Piper appears to have reduced to practice his invention, by freezing fish and preserving them until the following December, in the apparatus constructed by him in June.

Whitson's apparatus was not constructed and used until the fall of 1860. There is much conflicting testimony in relation to the use by Joseph H. Racey of an apparatus like that described in the complainant's second patent. As the complainant does not in this case rely upon his second patent, it becomes immaterial to determine whether the apparatus which Racey claims that he constructed in a cellar under Centre Market in New York was constructed, as he claims, in the latter part of 1859, or, as the complainant contends, in 1862. If we were to assume the truth of Racey's statement, that it was built in the latter part of 1859, that is more than a year after Piper's invention of the process described and claimed in his first patent.

John Good obtained a patent, Aug. 17, 1843, which was reissued Sept. 12, 1854, for preserving the bodies of deceased persons in a cold-air chamber, and not allowing the ice to come into immediate contact with the body. The apparatus patented by Good, and used by him, and exhibited in this case, was not designed and intended to prevent any contact of the atmosphere surrounding the body with the freezing mixture or with the ice. It was designed to prevent the ice or freezing mixture from coming in contact with the body itself. But the contact of the atmosphere surrounding the body with the ice or ice and salt in the bottom of the pan was provided for by the perforated false bottom upon which the body rested. This false bottom prevented the contact of the body itself, and secured the contact of the atmosphere surrounding the body with the freezing mixture, when a frigorific mixture was used in the bottom of the pan.

Good's apparatus was capable, however, of being used in a manner different from the use described in his patent, or in the directions given for its use by him to purchasers of his apparatus. By omitting the use of any freezing mixture in the bottom of the pan, and using it only in the receptacle above the preserving chamber in such a manner that the air of the preserving chamber did not come in contact with the ice and salt above, it was capable of a use which involved the practice of the process described in the complainant's first patent.

But this patent being for a process, and not for any apparatus, to deprive the complainant of the benefit of his invention it is not sufficient to show that any previously existing apparatus could have been used to practice the complainant's process. It must appear affirmatively to the satisfaction of the court or jury that it actually was put to such practical use before the date of Piper's invention.

One witness, John Peak, testifies substantially to such a use of the Good apparatus; but he cannot fix the date of his purchase earlier than 1857, and his use of it in any mode until two or three years after he purchased it, and fixes no date of the use of it in this particular mode. The testimony of Swartz, the other witness, is also indefinite as to date, and leaves it, to say the least, uncertain whether he ever reduced the atmosphere in the chamber below the freezing-point of water. This object was not to

freeze the body so as to preserve it for any length of time, but only, by partially freezing the surface, to arrest the progress of decomposition and prevent offensive exhalations.

Charles F. Pike, in the course of sundry experiments which he made with refrigerators, appears in one instance to have arranged an apparatus with which the plaintiff's process was once practised; but it was used only once as an experiment, and abandoned, and the parts used for other purposes. As the knowledge of this experiment was not communicated to Piper, and it was a mere experiment thus abandoned, it could be no obstacle to the right of Piper to take out a patent for his process. Cahoon v. Ring [Case No. 2,292].

The process of Benjamin and Grafton, described in their English patent, enrolled July 27, 1842, differs from the complainant's in many of its features, but particularly in this essential feature: that in the Benjamin and Grafton patent there is no description that the freezing mixture contained in the vessels in the preserving chamber is to be kept free from contact with the atmosphere of the chamber itself.

It is clear that the language of Piper's patent excludes the use of salt and ice in the same chamber with the fish to be preserved. A statement that he contemplated such use appears to have been inserted in his original application for his first patent, and stricken out from the amended specification on which the patent was granted. Such a use formed no part of his invention. In his original application, this use of salt and ice was confined to the box for freezing, and was not made applicable to the chamber for preserving for a length of time the substances previously congealed.

The patent must be construed without reference to the previous correspondence and previously rejected applications, which cannot aid in its construction, especially as the patent issued correctly describes the complainant's invention.

The apparatus, as first used by the defendants at Charlestown, contained a preserving chamber, the air of which had no contact with the freezing mixture, and it was used for the purpose of preserving animal substances by reducing the air in that chamber, by means of the freezing mixture, to a temperature below the freezing-point of water, and in all respects appears to have involved the use of the process patented to the complainant.

The complainant is entitled to an injunction, and to an account, as prayed for in the bill of complaint. The cause is to be referred to a master to ascertain the amount. Let the decree be prepared accordingly. Decree for injunction and account.

[NOTE. For hearing on exceptions to the master's report, see Case No. 11,181. This case was taken by appeal to the supreme court, where the decree of this court was reversed. 91 U. S. 37. For other cases involving this patent, see Piper v. Moon, Case No. 11,182; Piper v. Moon, 91 U. S. 44; Piper v. Brown, Case No. 11,181.]

Case No. 11,181.

PIPER v. BROWN et al.

[Holmes, 196; 6 Fish. Pat. Cas. 240; 3 O. G. 97.] [1]

Circuit Court, D. Massachusetts. Jan. 21, 1873.

PATENTS—INFRINGEMENT—RECOVERY OF PROFITS—FINDING OF MASTER—INTRODUCTION OF FURTHER EVIDENCE.

1. The profits recoverable in equity by the owner of a patented invention from an infringer, are such only as result directly and immediately from the infringement. Remote and contingent profits are not recoverable.

2. The defendants, in a suit in equity, by their use of the complainant's patented process of preserving fish, were enabled to withdraw fish from the market, and thus obtain a higher price for their unpreserved fish than they would otherwise have received. *Held*, that the profits resulting from such increased price were too remote and indirect to be charged against the defendants as profits realized from their infringement.

3. The finding of a master, upon a question of fact as to the construction of an apparatus, will not be reversed where it is based not only upon evidence before him not fully reported to the court, but also on his own examination of the apparatus, made by consent and in the presence of the parties.

4. The use of a certain apparatus by the defendants having been adjudged an infringement of the complainant's patent for a process, they claimed, on the accounting, to have so altered it that its use thereafter no longer infringed the patent; and exhibited to the master such portions of it as were not in use, but, though requested, refused to exhibit the portions which were in use. *Held*, that the master was justified in finding that the defendants still infringed the patent by the use of the apparatus.

5. In estimating the profits realized from infringement of a patent, compensation is not allowed the infringer for his time and labor.

6. After the master had submitted a draft of his report to counsel for the parties, the defendants asked leave to introduce further evidence. *Held*, that the request was rightly denied by the master.

[This was a bill in equity by James Brown and others against Enoch Piper. The court held complainant entitled to an injunction and account. Case No. 11,180.]

Hearing on exceptions to a master's report of profits made by the defendants from their infringement of letters-patent [No. 31,736] granted the complainant March 19, 1861, for a process of preserving fish, &c. A ruling not specifically mentioned in the opinion was as follows: After the master had submitted a draft of his report to the counsel for the parties, the defendants asked leave to introduce further evidence, which request the master denied, holding that the evidence was offered too late.

Causten Browne and Jabez S. Holmes, for complainant.

[1] [Reported by Jabez S. Holmes, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission.]

B. R. Curtis and Edward Avery, for defendants.

[The respondents' infringing business was one occupying but a portion of each year. At the close of each season the accounts were closed, and at no time did the business of one year run into or connect itself with that of another. Under these circumstances, the master reported disallowing the claim of the defendants to deduct the amount of a loss alleged to have been suffered in the business of 1869 from the profits made in the other years.] [2]

SHEPLEY, Circuit Judge. Exceptions were duly taken to the report of the master in this case, by both complainant and defendants. Complainant excepts that the master finds as a fact that the defendants, by preserving fish by the patented process and withdrawing them from the market during the season of abundance, have been enabled to demand, and have received, a large price for their green unpreserved fish remaining in their hands for sale in the market; that they have received for such green fish one and one-half cent per pound more than they would have done had they not withdrawn from the market the preserved salmon; and that the amount of green fish on which such advanced price was received was 413,612½ pounds, making a total profit of $6,204.19; and he claims that the master erred in disallowing the item of $6,204.19, profits resulting from the enhanced price of green fish.

The master finds that the gain and profit to the defendants, resulting from said enhanced price of one and one-half cent per pound on the sales of green fish in the said year, is not gain or profit with which defendants are to be here charged, because it is an incident of trade too remote and indirect to be charged in this account.

Where profits are recoverable by the owner of a patented invention against an infringer, they are such profits or gains as result directly or immediately from the wrongful act of the infringer. Remote and contingent profits or gains, depending upon the result of successive schemes or investments, are never allowed. The resultant profits are ordinarily best arrived at by determining the difference between the actual ascertained cost and the actual ascertainable value to the infringer, which value, in case of sales by him, is the price obtained or the market value of the thing sold. Profits contingent upon future bargains or speculations, or future states of the market, are not estimated, and are not recoverable. The distinction between such profits as are direct and immediate, and those which are remote and contingent, is recognized in Masterton v. Mayor, etc., 7 Hill, 61, and Philadelphia, W. & B. R. Co. v. Howard, 13 How. [54 U. S.] 307.

The second exception of the complainant is to the finding of a fact by the master. The master found as a fact, that, by the alterations made during the season of 1870, in defendants' apparatus, the atmosphere of the preserving-chamber mingled with the atmosphere of the chamber containing the freezing-mixture, making practically one atmosphere. The whole evidence upon which the master based this finding is not reported. In fact, the report leaves it to be inferred, that, upon this question, in addition to the light afforded by the evidence of experts introduced by the defendants, the master was aided by the evidence of his own examination of the premises at Charlestown, at an inspection of them made by him in the presence and by consent of the parties. Under such circumstances, the finding of the master on a question of fact will not be reversed. Sparhawk v. Wills, 5 Gray, 423; Boston Iron Co. v. King, 2 Cush. 405; Adams v. Brown, 7 Cush. 222.

Defendants except to the master's report as to his findings in respect to the operations of the year 1870. The defendants having been enjoined by the court from the use of their Charlestown apparatus as used by them in 1866 and 1867, continued during the years 1868 and 1869 to preserve fish by the complainant's process in a similar apparatus situated in Cambridge, and belonging to other parties. Such use of the Cambridge apparatus having been also adjudged an infringement, they returned, in the year 1870, to the use of the building in Charlestown. The master finds that the apparatus at Charlestown was originally so constructed, that its use by them, for the purpose of freezing and preserving fish, was an infringement of the complainant's patent. They attempted to satisfy the master, and did satisfy him, that at some time between the 20th of June and the 3d of December, 1870, they so altered their apparatus that it could be used without infringing complainant's patent. Whether it was so altered before Dec. 3, 1870, they did not prove. The finding of the master, that the use of the apparatus so altered would not infringe the complainant's patent, was certainly as favorable for the defendants as the evidence would justify. The expert who testified upon the subject did not believe that it made any practical difference in the process whether the openings between the two chambers were large or small. He rejects the whole theory upon which complainant applied for his patent, and utterly ignores any utility in the process of the plaintiff, so far as it is distinguishable from other known processes and patented to him. From his point of view, the communication between the atmosphere of the two chambers being productive of no change whatever, being entirely immaterial (except during the time of replenishing the chamber containing the freezing-mixture), the smallest orifice between the two would have been as available to take the apparatus out from the pale of

[2] [From 3 O. G. 97.]

infringement as the largest; and this he frankly states, in substance, in his testimony. Defendants could not reasonably object that a finding was not sufficiently favorable to them based upon this evidence. In coming to this conclusion, the master was unquestionably aided, if not governed, by the evidence of his own senses when he made the personal inspection. But at Charlestown he did not witness the process. He only saw a part of the apparatus not in use. Defendants contend that the master having found that the alterations made at some time prior to Dec. 3 were such that the use of the altered apparatus to preserve fish would not infringe the patent, the burden of proof was then upon the complainant to show that the apparatus when used was restored to its former state. The answer to this position is, that the master has never found any change in the process or in the apparatus in use. Defendants exhibited to the master such portions of the apparatus as were not in use, but neglected, and on request refused, to exhibit the chamber in which the fish of the catch of 1870 was being preserved. The patent is for a process, not for an apparatus. The exhibition of the modified apparatus not in use was of little moment compared to the exhibition of that part of the apparatus in which the process was going on. This apparatus, or this portion of the apparatus, in which defendants preserved salmon in Charlestown in 1870, was never shown to the master to have contained the alterations in the summer of 1870, at the time the freezing and preserving were in process.

No commissions were paid by defendants for selling the fish preserved by them. It is not customary in estimating profits from an infringement to allow the infringing parties compensation for their own time and labor. The master's decision rejecting the allowance of commissions is sustained. His report is also sustained upon the other points to which exceptions are taken, for the reasons stated by him in his report.

Decree accordingly.

[For other cases involving this patent, see note to Piper v. Brown, Case No. 11,180.]

Case No. 11,182.

PIPER v. MOON et al.

[10 Blatchf. 264; 6 Fish. Pat. Cas. 180; 3 O. G. 4.] [1]

Circuit Court, S. D. New York. Dec. 16, 1872.[2]

PATENTS—NOVELTY—INFRINGEMENT.

1. The claim of the letters patent granted to Enoch Piper, March 19th, 1861, for an "improvement in method of preserving fish," namely, "preserving fish, or other articles, in a close chamber, by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber, substantially as set forth," is void, for want of novelty.

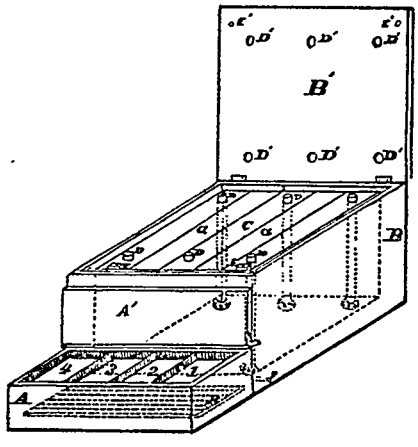
2. Whenever an article, already frozen, is preserved in a frozen state, in a close chamber, by means of a freezing mixture, which has the effect to keep the frozen article in such frozen state, while, at the same time, such mixture has no contact with the atmosphere of the preserving chamber, the claim of the patent is infringed.

[3. Cited in Burke v. Partridge, 58 N. H. 351, to the point that, although intention is the primary rule of construction, yet language invoked to support a particular theory must be such as is fit, when compared with the whole instrument, to express the imputed intention.]

[1] [Final hearing upon pleadings and proofs.

[Suit brought [by Enoch Piper against George T. Moon and others] on letters patent [No. 31,736] for "improvement in the method of preserving fish," granted to complainant March 19, 1861.

[A suit upon the same letters patent will be found reported in the case of Piper v. Brown [Case No. 11,180].



[The above engraving shows the apparatus used by complainant, and described, by words and drawing, in his letters patent. A is a box of wood, or other suitable material, in which the fish are laid, in small quantities, on a rack, R. This box is surrounded by a packing of charcoal or other suitable nonconducting material. 1, 2, 3, 4 are metallic pans, which, being filled with a freezing mixture, such as salt and ice, are then set over the fish, and the cover A is shut upon them. C is the large preserving-box in which the fish are afterward packed, and B the larger box in which C is inclosed. The space between these boxes is designed to be filled with charcoal or other non-conducting material. D, D, D are metallic tubes, opening at the upper ends, for the introduction of the freezing mixture; a, a are slats, which may be removed at pleasure, for the purpose of putting in or taking out the fish. B' is the cover of the outer box, and is provided with holes, D', through which the tubes may project, so as to be

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are taken from 10 Blatchf. 264, and the statement from 6 Fish. Pat. Cas. 180.]

[2] [Affirmed in 91 U. S. 44.]

[3] [From 6 Fish. Pat. Cas. 480.]

charged with the freezing mixture when the box is closed. The mode of using this apparatus is more fully described in the opinion of the court below.] [3]

Causten Browne and Jabez S. Holmes, for plaintiff.

George Gifford, for defendants.

BLATCHFORD, District Judge, in deciding this case, said, in substance: The patent to the plaintiff, granted March 19th, 1861, is for an "improvement in the method of preserving fish." The specification says: "The nature of my invention consists in a method of preserving fish, and other articles, by placing them within a chamber, and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed. The most important application which I propose to make of my invention is for preserving salmon, which are only taken in large quantities in high northern latitudes, in summer, so remote from our large cities, that they can be made available in a fresh state only by artificial congelation. Hitherto, the only method in use for preserving this kind of fish in a fresh state, has been to pack them with crushed ice in barrels or boxes. This method, however, owing to the melting of the ice, and the consequent moistening of the fish, fails to preserve them fresh and good for more than a month, at most; whereas, by my new method and treatment, they can be kept as fresh and sweet as when first caught, and for any desirable length of time, even for years. I do not profess to have invented the means of producing artificial congelation, nor to have discovered the fact that no decay takes place in animal substances, so long as they are kept a few degrees below the freezing point of water; but, the practical application of these to the art of preserving fish and meats, as above described, is a new and very valuable improvement. The apparatus for freezing the fish, and keeping them in a frozen state, may be constructed in various ways and of different shapes. The apparatus shown in the drawing, however, will suffice to illustrate the principle and mode of operation." The specification then describes, with references to the drawings, a method of freezing the fish, by laying them, in small quantities, on a rack, in a box of wood, or other suitable material, which is surrounded by a packing of charcoal, or other suitable non-conducting material. Metallic pans, filled with a freezing mixture, such as salt and ice, are then set over the fish, and the cover is shut upon them. The specification proceeds: "The temperature in the box soon falls to ten or fifteen degrees below the freezing point of water, and, in about twenty-four hours, the mixture being changed once in twelve hours, the fish will be frozen completely through. After being thus frozen, the fish or meats may, if desired, be covered with a coating of ice, by immersing them a few times in ice-cold water, or by applying the water with a brush, or swab, several times, forming a coat of about one-eighth of an inch in thickness. To prevent the ice from cracking off, I then apply to the fish, when they are to be kept an unusual length of time, a cover of cloth, and, in the same manner, cover the cloth with another coating of ice; or, they may be coated with gum-arabic, India-rubber, gutta-percha, tin-foil, or any suitable substance, either in combination or separately, that will effectually exclude the air, and prevent the juices from escaping by evaporation, thereby preserving the same plump and fresh appearance as when first frozen." The specification then goes on to say, that the fish are then packed closely together, in a large preserving box, which is enclosed in a still larger box, the space between the two boxes being filled with charcoal, or other non-conducting material, to exclude the heat; that metallic tubes pass through the inner box, which are open at the upper ends, for the introduction of a freezing mixture, the lower extremities being formed with flanges screwed to the bottom of the box; that a small tube leads from the bottom of each tube to the outside of the outer box, to draw off the brine from the tubes; that the tubes project, at the top, through the cover of the outer box, when it is shut down, so that they may be charged with the freezing mixture, without opening the box; and, that, by keeping the tubes filled with the mixture of salt and ice, the temperature of the preserving chamber can be maintained, for any length of time, below the freezing point, and fish surrounded by the dry and freezing atmosphere will be preserved as fresh and good as when first caught, and for a much longer period than by any other method. The patentee adds: "I do not desire to be understood as confining myself to the use of the specific apparatus above described, nor to the use of either or both the preliminary processes of freezing and coating, but I have described the mode of operation which, by experience, I have found best for preserving the most delicate varieties of fish. In the case of meats, it is not necessary to resort to the coating process, especially beef and pork, preserved for salt packing, in warm weather, which can be done by this treatment, with no more loss than in the best winter weather, while the cold pickle, or brine, of the dissolving salt and ice, is ready made, and may be drawn off, as required, to pickle the barrels, after packing the meats," &c. The claim is in these words: "Preserving fish, or other articles, in a close chamber, by means of a freezing mixture, having no contact with the

[3] [From 6 Fish. Pat. Cas. 480.]

atmosphere of the preserving chamber, substantially as set forth."

In this specification, as is usually the case, the patentee first sets forth the nature of his invention, by stating in what it consists; and we expect to find that the claim corresponds with such statement of the nature of the invention, whatever may be set forth in the intervening descriptive part of the specification. The claim in the present case is not so worded as not to cover a process, or subprocess, less than the entire process, or series of processes, described in the specification.

The statement of the nature of the invention says that it consists in a method of "preserving" fish and other articles, by placing them within a chamber, and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the "preserving" chamber, and that of the vessels in which the freezing mixture is placed. The claim is for "preserving" fish or other articles, in a close chamber, by means of a freezing mixture, having no contact with the atmosphere of the "preserving" chamber, substantially as set forth. What is the meaning of the word "preserving," as so used, and what is the chamber that is so referred to as the "preserving" chamber? Manifestly, the word refers to the process to which the article is subjected in the chamber between the interior of which and the interior of the vessels containing the freezing mixture, there is no communication. That chamber is the preserving chamber. That chamber may be used to freeze the article by means of a freezing mixture, applied as stated, as well as to preserve it afterwards by means of a freezing mixture, applied as stated; and the claim may cover the process when the chamber is used both to so freeze and so preserve the article, and also when it is used only to so freeze the article, and also when it is used only to so preserve the article. The article is preserved, when it is only frozen in the chamber. It is preserved, when it is only kept in the chamber, after being first frozen elsewhere. It is preserved, when it is frozen in the chamber, and then continues to remain in the chamber. That this is the scope of the claim is shown by the fact, that the specification speaks of "the preliminary processes of freezing and coating," and states that the patentee does not confine himself to the use of either or both of those preliminary processes. The preliminary process of freezing referred to, is described as one of freezing the article in a box, where the open pans of salt and ice are shut up in the box with the article. It is not the process referred to in the claim, which expressly requires that the article shall be in a close chamber, and that the freezing mixture shall have no contact with the atmosphere of that chamber. Therefore, whenever an article, already frozen, is preserved in a frozen state, in a close chamber, by means of a freezing mixture, which has the effect to keep the frozen article in such frozen state, while at the same time such mixture has no contact with the atmosphere of the preserving chamber, the claim of the patent is infringed, provided that it is done "substantially as set forth" in the specification. Full effect must be given to the words, "substantially as set forth." How is it set forth that the process must be practiced? It is not required that there shall be no contact between the article that is undergoing preservation and the metal which is interposed between such article and the freezing mixture. On the contrary, the specification says, that the fish are "packed closely together" in a box, directly through which run the metallic tubes which contain the freezing mixture. If the fish are thus packed closely together, some of them must be thus packed around the tubes. There is no direction that none of them are to be in contact with the tubes. It is true, that the specification speaks of the fish as being preserved because surrounded by a dry and freezing atmosphere. They will be surrounded by so much of a dry and freezing atmosphere as can surround fish packed closely together in contact with the tubes. All the atmosphere there is will be dry and freezing.

With this view of the claim, the invention covered by it, so far as preserving the frozen article is concerned, (and the claim covers that by itself,) is anticipated by what is proved in regard to the use of the process of preserving frozen ice cream. Anterior to the patentee's invention, ice cream, frozen, was preserved in a frozen state, in a close chamber, by means of a freezing mixture which had no contact with the atmosphere of the chamber. The frozen ice cream was thus preserved in a frozen state for a length of time, in one instance, as is shown, twenty-four days, and it might have been preserved an indefinite length of time by renewing the freezing mixture. The freezing mixture surrounded the metallic vessel containing the frozen ice cream, instead of being in pipes which ran through such vessel; but that made no difference in the process. Some of the frozen ice cream was in contact with the metal interposed between it and the freezing mixture, as some of the fish, in the practice of the plaintiff's process, are in contact with the metal interposed between them and the freezing mixture. All the atmosphere there was in the vessel containing the frozen ice cream was dry and freezing. The frozen ice cream was, in its frozen state, not a liquid, but a solid. It was no more a liquid than a frozen fish is a liquid. A fish, before being frozen, consists largely of watery particles. If it did not, it could not be frozen, for it is the watery particles in it that are frozen. What is frozen in the ice cream, and what is frozen in the fish, is the same thing, the liquid parts. Those are proportionally greater in the unfrozen ice cream than in the unfrozen fish. That is the only difference.

The specification of the patent, in describ-

ing the process claimed, describes the process previously used for preserving frozen ice cream. All that the patentee has done, according to his claim, is to take the frozen ice cream out of the vessel, and put into it a fish or other article, frozen or unfrozen. That is no patentable invention. If the process of preserving the frozen ice cream had not existed previously, the use of such process, in the manner stated, would be within the claim of the patent, and would be an infringement of it. The prior use of such process must, therefore, be an anticipation of the claim of the patent, at least, in a case like this.

The patentee may be the first person who has practically succeeded in introducing into the market, at all seasons, salmon as fresh as when first caught, and may thus have supplied a great desideratum, and have established a business that is commercially profitable. He may have invented something, in that connection, which is capable of being protected by a patent, and he may have described in this specification, or shown in the model or drawings accompanying it, something which may be claimed, and well claimed, as an invention, and which may be secured to him by a reissue. But, the difficulty with the present claim is, that it is too broad, and that it covers nothing but a process, and that a process practised before, substantially in the manner set forth in the specification.

For these reasons, the bill must be dismissed, with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 91 U. S. 44.]

[For other cases involving this patent, see note to Piper v. Brown, Case No. 11,180.]

Case No. 11,183.

PIPSICO v. BONTZ.

[3 Cranch, C. C. 425.] [1]

Circuit Court, District of Columbia. April Term, 1829.

INDEBITATUS ASSUMPSIT FOR WORK AND LABOR—COMPETENCY OF COLORED MAN AS WITNESS.

1. If work and labor be done according to special agreement, the plaintiff may recover upon a general indebitatus assumpsit.

2. In Alexandria, a colored man is not a competent witness for or against a white man.

Indebitatus assumpsit for work and labor.

The plaintiff offered evidence of a special agreement for $100 a year, and that the service was performed according to the agreement.

The defendant's counsel objected, that there was no count upon the special agreement.

THE COURT overruled the objection on the authority of the Bank of Columbia v. Patterson, 7 Cranch [11 U. S.] 299.

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

Mr. Taylor and Mr. Neale, for plaintiff.

Mr. Hooe and Mr. Hewitt, for defendants.

The defendants' counsel offered a free mulatto as a witness for the defendants.

Mr. Taylor, for plaintiff, objected; and cited the Virginia laws (Rev. Code, p. 187, December 17, 1792, c. 103, § 5), that "no negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes or mulattoes; or in civil pleas where negroes or mulattoes alone shall be parties."

THE COURT rejected the witness.

PITCAIRN (LIENOW v.). See Case. No. 8,341.

Case No. 11,184.

In re PITMAN.

[1 Curt. 186.] [1]

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

CONTEMPT—APPLICATION FOR ORDER TO OFFICER OF COURT TO PAY OVER MONEY—EVIDENCE—SWORN ANSWERS—ACT OF MARCH 2, 1831.

1. An application to the court to compel one of its officers to pay over money due from him in his official capacity, is a proceeding as for a contempt, and the court has jurisdiction under the act of congress of March 2, 1831 [4 Stat. 487].

[Cited in Re May, 1 Fed. 743; U. S. v. Anon., 21 Fed. 768, 770; Re Manning, 44 Fed. 276.]

[Cited in Cartwright's Case, 114 Mass. 239.]

2. In such a proceeding the sworn answers of the officer are evidence in his favor.

[Cited in State v. Matthews, 37 N. H. 456.]

Burrington Anthony, lately marshal of the United States for the district of Rhode Island, filed his petition, stating that, as marshal, he received from the treasury of the United States, and paid to [John T. Pitman] the clerk of this court, large sums of money, from time to time claimed by him for fees due to him from the United States; that subsequently, on a settlement of his accounts with the treasury, various items of the clerk's accounts, which had been thus paid, were disallowed, and the petitioner has thus overpaid to the clerk, the sum of twenty-five hundred dollars. He prays for an order to show cause, and the appointment of a master to audit the account, and for an order on the clerk to repay what may be found due. The answer of the clerk admits that he rendered to the petitioner charges against the United States, which, on being audited at the treasury department, were disallowed, amounting to the sum of $2,293.46. But he denies that he had received from the marshal any money on account of those charges. He states that he received from the marshal certain memorandum checks, amounting to the sum of $4,424.92, on account of the bills of cost, which embraced the rejected items; that

[1] [Reported by B. R. Curtis, Esq.]

from time to time the marshal paid various sums on account of these checks, amounting in all to $2,100, and leaving due thereon the sum of $2,324.92, which exceeds the amount of the items disallowed. He annexes copies of these checks, and states that the originals have been lost since the filing of the marshal's petition. An order of reference to a master to audit the accounts was made by the late Mr. Justice Woodbury, and the master having reported, the matter came on to be heard upon exceptions to the report. The other material facts will appear in the opinion of the court.

Mr. Jenckes, for petitioner.
Joseph S. Pitman, for respondent.

CURTIS, Circuit Justice. The first exception is "because the master has assumed that the terms of his commission confer on him no authority, to go into the private personal affairs of the parties, but must be confined to accounts between them, arising from their official capacities as officers of the court." This exception must be overruled. Not only the terms of the order of reference, but the nature of the proceeding, required the master to limit his action to accounts growing out of the official relations and conduct of the parties, as will be more fully stated in disposing of another exception.

The second exception is: "Because the master determined, there was not sufficient evidence of the existence and making of the checks in question, upon which to found a right to introduce secondary evidence of their loss and their contents." Some evidence of the existence and loss of these checks was necessary to be given to obtain a right to offer secondary evidence of their contents. But, with the exception of the one for forty-three dollars, the instruments are not negotiable, being payable on a contingency which affects both the time and the amount. Bayley, Bills & N. 1. They are writings of such a character as to be likely to remain in the personal custody of the clerk, and the loss of which, therefore, would not probably be within the knowledge of any third person. His affidavit, therefore, of their loss would be sufficient, uncontrolled, to prove their loss, if it were a trial at law; and though, on such a trial, some evidence must be given to the court of the existence of the instrument, before secondary evidence is offered to the jury of its contents, yet on a hearing by a master, this is wholly unnecessary, because all the evidence is offered to him, and if the secondary evidence proves the contents, it necessarily proves the existence of the instrument. In this case the master did receive and consider the secondary evidence, and has reported that there was not sufficient evidence of the existence of loss of checks, to found a right to introduce secondary evidence of their contents. If I considered the evidence clearly insufficient to prove the contents of the checks, I might not deem it necessary to order the report to be recommitted, on account of an erroneous ruling respecting the admissibility of this evidence; but, considering the nature of this proceeding, and the evidence which was before the master, I am of opinion, that he has fallen into an error which affects the substantial rights of the respondent.

The master did not treat the answer of the clerk as evidence. This was erroneous, as will plainly appear when we consider what this proceeding is. It is an application to the court to exercise its summary jurisdiction over its own officers, to restrain one of them from doing a wrong in his official capacity. Such a wrong is considered to be a contempt of court, and the court has power to proceed against and punish for it. This jurisdiction is expressly saved to the courts of the United States by the act of congress of March 2, 1831 (4 Stat. 487), which provides, that the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases, except (among others) the misbehavior of any of the officers of the said courts in their official transactions. It is in the nature of a criminal proceeding, and though often resorted to for the protection and enforcement of private rights, such as the payment of money improperly withheld from suitors by officers of the court, and the like, and though its modes of proceeding may be somewhat varied when the object is to afford a summary remedy for the violation of a private right; yet the character of the proceeding should not be lost sight of, and especially it should not be so varied as to deprive the party proceeded against of any substantial right.

Now one of the most important privileges accorded by the law to one proceeded against as for a contempt, is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this, that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact, by any other evidence. U. S. v. Dodge [Case No. 14,975]. "If the party can clear himself upon oath he is discharged." 4 Bl. Comm. 286, 287. Whether this rigid rule would be applied to that class of these cases which Blackstone (4 Comm. 285) says "is to be looked on rather as a civil execution for the benefit of the injured party," it is not necessary here to decide. There are certainly precedents for the introduction of other kinds of proof. Kilpatrick v. Vandiver, 2 Rep. Const. Ct. 341; Summers v. Caldwell, 2 Nott & McC. 341; Taylor v. Howren, 1 McCord, 418; Daniel v. Capers, 4 McCord, 237; U. S. v. Mann [Case No. 15,716]; Justices of Baldwin Co. v. Bivins, 6 Ga. 575.

The order of reference in this case must have been made by my learned predecessor upon the footing that evidence dehors the

answer was admissible, and I feel no disposition to disturb this order, even if there was any application by either party to do so, which there is not. But I cannot doubt that at every stage of these proceedings the clerk has a right to rely on his sworn answers, so far as they are responsive to the charges made by the late marshal, in his application to the court. Now what relates to these writings, called "memorandum checks," is directly responsive. The late marshal alleges that he paid the clerk moneys, on account of claims for fees which were afterwards disallowed at the treasury. The clerk denies that he paid him moneys; he says he gave him only his written promises to pay, which, so far as respects these disallowed claims, he has not paid.

It is argued that the clerk, having receipted his own bills, as if the marshal had paid them in money, for the very purpose of enabling the latter to obtain payment from the government, is estopped to deny that he did receive the money; and so he is, as between himself and the United States; but this does not render the clerk liable to be proceeded against as for a contempt, in not repaying to the late marshal, what he never received from him.

It is also argued that as the clerk chose to take the marshal's private promises in payment, he thereby closed the official transactions, and that these memorandums are private claims by Mr. Pitman on Mr. Anthony, and cannot be brought into the account by way of offset. But this view is more ingenious than sound. Mere promises, with one exception, are not negotiable. When the whole transaction is understood, they amount, in effect, only to acknowledgments by the marshal, that he had not paid the sums receipted for, but still remained accountable to the clerk, for so much as he should obtain from the treasury upon his bills, to the extent mentioned in these memorandums. They are not to be allowed in offset, but as evidence that the obligation of the late marshal that he had paid, in money, the clerk's bills, is not true. For this purpose, if produced, they would be competent and admissible, and their loss being shown by the oath of the clerk, secondary evidence of their existence and contents is to be received. This evidence, so far as it was exhibited to the master, consists first, in the answer of the clerk, together with his book of original entries; and second, in the testimony of Mr. Jackson, the present marshal. I do not propose to examine this evidence, because I think it proper, that the account should be recommitted. It is said that all the evidence was not laid before the master. This is the fault of the party, and affords no ground of action by the court; but inasmuch as the master committed an error in not treating the answer of the respondent as evidence, and in ruling that, upon the case made, secondary evidence was not admissible, I shall send the matter to him again, to be proceeded with in conformity with this opinion.

In drawing up the order to recommit, I think a clause should be inserted, empowering the master to examine the clerk upon interrogatories, upon the application of the petitioner. Regularly this should have been done, in the first instance, under the direction of the court; but it took a different course, I suppose, by consent, and went to the master, as already stated. I am unwilling to interfere with the order which was entered; and therefore, unless some objection is made, let such a clause be inserted in the order of recommitment. If either party does object, and the petitioner desires to examine the clerk on interrogatories, let them be prepared and exhibited to the clerk, and if not objected to, answered here, and if objected to, the court will settle them. The interposition of a master, in a case like this, though convenient, and when consented to, proper, is not strictly regular, and must not be drawn into a precedent.

Something was said at the argument respecting the danger to which the petitioner might be exposed, in case these promises came into the hands of a third person for value. Not being negotiable, with one exception, there can be no such danger, and in respect to the small note, which is negotiable, a bond, with surety, can be filed hereafter to protect the petitioner, in conformity with a practice now well settled even in courts of low.

This disposes of all the important exceptions. Those which allege some small errors of computation can be examined by the master when he reconsiders his report.

Case No. 11,184a.

PITMAN v. DAVIS et al.

[Hempst. 29.] [1]

Superior Court, Territory of Arkansas. April, 1825.

FORCIBLE ENTRY—POSSESSION—TRESPASS BY LANDLORD FOR INJURY TO TENANT.

1. The landlord cannot maintain trespass for an injury to his tenant, and on the same principle the tenant only can have a writ of forcible entry and detainer against one who expels him from the tenement.

2. Actual possession is absolutely necessary to enable a plaintiff to maintain an action for forcible entry and detainer, and constructive possession is not sufficient.

[This was a writ of forcible entry and detainer sued out by Peyton R. Pitman against Abijah Davis and wife.]

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. In this case the plaintiff sued out a writ of forcible entry and detainer against the defendants, where-

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

in it is alleged that the defendant, Elizabeth Davis, on the second and third days of November, 1823, entered in and upon a certain plantation and the dwelling-houses thereon, where Archer Brown, his tenant, resided; and the question is, whether the landlord can maintain a proceeding of this kind for a forcible entry on his tenant. It is well settled that the landlord cannot maintain trespass for an injury to his tenant, and on the same principle it has been decided in Kentucky that the tenant alone can have a writ of forcible entry and detainer against a person who forcibly enters and expels him from the tenement. Vanhorne v. Tilley, 1 T. B. Mon. 52. It is irresistible from the statute regulating forcible entry and detainer (Gey. Dig. 202) that possession in fact, and not a constructive possession, is absolutely necessary to enable the plaintiff to maintain the action. Stewart v. Wilson, 1 A. K. Marsh. 225; Pogue v. McKee, 3 A. K. Marsh. 127.

Reversed.

Case No. 11,185.

PITMAN v. HOOPER.

[3 Sumn. 50.] [1]

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

SEAMEN'S WAGES—CONDEMNATION—INDEMNITY—PRO RATA DEDUCTION FROM WAGES—PRIORITY OF CLAIMS—FREIGHT—EFFECT OF CONTRACT BETWEEN OWNER AND SHIPPER.

1. The libellant shipped in June, 1809, as a seaman, on a voyage from Marblehead to St. Petersburg, and thence back to the United States; the outward cargo was duly delivered; a return cargo to the same amount was taken on board; and the ship sailed in June, 1810, on her homeward voyage, in the course of which she was captured by some Danish gun-brigs, and afterwards condemned. The libellant continued on board the ship until her condemnation, when he was discharged. Under the treaty between the United States and the king of Denmark, of the 28th March, 1830, providing a certain sum in full for compensation for services, detentions, and condemnations by the king of Denmark, the respondent, administrator of the owner of the ship and cargo, received $19,115, in full for his proportion of the indemnity granted, being about one third of his loss ($61,416). *Held*, that the libellant was entitled to recover of the respondent full wages, and not simply a pro rata proportion, according to the amount received by the ship-owner. And this, though the commissioners under the treaty made no express allowance on account of freight. Semble, that this would be so, even if they had expressly rejected the claim for freight.

[Cited in Nevitt v. Clarke, Case No. 10,138; The John Perkins, Id. 7,360.]

[Cited in brief in Benner v. Equitable Ins. Co., 88 Mass. 223.]

2. The claim for seamen's wages takes precedence of bottomry bonds and all other claims, whether the entirety of the fund, out of which they are to be paid, remains, or a part of it is lost by accident or otherwise.

[Cited in The Dawn, Case No. 3,666; The Niphon's Crew, Id. 10,277; Skolfield v. Potter, Id. 12,925; The George Prescott, Id. 5,339.]

[Cited in Eddy v. O'Hara, 132 Mass. 58.]

3. If freight is earned by the voyage, whether greater or less, and whether actually received by the owner or not, the right of the seaman to his wages accrues, to the full extent of the freight earned.

[Cited in Joy v. Allen, Case No. 7,552; The Massasoit, Id. 9,260; The Niphon's Crew, Id. 10,277.]

4. The seaman's wages are nailed to the last plank of the ship; so also to the last fragment of the freight.

[Cited in The Dawn, Case No. 3,666.]

5. The right of the seaman to his wages is not affected, either for good or for evil, by any private contract between the ship-owner and the shippers, with regard to freight.

[See The Erie, Case No. 4,512.]

6. Semble, where freight is paid in advance and the voyage is not performed, the ship-owner cannot without an express stipulation to this effect, retain it; but the shipper may recover it back.

[Cited in The Zenobia, Case No. 18,208; The Bird of Paradise, 5 Wall. (72 U. S.) 562. Cited in brief in Fleishman v. The John P. Best, Case No. 4,861.]

[Cited in Ogden v. New York Mut. Ins. Co., 35 N. Y. 420; Brown v. Harris, 68 Mass. 360.]

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

Libel for mariner's wages. The libel in substance stated as follows: "That in the month of June, A. D. eighteen hundred and nine, the brig Polly, whereof the said Robert Hooper, deceased, was then the owner, and whereof Ebenezer Graves, of Marblehead aforesaid, was master, being at the said port of Marblehead, and destined on a voyage from thence to St. Petersburg, in Russia, and thence back to the United States, he, the said Robert Hooper, deceased, by himself or his agent, on the high seas and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this honorable court, did ship and hire the libellant [John Pitman] to serve as a mariner on board the said brig Polly for and during said voyage at the rate of wages of twenty dollars per month, as per schedulate; and that for the due performance of said voyage, the libellant signed and duly executed certain articles of agreement, commonly called the shipper's articles, which now are in the possession of the said administrator, and which he prays may be produced for farther certainty in the premises, and for the benefit of the libellant. That in pursuance thereof, on or about the nineteenth day of June, A. D. eighteen hundred and nine, he, the libellant, went on board and entered into the service of said brig as such mariner as aforesaid. That the said brig, having taken on board a cargo of divers goods and merchandise for the voyage, proceeded thence with the libellant on board, for the said port of St. Petersburg, and there safely arrived some time in the month of October, in the year last aforesaid, and delivered her cargo and made freight. That the said brig, with the libellant on board, sailed from the said port of St. Petersburg some time in the month of June, A. D. eighteen hundred

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

and ten, destined for the said port of Marblehead. That the said brig, while on her passage to the said port of Marblehead, in the month of July, in the year last aforesaid, was captured by five Danish gun-brigs, and sent into Christiansand, in the kingdom of Denmark, where she was libelled and condemned as prize in the lower prize court of that kingdom. That the libellant continued on board and in the service of said brig until the condemnation aforesaid, when he was discharged from such service by the said master, and took passage for the said port of Marblehead, in the ship America, where he arrived on the fifteenth day of November, A. D. eighteen hundred and ten. That during the whole time he was in the service of the said brig, to wit, from the time he went on board thereof to the time of his discharge therefrom as aforesaid, he well and truly performed his duty as a mariner on board the said brig, according to his best ability, and was obedient to all the lawful commands of the said master and other officers of the said brig, and well and truly deserved and is entitled to wages amounting to the sum of two hundred and sixty-eight dollars. Your libellant further alleges and propounds, that by an award of commissioners, duly appointed to carry into effect the convention between the United States of America and his majesty the king of Denmark, concluded at Copenhagen on the twenty-eighth day of March, A. D. eighteen hundred and thirty, the said Robert Hooper, in his said capacity of administrator as aforesaid, did receive on account of the capture and condemnation of said brig Polly and cargo, the sum of twenty thousand three hundred eighty-one dollars, and sixty-four cents."

The answer of the respondent acknowledged that he was the administrator of Robert Hooper, deceased; and that on the 15th June, 1809, the libellant shipped on board the brig Polly; that the brig performed her voyage to St. Petersburg and then delivered her outward cargo, and on or about May 1st, 1810, sailed from St. Petersburg for Marblehead. The answer continued as follows: "That the said brig was captured, libelled and condemned, as is stated in said libel, and that the said libellant returned to the United States, but whether he did any and what duty on board of the said brig after her capture, or when he was discharged from the said brig, or when he arrived in the United States, this respondent does not know and cannot set forth, but leaves the said libellant to prove the same, if material. That this respondent believes that the libellant while on board the said brig, did his duty as a mariner, but he denies that he is now entitled to the wages claimed by him. That before the departure of the said brig for sea, and during the course of the said voyage, various sums of money were advanced and paid either to the libellant or to Elizabeth Pitman, his mother and guardian, and after the return of the libellant to the United States, the said intestate and the said Elizabeth Pitman, accounted together of and concerning the wages of the said son, who was then a minor under the age of twenty-one years, and upon such accounting, the said intestate paid to the said Elizabeth Pitman, a balance of thirty-one dollars 41-100, which was the whole sum justly due for the wages of the said libellant, and took the receipt of the said Elizabeth in full discharge. And this respondent further says that from the lapse of time, and from the decease of said intestate, he is unable to exhibit plenary proof of the particular sums advanced and paid from time to time to the said libellant and the said Elizabeth, but he produces herewith an original account in the handwriting of the said intestate, and found by this respondent among the papers of the intestate, which relates to the said voyage, which account contains a statement of the various sums paid to the seamen who were of the crew of the said brig in the said voyage, to the said libellant or his representative among others, and this respondent verily believes that it is an original and correct account thereof. This respondent denies that, by the award of the commissioners named in said libel, he received, on account of the condemnation and confiscation of the said brig and her cargo, the sum named in said libel, but on the contrary this respondent avers that the value of the said brig, without freight, and the invoice cost of the cargo which was on board at the time of her capture and condemnation, were by the said commissioners adjudged to be sixty-one thousand four hundred and sixteen dollars; that in point of fact the just and true value thereof was a larger sum, that is to say, sixty-five thousand dollars and upwards, as will appear by the statement hereto annexed, marked 'A.' That the amount of money received by the United States of America under the said treaty was far less than sufficient to pay the full amount of all the claims thereon which were allowed by the said commissioners, and were only sufficient to pay thirty-one per centum of the said claims, and, pursuant to the said award of the said commissioners, there was allowed to this respondent, as administrator as aforesaid, the sum of nineteen thousand one hundred and fifteen dollars 73-100, being about thirty-one per centum of the invoice value of the said cargo and of the value of the said brig, without including freight or profits; and this respondent denies that any freight, or damages by way of freight or profits, or increased value of vessel or merchandise, was in any way allowed to or received by this respondent. And this respondent was obliged to and did incur large expenses to procure the allowance and award aforesaid, that is to say, this respondent did allow and pay to his agent employed and retained to prosecute the said claims, six per centum upon the whole amount recovered and received by this respondent; and this respondent was also subjected to other expenses by reason of journeys, preparing documents, and other causes, amounting

to the sum of two hundred dollars, or thereabouts. And this respondent denies that the said libellant is justly entitled to any part of the wages claimed by him, inasmuch as no freight was allowed to or received by the said respondent, and this respondent denies that the said libellant is justly entitled to receive any part of the sums allowed to and received by this respondent as and for thirty-one per centum of the cost of the cargo, and the value of the brig Polly aforesaid."

The district court made a pro forma decree in favor of the libellant [case unreported], upon which an appeal was taken to the circuit court; and the following reasons of appeal were filed: I. For that by the said decree, the wages of the said libellant for the whole voyage are allowed, and decreed to him, deducting only the advances therefore made to him, as alleged in his said libel, whereas there should have been deducted from any allowance made to him, a much larger sum, that is to say, the sum of one hundred and forty dollars, being the amount of advances actually made to him. II. For that wages were allowed to the libellant for the whole voyage, whereas there should have been no wages allowed to him for any time before the expiration of one half the time while the said brig remained at St. Petersburg. III. For that the full wages of the libellant were allowed to him, whereas if any thing, only thirty-one per centum of such wages should have been allowed. IV. For that no deduction from the said wages was made on account of expenses incurred by the respondent in recovering and obtaining the partial indemnity aforesaid. V. For that wages or compensation were allowed to the libellant by reason of the partial indemnity aforesaid, although no freight, or damages by way of freight or profits, or increased value of vessel or cargo, was allowed to the respondent under the treaty aforesaid.

J. Pickering, for libellant.

B. R. Curtis, for respondent.

STORY, Circuit Justice. The libellant, in June, 1809, shipped on board the brig Polly, owned by the intestate Robert Hooper, on a voyage from Marblehead, in this district, to St. Petersburg, in Russia, and thence back to the United States. The brig sailed on the voyage with a cargo belonging to the intestate, and arrived at St. Petersburg, and there safely delivered her cargo. A return cargo on the same account was taken on board, and the brig sailed on the homeward voyage in June, 1810, and in the course of the voyage was captured by some Danish gun-brigs, carried into Christiansand, in Denmark, and there condemned. The libellant continued on board of the brig until her condemnation, and then was discharged and took passage in an American ship and arrived at Marblehead in November, 1810.

By the treaty between the United States and the king of Denmark, made at Copenhagen on the 28th of March, 1830, the sum of $650,000 was agreed to be paid by the king of Denmark on account of claims of the citizens of the United States for seizures, detentions, and condemnations or confiscations of their vessels and other property, to be distributed by a board of commissioners, appointed in the manner pointed out in the treaty. The sum thus agreed to be paid fell far short of the amount claimed before the commissioners under the treaty. By the final award of the commissioners in 1833, they allowed to the respondent, as administrator, on account of the capture of the brig Polly and her cargo, the sum of $61,416 as his loss, and awarded him as his proportion of the indemnity granted by the treaty, payable on reduction (to use their own phrase) the sum of $19,115.73, a little short of one third of the amount lost. In the amount allowed to the respondent, no notice whatsoever is taken of freight. Nor was it necessary; because the intestate, being sole owner of the brig and cargo, freight could not constitute a distinct item of loss; but would naturally and properly be included in the estimated value of the ship and cargo. And in cases of this sort, the award must be presumed to include all proper allowances to the owner; and it will be conclusive on that point, unless, on the face of the award itself, the contrary expressly appears. Indeed, if it had appeared on the face of the award, that no freight had been allowed, and that the claim had been expressly rejected, it would be far from certain, that that rejection would necessarily affect the title to wages; because the natural presumption would be, omnia rite acta, that the rejection was founded on objections personal to the owner, or his acts; in no respect touching the rights of the seamen. At least it must be a very strong case, which would justify a different conclusion. We may, therefore, lay out of the case all further consideration of the question, whether freight has been awarded, as, indeed, upon the intimation of the court, it was waived at the argument.

The real, and indeed the only point, raised at the argument, is, whether the libellant is entitled to receive his full wages for the homeward voyage, or whether there is a reduction to be made of the wages in the same proportion (about two thirds), as the owner himself has been compelled to submit to under the award. That question depends upon this, whether the wages of the seamen constitute, in cases of this sort, a privileged claim to their full amount, or only pro rata, on the sum received by the owner. There is no doubt, that, to the full extent of the wages actually due by the owner to the seamen, the wages constitute a lien, or privilege on the sum received by him prior to all other claims. This is clear upon authority and principle. The seamen's wages generally constitute a lien, or claim upon the ship and freight, and upon the proceeds thereof, in whatever hands

they may be, which must be paid before any other claims. It has been significantly said, that they are nailed to the last plank of the ship; a figurative expression, which will be found used in one of the earliest maritime codes in modern times (the Consolato del Mare) of which we have any distinct traces. Pard. Collect. des Lois Mar. tom. 2, p. 129; Consol. del Mare, c. 93 (138). And it may be added, that they adhere also to the last fragment of the freight. The case of Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, 710, fully supports this doctrine. It was recognized by this court in the case of Brown v. Lull [Case No. 2,018]. See, also, Sir Leoline Jenkins' argument before the house or lords. 6 Hall, Law J. 566. But the true question in the present case is not as to this privilege or priority of wages over all other claims, but as to the amount really due as wages from the owners in the present case, for which this privilege or priority is to take effect. When the question was first presented to my mind, I am free to confess that my impression was, that the wages must be reduced pro rata with the claim of the owners, received under the award of the commissioners. The case was confessedly novel in its actual presentation. The fund received by the claimant may justly be considered as a sort of trust fund in his hands for the discharge of all the claims of all parties interested therein. Under such circumstances, if the trust fund is inadequate to discharge the claims of all who are interested therein, the question naturally presented is, whether all shall partake pro rata. If a part of the trust fund had perished, that would be the ordinary course of distribution among all the claimants; for in such case, "Res perit domino." But this supposes an equality of right in all the claimants, and the absence of any priority or privilege of payment of some before others. In such a case, the priority or privilege would seem to attach to the residue, as it did to the original fund; that is, he will be first to be entitled to be paid in full, who has originally that right, before the others are to receive anything. This is the ordinary rule in regard to several bottomry bonds, where the funds are inadequate to the discharge of all. And in cases of bottomry bonds, conflicting with maritime wages from the deficiency of the fund, the wages have a priority of payment out of the fund, without any distinction, whether the entirety of the fund remains, or a part of it is lost by accident or otherwise. The general principle is well stated and fully recognised in the learned Commentaries of Mr. Chancellor Kent, with equal brevity and clearness,—3 Kent, Comm. (3d Ed.) lecture 46, pp. 196, 197,—and it was judicially expounded and acted on by Lord Stowell in the case of The Madonna D'Idra, 1 Dod. 37, 40, The Sidney Cove, 2 Dod. 1, 13, and The Kanmerhevie Rosenkrants, 1 Hagg. Adm. 62; and by the supreme court of the United States in the case of The Virgin, 8 Pet. [33 U. S.] 538.

The wages of seamen constitute, as has been justly remarked at the argument, a peculiar class of contracts; and the principles, applicable to them, do not belong to the ordinary contracts for hire and services. In ordinary contracts for hire and services, the persons employed do not partake af any of the risks of the owner in relation to the property. They are entitled to their full compensation for labor and services on the property, although it shall be utterly lost or destroyed by accident or superior force. Not so with the contracts of seamen for maritime voyages and adventures. The policy of the maritime law has in such cases subjected them to the risks of the voyage to a limited extent; for the payment of wages is ordinarily made to depend upon the earning of freight in the voyage. If freight is not earned in the voyage, in consequence of an overwhelming calamity, or an unexpected accident, the seamen generally lose their wages. But if freight is earned in the voyage, and for the voyage, whether it is greater or less, and whether it is actually secured by the owner or not, makes no difference in the rights of the seamen. The general doctrine will be found well laid down in Lord Tenterden's treatise on Shipping (page 447, and note 2 to the last American edition); and in Mr. Chancellor Kent's Commentaries (volume 3 [3d Ed.] pp. 187–194). There are exceptions, however, to the general rule, some of which will be here stated, because they bear directly upon the point in discussion. In the case of a shipwreck during the voyage, the seamen, if they remain by the ship and assist in the salvage, will be entitled to receive their wages out of the fragments of the wreck, if enough is saved to pay them, even though the entire freight be lost by the total destruction and loss of the cargo. This exception is doubtless designed to enlist the zeal and exertions of the seamen in the preservation of the property as far as possible; and it is founded upon the same policy as the general rule; that is to say, to make it their interest to use every endeavor to save the property, and to promote the success of the voyage. Whether this exception is to be expounded upon the ground of its being an allowance to the seamen in the nature of salvage, or whether it is a mere dry exception to enforce the public policy of the original rule, has been a topic of some judicial discussion. But whether it stands upon the one ground or the other, it is an exception now firmly established. It was fully recognized by Lord Stowell in the case of The Neptune, 1 Hagg. Adm. 227, and by this court at an earlier period in the case of The two Catherines [Case No. 14,288]. What I rely on, in regard to this exception, is, that it establishes a case, in which, though the entire freight is lost, the seamen recover their full wages out of the wreck of the ship, without any deduction pro rata on account of the value of the materials of the ship, which have perished.

The entire wages constitute in this case a privileged lien to be first paid; and the owner must submit to the entire loss, without any contribution towards his own loss. Then, again, in the case of a general average in the course of a voyage, the wages of seamen do not contribute to the loss, though the ship, cargo, and freight, all do, and though thereby a part of the freight for the voyage is necessarily lost. In such a case it is plain, that the loss of freight does not entitle the owner to make a pro rata deduction of the wages. And here, again, there is an exception of the case of ransom, and, perhaps, also of the analogous case of recapture; in which the wages of seamen do contribute. This exception, also, is founded upon the public policy of offering a strong inducement to the seamen to stand by and defend the ship against hostile and piratical attacks; and was probably borrowed from the Roman law, in which all the jurists seemed to concur, that contribution by all interested should be made in such a case. "Si navis a piratis redempta sit, Servius, Offilius, et Labeo omnes contribuere debere aiunt." Dig. lib. 14, tit. 2, l. 2, § 3 ; 1 Valin, Comm. lib. 3, p. 752, tit. 4, art. 20. I need not do more upon this point than to refer to Lord Tenterden's treatise on Shipping (Abb. Shipp. pt. 3, p. 357, c. 8, § 14, and part 4, p. 458, c. 3, § 1), and Marshall on Insurance (book 1, p. 544, c. 2, § 7). See, also, cases in the American courts, cited in Abb. Shipp. (Boston Ed. 1829) 444, note 2; The Saratoga [Case No. 12,355].

Cases of salvage are of a kindred nature; and in no instance within my recollection, except of a recapture, has it ever been contended, that the seamen's wages were to contribute towards the salvage. Yet a decree of salvage may occasion a loss of a moiety of the value of ship, cargo, and incidentally of the freight also. Now, I cannot but think, that, if any rule had been established, that, in cases of freight partially lost or diminished in the course of the voyage by maritime accidents or perils, a deduction is to be made pro rata from the seamen's wages, there must have been some clear and decisive evidence of the existence of the rule, either by judicial decisions, or by settled usages, considering that a vast variety of cases must have arisen to which it was applicable, many of which must have undergone a full consideration in courts of justice. The total silence of the books, under such circumstances, is peculiarly expressive; and the total absence of any known and fixed usage affords no mean corroborative proof that there is no such rule. It is this consideration, that, upon further reflection, has greatly shaken my confidence in the original opinion which I entertained upon the subject. Let us put a case of very common occurrence, where, in the course of the voyage, there has been a partial loss of cargo by a peril of the seas. In such a case, has there ever been a reduction of the seamen's wages, when the remaining freight has been more than sufficient to pay the entire wages due on the voyage, and the voyage has been completely performed? If there has not been, then it would be difficult to show any ground, upon which any deduction can be properly made in the present case; for, at most, it amounts but to a partial loss of the cargo and freight during the voyage. No case can be found, as I believe, in which any such deduction has been recognized by any court of justice; and no general usage by the custom of merchants, allowing the deduction, has been referred to at the argument, or has been asserted to exist. What, then, is the proper conclusion to be drawn from this universal silence in our courts of justice, and in the maritime adjustments of wages? Certainly, it would seem to be, that the maritime law has never been supposed to authorize any such deduction, since the occasion to apply it must have been of almost daily occurrence in our own extensive navigation, as well as that of the commercial nations of Europe. I have made some researches into the jurisprudence of the most commercial of the nations of continental Europe; and though these researches have not led me to a very definite and positive result, yet, as far as I have been able to ascertain, no such rule of deduction is any where known to exist; and the presumptions from the doctrines in other cases seem all the other way.

In cases of general average, it seems generally held, that the seamen's wages do not contribute, except in the case of ransom. This is positively stated in the ordinance of Louis XIV. (article 20) on this subject (1 Valin, Comm. lib. 3, p. 752, tit. 4, art. 20), Jac. Sea Laws, p. 155, as the law of France; and this seems the general rule adopted in the maritime states of the continent. In cases of shipwreck the seamen are entitled to be paid their full wages out of the remains of the ship; and if they are insufficient, then out of the freight of the cargo which has been saved. The language of the ordinance of Louis XIV. (article 9) on this subject, seems to be somewhat equivocal; and would seem, at first view, to point, not to the full wages, but only to pro rata wages, in proportion to the freight received. "S'il n'y a que des merchandisés sauvees, les matelots, meme ceux engagés au fret, seront payés de leurs loyers par le maitre à proportion du fret, qu'il recevra." But Valin manifestly understands this to mean, that they shall be paid their full wages out of the freight for the part of the voyage performed, as far as the freight will go. 1 Valin, Comm. lib. 3, p. 703, tit. 4, art. 9.[2] And Pothier adopts the same doctrine; for, commenting on the article, he says: "The mariners, as well those, who are hired by the voyage, as those, who

[2] See Stev. & B. Average (by Phillips) 218, 251; 1 Emerig. Assur. (Ed. Boulay Paty, 1827) pp. 624, 625, c. 12, art. 7, § 42.

are hired by the month, may pay themselves out of the freight (se venger du fret) for their lost wages, and they may entirely exhaust the freight for the payment of their wages. But those who are hired by the freight (that is, those who are to have a part of the freight in lieu of wages) can only claim from the freight the part which they ought to have according to their agreement." Poth. Traité du Louage des Matelots, art. 186. And in case of shipwreck, it is very clear that the same ordinance allows a freight pro rata only on the cargo saved; as, indeed, was the rule in the Consolato del Mare. 1 Valin, Comm. lib. 3, pp. 664, 665, tit. 3, arts. 21, 22; Consolato del Mare (Pardessus' Ed.) c. 101 (196). Now, I think that it can scarcely be doubted, that this ordinance embodies, in general, the principles of maritime law recognized at the time when it was promulgated. The modern French code seems to have recognized the same rule; and its commentators have adopted a similar interpretation. Code de Commerce, art. 259. See Sautayra Code de Commerce, Expliqué, p. 170. If, in cases of shipwreck, the seamen's wages are not to abate in proportion to the diminution of freight, there would seem to be but little reason to suppose that they were liable to a deduction pro rata in case of loss of a part of the freight from any other accident in the voyage. I have not been able to find that any such case is specially provided for, in that or in any other ordinance of any commercial nation. There are one or two passages in the Consolato del Mare, which speak of the mariner's wages being diminished in proportion to the diminution of freight; but they furnish no general rule in a case like the present. One of them is a case of a voluntary allowance by the master to the shipper of a part of the freight, where it is said that the seamen's wages should also abate in proportion; a doctrine hardly tenable at this day. Consolato del Mare (Pardessus' Ed.) c. 59 (104) p. 108. See, also, Id. p. 131, c. 95 (140).

The only case bearing upon this subject in English jurisprudence, which has been cited at the bar, is the anonymous case in 2 Show. 291 (283), where it is asserted to have been held at nisi prius by Lord Chief Justice Saunders, that freight is the mother of wages; and wheresoever freight is due, wages are also; and that advance money, paid before, if in part for freight, and named so in the charter party, although the ship be lost before it come to a delivering port, yet the wages are due according to the proportion of the freight paid before; for the freighters cannot have their money. This report is at best very loose, and without any special statement of the facts, which would enable us to say, whether the language attributed to the lord chief justice was a mere dictum, or involved the point directly in judgment. It was held, too, at a time, when the principles of commencial law were very little understood in the courts of England; and it is not very easy to reconcile it with strict principle. The peculiar contract between the ship-owner and the shippers in regard to freight has in general nothing to do with the rights of the seamen to their wages. Their rights stand upon the general grounds of maritime law. If freight could be earned by the common principles of that law in a given case—if there was no precise, express contract, variant from that law—the seamen would be entitled to their wages, notwithstanding the owner had stipulated for his freight upon other contingencies, and under very different circumstances. Abb. Shipp. pt. 4, pp, 447, 448, c. 2, § 4. In short, his private contract respecting freight will not vary theirs respecting wages. If he were to stipulate for freight only upon the successful termination of the homeward voyage, they would still be entitled to wages for the outward voyage, if successfully performed, notwithstanding the ship were lost on the homeward voyage. Upon the same ground, if he were to stipulate for an advance of freight, not to be repaid, whether the voyage were performed or not, that would seem equally to be a matter with which the seamen have no concern; for their title would seem to depend upon the common right to freight earned by the due performance of the voyage. Besides, in the ordinary cases of freight paid in advance, I do not understand that, if the voyage is not performed, the owner can, without an express stipulation to the purpose, retain it; but the shipper is entitled to recover it back.[3] This is certainly the doctrine of foreign jurists; and it stands approved by the judgment of the supreme court of New York in Watson v. Duykinck, 3 Johns. 335, and by the supreme court of Massachusetts in Griggs v. Austin, 3 Pick. 20. I am aware, that some of the English cases look the other way; and while they seem to admit the doctrine, fritter it away upon very nice distinctions.[4] This point, however, it is not necessary for me now to decide. But I specially refer to the case of Watson v. Duykinck, because, in delivering the opinion of the court, Mr. Chief Justice Kent treated the case in 2 Show. 283 (291), as of very little authority; and, although it is cited by Lord Tenterden (Abb. Shipp. pt. 4, p. 447, c. 2, § 4), it is dryly stated, without any auxiliary authority or comment

[3] See the opinions of foreign jurists, and especially of Cleirac, Valin, Pothier, Roccus, Straccha, and Loccenius, cited in note 1 to the American edition of Abbott on Shipping (1829; p. 277). See, also, 1 Valin, Comm. p. 661, and the authorities cited in 3 Johns. 339, 340.

[4] See, also, on this point, Mashiter v. Buller, 1 Camp. 84; Gillan v. Simpkins, 4 Camp. 241; Blakey v. Dixon, 2 Bos. & P. 321; Manfield v. Maitland, 4 Barn. & Ald. 582; De Silvale v. Kendall, 4 Maule & S. 37; Tasker v. Scott, 6 Taunt. 234; Andrew v. Moorhouse, 5 Taunt. 435. Most of these cases are very ably commented on by Mr. Chief Justice Parker in delivering the opinion of the court in Griggs v. Austin, 3 Pick. 20.

to support it. It is also cited in the same way by Mr. Chancellor Kent, in his Commentaries (volume 3 [3d Ed.] p. 191). It seems to me, that this case is at variance with the general law, which governs the claim of wages. That depends not at all upon the particular contract of the owner, as to the freight for the voyage but upon general principles. The contract of the owner respecting freight, is strictly res inter alios acta; of which the seamen are neither to take the disadvantages, nor the benefits, unless they are direct parties to its stipulations, and make their own rights dependent upon it. It might just as well be maintained, that, if the owner should insure the freight, the seamen would, in case of a total loss of freight, recover their wages, because he was indemnified thereby; and so in effect received freight. Yet we all know, that such a doctrine is wholly indefensible. See Abb. Shipp. pt. 4, c. 3, § 1, note 1 to American edition of 1829, and cases there cited.

A passage has also been cited from Mr. Chancellor Kent's Commentaries (volume 3, p. 192), in which, after referring to the doctrine, that wages are payable after a capture and condemnation, if there has been a final decree of restitution upon an appeal, and freight allowed in damages, he has added: "So in the case of shipwreck, if any proportion of freight be paid for the cargo saved, wages of seamen are to be paid in the same proportion." No authority is cited for this position; and from what has been already stated, as to wages in cases of shipwreck, it will be found difficult to reconcile it with the present admitted doctrine, that even if no freight is earned, the seamen are entitled to be paid their full wages out of the remnants of the ship. The foreign law, as we have seen, contemplates no reduction in the very case put by the learned chancellor. The case of Lewis v. The Elizabeth & Jane, 7 Am. Jur. 30, before the learned judge of the district court of Maine, has also been relied on at the argument by the defendant's counsel, to defeat the claim for full wages. I can find no sufficient warrant in that opinion to support the argument. The principal point there was, whether the seamen were entitled to their wages for the voyage, the vessel having been by them abandoned as a derelict at sea before the end of the voyage; and having been brought into port by other salvors, and restored on salvage to the owners of the vessel and cargo. The learned judge discussed that subject with great ability, and came to the conclusion, that the seamen were not entitled to their wages under such circumstances. I am not now called upon to express any opinion upon that question, although it must be said, that it is very difficult to resist the cogent reasoning by which his judgment is maintained. In that case he merely glances at the present question in some incidental suggestions, but nowhere affects to dispose of it. It seems to me, then, that this question is fairly open to be decided upon principle and the analogies of the law, if indeed the silence already alluded to does not lead us to a direct conclusion. Upon principle and the analogies of the law (although at first I freely confess that I thought otherwise), I am satisfied that the seamen are entitled to their full wages, since more freight has been in fact received than is sufficient to pay them. Or, treating this as a case, like the tabula in naufragio, where one third only of the ship, cargo, and freight has been saved from the common shipwreck, the seamen's wages attach, as a privileged lien, to the relics of the ship and freight.

There are some other considerations, not unimportant in a case of this sort. In the first place, there is no hardship upon the owner in such a rule; for he may indemnify himself by insuring the ship and freight. In the next place, there would be great hardship on the other side in an opposite rule; for the policy of the law will not suffer the seamen to insure their wages. In the next place, the general principles of the contract of hire entitle the seamen to recover full wages for their services in all cases. There are exceptions created by the maritime law, which make them oftentimes dependent upon the fate of the ship and freight, upon the grounds of public policy. Freight must be earned in ordinary cases, to found the claim for wages. But it is by no means necessary, that it should be a full freight; or that the voyage should be beneficial to the owner. It is incumbent upon those, who insist upon the exception, as extending to the present case, to show, that it is the proper result of the policy, on which the exception is founded; or that some positive authority has established the rule, that the seamen must contribute from their wages pro rata for every partial loss of freight. Neither has been shown; or at least neither has been shown to my satisfaction. If the seamen's wages are nailed to the last plank of the ship, it seems to me, that they are also to the last fragment of the freight. In the former case it is a lien for the full wages for the voyage. In the latter it seems to me, that the same principle must govern. The case of Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, treats the lien on a ship and freight as of the same nature, and ordinarily of the same extent. It would be strange, that the owner should be liable for the whole wages, if he received from the proceeds of the wreck of the ship sufficient to pay them; and yet, that he should be liable, as receiver of the freight, for one third only, although, the freight were of a far greater amount in value than the proceeds of the ship. It appears to me, that the true principle in cases of this sort is, that if any freight is saved, sufficient to pay the wages, it is bound to the full payment of them. I cannot also but deem, that public policy and the interests of commerce are best subserved by this course. For, if upon every partial

loss of freight in a voyage, the wages of seamen were to be reduced pro rata, it would operate a great discouragement upon seamen to remain by the ship, and to perform the voyage. If there should be a loss of half the freight they would lose half of their wages; and indeed would continue in the service of the ship in future for half pay. Such a consideration would tend to promote discontent, indifference in the discharge of duty, a disposition to desertion, and an unwillingness to encounter perils, all of which would be most mischievous to the substantial interests of the owner. These interests are best promoted by holding out a uniform, if not a high, premium for diligence, activity, enterprise, and gallantry in the service of the ship.

Upon the whole, my opinion is, that there ought to be a decree of full wages for the voyage. The decree of the district court is therefore affirmed, with interest and costs.

[NOTE. The case was again submitted to the court upon the question whether the whole wages are to be calculated from half the time after the arrival of the brig at the port of St. Petersburg, in Russia. The court answered in the affirmative. Case No. 11,186.]

Case No. 11,186.

PITMAN v. HOOPER.

[3 Sumn. 286; [1] 1 Law Rep. 226; 20 Am. Jur. 428.]

Circuit Court, D. Massachusetts. May Term, 1838.

SEAMEN'S WAGES—FREIGHT—TIME IN PORT—OUTWARD AND HOMEWARD VOYAGES — CAPTURE OF VESSEL ON RETURN VOYAGE—STALE CLAIMS.

1. Quære, in what cases the earning of freight is not necessary to give a title to wages.

2. Seamen are entitled to wages, for the full period of their employment in the ship's service for any particular voyage, in which freight is, or might be, earned by the owner.

[Cited in Farrell v. Mayers, Case No. 4,685; The Erie, Id. 4,512; The General Chamberlain, Id. 5,310.]

3. One half of the time during which a vessel is lying in port is deemed to belong to the outward voyage, and the other half to the homeward voyage. This rule stands upon equity, convenience, and practice.

4. Where an American ship, in 1809, sailed from Marblehead, on a voyage to St. Petersburg and back, and performed her outward voyage, and on her return voyage was captured and carried into Denmark, and condemned by the Danish tribunals, and afterwards compensation was made under the treaty with Denmark, of the 28th of March, 1830, for the ship and cargo, *held*, that the seamen were entitled to full wages for the homeward voyage, as if it had been performed, including half the period of the ship's stay at St. Petersburg; or to full wages up to the time, when the seamen did return or might have returned home, without any unnecessary delay, deducting any wages, which they might have earned in the intermediate time in another employ. Three months were treated as a reasonable time for the return of the seamen home.

[Cited in The Niphon's Crew, Case No. 10,277; The Ocean Spray, Id. 10,412.]

5. The wages for the outward voyage to St. Petersburg were, by the capture and condemnation, vested by an absolute title in the libellant, in 1809. They might then have been sued for, and, consequently, by lapse of time, upon the principles of courts of admiralty, are now stale claims, incapable of being asserted here.

[Cited in Packard v. The Louisa, Case No. 10,652; The George Prescott, Id. 5,339.]

The parties in this case did not agree, as to the extent of the decree pronounced at a former term. See [Case No. 11,185]. The libellant [John Pitman] understood it to have been the intention of the court, to decree payment of the whole amount of wages from half the time the vessel remained in Russia, to the time of the arrival of the seamen in the United States. The counsel for the respondent [Robert Hooper] understood the court to say, that the receipt of the indemnity money did not revive any old claim, which the seaman might have prosecuted on his return home; that, whatever wages he might have recovered on his return, he could not now recover. This was as far as they understood the court to go, the particular circumstances of this case not being at any time before the court for consideration. Acting upon this principle, they supposed, if the libellant had, at the request of the master, remained by the ship from the time of the capture to the condemnation and sale, that for that time he was entitled to a compensation on his return home; and that, after the lapse of twenty years and a settlement with the owner being made on his return and proved, it would be presumed, that he had received it.

J. Pickering and J. Hardy Prince, for libellant.

C. P. & B. R. Curtis, for respondent.

STORY, Circuit Justice. This case has been again submitted to the court upon an incidental question, which has arisen in adjusting the claim of the libellant, upon the principles already decided by the court. The question is, whether the whole wages are to be calculated from half the time after the arrival of the brig at the port of St. Petersburg, in Russia; or, whether a deduction is to be made therefrom of the wages from the time of the capture up to the time of the first condemnation of the brig by the Danish tribunals.[2] The ground upon which this deduction is asked by the defendant is, that compensation for the wages from the capture to the condemnation might have been originally claimed by the libellant, for his services during that period, even if no restitution under the treaty ever had been made; and

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

[2] Compensation had been allowed to the owners for the capture and condemnation of the ship and cargo, under the treaty with Denmark, of the 28th of March, 1830. For a full report of the facts of the case, see [Case No. 11,185].

that, consequently, the amount ought now to be deemed, by the lapse of time, a stale demand.

Before I proceed to the consideration of the question as to this deduction, I wish to say something upon another point, which is involved in the adjustment, although it has not been made at the bar. It is, from what point of time the wages ought to be calculated; whether from half the time that the brig was at St. Petersburg, or from the time when the outward cargo was discharged at that port. I say that the point has not been made at the bar, and probably not made, because it has been deemed long since settled in the local jurisprudence of Massachusetts, as well as in the administration of maritime law in the courts of the United States exercising admiralty jurisdiction in this circuit. But my learned friend, Judge Hopkinson, of the district court of Pennsylvania, in his elaborate opinion in Bronde v. Haven [Case No. 1,924], has utterly denied the doctrine to be well founded, either in principle, or in authority. My great deference for the opinions of that able judge has induced me on this, the first occasion, which has occurred, to review the grounds of the doctrine; for if I now saw any error in it, so far as my own judgments are concerned, I should be well disposed at once to set about correcting it. But I am bound to declare, that, upon the fullest re-examination, I am entirely satisfied, that the doctrine is well founded in principle and in authority; that it is just and equitable, and is a natural, I had almost said a necessary, result of the enlarged policy of maritime jurisprudence, applicable to the wages of seamen. I do not propose to enter upon any elaborate exposition of the principles, on which the doctrine is established, but merely to advert to the more leading reasons for it, and the authorities, which support it. The general formulary, as laid down in Lord Tenterden's Treatise on Shipping, Abb. Shipp. pt. 4, c. 2, § 4, p. 447, is this: "The payment of wages is generally dependent upon the payment of freight. If the ship has earned its freight, the seamen, who have served on board the ship have in like manner earned their wages. And, as in general, if a ship, chartered on a voyage out and home, has delivered her outward bound cargo, but perishes in the homeward voyage, the freight for the outward voyage is due; so, in the same case, the seamen are entitled to receive their wages for the time employed in the outward voyage, and the unloading of the cargo, unless by the terms of the contract the outward and homeward voyages are consolidated into one." To language so very general, certainly nothing farther than general truth can be, or ought to be attributed. In truth, however, the language is far from being accurate; and it is not comprehensive enough to embrace the exceptions to the general rule, or even all the cases, which fall within it. Thus, it is not true in every case in the maritime law, that the payment of wages is dependent upon the payment of freight; for if freight be earned, it is wholly immaterial, whether it be paid or not. So, the earning of freight is by no means necessary in all cases to give a title to wages; as, for example, where the ship performs her voyage without the owner having furnished any cargo, or where there is a special contract between the owner and freighter, varying the right to freight from the general law; as where the freight is made dependent upon the performance both of the outward and the homeward voyage. The case of shipwreck, where materials are saved from the wreck, furnishes a still stronger illustration; for in such a case the seamen earn their wages, as far as the materials saved go, even though the freight for the homeward voyage is wholly lost. The Neptune, 1 Hagg. Adm. 227. So that a moment's reflection will teach us, that the general text of Lord Tenterden does not contain a full or an accurate exposition of the whole doctrine applicable to the subject. It affords one out of many illustrations of the maxim, "In generalibus versatur error." If the doctrine be susceptible of any exact generalization (which perhaps it is not), it would be more correct to say, that the general rule, though not the universal rule, is, that the seamen are entitled to wages for the full period of their employment in the ship's service for any particular voyage, in which freight is or might be earned by the owner. Ordinarily, we divide voyages into the outward and the homeward voyage; though there certainly may be, and often are, many intermediate periods and voyages; as, for example, by vessels engaged in the freighting business. When seamen contract for a voyage from A to B, and thence back to A; the voyage from A to B is commonly called the outward voyage, and the voyage back from B to A the homeward voyage. And the maritime law in such a case, whether there be a cargo on board or not, treats these as distinct voyages, in which freight is, or may, upon its own principles, be earned. We are, therefore, accustomed to say that the seamen are entitled to their wages for the outward voyage, when ended, if freight is, or might have been earned on that voyage; and for the homeward voyage, if freight is, or might have been earned on that voyage. But the material inquiry still remains. When, in the sense of the maritime law, as to seamen's wages, does the voyage (either outward or homeward) commence and terminate? It certainly does not commence on the very day of the sailing of the ship on the voyage from the port of departure, and not before; or end with the very day of her arrival at her port of destination. Neither does it necessarily, as to the seamen, commence with the loading of the cargo on board of the ship; for the seamen may have been employed in the ship's service for a month before. Neither does it necessarily terminate with the discharge of the cargo, if

the seamen are still retained in the ship's service for a month longer, for purposes connected with that particular voyage. In some voyages, even now, it is not uncommon to land the cargo of the outward voyage, and to wait, until it is sold, before any homeward voyage is, or can be undertaken; and the homeward or ulterior voyage is in such cases mainly dependent upon the success of such sales; sometimes conducted by the masters and officers by what may be called a retail or barter trade. In the simplicity of the commerce in former ages, when the rule, we are considering, was first established, this was the common course of business. It is sometimes said, that the outward voyage is ended, when the cargo is landed, because freight is then earned; and that the homeward voyage commences, when the outward is thus finished. Neither of these propositions is, or can be admitted to be absolutely true; and both of them assume the very matter in controversy. It might with equal propriety of reasoning and logic be said, that the homeward voyage commences, when the cargo for the homeward voyage is taken on board; and of course, that the outward voyage then, and not till then, terminates. In some voyages the sale and discharge of the outward cargo, are going on simultaneously with the purchase and loading of the homeward cargo; as, for example, in the pepper and coffee voyages to some ports and islands in the Pacific Ocean. But although the freight is ordinarily earned by the discharge of the cargo, the discharge is not necessarily to be taken as the true test or termination of the voyage. Nor is it essential to it. If the cargo arrives at the port of destination, it may still be kept on board for a great length of time, to suit the purposes of the owner or shipper; and its discharge there may be made dependent upon future contingencies, as to the markets and prices; or a new destination may be given to it upon some new undertaking for another voyage in the same ship. In such a case it could not be correctly said, that the outward voyage continued after a reasonable time for the discharge of the cargo had passed. On the other hand, the cargo may be taken on shore for sale, and yet, from the want of a market, it may be required to be reshipped, and carried for sale to another port, in order to procure funds for the return cargo on the homeward voyage. Again; it is not true, that, because the outward voyage has terminated, therefore, eo instanti, the homeward voyage commences. Suppose a ship to carry a cargo to New Orleans, with instructions to the master to proceed on a freighting voyage, if, within a reasonable time after the discharge of the cargo, a freight could be procured for a foreign voyage, or, if freight could not be procured, to purchase a cargo on the owner's account, if it could be purchased at a reasonable price, and to proceed therewith to a foreign port; and, if neither could be obtained within the limits of the instructions, then to return home with a different cargo, or in ballast; could it be correctly said, in such a case, that the homeward voyage commenced immediately after the outward cargo was landed? That would be to say, that a new voyage was actually commenced, before it could be ascertained what that voyage would be. These cases show the danger of attempting to lay down any universal rule, as applicable to all cases, as to where the outward voyage ends, and the homeward voyage begins, in respect to seamen's wages. In a just and legal sense the outward voyage may well be deemed, generally, to continue as to seamen's wages, as long as the seamen are engaged in purposes connected with the outward voyage, whether the cargo is discharged or not; and the homeward voyage to begin, when any acts are done or preparations made, having reference exclusively to the homeward voyage. And, if there be any intermediate time, which is not properly referable to either, that may well be treated, like an intermediate voyage in ballast, to be for the benefit and purposes of the owner, and for which he ought therefore to pay the seamen for their services. In ordinary voyages it is not common to find any such intermediate time, or to measure it with exactness. And in many cases acts are done and proceedings had simultaneously with reference both to the outward and the homeward voyage; so that it is impracticable to divide the time with perfect accuracy, which is devoted to each. Now, I apprehend, that it was with a view to this practical difficulty, that the rule has been established, that one half of the time, during which the vessel is lying in the port, shall be deemed a part of the outward voyage, and the other half a part of the homeward voyage. In this, as in many other cases, the law prefers general certainty to mere metaphysical distinctions; and a compendious, practical result to the variable elements of every distinct voyage. The rule may seem at first view purely artificial; but it is in reality not so, but is founded upon what is ordinarily a reasonable apportionment of the time with reference to the exigencies of common voyages. It is like the allowance of the ten per cent. damages upon the protest of a foreign bill of exchange; and the deduction of one-third new for old in the common cases of repairs to ships; and the deduction in cases of general average of one-third from the amount of the gross freight of the ship in estimating its contributory value. The rule is founded upon the notion, that it is a nearer approximation to absolute equity between the parties, than any other which could be assigned; and thus it conduces to the general convenience of commerce, and subserves the great public policy of suppressing litigation upon trifling differences. Perhaps, if a rule were now for the first time to be established, upon grounds of mere equity between the parties, without any reference to maritime policy, it ought to be, to consider the seamen

absolutely entitled to their full wages in every event for the whole period, during which the ship lies in port, between the discharge of the outward cargo and the taking on board of the return cargo. Such a rule, however, would somewhat impair the policy of the general maritime doctrine, which connects and binds up the interests of the seamen with the interests of the voyage; and might seduce them into languor and indifference in the performance of their duties in port, and thus retard the operations of the voyage.

Nor is there any thing in the text of Lord Tenterden, which, properly considered, interferes with this doctrine. He admits, that "the seamen are entitled to receive their wages for the time employed in the outward voyage, and the unloading of the cargo." So that he admits, that the wages are due so long as the seamen are employed in the outward voyage; leaving the point when it ends to be decided upon the circumstances of each particular case; for I cannot admit that the latter words, "the unloading of the cargo," necessarily constitute a qualification of the former words, or were so intended to be understood by the author. If they were so intended, they are too loose to found any general doctrine upon them. His subsequent language, "if the ship sails to several places, wages are payable to the time of the delivery of the last cargo" (Abb. Shipp. pt. 4, § 2, c. 4, p. 447), was not designed so much to express the particular time, to which wages were due, generally, as to point out the distinction founded upon the deliveries of successive cargoes at different ports, and to state, that wages were due up to the last, and not merely to the first port of delivery. But, in truth, Lord Tenterden's text is not of itself of any intrinsic authority, beyond what the authorities, on which he relies to support it, justify. Now, it is remarkable, that, if his text imports, what it has been supposed to import, that the wages are due only up to the delivery of the cargo on the outward voyage, the authorities, on which he relies, do not support it; but they do in effect overturn it. It is for this reason, that I am not satisfied, that he did so construe the import of his own text. He relies on an anonymous case, reported in 1 Ld. Raym. 639, and in 12 Mod. 409. I will give the report at large in each book, as it is brief. In 1 Ld. Raym. 639 (Hil. T. 12 Wm. III.), it stands thus: "Upon a motion for a new trial in an action for seamen's wages, Holt, C. J., said, that if the ship be lost before the first port of delivery, then the seamen lose all their wages. But if she has been at the first port of delivery, then they lose only from the last port of delivery. But if they run away, although they have been at a port of delivery, yet they lose all their wages." [3] In 12 Mod. 409, under Trinity term (12 Wm. III.), it is as follows: "Holt, C. J., said: If a ship go freight of an outward voyage, the seamen shall have their whole wages out. But if, at their return, the ship be taken, or other mischief happen, whereby the voyage homeward is lost, they shall have but half wages for the time they were in the harbor abroad." Again; in an anonymous case (probably the same case) reported in the same volume (12 Mod. 442), under Hilary term (12 Wm. III.), it is stated thus: "Per Curiam. In respect to seamen's wages, the usage is, that, if the ship be lost before the arrival in the port of delivery, they lose their wages out. If she arrives safe in port, and is lost in her homeward voyage, they have their wages out, but lose their homeward wages. If they run away after arrival in port abroad, they lose their wages." In 1 Ld. Raym. 739, there is a report of an anonymous case,—most probably also the same case, when it was before Lord Holt, at nisi prius, for it was in the same year (12 Wm. III.[4]),—which is as follows: "If a ship be bound for the East Indies, and from thence to return to England, and the ship unloads at a port in the East Indies, and takes freight to return to England, and on her return she is taken by enemies, the mariners shall have their wages for the voyage to the East Indies, and for half the time that they stayed there to unload, and no more. Ruled by Holt, C. J., June 4, 1700, at Guildhall, at nisi prius." Now, whether (as I suppose the fact to be) these are all but different reports of the same case in its different stages at nisi prius, or in bank, or not, it is most manifest to me, that they mean to inculcate substantially the same doctrine, namely, that the wages for the homeward voyage only are lost by a loss of the ship on the return voyage; and that the homeward voyage is not calculated from the time of the discharge of the outward cargo. In the report (1 Ld. Raym. 639) the wages lost are said to be "only those from the last port of delivery." In the report in 12 Mod. 442, the wages lost are said to be "the homeward wages." In the report in 12 Mod. 409, it is said, that they (the seamen) shall have their "whole wages out;" but if the voyage homeward is lost, "they shall have but half wages for the time they were in harbor abroad;" which is the same as the whole wages for half the time. In the report in Ld. Raym. 739, it is said, that the seamen are to "have their wages for the voyage to the East Indies, and for half the time that they stayed there to unlade;" meaning, as I think, to

[3] The same point is stated, in almost the same language as used by Lord Holt, in anonymous case in Hil. T. 13 Wm. III., in 3 Salk. 23. There is a dictum of Lord Chief Justice Saunders, in 2 Show. 291, 34 & 35 Car. II., in what case, or on what occasion delivered, we do not know, as follows: "If a ship be lost before it comes to a delivering port, no freight nor wages is due. If lost afterwards, it is due to the last delivering port." See Cullen v. Mico, 1 Keb. 831.

[4] William III. and Mary began their reign on the 13th of February, 1688; so that Hilary term, 12 Wm. III., was in January, 1701.

"unlade and lade," the latter words being left out by mistake.[5] Taking all the reports together, not only do they not justify the doctrine supposed to be laid down in Abbott on Shipping, but they directly contradict it. In my judgment, there is no irreconcilable discrepancy in these different reports, properly understood. They intend to assert, that the wages of the homeward voyage only are lost in the cases supposed; and that these wages are the wages from the time of the departure from the last port of delivery, and for half the time, which the ship lay in that port.

The only other citation relied on in Abbott on Shipping, in support of the text, is the Ordinance of Rotterdam, art. 214, cited in 2 Magen, Ins. 113. That article is as follows: "Further, the full wages of the ship's company shall always be deemed to be earned, whether one or more complete voyages have been made in foreign ports, even though the ship should afterwards happen to be lost." There is no pretence to say, that this article in any manner supports the doctrine, that the seamen are not entitled to wages, except up to the time of landing the cargo.

I am, therefore, I repeat it, not satisfied, that it was Lord Tenterden's intention to lay down in his text the particular doctrine already commented on; for none of the authorities cited by him sustain it. All that he meant to state was, that the wages of the outward voyage would be payable, if freight was earned in that voyage; and the wages of the homeward voyage lost, if the ship perished on that voyage. And in this view it leaves the point perfectly open, when the outward voyage in any given case ends, and when the homeward voyage in any given case commences. Now the very rule which the cases in 1 Ld. Raym. and in 12 Mod. seem to promulgate, has been adopted in a great variety of cases in our American courts. I found it well established, when my own professional life began in Massachusetts; and it has been uniformly recognized and supported in that state. It is sufficient to refer to the cases of Hooper v. Perley, 11 Mass. 545; Locke v. Swan, 13 Mass. 76; Swift v. Clarke, 15 Mass. 173; and Moore v. Jones, 15 Mass. 424. The same rule was adopted by the supreme court of Pennsylvania in Galloway v. Morris, 3 Yeates, 445, and by the late venerable district judge of the district court of that state (and his large experience in maritime contracts entitles his judgments to very great weight) in the case of Giles v. The Cynthia [Case No. 5,424]; Bordman v. The Elizabeth [Id. 1,657]; Johnson v. Sims [Id. 7,413]; and in Cranmer v. Gernon [Id. 3,359]. My learned brother, the late Mr. Justice Washington, fully supported the same rule in his able judgment in Thompson v. Faussatt [Id. 13,954]; and it was substantially acted on by Mr. Justice Duvall in Jones v. Smith [Id. 7,497], the difference being more in terms than in judicial intention. Nor have I been able to trace a single intentional deviation from this rule, and the equities growing out of it, until Judge Hopkinson, in his elaborate opinion in Bronde v. Haven [Id. 1,924], shook its authority. The learned judge seems, in that opinion, to hold, that the outward voyage, with reference to seamen's wages, ends with the discharge of the outward cargo; and that the homeward voyage commences when the outward voyage ends. Now, assuming the first proposition to be true (which is admitted only for the sake of argument), the latter is not either a natural or a necessary consequence from it; for there may be (as we have seen) an intermediate period properly belonging to neither. The learned judge, however, admits no such intermediate period; but he deems all the time of the ship's stay in port, after the discharge of the outward cargo (however long it may be), to be positively and necessarily a part of the homeward voyage; and, therefore, if the ship is lost on the homeward voyage, wages are due to the seamen only up to the discharge of the outward voyage. In support of these propositions, he has produced no authority; or at least none, except the passage from Abbott on Shipping, already quoted, which does not sustain them, and is not (as we have seen) a just deduction from the authorities, on which his text is founded. The learned judge has suggested, that no authorities have been cited, which support the decisions the other way in the American courts. But he seems not sufficiently to have considered, that in the cases then in judgment, the American courts were not promulgating a new rule, but were merely recognising one already well known and well established. Thus, Judge Peters, in Giles v. The Cynthia [supra], speaks of the rule as the well "settled law in the court." So Mr. Justice Jackson, in delivering the opinion of the court in Hooper v. Perley, 11 Mass. 547, says: "The general rule, as to the wages of seamen, which has been for many years recognized and uniformly adopted in our courts, is, that if the ship has carried one or more freights, and is afterwards lost, before completing the voyage, for which the seaman is hired, he is entitled to his wages up to the last port of delivery, and for half the time that the ship lies in port." He neither cited nor commented on any authorities (the citations were merely those of the adverse counsel) in support of the doctrine, deeming it well known and standing upon principles long established in our local juris-

[5] In Mr. Justice Bayley's edition of Lord Raymond's Reports, the marginal note states the case, as I understand it, that the seamen were to be "paid for the outward voyage, and for half the time they stayed at the port of delivery." There is a dictum in Campion v. Nicholas, 1 Strange, 405, that seamen are not paid wages "while the ship is lading and unlading;" which, if understood according to the literal import of the words, is not reconcilable with the admitted principles of law.

prudence.[6] But Mr. Justice Jackson has stated the general reasoning on which the rule is founded, with great clearness and strength, and his own extensive knowledge of commercial jurisprudence gives a weight to that reasoning, which it will be found difficult to resist. As yet, I have seen no attempt to meet, much less to overturn, that reasoning. And I entirely agree with that distinguished judge, that, "if we were at liberty, without reference to authority, to decide according to equity and good conscience, or to adopt a rule that would be most convenient in practice, we could not, perhaps, devise one better than that heretofore established." He puts his reasoning, in effect, upon this; either that the outward voyage ends with the discharge of the outward cargo, and the homeward voyage begins with the lading of the homeward cargo; and that then the intermediate period does not properly constitute a part of either voyage, and for that period full wages are payable; or that half of the period of the stay of the ship in port may be properly deemed referable to the concerns of the outward voyage, and the other half to those of the homeward voyage; and then the wages should be equally apportioned between them. The latter rule has been in practice adopted as the best rule; and it seems to me certainly founded in equity and general justice. My learned brother, Mr. Justice Washington, in Thompson v. Faussatt [supra], fully recognized the same doctrine, and upon the same ground. He said: "My own opinion upon this new and somewhat difficult case is, that whenever the vessel is lost on her return voyage, her arrival at the last port of delivery of the outward cargo, or at the last port of destination, if there be no cargo, fixes the time to which full wages are to be allowed, and that one half of her stay there should be added to the outward, and the other half to the homeward voyage, and to be considered respectively as parts thereof." Whether he applied his own rule correctly in that case, or not, need not be here considered. Now, it is incumbent upon those, who assert, that this is not a proper rule, to show, either that it is unjust and inconvenient in its practical operation, or that it is contradicted by some stringent and satisfactory authorities. As far as the authorities go, they are unequivocally the other way. And, for myself, I do not hesitate to say, that I should have felt myself bound by them, even if I had entertained some lurking doubts, whether they were founded in the most exact principles; for, in cases of this sort, it is far more important, that a rule should be established of general application, though somewhat arbitrary, than to be left without one. Then, as to the injustice or inconvenience of the rule, promulgated by these authorities, where has it been shown or attempted to be shown? For myself, I can only say, that I am unable to perceive any rule, which is better founded in good sense, enlightened policy, or general equity. The opposite doctrine would, on the other hand, in many cases involve the harshest and most oppressive inflictions upon a class of men highly meritorious, and who are, by the very policy of the law, disabled from protecting themselves (as the owner may), by insurance, from the loss of their hard and stinted earnings. Take the case of a voyage to St. Petersburg, and back, where the ship arrives and delivers her cargo so late, that she must wait for a homeward cargo until the next season, a period of six or nine months; is it just or equitable, that the seamen should remain by the ship for such a period, and lose all their wages without remuneration? Take the case of a detention by an embargo for a like period after the outward cargo is landed, and before the homeward voyage is undertaken, or even definitely fixed upon, are the seamen to lose their whole wages, if the ship is lost in a homeward voyage afterwards planned and commenced? The whole error seems to me to consist in a gratuitous assumption, that the homeward voyage begins as soon as the outward cargo is landed. I am not aware, that there is any authority to that effect, either in our own or in foreign jurisprudence. In cases of insurance, the commencement and termination of the outward and the homeward voyage are governed by no such considerations; but depend upon the subject-matter of the insurance, and upon other collateral circumstances. See 3 Kent, Comm. (3d Ed.) lect. 48, pp. 307–316, and the cases cited in Seamens v. Loring [Case No. 12,583]; 1 Phil. Ins. (1st Ed.) c. 9, § 1, pp. 161–170.

No doctrine is to be found generally established in the maritime jurisprudence of continental Europe, independent of positive ordinances, that the seamen are to lose their wages of the homeward voyage and during their stay in port, if the ship is lost on that voyage. The text of the French Ordinance of 1681 (1 Valin, Comm. lib. 3, tit. 4, art. 8, p. 703), which is substantially the language of the present French Code of Commerce (article 288), contains a positive provision on the subject, which has been differently interpreted by her ablest commentators. Valin thinks (1 Valin, Comm. lib. 3, tit. 4, art. 8, pp. 703, 704. Pothier leaves the point of interpretation untouched. Poth. Mar. Cont., by Cushing, note 184, p. 111) that, if the ship is totally lost in the return voyage, the seamen are entitled to no wages whatsoever, even for the outward voyage. Emerigon, on the contrary, thinks, that, if freight is earned in the outward voyage, the seamen are entitled to their full wages up to the

[6] Judge Hopkinson has, by mistake, attributed this opinion to Mr. Chief Justice Parker. The citations of authorities, also, which he has supposed were relied on to sustain the judgment, were made, not by the court, but by the counsel adverse to the decision of the court.

time of the loss of the ship, upon the ground, that the wages attach as a lien upon the freight earned, "tota intoto, et tota in qualibet parte." Emerig. (2d Ed., 1834) tom. ii. pp. 239, 240, c. 17, §§ 2, 11, note. Delvincourt differs from both, and thinks, that the seamen in such a case are entitled to half their wages. Delvincourt, Inst. du Droit Com. (2d Ed.) tom. i. pp. 158–160; Id. tom. ii. pp. 258, 259, notes 1, 6. Boulay-Paty deems the seamen entitled in the same case to their full wages for the outward voyage and to none for the homeward voyage. Boulay-Paty, Droit Com. tom. ii. pp. 224, 225, tit. 5, § 8. See, also, Santayra sur Code de Com. p. 269, art. 258. But what I would particularly rely on, is the opinion of Pothier, who, in commenting upon this particular article of the Ordinance, admits, that it is an exception to the general principles of the contract of letting to hire, according to which, the seamen ought to be paid the part of the voyage elapsed up to the time of the misfortune, and not paid for the residue of the voyage. Poth. Mar. Cont. (by Cushing) p. 111, note 184; Id. p. 151, note 50. In general justice, then, this persuasive author shows us, that the exception has no foundation; and that it stands upon positive law as a matter of public policy. If it is to be extended beyond the homeward voyage, to embrace the stay of the ship in port from the time of the discharge of the outward cargo, it should be clear, beyond any doubt, that the public policy extends to it. That has not been shown, and, as I humbly conceive, cannot be shown. If resort be had to the doctrine of apportionment in courts of equity, where contracts have been by accident prevented from being carried into entire execution and performance, it will be found, that it favors the more liberal course. And it ought not to be forgotten, that, in contracts for seamen's wages, courts of admiralty always follow out the benign interpretations of equity, rather than the rigid principles of the common law.

Upon a careful review of the whole doctrine on this subject, which I had occasion to examine, and act upon, in the case of The Two Catherines [Case No. 14,288], on this point, I see no reason to change the opinion then expressed. I think that the question was at that time closed in by antecedent authorities, which ought to govern my own judgment upon such a question. But if there were no authority then or now existing on the subject, I should still approve of the rule as settled, as one founded in solid equity, in public policy, and in commercial convenience. It will reach the justice of most cases with as much certainty as is ordinarily attainable in human affairs. The true theory of the rule is, that the seamen ought to be paid wages for the outward voyage, and for all the time they are employed in port in the concerns thereof, and if freight is or might have been earned by the owner in that voyage, that the wages for the homeward voyage, and for all the antecedent period in port in which the seamen are employed in preparations or business connected therewith, are lost by a total loss of the ship and freight on the homeward voyage. That, for the sake of uniformity and certainty, half the time passed in port is attributed to each voyage, and is an apportionment commended by the double motive of suppressing litigation upon slight distinctions, and of accomplishing the ends of maritime policy, by which the right to wages is made in a good degree dependent upon the safety and success of the voyage.

The other question, which, indeed, is the only one propounded for the consideration of the court, does not seem to me to involve any intrinsic difficulty. The contract for mariners' wages, though in itself capable of division for some purposes, as, for example, in regard to the outward and the homeward voyage, is, for most purposes, treated as an entire contract. Although a seaman may, in many cases, be entitled to claim his wages for the outward voyage, upon the due performance thereof, yet, inasmuch as the claim arises under an entire contract for the round voyage, the mere fact of the earning of such wages on the outward voyage, does not amount to a positive severance of the contract, pro tanto. The most, that can be properly said, is, that it may give an election to the seaman to sue; and upon his election and suit, there will be an actual severance of the contract; but not before. For many purposes, indeed, the contract must be treated as an entire one, subsisting for the round voyage; for if, upon the homeward voyage, the seaman should grossly misconduct himself, that might involve the forfeiture of all his wages antecedently earned. That was the very case of The Mentor [Case No. 9,427]. It seems to me, therefore, that where wages are earned under an entire contract for the outward voyage, and yet the right thereto may be affected by subsequent events, and has not become absolute to all intents and purposes, the contract is not to be deemed ipso facto severed, but as subsisting as an entirety for the round voyage. Such at least is the opinion, to which my present reflections have led me, though certainly I do not wish to be bound by it, if upon further argument and reflection I should see reason to change it. In this view of the matter, in the events which did occur, the wages, which became due on the outward voyage to St. Petersburg, were, by the capture and condemnation, vested by an absolute title in the libellant, in 1809. They might then have been sued for, and consequently by lapse of time, upon the acknowledged principles of courts of admiralty, even if they have not been paid, they are to be treated as a stale claim, incapable of being asserted here. Indeed, in the present suit, which may be deemed in some sort, in the

nature of a proceeding in rem, against the proceeds of the captured property in the hands of the owner, under the award of the commissioners, there is no ground to say, that any indemnity has been received for such wages, or for the freight earned on the outward voyage; or that any trust, or equitable lien therefor, attaches to the fund. So far, then, as the claim for the wages of the outward voyage concerned, if they were in controversy, there is as little ground to say, that the claim is or could be revived by the award. In point of fact, I understand that it is not controverted that they were paid by the owner.

Very different considerations, however, do, in my judgment, arise in respect to the claim for the wages for the homeward voyage, including half the time of the stay at St. Petersburg. The capture of a neutral ship does not dissolve the contract for the seamen's wages, but merely suspends it; and it is not dissolved until the final condemnation. Up to that period, the seamen have a right to remain by the ship, and await the event, as an incident to their contract. So it was held by this court in the case of The Saratoga [Case No. 12,355]. If nothing more occurs, and the ship is condemned, the seamen lose their whole wages for the homeward voyage, unless, indeed, there is an ultimate decree of restitution, or an award of indemnity by treaty on account of the illegality of the capture, as in the present case; in which event the right to their wages revives as a trust, lien, or privilege attached thereto. The seamen cannot claim any compensation for their services between the time of the capture and condemnation, unless there is a new and distinct retainer, or contract of the master with them, to pay them a compensation for such services in every event. Such a contract is not to be presumed; but it must be distinctly propounded and proved. Now, in the present case, it is neither propounded in the answer, nor is it proved in the case; and as a matter of defence, the onus probandi is on the respondent. If such a contract had been proved, and payment under it had been also established, I should have thought that a deduction pro tanto ought to have been made from the present claim. If the contract had been made, but no payment under it had been made, I should have thought, that it could not have been propounded, as an extinguishment of the claim to wages pro tanto, since at most it would be but an accord without a satisfaction. Indeed, in an equitable view, it would be manifestly unjust, to allow the owner to deduct a sum under another contract, which he had never paid, in extinguishment of a legal claim under the shipping articles, and the award of the commissioners.

My judgment, therefore, is, that the libellant is entitled to full wages during the whole of the homeward voyage, in the same manner as if it had been performed, including half the time of the ship's stay at St. Petersburg, without any deduction; which is the substance, I believe, of the decree of the district court.

Afterwards, it was suggested by the counsel for the respondent, that, as the homeward voyage had not been performed, the time, up to which the wages were to be allowed, was uncertain; and that the district judge had allowed three months' wages from the time of the condemnation, as a reasonable time for the return of the seamen home, by analogy to the act of congress [2 Stat. 203], allowing three months' wages in cases of the discharge of seamen in foreign ports. There were other cases depending, in which the same point might arise, and, therefore, it was desirable to have it settled.

STORY, Circuit Justice. The rule in cases of this sort ought to be, to give wages up to the time, when the seamen did return, or might have returned home, without any voluntary and unnecessary delay on their part, deducting any wages they may in the intermediate time have earned in another employ. I should think, that, in the absence of all other proofs, the rule of the district judge was a very equitable one, as applicable to European voyages; although it might not be equally applicable to East India voyages. No objection being made to this allowance in the present case, it will of course stand. Decree affirmed.

Case No. 11,187.

PITMAN et al. v. The PARAGUAY.

[N. Y. Times, Nov. 12, 1853.]

District Court, S. D. New York. 1853.

MARITIME LIENS—UNDER STATE LAWS—CABIN FURNITURE.

[Labor and supplies to furnish a passenger steamer's cabin give rise to a lien under the New York statute.]

[This was a libel by George F. Pitman and George S. Humphrey against the steamship Paraguay for labor and materials.]

F. C. Bliss, for libellants.

C. A. May, for defendants.

Before BETTS, District Judge.

The libellants, residing in this city, claim to recover in this action the sum of $236.30, for mattresses, curtains, sofas, table covers, and other upholstery furnished the ship, and for labor done in fitting up her cabin furniture, as being a lien upon the ship, under the lien law of this state. The answer denies all knowledge of the furnishing, and alleges that the charges are extortionate and that the goods furnished were not necessary to the steamer to enable her to perform her intended voyage. The vessel was fitting out for a voyage to South America, with passengers.

HELD BY THE COURT, that it is a fair and reasonable interpretation of the lien law, to understand it as giving protection to credits for the accommodations and even luxuries usually furnished to steam vessels in the present day, equally with those having relation to merely repairing and rigging a ship so as to render her navigable, and that cabin furniture supplied to a steamship, intended to be engaged in transporting passengers, comes within the class of privileged claims, without an allegation in the pleadings that they went into the construction of the ship or were attached permanently to her.

Decree for libellants accordingly, with a reference.

PITMAN (UNITED STATES v.). See Case No. 16,051.

Case No. 11,188.

In re PITT et al.

[8 Ben. 389; 14 N. B. R. 59; 23 Pittsb. Leg. J. 196.] [1]

District Court, E. D. New York. Feb., 1876.

BANKRUPTCY—AMENDMENT OF PETITION.

A petition in bankruptcy against a firm, naming only two partners of the firm and omitting the third member, cannot be amended so as to make the third member a party, after all the testimony has been taken and the cause is before the court upon hearing; and upon a petition so defective, the firm cannot be adjudicated bankrupts.

[In the matter of Charles S. Pitt and Alfred Pitt, bankrupts.]

Thomas M. Wheeler, for petitioning creditors.

Miller & Van Valkenburgh, for bankrupts.

BENEDICT, District Judge. The subsisting firm of Pitt Brothers, sought to be adjudicated bankrupt by these proceedings, is composed of Charles S. Pitt, Alfred Pitt, and Walter Pitt. But the proceeding has been taken against Charles S. Pitt and Alfred Pitt alone, Walter Pitt not being made a party. Upon such a petition the existing firm of Pitt Brothers cannot be adjudged bankrupts, because all the persons comprising the firm are not before the court.

The defect cannot be cured by an amendment made at this time, when all the testimony has been taken and the cause is before the court upon hearing. The application to amend should have been made when the defect was discovered and before taking the proofs of the act of bankruptcy.

PITT (SPRAGUE v.). See Case No. 13,254.

PITT, The (UNITED STATES v.). See Case No. 16,052.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 23 Pittsb. Leg. J. 196, contains only a partial report.]

PITTMAN (UNITED STATES v.). See Case No. 16,053.

Case No. 11,189.

In re PITTOCK.

[2 Sawy. 416; [1] 8 N. B. R. 78.]

District Court, D. Oregon. May 6, 1873.

USURY LAW, CONSTRUCTION OF—PROHIBITION AND PENALTY—PROHIBITORY ACT, CONSTRUCTION OF—USURIOUS INTEREST—JURISDICTION OF BANKRUPTCY COURT.

1. It is the province of the law-making power to determine what rate of interest on money will best secure and promote the public good, and therefore it is the duty of the courts to construe and administer such a law with a view to effect its objects and to promote justice.

2. Where a statute contains both a prohibition and a penalty, a contract or transaction contrary thereto is absolutely illegal and void, unless it appears, upon a consideration of the whole act, that the legislature did not so intend.

[Cited in Dowell v. Applegate, 7 Fed. 883; U. S. v. Howard, 17 Fed. 641.]

3. Where an act to regulate the rate of interest on money contains an unqualified prohibition against taking or receiving a greater interest than therein prescribed, and in a certain contingency also provides for the forfeiture of the entire usurious debt, the reasonable inference is that the legislature intended to make all acts and contracts in contravention thereof absolutely illegal and void.

4. Section two of the interest act of Oregon (Code, p. 755, c. 24, § 2) provides that, "no person shall receive any greater sum or value for the loan or use of money," than in such act prescribed: *Held*, that it is not necessary that this "greater sum or value" should be contracted for or received at the time of making the loan, to bring the transaction within the prohibition; but if it is received at any time for or on account of such loan or use of money, it is within such prohibition, and the whole contract or transaction becomes illegal and void.

5. This court has jurisdiction to allow or disallow claims against a bankrupt's estate, and therefore to pass upon their legality; and this, although it may not have jurisdiction to enforce a penalty imposed by the state law on account of an act making any such claim illegal.

[Cited in Re Prescott, Case No. 11,389.]

L. C. Potter made proof of a debt of $387.25 against the bankrupt's estate, to which the assignee objected on the ground that the claim was usurious and illegal. On April 10, 1873, the bankrupt and creditor were examined before the register in relation to the matter, from which it appeared that: "On October 13, 1872, Potter came into Robert Pittock's store on Front street, and asked Pittock if he wanted some money. Pittock replied that he did; Potter then counted out $370 in coin, laid it upon the desk, and Pittock gave him his note for $370, with interest at one per centum per month. At the same time, and while the money was still lying upon the desk, Potter asked Pittock how much he was going to allow him for the accommodation, when Pittock handed him $20, which Potter took and went

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

away." Thereupon the following questions arose, and upon the request of counsel were by the register certified to the district judge for his opinion: (1) Does the evidence taken support the charge that the claim of Potter is usurious? and (2) if so, can it be proved in bankruptcy? The certificate of the register was accompanied with an opinion that the claim ought to be rejected. The judge made an order accordingly, with leave to the creditor to have the matter placed upon the docket for argument, and show cause why the claim should be allowed.

On April 24 the matter was argued by counsel and submitted. The following is the opinion of the register:

By J. J. HENDERSON, Register:

The last clause of section one of the usury law of this state provides that one per cent. per month for the loan or use of money may be charged by express agreement of the parties, and no more. Section two provides that "no person shall, directly or indirectly, receive in money, goods, or things in action, or in any other manner, any greater sum or value for the loan or use of money * * * than is in this act prescribed;" and amounts to a prohibition. Section three further provides that, "if it shall be ascertained, in any suit brought on any contract, that a rate of interest has been contracted for greater than is authorized by this act, either directly or indirectly, * * * or that any gift or donation of money, property or other valuable thing has been made * * * to a lender or creditor * * either by the borrower or debtor, or any person for him, the design of which is to obtain for money so loaned * * a rate of interest greater than that specified by the provisions of this act, the same shall be deemed usurious, and shall work a forfeiture of the entire debt so contracted, to the school fund of the county where such suit is brought;" and this prescribes the penalty for violating its provisions. This last section embraces two classes of cases—one where the unlawful interest is contracted for, and the other where it is taken with the design to obtain a greater rate of interest than is prescribed, and may be after the contract is made. The creditor and bankrupt agree that while the $370 was still on the desk, the former asked the latter what he was going to allow him "for the accommodation," and bankrupt then handed back $20, which creditor took, and that it was given or "allowed" for the accommodation. The one per cent. per month was contracted for, for the use of the money; and the "use of the money" was no more nor less than the "accommodation" for which the $20 was given. I must conclude that the case comes within the usury law of the state. That law settles the right of Potter, and determines the legality of his claim. He could not recover it in a state court. The last clause of section twenty-two of the bankrupt act [of 1867 (14 Stat. 527)], declares that "the courts shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality or mistake." If the claim of Potter be usurious, it is illegal, because prohibited by a statute which also forfeits the entire debt.

The creditor stands before the court in the attitude of a plaintiff, invoking its jurisdiction to enforce a right which the laws of the state of Oregon deny him. It cannot be claimed that congress intended the bankrupt law as a means of evading a penalty imposed by the law of any state for the violation of its positive prohibitions. Such a construction would permit men every day to take usury and make contracts usurious under the state law, and then come to a court of bankruptcy to enforce them. I think the cases cited by the creditor's counsel in National Exch. Bank v. Moore [Case No. 10,041], and Darby v. Boatman's Sav. Inst. [Id. 3,571], so far as they are applicable, support the view I have taken. In the former of these, it is admitted that in Ohio, where the rate of interest is six per cent., and the penalty for usury is the forfeiture of double the illegal interest charged, the claim for such illegal interest cannot be enforced in a court of bankruptcy. In the opinion of the court we find this language: "There is no reason to doubt that if the statute referred to had stopped with the prohibition of taking or receiving interest in excess of the rate prescribed, a loan made by a bank in conflict with such prohibition could not be enforced. It would unquestionably be held to be an illegal and void act. But the legislature has chosen to prescribe a specific penalty for the illegal act, namely, the forfeiture of double the sum of the entire interest charged or paid, and have not declared that the principal debt should be forfeited." The law of this state not only prohibits the giving or taking of more than one per cent. per month, for the loan or use of money, but provides that if it is done, "the same shall be deemed usurious, and shall work a forfeiture of the entire debt." The same rule which would bar the claim for interest in Ohio, would exclude the whole debt in Oregon. The other case cited is not in conflict with this view. See, also, McKinsey v. Harding [Case No. 8,866]. The claim is disallowed, and costs of the contest are taxed to the creditor, and will be taken from the deposit in court.

Joseph N. Dolph, for creditor.

John Catlin and Presley M. Denny, for assignee.

DEADY, District Judge. Section 23 of the bankrupt act, as above cited, prohibits the allowance of a claim in bankruptcy, which is founded in illegality. In this respect, the act is only in affirmance of the common law. What is or is not an illegal contract or transaction, depends upon the law of the place where the contract was made or the transaction had. The right of the creditor to prove this debt then depends upon the effect to be given to the usury act of the state of Oregon.

It is apparent upon an examination of the books that opinions as to the morality and policy of usury laws have frequently led to their being construed and refined away. The crafty means contrived by the wit and greed of man to evade the law have too often been successful, only because the private opinions and sympathies of courts and juries have interfered with its just and general enforcement.

But in this court, an act of the legislature limiting the rate of interest to be taken for the use of money, will receive as favorable a construction as any other act emanating from that authority, to secure and promote what it deems to be the public good. It is for the law-making power to determine whether the rate of interest shall be limited, and not the courts. An act prohibiting the taking of interest beyond a certain rate should be construed, according to the general rule, with a view to effect its objects and promote justice.

Is a contract to receive more than lawful interest illegal and void under this act? It prescribes the legal rate of interest, and declares that "no more" shall be contracted for or received. This is a prohibition, and any contract contrary thereto is illegal and void, the same as if the act had expressly declared such to be the result. In Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 538, the supreme court held that a contract contrary to a clause in the act incorporating the bank, which forbade it to take a greater interest than six per cent., but did not declare such contract void, was, nevertheless, necessarily illegal and void. In answer to the question, "whether such contracts are void in law upon general principles," the court say:

"The answer would seem to be plain and obvious, that no court of justice can in its nature be made the hand-maid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummations of violation of law?"

In Harris v. Runnels, 12 How. [53 U. S.] 83, cited and relied on by counsel for creditor, Mr. Justice Wayne says: "The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand originating in its breach or violation of its principles and enactments. Contracts in violation of statutes are void. * * * A statute may either expressly prohibit or enjoin an act, or it may impliedly prohibit or enjoin it by affixing a penalty to the performance or omission thereof. It makes no difference whether the prohibition be express or implied. In either case, a contract in violation of its provisions is void."

But the usury act (section 3) also affixes a contingent forfeiture or penalty to the violation of its terms in this respect, and counsel for the creditor maintains that when such is the case, the ordinary effect of the prohibition is modified or mitigated so far as to leave the contract legal, subject to the penalty imposed for making it.

The case mainly relied on in support of this position is Harris v. Runnels, supra. The case was an action upon a note for the purchase of slaves sold in Mississippi. Defense, that they were brought into the state in violation of a statute of the state which prohibited the bringing therein of convict negroes, and as a means to that end, provided that no slaves should be brought into the state without a certificate, by two freeholders, describing them, and stating that they had not been guilty of certain crimes. The seller and purchaser of slaves brought into the state contrary to the act, were each made liable to a penalty of $100 for every violation thereof.

The court held that the parties to the sale of the slaves were liable for the penalty, but the contract itself was not void, because upon the whole act it did not appear reasonable that such was the intention of the legislature. The court freely admitted the general rule as stated, that a contract made contrary to a prohibition or a penalty, was illegal and void, and added, "the rule is certain and plain; the practice under it has been otherwise. The decisions in the English courts have been fluctuating and counteracting. Those in the courts of our states have followed them without much discrimination."

The court then proceeds to notice some of the contradictions in the application of the rule, and says: "We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only, for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true, that a statute containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow, that the unlawfulness of the act was meant by the legislature to avoid a contract in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

The rule furnished by this case seems to be as follows: Where a statute contains both a prohibition and a penalty, a contract or transaction contrary thereto is absolutely il-

legal and void, unless it appears, upon a consideration of the whole act, that the legislature did not so intend.

Let us apply the rule to the case at bar. The act under consideration contains a prohibition against contracting for or receiving more than a certain interest. If this were all, it is admitted that a contract contrary thereto would be totally void. Counsel for creditor claims that the act also contains a penalty, because it provided in section three for forfeiting the entire debt, under certain circumstances, upon which usurious interest has been received or contracted for.

Let this be admitted, and still it follows that an act in contravention of the statute is void, unless the contrary appears from the act itself. What is there in the provisions or object of this act that tends to prove that the legislature did not intend that a transaction in contravention of it should be void?

In Harris v. Runnels, supra, the facts that the act was passed to prevent the importation of negro convicts into the state, and not negro slaves generally, and that the prescribed certificate concerning the importation of slaves generally was only a means to secure that end, and lastly and chiefly, that the penalty prescribed for the violation of the act was merely $100 instead of the forfeiture of the subject-matter of the prohibited sale and purchase, were held sufficient to show that the legislature did not intend to declare the contract of sale absolutely void. The prescribed penalty for the sale of a non-certificated slave being merely $100, while his value was probably ten times that amount, there was much reason for inferring that the legislature thereby evidenced its intention not to punish the party by the further forfeiture of the value of the slave, if the purchaser did not choose to pay the purchase price, as would be the case, in effect, if the contract was held to be void absolutely.

But in this case the primary and palpable object of the legislature is to prevent the giving and receiving more than a certain rate of interest for the loan or use of money, as a thing contrary to the public good. The prohibition is unqualified, and reaches all cases of usurious interest under whatever name or device, promised, paid or received. But the penalty, which consists of a forfeiture of "the entire debt" to the school fund is contingent upon two things: (1) A suit being brought to recover the debt; and (2) it being ascertained in said suit that the same is usurious.

In effect, there is no penalty imposed by the act for its violation, except in cases where the debtor declines to pay the debt, and in a suit to enforce payment, it appears that it is usurious. In such case the law converts the action of the creditor into one for the use of the public to whom the forfeiture is given—the school districts of the county.

A debtor may pay a debt tainted with usury with impunity. The law forbids the act, but prescribes no penalty for disobedience. But if payment of such a debt is sought to be enforced by a "suit," and the fact of its being usurious is "ascertained" or established therein, then the law intervenes, and directs that judgment for the amount of the sum loaned be given for the benefit of the parties for whose use the suit in contemplation of law in such contingency is brought.

The prohibition being absolute and the penalty contingent and remote, it is a question whether this is a case of both a prohibition and a penalty within the rule in Harris v. Runnels. But admitting that it is, the cases are in every other material matter unlike. Here the penalty is contingent upon the action of the debtor, and is equal to the entire debt—neither more nor less. No penalty is imposed upon the debtor; on the contrary, he is relieved from the payment of any interest. So far as the creditor is concerned, the effect is the same as if no penalty had been imposed, for although he may maintain a suit for the usurious debt, it is only for the benefit of another. If no penalty had been provided, it is admitted that the contract being prohibited, would be illegal and void. In either case the creditor loses his debt, unless his debtor chooses to pay it. The conclusion is plain that the intention of the act is to make illegal and void all acts and contracts done or made in contravention of its provisions.

Counsel for creditor also cited National Exch. Bank v. Moore [Case No. 10,041], and Darby's Trustees v. Boatman's Sav. Inst. [Id. 3,571]. The case is commented on in the opinion of the register, and shown to be against the claim of the creditor, so far as applicable to the case. It arose under section thirty of the national banking act (13 Stat. 108), which forbids the taking by the national banks of more than a specified interest, and prescribes a specified penalty for its violation—the forfeiture of the entire interest agreed to be paid, and a liability to pay back twice the amount of any such interest received.

The court, following the rule laid down in Harris v. Runnels, supra, held that the nature and amount of the penalty prescribed for the violation of the act showed that congress did not intend to render void the whole contract upon which the usurious interest had been received or taken, and that as to the principal of the debt, it was valid.

The second cause arose under a clause in the charter of the defendant, which "authorized it to loan the money deposited with her at any rate of interest not exceeding eight per centum per annum."

A greater sum than this having been received upon a loan, it became a question what was the effect of this violation of the law. The argument for the plaintiff was, that the charter of the defendant not having authorized the making of such a loan, it was ultra vires and void. The court held that

only so much of the interest as was in excess of the rate authorized, was illegal and void. The question of usury was not made, and the court held the transaction valid so far as it was authorized by the charter.

The creditor also makes the point upon the facts that the payment of the $20, although contrary to the act, was no part of the original loan, and therefore cannot affect it one way or the other.

Upon the testimony my mind inclines to the conclusion reached by the register, that the payment of the $20 was demanded and made while the transaction was yet incomplete. True, the money and note therefor had literally changed hands, but barely so. Neither, at least the note, had been formally accepted, and I feel quite certain that if the bankrupt had not responded to the creditor's demand for something more, the latter would not be here to-day asking the allowance of this claim.

But the point is not material. It is admitted on all hands that the $20 was paid the creditor on account of the loan—for the accommodation. Section 2 of the act is explicit and comprehensive upon this point. "No person shall directly or indirectly receive * * * any greater sum or value for the loan or use of money than in this act prescribed." Nothing could be plainer than this. It is not necessary that this "greater sum or value" should be contracted for or received at the time of making the loan. If it is received at any time for or on account of such loan or use of the money lent, the case is within the prohibition of the act, and the whole contract or transaction becomes illegal and void.

I do not mean to be understood as holding that a borrower may not manifest his gratitude for a loan, by a free gift to the lender of either money or goods, over and above the lawful interest. The sum so given is not, in fact or contemplation of the act, either paid or received as a consideration for the use or loan of the money. But whether such money passes between the parties as a gift or consideration for the loan in pursuance of an understanding of the parties, is a question of fact in each particular case. 3 Pars. Cont. 114.

It seems to me that whenever the money is received by the lender while the debt remains unpaid, and the relation of creditor and debtor exists, there is a reasonable inference, in the absence of anything to the contrary, that it was paid and received in consideration of the loan, and is usurious. But where, as in this case, it was received within an instant from the making of the loan, if not as a part of it, and that too in pursuance of what amounted to a direct demand by the creditor for something more than legal interest, there is little room to doubt that the money was paid and received in consideration of the loan.

It is said in a text book, that the taking of usurious interest upon a contract for lawful interest will not conclusively imply a prior agreement to that effect, but that it is prima facie evidence thereof. 3 Pars. Cont. 114. Even under this rule, the inference would be that the twenty dollars was paid in pursuance of an understanding of the parties at the time of making the loan, although it appears to have been paid afterward. But the statutes of the different states on the subject of interest vary materially. Under the statute of this state, it is quite clear that unlawful interest received upon a lawful loan, in pursuance of a contract or understanding of the parties, though subsequent in point of time to the making of the loan, makes the debt usurious and the original contract illegal and void.

The general intent to strike at the root of the evil intended to be remedied, is more manifest in section three, which provides that, if in a suit upon any contract it shall appear that even a gift of money has been made or promised to a creditor, the design of which is to obtain for debts due or to become due a rate of interest greater than that allowed by the act, the same—the contract—shall be deemed usurious and the entire debt forfeited.

Another point made for the creditor is, that this court cannot or will not enforce a forfeiture given by the laws of this state to the school districts of this county, and therefore it cannot take cognizance of the alleged illegality of this transaction. For this position, counsel cites Sherman v. Gassett, 4 Gilman, 525. I think the law of this case very questionable. The court was evidently influenced by the idea that the transaction was not oppressive, according to its notions of right, rather than the rule prescribed by the law-making power.

But be that as it may, I am unable to perceive the relevancy or force of the objection. This is not a suit or proceeding to enforce a forfeiture, but an objection to the allowance of a claim against a bankrupt's estate because the same is illegal. The transaction being illegal and void by the lex loci, is illegal and void everywhere and in all courts.

Because this court may not have jurisdiction to enforce all the penalties consequent upon this illegal transaction by the laws of the state, it by no means follows that it cannot inquire into its legality when the question arises in a proceeding duly before it. This court has express jurisdiction to allow or disallow claims against the estate of a bankrupt, and in so doing must determine their legality. According to the law of this state, this claim is illegal, and must therefore be rejected.

Case No. 11,190.

In re PITTS.

[19 N. B. R. 63.] [1]

District Court, S. D. New York. Jan. 9, 1879.

BANKRUPTCY—EFFECT OF DISCHARGE UPON DEBT FRAUDULENTLY CONTRACTED—EXECUTION—STAY.

A creditor of the bankrupt, prior to the commencement of the proceedings in bankruptcy, recovered judgment in an action for goods sold and delivered. An order of arrest was granted in such action on affidavits showing that the credit given was induced by false representations made by the bankrupt as to his credit and means. An appeal from this order was not finally determined until after the proceedings in bankruptcy had been commenced, when it was affirmed. *Held*, that such a debt, even after judgment, is not dischargeable in bankruptcy, and that, as there was a final judgment before the commencement of the proceedings in bankruptcy, a stay of proceedings which would prevent the issue of an execution against the person of the bankrupt was not authorized by section 5106.

In bankruptcy.

C. Whitaker, for bankrupt.

Bernard & Fiero, for judgment creditors.

CHOATE, District Judge. This is a motion to vacate a stay of proceedings, by the effect of which a creditor of the bankrupt, who recovered judgment prior to the commencement of the proceedings in bankruptcy, is stayed from arresting the bankrupt. The judgment record shows that the judgment was recovered for goods sold and delivered. Before judgment an order of arrest was made on affidavits showing that the plaintiff was induced to give the bankrupt credit for the goods by false representations as to his credit and means. From this order an appeal was taken, which was not finally determined until after the commencement of the bankruptcy proceedings. The order was then affirmed, and is now in force, and, under the laws of New York, entitles the judgment creditor to an execution against the person. That the judgment was a provable debt, being recovered before the filing of the petition, admits of no doubt. It would be so if recovered for a mere tort. That the claim on which it was founded would have been provable even though the plaintiff might have had his action, or might even have commenced an action sounding in tort for the deceit, has also been held in this circuit. In re Schwartz [Case No. 12,502]. But the bankrupt is liable to arrest, notwithstanding the pendency of the question of his discharge, if the claim is one from which his discharge will not release him. Section 5107; In re Rosenberg [Case No. 12,054]. And within the meaning of section 5107 there is no distinction to be made, as to arrest, between mesne and final process. In re Patterson [Case No. 10,817]; In re Wiggers [Id. 17,623]. If the claim is one "created by fraud," within the meaning of section 5117, it is not discharged; and if the original cause of action or debt was one created by fraud, it is not so merged in the judgment that the judgment becomes dischargeable; but the court will look through the judgment record to ascertain the real nature of the debt. In re Patterson [supra]; Warner v. Cronkhite [Id. 17,180]; In re Whitehouse [Id. 17,564]. There are some cases which hold that to bring a debt within this section as created by fraud, the fraud must be the sole foundation of the claim, and that a debt is not created by fraud if it grows out of a contract into which the party was induced by fraud to enter; that such a claim cannot be said to be created by fraud, particularly after the claimant has elected to sue in contract and has recovered judgment in such suit; that the fact that the complaint contained allegations of fraud not constituting part of the cause of action, or that by the state law in such an action an arrest on mesne process or execution is given, does not affect the question. Palmer v. Preston, 45 Vt. 154. See, also, Warner v. Cronkhite [supra], and case cited. But see Stewart v. Emerson [52 N. H. 301]. In the case of In re Robinson [Case No. 11,939], it was decided by Mr. Justice Nelson, upon review, that where a judgment was recovered before the bankruptcy in an action for goods sold and delivered, and the bankrupt was arrested on execution, there having been, as in this case, an order of arrest upon affidavit before judgment that the sale was induced by false representations, that the bankrupt was not entitled to be discharged from arrest. That case has settled the law for this court that such a debt, even after judgment, is not dischargeable in bankruptcy. The facts do not fully appear in the report of the case, but the papers on file show that this precise point was ruled after full argument. As there was a final judgment before the commencement of bankruptcy proceedings, section 5106 seems not to authorize a stay which will prevent the issue of the proper process to secure to the creditor the benefit of the right to arrest the bankrupt given him by the state law, and preserved by section 5107. See In re Whitney [Case No. 17,581].

Stay vacated, so as to allow the issue of process on the judgment for the arrest of the bankrupt.

[For demurrer to specifications in opposition to bankrupt's discharge, see 8 Fed. 263.]

[1] [Reprinted by permission.]

Case No. 11,191.

PITTS v. EDMONDS.

[1 Biss. 168;[1] 2 Fish. Pat. Cas. 52.]

Circuit Court, E. D. Michigan. June Term, 1857.

PATENTS — COMBINATION OF KNOWN MECHANICAL POWERS—IMPERFECT MACHINE — PATENTABILITY —EQUIVALENTS—DEFENSE OF WANT OF NOVELTY —NOTICE.

1. At law, a notice is essential to authorize the defense of want of novelty. In chancery the rules of pleading equally require the same matter to be set up.

[Cited in Brown v. Hall, Case No. 2,008.]

2. The most valuable inventions consist in the combination of known mechanical powers. Every part of such inventions may be found in some form, among the various devices of human ingenuity, and the man who unites these powers, and produces a new and important result to society, is well denominated a public benefactor.

3. It is not the man who may form an imperfect machine, which may suggest to a higher order of mind, valuable ideas, but it is the one who embodies those ideas in a practical and working form, whom the law protects.

4. A patent, in calling for a specific mode, embraces in law all mechanical equivalents, or modes which operate on the same principle; consequently all modes, however changed in form, but which act substantially on the same principle, and effect the same end, are within the patent. If this were not so, a patent right would be of no value, as it might be avoided by any one who possessed ordinary mechanical skill.

[Cited in Odiorne v. Denney, Case No. 10,431.]

This was a bill in equity, filed to restrain the infringement of letters patent granted to William Woodworth, December 27, 1828, for improvements in planing and tonguing and grooving machines, more particularly referred to in the case of Foss v. Herbert [Case No. 4,957].

S. A. & D. Goodwin, Jr., for complainant.

S. S. Fisher, of counsel for complainant, filed the following brief:

The complainant shows a prima facie case of exclusive right, exemplification of the letters patent, and the defendant's stipulation as to title. Act 1836, § 4 (5 Stat. 117); Curt. Pat. §§ 30, 39; Alden v. Dewey [Case No. 153]; Woodworth v. Sherman [Id. 18,019]; Stearns v. Barrett [Id. 13,337]; 2 Robb. Pat. Cas. 297; Winter v. Wells, Webst. Pat. Cas. 129; 2 Greenl. Ev. § 473.

As to what is an infringement, vide Curt. Pat. §§ 220–222, and cases cited; Walton v. Potter, Webst. Pat. Cas. 586, note; Wyeth v. Stone [Case No. 18,107]; Odiorne v. Winkley [Id. 10,432]; Buck v. Hermance [Id. 2,082]; Curt. Pat. § 224; Washburn v. Gould [Case No. 17,214]; Woodworth v. Edwards [Id. 18,014]; Woodworth v. Rogers [Id. 18,018]; Sloat v. Spring [Id. 12,948a]; Motte v. Bennett [Id. 9,884]; Whittemore v. Cutter [Id. 17,601].

The above cases show clearly that Mr. Wilder, by his patent set up in the answer and shown in Exhibit G to defendant's testimony, gained no right, on account of his improved mode of feeding, to use our pressure rollers and cutters together, which construction is the essence of our invention. They also show very fully that the gearing of our rollers, so as to make them aid in feeding, does not take from them their character and effect as pressure rollers, and acting in a double function.

Nor does the inclination of the rollers, ¼ inch in 20 inches, spoken of by one witness (Wilder), change at all their character. They do the same office still, that is, they hold the board steady, &c. Such a change is merely formal, and not so great as the mechanical equivalents and analogous devices condemned in the following cases: Gibson v. Harris [Case No. 5,396]; Gibson v. Van Dresar [Id. 5,402]; or as the springs in Foss v. Herbert [supra]; or as in placing the cylinder diagonally across the face of the board; and as in the rollers inclined in Sloat v. Spring, supra.

The use by the defendant of the tonguing and grooving part of Woodworth's patent without the planing is an infringement. The point was, in fact, ruled in this case on the motion for injunction. But, if now open for argument, I refer to Foss v. Herbert, supra, where Judge Drummond ruled the very point in his charge to the jury; and also to the following authorities: Curt. Pat. § 245, and note, and cases cited; Moody v. Fiske [Case No. 9,745]; Pitts v. Whitman [Id. 11,196]; Curt. Pat. §§ 110, 111, and notes; Wilson v. Rosseau, 4 How. [45 U. S.] 646, 2 Robb, Pat. Cas. 372; Wyeth v. Stone [supra]; Root v. Ball [Case No. 12,035]; Hogg v. Emerson, 11 How. [52 U. S.] 587, 2 Robb, Pat. Cas. 655; Gibson v. Betts [Case No. 5,390]; Brooks v. Fiske, 15 How. [56 U. S.] 212; Wilson v. Barnum [Case No. 17,787]; Potter v. Wilson [Id. 11,342]; Sloat v. Spring, supra.

The recitals of the specification are no evidence of a patent. Cow. & H. Notes, pt. 1, p. 160; Id. pt. 2, pp. 235, 236, and cases cited; O'Reilly v. Morse, 15 How. [56 U. S.] 62. Vide 5 Stat. 353 (Act 1839, § 6); Brooks v. Norcross [Case No. 1,957]; Act 1836, § 15 [5 Stat. 117].

There is nothing in either machine to shake the originality of the Woodworth machine. The Woodworth invention, after twenty-eight years of possession and most severe litigation before courts and juries in almost every circuit of the Union, has never been defeated on the merits, and the originality of the tonguing, &c., and planing, conceded as settled, on interlocutory argument. Vide Wilson v. Rousseau, 4 How. [45 U. S.] 646; Woodworth v. Wilson, Id. 712; Gibson v. Betts [supra]; Van Hook v. Pendleton [Case No. 16,851]; Gibson v. Gifford [Id. 5,395]; Gibson v. Van Dresar [supra]; Sloat v. Spring, supra; Bloomer v.

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

McQuewan,[2] Fed. Cas. Append.; Sloat v. Patton [Case No. 12,947]; Foss v. Herbert [Id. 4,957]; Gibson v. Betts [supra].

The complainant is entitled to a decree for a reference to a master to report the amount due the complainant, with award of execution on confirmation of report, and with costs. Goodyear v. Day [Case No. 5,569]; Allen v. Blunt [supra]; Livingston v. Woodworth, 15 How. [56 U. S.] 546. For form of decree, see Motte v. Bennett [Case No. 9,884].

Lockwood & Clark and Jas. V. Campbell, for defendants.

Before McLEAN, Circuit Justice, and WILKINS, District Judge.

McLEAN, Circuit Justice. This bill complains of an infringement of the Woodworth patent. It sets forth the original patent granted in 1828, the death of the patentee in 1839, administration of William W. Woodworth, a renewal of the patent in 1842, an extension by act of congress in 1842 [5 Stat. 543], to take effect December 27, 1849, and a surrender and a reissue of the patent on amended specifications in 1845, and a transfer of the patent by the administrator to Wilson, and by him to Pitts, the complainant.

In their answers, the defendants do not deny the invention of Woodworth, as to the planing machine, and admit that its validity has been established at law, but they deny from information and belief, that part of this invention, as distinct from the planing machine, which performs the operation of tonguing and grooving. This part of the combination only is in controversy in this case.

No patent in this country has been so much litigated as Woodworth's planing machine. While this affords the highest evidence of its value, it has involved the holder of the patent in an expense which would have been ruinous had not the renewals been granted, as above stated.

In every patent the originality of the invention may be considered open to controversy, as it depends upon facts which may be proved.

The construction of the patent being matter of law, establishes the right, on the facts proved, but, in a subsequent case, new facts may be proved, showing a prior invention of the same thing.

In his amended specifications, Woodworth claims the combination of the rotating planes with the cutter wheels, for the purpose of planing, tonguing and grooving boards, &c., at one operation as described; and also the combination of the cutter wheels for tonguing and grooving boards at one operation, as described. And finally, the combination of either the tonguing or grooving cutter wheels, for tonguing boards with the pressure rollers, as described,—the effect of the pressure rollers in the operation, being such as to keep the boards, &c., steady and prevent the cutters from drawing the boards toward the center of the cutter wheel, while it is being moved through by machinery. In the planing operation the tendency of the plane is to lift the boards directly up against the rollers, but in the tonguing and grooving, the tendency is to overcome the friction occasioned by the pressure of the rollers.

The patent having been issued on an examination of the right claimed is prima facie evidence of such right.

Woodworth's machine consists of the combination of mechanical powers to plane, tongue and groove plank, at one operation, and he claims the planing as a distinct operation, and also the tonguing and grooving as distinct from that of planing.

In the numerous suits that have been prosecuted, the originality of this invention has not been successfully assailed. So far as regards the construction of Woodworth's patent, and his corrected specifications, it has been so frequently before the federal courts, that it can scarcely be considered now open for controversy.

No new light can, at this day, be expected on the nature and extent of Woodworth's patent. Its originality may be questioned by showing prior inventions; and when an infringement of it is charged, it must be tried by a comparison of the machines. Two machines have been set up in the evidence and argument, as same in principle as Woodworth's and of prior date. This is objected to on the ground that in the answer these machines are not referred to or relied on as affecting the complainant's right.

At law a notice may be given, and, indeed is essential to authorize such a defense. In chancery the rules of pleading equally require such matter to be set up.

Whether at law or in chancery, a defense in bar of the plaintiff's right must be set up, so as to enable the plaintiff to meet it.

In the case of O'Reilly v. Morse, 15 How. [56 U. S.] 110, the supreme court says, "This case must be decided by the testimony in the record, and we cannot go out of it and take into consideration a fact stated in a book of reports. Moreover, we have noticed this case merely because it has been pressed into the argument. The appellants do not mention it in their answer nor put their defense on it, and if the evidence of its priority was conclusive, it would not avail them in this suit, for they cannot be allowed to surprise the patentee by evidence of a prior invention, of which they gave him no notice."

But if the Shakers' machine and Muir's were in evidence, they would not invalidate Woodworth's. The former is rude in structure and impracticable. The Muir machine, it would seem from its organization, could not tongue and groove as the Woodworth machine is capable of doing. In tonguing and grooving Woodworth does it by one operation, and the board is subjected to the same pressure. In Muir's it is done by different tools, and at different spaces, and acting in

[2] [See same case on appeal, 14 How. (55 U. S.) 539.]

different ways on different spindles, and having different pressures, and in the last part of the operation there seems to be nothing to keep the board steady, consequently the work cannot be complete.

The value of Woodworth's machine consists not in the novelty of its parts, but in their combination. It is not enough to show that other machines have some parts more or less similar to those of Woodworth's. Every part of Woodworth's machine may be found in use in some mechanical operation. The most valuable inventions consist in the combination of known mechanical powers. Every part of such inventions may be found, in some form, among the various devices of human ingenuity, and the man who unites these powers and produces a new and important result to society is well denominated a public benefactor. It is not the man who may form an imperfect machine, which may suggest to a higher and more practical order of mind valuable ideas, but it is the one who embodies those ideas in a practical and working form whom the law protects.

Whether we examine the descriptions of the machines in controversy, the models furnished, or the opinions of the experts examined, it appears that the machines differ but little in the mode of their structure. The mode of advancing the plank to the cutters, by reciprocating clamps, is relied on mostly, as distinguishing the defendant's from the plaintiff's machine.

In the original written specifications of Woodworth's patent of 1828, there is no claim for pressure rollers on both sides of the cutting cylinder, which confine the board to its place; but in the drawings, these rollers appear at the proper places, and this is sufficient. But in the amended specifications these rollers are described in their combinations for planing, and also for tonguing and grooving. In his original specifications, Woodworth says: "The carriage which sustains the plank or board to be operated upon may be moved forward by means of a rack and pinion, by an endless chain or band, by geared friction rollers, or by any of the devices well known to mechanics for advancing a carriage, or materials to be acted upon in machines for various purposes."

It is said by the experts, that the combination of the cutter heads with the pressure rollers constitutes the invention of Woodworth for tonguing and grooving. Some of the experts say, that from their examination of the defendant's machine and also of Woodworth's specifications, they find the combination of Woodworth for tonguing and grooving in defendant's machine.

The effect of the pressure rollers is the same in both. They keep the board steady and prevent it being drawn toward the center of the cutter heads. The revolutions of the cutter wheels in each are from 2,500 to 3,000 strokes a minute.

Take out the surface planing knife from Woodworth's machine and there remains no difference between it and the defendant's machine for tonguing and grooving, except the mode of feeding. And the mode of feeding is mainly relied upon as showing a difference in principle between the two machines. But if the invention of Woodworth consists in the combination of the cutter heads with the pressure rollers, then it is clear there is an infringement, as the whole of the combination is used. And it is no less an infringement if the mode of forcing the board forward be an improvement on Woodworth's machine. In such a case the defendants would have no more right to use the invention of Woodworth than the plaintiff would have to use the improvement of Wilder.

But Woodworth in his specifications says: "In a single horizontal machine the friction rollers may be geared, and the pressure rollers placed above them, to feed the board, with or without the carriages." And again: "In the present instance, the plank is supposed to be advanced by means of one or two pairs of friction or feed rollers, shown at F. F. The uppermost F. F. of the pairs of rollers may be held down by springs or weights, levers, &c. The lowermost of these rollers may be fluted, or made rough on their surfaces, so as to cause friction on the underside of the plank." In the summing up he spoke of the pressure rollers as described, to keep the board steady, &c.

The entire specifications may be examined to ascertain the claim of the patentee. The specifications, and also the drawings constitute a part of the patent.

The claim of the "combination of the tonguing and grooving cutter wheels, for tonguing and grooving boards, and the combination of either the tonguing or the grooving cutter wheels, for tonguing or grooving boards, &c., with the pressure rollers as described," is a claim, not only for tonguing and grooving by one operation, but also for tonguing and grooving separately, with the pressure rollers.

The plank in tonguing and grooving, as well as in planing is moved against the cutting knives by rollers, which, in his original patent, is described as "geared friction rollers, to move forward the board." Now if the machinery to force the board against the cutting knives, in tonguing and grooving, or in planing, is in Woodworth's combination, can it be objected that the rollers are not, as often as named in the specifications called feeding rollers? They perform that office, and whether feeding, friction, or pressure rollers is immaterial. The machinery is there and the principle on which it operates is seen, and this is sufficient to sustain the patent.

The reciprocating, or eccentric clamps, as they are called, are in effect feed rollers. "Where one clamp is on the board to shove it ahead, the other one is drawing back to get a new hold, and is not in contact with the board." And in this way the clamps seize

the board alternately, and push it forward. At the same time they act as a pressure roller.

This is a clumsy attempt to avoid the Woodworth patent for tonguing and grooving, by the substitution of these clamps for the rollers of Woodworth, which propel the board on the cutting knives.

Woodworth calls for feed and pressure rollers, and says that the plank may be moved forward by other means. Now a patent, in calling for a specific mode, embraces in law all mechanical equivalents, or modes which operate on the same principle, consequently all modes, however changed in form, but which act substantially on the same principle, and effect the same end, are within the patent. If this were not so, a patent right would be of no value, as it might be avoided by any one who possessed ordinary mechanical skill.

As it appears from the evidence that the infringement of the plaintiff's patent was free from any aggravated circumstances, and was the result of a conviction by the defendants that they were protected by Wilder's patent under which they were licensed, they will be held responsible in damages only for the profits realized after a deduction of all expenses, &c., in carrying on their operations.

Case No. 11,192.

PITTS v. HALL.

[2 Blatchf. 229;[1] 1 Fish. Pat. Rep. 441.]

Circuit Court, N. D. New York. June 19, 1851.

PATENTS — PRESUMPTION AS TO INVENTION — WHO IS INVENTOR — ABANDONMENT — PUBLIC USE — DEDICATION — SALE WITHIN TWO YEARS — METHOD OF COMPUTING DAMAGES FOR INFRINGEMENT.

1. The presumption of law is, that a patentee was the inventor of that which he patented, and the burden is thrown on the defendant to disprove the fact.

[Cited in Agawam Woolen Co. v. Jordan, 7 Wall. (74 U. S.) 597; Blanchard v. Putnam, 8 Wall. (75 U. S.) 426. Cited in brief in Locomotive Engine Truck Co. v. Pennsylvania R. Co., Case No. 8,453.]

[Cited in Slemmer's Appeal, 58 Pa. St. 162.]

2. A person, to be entitled to the character of an inventor, within the meaning of the act of congress, must himself have conceived the idea embodied in his improvement.

3. But, in order to invalidate a patent on the ground that the patentee did not conceive such idea, it must appear that the suggestions, if any, made to him by others, would furnish all the information necessary to enable him to construct the improvement completely and perfectly.

[Cited in Agawam Woolen Co. v. Jordan, 7 Wall. (74 U. S.) 603; Union Paper Bag Mach. Co. v. Pultz & Walkley Co., Case No. 14,392; National Feather Duster Co. v. Hibbard, 9 Fed. 561.]

4. An inventor may forfeit his right to an invention by using it publicly, or by vending it to others to use, at any time prior to the period of two years before his application for a patent.

[Cited in McMillin v. Barclay, Case No. 8,902; Consolidated Fruit Jar Co. v. Wright, 94 U. S. 94; Henry v. Providence Tool Co., Case No. 6,384.]

5. Such use must be a use by the patentee himself, publicly, in the ordinary way of a public use of a machine, and not a use for experiment or trial, with a view to test its operation or ascertain its defects.

[Cited in Jones v. Sewall, Case No. 7,495; Jennings v. Pierce, Id. 7,283; Manning v. Cape Ann Isinglass & Glue Co., Id. 9,041; Smith & Davis Manuf'g Co. v. Mellon, 7 C. C. A. 439, 58 Fed. 707.]

6. A forfeiture of an invention is not favored in law; and, where a use is relied on as having worked a forfeiture, the evidence should be quite clear that the use was not by way of experiment, or for the purpose of perfecting the machine.

[Cited in Jones v. Sewall, Case No. 7,495; Jennings v. Pierce, Id. 7,283; Emery v. Cavanagh, 17 Fed. 243; Celluloid Manuf'g Co. v. American Zylonite Co., 26 Fed. 698; Andrews v. Hovey, 124 U. S. 705, 8 Sup. Ct. 678.]

7. An inventor may abandon his invention, or dedicate it to the public, at any time before procuring his patent.

[Cited in Andrews v. Hovey, 124 U. S. 705, 8 Sup. Ct. 678; Bevin v. East Hampton Bell Co., Case No. 1,379.]

8. But the mere use or sale of the invention by the patentee within two years before his application for a patent, will not alone or of itself work an abandonment. There must be, in addition, some declaration or act going to establish an intention on his part to give to the public the benefit of his invention.

[Cited in Bevin v. East Hampton Bell Co., Case No. 1,379; Jones v. Sewall, Id. 7,495; Anderson v. Eiler, 46 Fed. 780.]

9. Declarations of a determination not to take out a patent, but to let the public have the invention, will estop the party making such declarations, and any one holding under him, from afterwards asserting his right against one who acts on the faith of them.

10. But declarations of an intention to dedicate an invention to the public, will not be regarded as equivalent to an actual dedication. Besides words, there must be acts, in order to fasten on a patentee the intention which, in judgment of law, will work an abandonment of his invention.

11. Such an abandonment operates in the nature of a forfeiture of a right, which the law does not favor, and must be made out beyond all reasonable doubt.

12. In patent cases, the plaintiff is entitled to the actual damages he has sustained in consequence of the infringement of his patent, as contradistinguished from exemplary, vindictive and punitive damages.

[Cited in Mulford v. Pearce, Case No. 9,908.]

[Cited in El Modello Cigar Manuf'g Co. v. Gato, 25 Fla. 886, 7 South. 28.]

13. One mode of arriving at the damages is, to ascertain the profits which the plaintiff derives from the machines he makes and sells and which have been made and sold by the defendant.

14. Another mode is, to ascertain the profits which the party infringing has derived from the machines; but this measure of damages is not controlling, and the plaintiff is entitled to the profits he would have made if not interfered with.

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

15. The plaintiff is entitled to interest on the actual damages, from the commencement of the suit.

This was an action on the case [by John A. Pitts against Joseph Hall], tried before Mr. Justice NELSON and Judge CONKLING, for the infringement of letters patent [No. 4,595] granted to Daniel Carey, of Clarkson, N. Y., June 27th, 1846, for an "improvement in the horse-power." The plaintiff was assignee of the patent, for the state of New-York. The infringement alleged was the making and selling horse-powers containing the patented improvement. There was no dispute as to the identity of the defendant's machines with that patented.

[The claim of the patentee was as follows: Having thus fully described the manner in which I construct my horse-power, what I claim therein as new, and desire to secure by letters patent, is the special arrangement and combination of the gearing, as herein set forth; said gearing consisting of the single large wheel, A, driving two pinions, C, C, in the shafts of the two horizontal wheels, E, which horizontal wheels gear into the two pinions, J, J, on the line shaft, there being a bridge, G, to admit of the passage of the line shaft; the whole arrangement being substantially the same with that herein represented and made known.] [2]

Samuel Stevens and William F. Cogswell, for plaintiff.

Harvey Humphrey, Charles M. Keller, and Samuel Blatchford, for defendant.

NELSON, Circuit Justice (charging jury). As to the particulars of the improvement invented by Carey, we do not think it material to call your attention to them critically, because they are not in controversy. In very general terms we may say, that the invention is a new arrangement of the gearing of the horse-power, by duplicating it, and in this way distributing the power applied to the line or driving shaft, and diminishing the strain on any one part of it. It is admitted by the defendant that this arrangement of the gearing and distribution of the strain, in the operation of the machine, is new and useful, and the proper subject of a patent. The novelty of the improvement, therefore, which is a very important matter in most patent cases, need not embarrass your deliberations, in examining the questions growing out of this case.

This brings us to the first question arising upon the evidence, and that is, whether or not Carey, the patentee, was the first and original discoverer of the improvement. This is the most material question in the case, and the one that has been the most severely litigated. It is undoubtedly vital to the right claimed by the plaintiff, and, of course, it is one to which you will be obliged to turn your attention with some particularity. A good deal of evidence has been given by each of the parties, bearing on this question, both by deposition and by the examination of witnesses in court. Carey having obtained his patent from the government in June, 1846, the presumption of law is with him. He is, in the first instance, to be deemed the inventor, and the burden is thrown on the defendant to disprove the fact. This he has assumed, and he insists that the witnesses Daniel Fowler and Russell Bowers, one or both of them, were the first inventors of this peculiar arrangement, and that they made to Carey the first suggestions of the improvement, and of the particular combination embodied in the description of the patent. It is claimed, on the part of the defendant, that these witnesses prove that they made the first suggestions of this new arrangement to Carey as early as September, 1839, at a public house in Chili, Monroe county, where they were at the time, and where they met Carey. You recollect the drawings testified to by them as accompanying the explanations they made to him, and which they claim to have been the result of previous consultations between them about this improvement, with a view to perfect it. There is also the testimony of Leonard Hall, on this branch of the case. He states that, in the spring of 1846, he was present at this same public house, in Chili, in company with Carey and Bowers, and the subject of an improvement on the old horse-power came up, and Bowers mentioned to Carey and the witness his contemplated improvement on the machine, and took out some chalk and made a drawing on the floor and explained it.

In connection with the testimony of the two witnesses Bowers and Fowler, it is proper to call your attention to a circumstance which should be taken into the account when endeavoring to ascertain the credit and weight to which their testimony is entitled. It is, that Bowers purchased of Carey two machines containing the patented improvement, one in 1844 and one in 1845. And it appears that at this time, or at some previous time, when speaking of this improvement of Carey's, he recommended it highly, as being by far the best arrangement of the horse-power in public use, and stated, also, that he intended to have one or two of the machines before he went West. And, while thus speaking of the improvement and recommending it for its advantages, he did not pretend that he was the inventor or had suggested the arrangement to Carey. This circumstance is relied on to weaken the effect of his testimony. It is for the jury to say what effect it should have. He purchased two or three machines, and took them with him when he went West.

Another fact should be noticed in relation to the testimony of Fowler, the other witness. He wrote a letter, on the application of the plaintiff, giving an account of the part

[2] [From 1 Fish. Pat. Rep. 441.]

he had taken in getting up this improvement, and undertook to give a detail of the interview between him and Carey upon this subject. That letter was signed by Fowler, on the application of the plaintiff. The witness did not read it himself, but heard it read before he put his signature to it. It is insisted by the plaintiff, that the account he gave in this letter of the part he took in the improvement, and of the suggestions he made to Carey in getting it up, fell far short of the account he has given in his deposition, and that, for this reason, his testimony going to detract from the merit of Carey should be regarded with considerable allowance. It is for you to say to what credit the witness is entitled.

This is the substance of the proof put forth on the part of defendant, to rebut the presumption of law arising from the patent, in favor of the claim of Carey, and to show that he was not the original inventor, but, on the contrary, that he got up the improvement on the suggestion of Fowler and Bowers.

In answer to this view, it is claimed, on the part of the plaintiff, that Carey made the improvement himself, in the summer and fall of 1842 and the spring of 1843; that he was engaged for some time in the discovery and in making drawings and experiments with a view to perfect it; that the result was due to his ingenuity and labor bestowed on the subject; and that he actually constructed a machine in the spring of 1843, completed it in June of that year, and put it in operation in the course of the fall. It is insisted, therefore, for the plaintiff, that he has shown that Carey was the inventor of the arrangement which has turned out to be so highly useful and profitable. The witnesses relied on to maintain this view of the case are Shelton, the brother-in-law of Carey, and who witnessed the experiments and trials made by him, and has related the conversations had with Carey at the time; Howe, who lived in his family from 1842 to 1847, and has detailed his knowledge of these experiments and trials; and Peck and Thompson, who built the first machine in the spring of 1843.

Without going into the evidence with any more particularity, we shall leave this question with you. It is a simple question of fact, and its determination will depend upon the exercise of good sense and judgment and an attentive and critical examination of all the testimony in the case.

Now, there is no doubt that a person, to be entitled to the character of an inventor, within the meaning of the act of congress, must himself have conceived the idea embodied in his improvement. It must be the product of his own mind and genius and not of another's. Thus, in this case, the arrangement patented must be the product of the mind and genius of Carey, and not of Bowers' or Fowler's. This is obvious to the most common apprehension. At the same time, it is equally true that, in order to invalidate a patent on the ground that the patentee did not conceive the idea embodied in the improvement, it must appear that the suggestions, if any, made to him by others, would furnish all the information necessary to enable him to construct the improvement. In other words, the suggestions must have been sufficient to enable Carey, in this case, to construct a complete and perfect machine. If they simply aided him in arriving at the useful result, but fell short of suggesting an arrangement that would constitute a complete machine, and if, after all the suggestions, there was something left for him to devise and work out by his own skill or ingenuity, in order to complete the arrangement, then he is, in contemplation of law, to be regarded as the first and original discoverer. On the other hand, the converse of the proposition is equally true. If the suggestions or communications of another go to make up a complete and perfect machine, embodying all that is embraced in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real discovery belongs to another.

These are all the observations I shall trouble you with on the first branch of the case. It is an important question, and, in one aspect of the case, puts an end to the controversy. It is for you to say, after weighing carefully the whole evidence, who is entitled to the merit of this improvement—who invented and perfected it. I do not mean, who constructed the first machine, but who conceived and gave practical form and effect to the ingenious arrangement which constitutes the improvement engrafted on the old machine.

The next question in order, in the examination of the case, assuming that you may come to the conclusion that Carey was the inventor, is, whether or not he has forfeited his right to the invention, or has abandoned it to the public use. By the 7th section of the act of March 3, 1839 (5 Stat. 354), it is provided, that "every person or corporation who has, or shall have, purchased or constructed any newly-invented machine, manufacture or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale or prior use has been for more than two years prior to such application for a patent." The right to an invention may be forfeited or abandoned in two ways: first, by using or vending the improvement more than two years prior to the appli-

cation for a patent; and secondly, by a dedication or abandonment of it to the public use. There may be an abandonment by the inventor at any time, even within the two years before the application for his patent.

In the first place, the patentee may forfeit his right to the invention if he constructs it and vends it to others to use, or if he uses it publicly himself in the ordinary way of a public use of a machine, at any time prior to the period of two years before he makes his application for a patent. That is, he is not allowed to derive any benefit from the sale or the use of his machine, without forfeiting his right, except within two years prior to the time he makes his application. In this case, the application by Carey was made on the 28th of April, 1846. The two years would extend back to the 28th of April, 1844, and the sale or use of the machine, in order to work a forfeiture of his right, must have taken place anterior to the latter period. It is not pretended that there was any sale of this improvement previous to that time; and but one machine had been previously constructed. But it appears that this machine was used by Carey in 1843, in the business of threshing. This, unexplained, would operate as a forfeiture of the right. It is claimed, however, that the machine was used in the fall of 1843 by way of experiment and trial, with a view to ascertain whether it would meet the expectations of the discoverer, and to enable him to ascertain any defects in its operation or construction, so that he could remedy them before the application for the patent. It is also claimed that there were defects, and that material alterations were made in the spring of 1844, in the construction of the second machine; that the two bevelled wheels driven by the bull pinions were too large, so large that they were obliged to be extended over the frame, which threw the gearing, and the arms to which the horses were attached, so high as to put the machine out of gear, by canting the machinery; and that, to relieve this defect, the two bevelled wheels were reduced in the spring of 1844, and dropped down within the frame, so as to lower the gearing and arms. It is insisted, therefore, that the use in the fall of 1843 was by way of trial, and that the experiments resulted in a change in the construction of the machine. No doubt the view presented, if you think it sustained by the evidence, explains satisfactorily this previous use, and prevents its working a forfeiture of the right of the patentee.

On the other hand, if the machine was complete when it was constructed in June, 1843, and if the patentee put it into public use, or put it in operation himself publicly, deriving profit from it, and having no view of further improvements or of ascertaining its defects, then, this use having occurred anterior to the two years, the effect would be to work a forfeiture. It is proper to say, however, that this ground of forfeiture is not favored in law, but is regarded as being somewhat harsh in its operation on individual rights. The evidence, therefore, should be quite clear, that the use was not by way of experiment, or for the purpose of perfecting the machine, in order to justify the conclusion that the patentee had forfeited his right to the improvement.

Then, as to the point of abandonment. This is a difficult question, although somewhat connected with the one to which we have been directing your attention. An abandonment or dedication may occur within the two years, and at any time down to the procurement of the patent. The mere use or sale, however, of the machine, within the two years, will not alone or of itself work an abandonment. There must be something more, because the 7th section of the act of 1839 permits the sale or use by the patentee at any time within two years before his application, without its operating to invalidate his right. The use or sale must be accompanied by some declarations or acts going to establish an intention on the part of the patentee to give to the public the benefit of his improvement. The question here is, whether there has been shown any such act or declaration of Carey's prior to April, 1846. If the evidence leads you to this conclusion, then there has been an abandonment which operates as a dedication of the invention to the public, and bars the claim of any one under the patent.

It is insisted, on the part of the defendant, that the patentee should be bound by his declarations; and evidence has been given that, on several occasions, he expressed a determination not to take out a patent, but to let the public have the invention. Undoubtedly, a person acting on those declarations, who has constructed a machine and put it in operation, would not be liable to the patentee, or to any one holding under him, for an infringement, because Carey, having led the defendant, by his declarations, to believe that he had a right to construct and put in operation the machine, without exposing himself to responsibility, would be estopped from afterwards denying the license thus given. But that is a different principle, and is founded on a different consideration, from the one that gives to these declarations of Carey's the effect of a dedication of the improvement to the benefit of the public. We think he is entitled to the locus penitentiæ, and that there must be something more than mere words, to fasten on him the intention which, in judgment of law, would work an abandonment of his invention. There must be acts. The invention is the property of Carey, as much as the stock on his farm, or the furniture in his house, and the mere expression of an intention not to take measures for the purpose of securing to himself the exclusive enjoyment of this property, or the mere declaration of an intention to dedicate it to the public, cannot be regarded as equivalent to

an actual dedication. This abandonment or dedication, too, operates in the nature of a forfeiture of a right, which the law does not favor, and which should be made out beyond all reasonable doubt.

The only remaining question is as to the damages. This assumes, in the first place, that you will find that Carey was the first and original inventor; and, in the next place, that he has not forfeited or abandoned his right to the public. The general rule is, that the plaintiff, when he has established a right to recover, is entitled to all the actual damages which he has sustained in consequence of the infringement of his patent, as contradistinguished from exemplary, vindictive and punitive damages. These are not to be taken into consideration in patent cases.

One mode of arriving at the actual damages is, to ascertain the profits which the plaintiff derives from the machines which he manufactures and sells, and which have been made and sold by the defendant. This mode is founded on the presumption of law, that if the defendant had not been wrongfully concerned in the manufacture of the machines, those persons who procured them from him would have applied to the patentee or assignee for them.

Another mode, and the one resorted to partially in this case is, to ascertain the profits which the party infringing has derived from the use of the invention or the construction of the machines; because, whatever profits he has derived have arisen from the wrongful use of the invention, and belong to the real owner of the machine. This measure of damages, however, is not controlling, and ought not to be; because, a party concerned in infringing a patent stands in a different position from the patentee, not having been previously subjected to the expense and labor to which the latter is frequently exposed in the process of invention and experiment. Hence, the person who enters upon the business without previous expense, may very well afford to sell machines at less profit than the patentee. The latter must have his profit, not only for the expense of putting in operation the improvement, but by way of indemnity for the previous time, labor and money which he has been obliged to bestow on the invention. He must, therefore, charge a higher price, to cover these greater expenses. Thus, profits which the party infringing might be satisfied with, and which would afford him compensation, would not afford indemnity to the patentee. If, therefore, on looking into the profits made by the defendant, the jury shall be of opinion that they do not correspond with the fair profits which the plaintiff, if left alone, would have realized, they are not bound by the measure of the profits of the defendant, but have a right to look to the profits which the plaintiff or the patentee would have made under the circumstances, if not interfered with. It is admitted that the defendant made forty-two machines within the time for which the plaintiff is entitled to recover, if at all, and your inquiry will be as to the profits which the plaintiff would have derived from those machines if they had not been manufactured by the defendant. You will thus approximate to the actual damages which the plaintiff has sustained, and you will add interest from the commencement of the suit.

The jury found a verdict for the plaintiff, for $2,345.

Case No. 11,193.

PITTS et al. v. HALL.

[3 Blatchf. 201.] [1]

Circuit Court, N. D. New York. Oct., 1854.

PATENTS—AGREEMENT FOR INTEREST IN RENEWAL—CONSTRUCTION—JOINT PATENTEES—SALE WITHOUT AUTHORITY OF CO-OWNER.

1. Where a patentee, in 1846, made an agreement with a person, that, in case of the renewal of the patent, or of the obtaining of other or further letters patent for the invention, after the expiration of the existing patent, such person should have a certain undivided interest in the rights that should be secured by the further or renewed letters patent: *Held*, that the parties had in view an extension of the patent under the 18th section of the act of July 4, 1836 (5 Stat. 124).

[Cited in Hodge v. Hudson River R. Co., Case No. 6,559.]

2. A. and B. were joint patentees. A. assigned to B. his right for New York. B. then assigned to C. the undivided half of the patent for New York, and agreed with C. that, in case of the extension of the patent, C. should have and be entitled to the undivided one-fourth of the patent for New York on paying to B. the proportional one-fourth part of the expenses of obtaining the extension, that is, to be proportioned as the value of the right for New York should be to that for the rest of the United States, and C. to pay the one-fourth part of the proportion for New York. The agreement was recorded. The patent was extended, and, after the extension, C. requested B. to inform him what the expenses of obtaining the extension had been, and offered to pay him the proportion of expenses mentioned in the agreement to be paid to B. by C. B. refused to inform C. what the amount of the expenses had been. C. was ignorant of the amount, and B. knew the fact. C. then went on, after the extension, to work under the patent, and was sued for infringement by A. and B. C. pleaded specially the above matters: *Held*, on demurrer to the plea, that the agreement was a valid executory agreement, entitling C. to the undivided interest in the extended patent, on the performance of the condition precedent as to the payment of the specified portion of the expenses of obtaining the extension.

[Cited in De Witt v. Elmira Nobles Manuf'g Co., 66 N. Y. 463.]

3. Whether the terms of the agreement are words of grant and conveyance, and whether the agreement would be a sufficient assignment of the undivided interest in the extension, if the condition precedent had been performed, quere.

4. The offer by C. to perform the condition precedent, did not vest in C. the undivided interest in the extension, and the plea was bad.

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

5. Semble, that the plea would be bad, even if the undivided interest in the extension had vested in C.

6. The relation of copartners does not exist between joint patentees, or between one of two joint patentees and the assignee of the other. The parties are simply joint owners or tenants in common, like the joint owners of a chattel.

7. One joint owner of a patent for a machine can use and sell machines made according to the patent, only in respect to his own right. If he uses or sells them without the authority of his co-owner as respects the right of the latter, he is liable to an action by such co-owner for an infringement of the patent.

[Cited in May v. Chaffee, Case No. 9,332; Dunham v. Indianapolis & St. L. R. Co., Id. 4,151; Herring v. Gas Consumer's Ass'n, 9 Fed. 557.]

[Cited, contra, in Carter v. Bailey, 64 Me. 464.]

8. In such action, the plaintiff may recover his actual and proper damages, proportioned to the value and extent of his undivided interest, without regard to the amount which his co-proprietor has received by means of the infringement.

This was an action on the case for the infringement of letters patent [No. 542] granted to the plaintiffs [John A. and Hiram A. Pitts] in the year 1837, and extended for seven years, in 1851, under the 18th section of the act of July 4, 1836 (5 Stat. 124). The declaration alleged that the defendant [Joseph Hall] had, unlawfully and without the consent of the plaintiffs, made, used, and vended to others to be used, large numbers of the machines patented to the plaintiffs, in violation of the exclusive right granted to the plaintiffs by the letters patent and the extension thereof. The defendant pleaded the general issue, and also a special plea, in which he set up that the plaintiff Hiram A. Pitts, after the granting of the letters patent, and during their original term, assigned to the plaintiff John A. Pitts, all his title to the patent and the rights thereby secured, for the states of New York and Michigan; that thereafter, and in the year 1846, John A. Pitts did, by an agreement in writing, transfer to the defendant the one equal undivided half part of all the rights secured by the patent for the states of Michigan and New York; and that it was, by the agreement, agreed by John A. Pitts with the defendant, that in case of the renewal of the patent, or of the obtaining of other or further letters patent for the invention, after the expiration of the existing patent, the defendant should have and be entitled to the equal undivided fourth part of all the rights and benefits that should be secured, by such further or renewed letters patent, for the states of New York and Michigan, on paying to John A. Pitts the proportional one-fourth part of the expenses of obtaining the further or renewed letters patent —that is to say, to be proportioned as the value of the right for the states of New York and Michigan should be to that for the other states and territories of the United States; and the defendant to pay the one-fourth part of the proportion for the states of New York and Michigan. The plea also set forth, that the agreement had been duly recorded in the patent office at Washington; that, immediately after the extension of the patent, the defendant called upon and saw John A. Pitts, and requested him to inform him, the defendant, what the expenses of obtaining the extension of the patent had been, and stated to him, in substance, that he was ready and willing, and then and there offered, to pay him the proportion of expenses mentioned in the agreement to be paid to John A. Pitts by the defendant; that John A. Pitts then and there declined and refused to inform him what the amount of such expenses had been, although the defendant then was and ever since had been ready and willing to pay John A. Pitts his just proportion of said expenses; that the defendant was wholly ignorant, at the time, of the request and offer to pay, and still was ignorant, of the amount of expenses of obtaining the extension, which ignorance of the defendant was, at said time, well known to John A. Pitts; and that John A. Pitts so declined and refused to make known the amount of such expenses to the defendant, with a view to put it out of the power of the defendant to pay him the just and proper proportion of the expenses, according to the terms of the agreement. To this plea there was a general demurrer and a joinder.

William F. Cogswell, for plaintiffs.
Alvah Worden, for defendant.

HALL, District Judge. It was urged, upon the argument of the demurrer, that the agreement set forth in the plea did not, upon any fair construction of its terms, give, or provide for giving, to the defendant any interest in the extended patent; and that the words used, though proper and apt, were none of them proper or apt words to confer any interest in the extended patent. But I cannot doubt that the parties intended, by the language used, to refer to and provide for an extension of the patent under the general patent law. The term "renewal" was, in my judgment, a proper and apt word for that purpose. The 18th section of the act of July 4, 1836 (5 Stat. 124), under the authority of which the extension was granted, declares that, in the cases provided for in that section, "it shall be the duty of the commissioner to renew and extend the patent, by making a certificate thereon of such extension, for the term of seven years from and after the expiration of the first term;" and, also, that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein." The parties have, therefore, followed the language of the statute, and the renewal or extension of the patent under the section just referred to, was clearly within the contemplation and intention of the parties in making the agreement.

The agreement set forth in the plea must, therefore, be considered as a valid executory agreement, entitling the defendant to the undivided interest in the extended patent, upon the performance of the condition precedent in that agreement mentioned. It may, perhaps, be doubtful, whether the terms of the agreement are not words of grant and conveyance, and whether the agreement itself, even under the provisions of the patent law, would not have been a sufficient assignment of the interest to which it relates, if the condition precedent—the payment of the specified proportion of the expenses of obtaining the extension—had been performed. Without discussing this question, I shall pass to another, which would necessarily arise in case it should be held to be a present grant upon a condition precedent.

If the agreement is a present grant upon condition, the condition is confessedly a condition precedent. It is a condition which the defendant may or may not perform, at his election; and, by its express terms, no interest is to vest until the condition is performed. It is, however, contended, that the plea shows a readiness and an offer to perform; that the performance of the condition by the defendant was prevented by the wrongful act of the plaintiff John A. Pitts; and that the grant has therefore become absolute, and the undivided interest in the patent completely vested in the defendant.

If it be admitted that the offer to perform, and the conduct charged upon the plaintiff John A. Pitts, as stated in the plea, are sufficient to enable the defendant to bring his action for a breach of the agreement, it does not necessarily follow that the grant has become absolute, so as to vest in the defendant the right granted upon the condition stated. The defendant may have done all that he can be legally required to do, to entitle him to bring his action and recover damages for the non-performance of the agreement on the part of the plaintiff John A. Pitts; or to entitle him to file his bill, and obtain a decree for a conveyance of the specified interest, on paying the proportion of the expenses required to be paid by the terms of the contract. In the first case, the fact of the non-payment of the expenses would have its due weight, upon the question of the amount of damages to be awarded; and, in the second, the decree, like the grant or agreement, would be conditional, and the now defendant would only have the benefit of such decree upon the payment into court, or to the opposite party, of the amount of such expenses, to be ascertained under the direction of the court. But, if the matters set up in the plea are held to be a full defence to the plaintiffs' action, the plaintiffs may be turned out of court, and be charged with costs, and the plaintiff John A. Pitts may be wholly unable to obtain the payment of any portion of the expenses mentioned in the agreement. It is no answer to say that this is not probable, and that the damages which the plaintiffs seek to recover in this case are trifling and insignificant, compared with the value of the interest to which the defendant is entitled under the agreement. It might be otherwise; and, if the principle contended for is to be sunstained, it would equally apply in a case where the infringement had continued during the whole term of the extension, and the claim of the plaintiffs much exceeded the amount to be paid as a condition precedent to the vesting of the right. The offer to perform the condition precedent has not, in my opinion, given effect to the grant, if grant it be, so as to vest the undivided interest; and, on this ground, the plaintiffs are entitled to judgment on the demurrer.

But I am inclined to think that the plea is bad upon another ground, and that the plaintiffs would be entitled to judgment even if the undivided one-fourth interest in the extended patent had actually vested in the defendant. The rights of joint patentees, or of assignees of undivided interests in a patent, as against each other, in respect to the making, using, and vending the patented invention, have not, so far as I have been able to discover, been discussed by any elementary writer or in any reported case. The counsel, on the argument of the demurrer in this case, declared the question to be an embarrassing one, which had never been decided; and, without intending now to express an opinion by which I shall feel bound, if, upon a further discussion of the question, a different conclusion shall be reached, I propose to put upon paper for further use the result of my reflections upon it, in the hope that the attention of parties interested may be attracted to the subject, and that the question may be brought before the supreme court of the United States for adjudication.

In the case of joint patentees, where no agreement of copartnership exists, the relation of copartners certainly does not result from their connection as joint patentees; and, when one joint owner of a patent transfers his undivided interest to a stranger, the assignee does not become the partner of his co-proprietor. In both cases, the parties interested in the patent are simply joint owners, or tenants in common, of the rights and property secured by the patent; and their rights, powers, and duties, as respects each other, must be substantially those of the joint owners of a chattel.

Part owners of goods and chattels are either joint owners or tenants in common, each having a distinct, or at least an independent, although an undivided interest in the property. Neither can transfer or dispose of the whole property; nor can one act for the other in relation thereto, but merely for his own share, and to the extent of his own several right and interest; and, at common law, the one had no action of account against the other, for his share of the profits derived from the common property. Story, Partn. § 89.

A personal chattel vested in several different proprietors cannot possibly be enjoyed advantageously by all, without a common consent and agreement among them. To regulate their enjoyment in case of disagreement, is one of the hardest tasks of legislation, and it is not without wisdom that the law of England and of this country in general declines to interfere in their disputes, leaving it to themselves either to enjoy their common property by agreement, or to suffer it to remain unenjoyed, or to perish by their dissension, as the best method of forcing them to a common consent for their common benefit. Abb. Shipp. 98.

It is well settled, that a destruction or sale of the joint property by one of the part owners, authorizes his co-proprietor to maintain trover for the conversion. 2 Kent, Comm. (8th Ed.) 351, note. But, on such a sale, only the right of the party who makes the sale passes to the purchaser; and the purchaser becomes a tenant in common with the owner of the remaining interest, unless and until the latter confirms the sale, or recovers the value of his share from the wrong-doer.

The principles of these doctrines are, it strikes me, applicable to the case of the joint ownership of patent rights. The grant of the exclusive right to make, use, and vend to others to be used, is to the patentees jointly and not to either severally. The right, the property secured by the patent, may be granted to others by license or assignment, or by the sale of machines by the patentees jointly; and a license or assignment or sale of a machine by them, is a transfer, pro tanto, of the property secured by the patent. One joint owner can legally grant, assign, license, or sell only in respect to his own share or right. He cannot sell and give a good title to his co-owner's right, for the same reason that one joint owner of a chattel cannot transfer the share of his co-proprietor. And, if he appropriates any portion of the exclusive right or common property to his separate use or benefit, by either the use or the sale of the patented machine, he does what is in principle the same as the conversion, by destruction or sale, of the joint property by a tenant in common, which authorizes his co-tenant to maintain trover.

I can see no objection in principle to the doctrine, that the joint owner of a patent can sustain his action for an infringement against his co-owner, in which he can recover his actual damages, according to his interest in the patent. His rights are invaded by the act of his co-proprietor, and he is entitled to his legal remedy. This invasion is tortious, and no action founded upon a contract can be sustained, unless this tort is waived, and the tortious act confirmed; for, no contract exists, upon which such an action can be founded, without such waiver and confirmation. The injury is a violation of the exclusive right secured by the patent; and, for this injury, the action for an infringement is the appropriate remedy, and one which enables the court, without the violation of legal principles, and in the most direct and convenient mode, to do justice between the parties. In such an action, the plaintiff may recover, as he should, his actual and proper damages, proportioned to the value and extent of his undivided interest in the exclusive right, without regard to the amount which his co-proprietor has received by means of the infringement. And there is certainly nothing in the language of the statute which authorizes this form of action, or rather recognizes it, for this form of action was given by the common law (Curt. Pat. §§ 257, 258), to prevent the action from being sustained in such a case; for, the action on the case, under the fourteenth section of the act of 1836, may be brought in the name or names of the person or persons interested, whether as patentees, assignees, or grantees of the exclusive right within and throughout a specified part of the United States. Indeed, no satisfactory reason is perceived for holding that the part owner of a patent right cannot, like the part owner of a chattel, have his remedy, by an action on the case, against his co-proprietor, for the exclusive appropriation of the joint property, in the same form as though the plaintiff were the sole owner, and the defendant a stranger; the reduction of the amount of damages to be recovered, to a proportionate share of the value of the property appropriated, being, in both cases, the natural and necessary consequence of the partial ownership by the wrong-doer.

In the case of the joint owners of a patent right, the ordinary action for an infringement is, it appears to me, the most appropriate and simple remedy, even if an action of account could be sustained. In an action of account, the amount of profits received by the joint owner would ordinarily determine the aggregate sum of which the plaintiff would recover his just proportion. And, it might well happen, indeed it would most usually be the case, that the sums received by the joint owner would be either much more or much less than the actual damages sustained by the injured party. The party selling territorial rights, or granting licenses, or selling machines, might wilfully or systematically sell the right at an insignificant price, and certainly this conduct on the part of the wrong-doer should not, and, in the appropriate form of action, would not, reduce the recovery of the party injured.

The plaintiffs must have judgment on the demurrer, with leave to the defendant to amend on payment of costs.

[For other cases involving this patent, see note to Pitts v. Wemple, Case No. 11,194.]

Case No. 11,194.

PITTS v. WEMPLE.

[1 Biss. 87; 5 Fish. Pat. Cas. 10.] [1]

Circuit Court, N. D. Illinois. Dec., 1855.

PATENTS—CONSTRUCTION—NONUSER OF PATENTED INVENTION—PRIOR MACHINE—UTILITY.

1. The claims of a patent are to be construed with reference to the state of the art at the time of the invention.

[Cited in Johnson v. McCabe, 37 Ind. 538.]

2. The whole patent, including the specifications and drawings, is to be taken into consideration, but we look only at them for the purpose of placing a proper construction on the claim.

3. The invention set forth in the first claim of Pitts' patent consists in the peculiar construction of the apron and of its use in the machine, and operating substantially as described. It does not consist of an endless apron merely, or of an endless apron divided into troughs or cells merely, but of the apron as it is described operating in the machine substantially as described, that is, such an apron in such a machine.

4. It is not necessary that a prior machine should have been actually used for the purpose contemplated, but it must have been capable of such use, and a mechanic of competent skill should be able in the then state of the art to construct the machine, so as to produce the result, from an inspection of the specification and drawings.

[Cited in Stitt v. Eastern R. Co., 22 Fed. 651.]

5. A man may obtain a patent for an invention and let it lie in the patent office without use, and no one else would have the right to use such invention because it is his property.

6. Still in ascertaining whether the machine is capable of use, it may be important to know that the inventor had never made or used the machine, because the presumption is, that a person obtains a patent for something practical, and not for a mere experiment.

7. The question is not whether the apron of the defendant's machine operates as perfectly as the apron of the plaintiff's machine, but whether it is the same in principle or not.

8. By the principle of a machine or improvement, is to be understood, the peculiar mode, manner or device by which the proposed result or effect is produced.

9. The superior utility of the defendant's elevator, is not of itself a certain test upon the question of identity, because the defendant's machine might contain the whole substance of the plaintiff's and something in addition, and the addition would not prevent it from being an infringement.

[Cited in Pacific Cable Ry. Co. v. Butte City St. Ry. Co., 55 Fed. 763.]

This was an action on the case tried by Judge DRUMMOND and a jury, for the infringement of a patent issued to Hiram A. and John A. Pitts, December 29, 1837 [No. 542], and assigned to plaintiff for "a new and useful improvement in machines for threshing and cleaning grain." The specification of Pitts set forth that the inventors "had invented a new and improved combination of machinery for separating grain from the straw and chaff as it proceeds from the threshing machine." The chief feature in their invention consisted in an endless belt or apron, proceeding from the threshing machine to the fan-mill, which was of a peculiar construction. The apron was provided with a series of narrow wooden compartments, of a sufficient height above the apron to permit the grain, which was separated from the straw and chaff by the agitation of the machine when in operation, to fall through into the cells. By this means the straw and chaff were carried along on the tops of the boxes, and kept from being commingled with the grain below, until, by the action of the machine, the compartments were carried forward and emptied the separated grain into the fan-mill, and the straw and chaff passed off over the end of the apron. Previous to the invention of the plaintiff, an endless apron with cells or buckets, had been used as a carrier, or elevator, to carry flour and other materials from one point to another. The defendant put in evidence a patent issued to Samuel Lane, April 6, 1831. The Lane patent contained an endless apron proceeding from the threshing machine to an endless sieve. The Lane apron had no compartments or cells, but was a smooth apron, and was used in his machine to carry forward the threshed grain as it came from the thresher, mixed with the straw and chaff to an endless sieve, by the agitation of which sieve the grain was separated from the straw and chaff, which latter were cast off over the end of the sieve, while the sifted grain was conducted from the sieve to the fan-mill. In the defendant's machine there was also an endless apron, which carried the threshed grain to a peculiarly constructed sieve, secured to Wemple by letters patent, granted July 13, 1844, and the sifted grain was conducted from the sieve to the fan-mill. It further appeared that the defendant had sometimes used slats about half an inch in thickness, nailed to the apron, and placed about a foot apart, to give it stiffness and prevent it from sagging at the sides. In addition to these features of the machine, there was what was termed a side elevator in the Pitts machine, which constituted the fourth claim of the patent. This consisted of a larger sieve extending beyond the upper sieve, into which the light grain or tailings which pass over the sieve was received, and from which lower sieve it was conducted through a shoe underneath and a spout to an elevator by which it was taken up and emptied into the upper sieve of the machine, for further sifting. In the Wemple machine there were also a lower projecting sieve and shoe and spout, through which the grain received by them was poured into a side elevator, and was carried forward and emptied into the thresher of the machine. The claims of the plaintiff's patent are set forth in the charge of the court.

Chickering & James, for plaintiff.

E. C. Larned and Grant Goodrich, for defendant.

[1] [Reported by Josiah H. Bissell, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission.]

DRUMMOND, District Judge (charging jury). This is an action brought by the plaintiff to recover damages from the defendant for the infringement of letters patent granted by the United States to John A. Pitts and the plaintiff, and of which the latter is assignee for Illinois.

In the present trial, the discussion has been brought within a very narrow compass: that is, first, the extent and nature of the claims contained in a patent of the plaintiff; and, second, the infringement of those claims by the defendant, both of which are resolved into the last point, that is, whether the defendant has been guilty of a violation of the plaintiff's patent.

The validity of the plaintiff's patent has not been questioned at the present trial. It is admitted that as properly limited and interpreted, it is valid. Testimony has been introduced to prove the state of the art at the time, and this is always necessary, because the claims in the patent are to be construed with reference to the state of the art at the time of the invention. It is with this view that the Lane patent has been introduced, and has been allowed to go before you.

The court is of opinion now, as it always has been, that the Lane patent, even if it covered a practical improvement in the machine for threshing and cleaning grain, may be permitted to stand, without impairing the just claims of the plaintiff, for reasons that will be briefly stated hereafter.

The patent law requires the inventor to set forth the nature and extent of his discovery, so that, by referring to his letters patent, a mechanic of competent skill may be able, in the state of the art as then understood, to construct the machine or improvement, if the invention relate to a machine. And he must particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery. He is restricted to this claim. It is true that the whole patent, including specifications and drawings, is to be taken into consideration, but we look at them only for the purpose of placing a proper construction upon the claim.

Guided by these principles, let us look into the plaintiff's patent.

The patentees set out with declaring that they have invented a new and improved combination for separating grain from the straw and chaff as it proceeds from the threshing machine. This they declare to be their invention. They then minutely and particularly describe this new and improved combination of machinery for accomplishing that result. After this description, they comply with the demands of the law, by setting forth their claims, which have been classified as follows:

They claim: First. The construction and use of an endless apron, divided into troughs or cells in a machine for cleaning grain, operating substantially in the way described. Second. The revolving rake, for shaking out the straw, and the roller for throwing it off the machine, in combination with such a revolving apron as set forth. Third. The guard slats in combination with a belt (apron) constructed substantially as above described. Fourth. The combination of an additional sieve and shoe with the elevator for carrying up the light grain, in the manner and for the purpose set forth.

If we take these four claims and apply them to the description of each, as contained in the specifications, drawings, &c., we shall clearly understand the nature and effect of each distinct claim.

The only thing that is claimed as new, is the construction and use of the apron, and that is claimed in the machine as described.

All the other claims consist of combinations of parts with each other.

As to the first claim, I agree with all the courts that have had this patent before them. It consists in the peculiar construction of the apron, and its use in the machine, and operating substantially as described.

It does not consist of an endless apron merely, nor of an endless apron divided into troughs or cells merely, but of the apron as it is described, operating in the machine substantially as described, that is, such an apron in such a machine.

And here may be shortly stated the reason why the patent of the plaintiff may be sustained, notwithstanding the Lane patent may be considered valid; and it is because of the construction which is given to this first claim of the plaintiff. Lane only used an endless apron for the purpose of carrying the grain and straw to a sieve or rake, which connected with a fan-wheel. Lane's apron was a smooth apron, used only for the purpose of carrying forward the grain and straw. It was not constructed for, nor did it operate as a separator of the grain from the straw as it proceeds from the threshing machine. If the plaintiff's apron was constructed for that purpose only, and operated only to produce such a result,—on the supposition that the Lane patent is valid,—his patent would be void. But it is because the apron, with its appliances and combinations, the moment the grain and straw and chaff proceed from the threshing machine, produces the process of separation, and thus has a different office or function from that of Lane's apron, that the plaintiff's first, second, and third claims can be considered valid.

If the apron of the plaintiff's machine is not constructed for that purpose, and does not produce that result,—that of separation,—then these first three claims can not be sustained consistently with the validity of Lane's patent.

But it is said that Lane's patent can have no influence in this case, because his machine was not a practicable machine.

This may be true, and still it can not be dis-

puted but that Lane invented the combination of an endless apron with a threshing machine, and a winnower for the purpose of carrying the straw and grain from the one to the other, and any one would have the right to use such an apron as that of Lane's for a similar purpose, and by other machinery or improvements (not including that of the plaintiff's) he might have a practical machine, and by so doing, he would not infringe as to the plaintiff's apron. This is so, because the machine of Lane might not have been practicable, from some other defect in the machine which had nothing to do with the office of the apron as a conveyer or carrier.

Whether Lane's machine was a practicable machine, is a question of fact for the jury. It is not necessary that it should have been actually used for the purpose contemplated, but it must have been capable of such use, and a mechanic of competent skill should be able, in the then state of the art, to construct the machine so as to produce the result from a mere inspection and examination of the specifications, drawings, &c.; that is, from the letters patent.

A man may obtain a patent for an invention, and let it lie in the patent office without use, and no one else would have the right to use such invention because it is his property; but, while this is true, as a matter of law, still in ascertaining whether the machine is capable of use, it may be important to know that the inventor had never made or used the machine, because the presumption is, that a person obtains a patent for something practical, and not for a mere experiment.

It need not be a very useful or profitable machine, but it must be capable of some use not mischievous, injurious, or immoral.

If the defendant has used any one of the four claims contained in the plaintiff's patent, then he is guilty of an infringement, and whether he has or not is a question of fact for the jury to determine; but in order to constitute an infringement there must have been the use of the whole of one or more of the claims—that is, the whole combination of one of the claims. This part of the controversy has been brought within somewhat narrow limits under the law, which it is the duty of the court to declare to you.

As to the first three claims of the plaintiff, there can be no infringement of either of these claims, unless the defendant has used the apron of the plaintiff's machine. The reason of that rule is this: his first claim is for the apron as used and operated and constructed. Of course to infringe that claim the plaintiff's apron must be used by the defendant.

The second claim is not for the revolving rake alone, nor for the roller alone, but for them in combination with such a revolving apron as set forth. The revolving apron as described is of the essence of this claim, and there can be no infringement of this claim unless the defendant has used the plaintiff's revolving apron.

The third claim is not for the guard slats alone, but for the guard slats in combination with the apron constructed substantially as described. The apron is an essential part of this claim, and there can be no infringement unless the apron of the plaintiff has been used by the defendant.

The defendant's counsel have chosen to rest the defense, as to this part of the case, upon the point, as they allege, that the defendant has not used the apron as described in the plaintiff's patent.

If he has used the plaintiff's apron as described and claimed, it is conceded the defendant has infringed. Whether the defendant has used the apron of the plaintiff's machine, as described, is a question of fact for the jury to determine. The thing for you to decide is whether the endless apron, as used by the defendant in his machine, is constructed substantially like that of the plaintiff's machine, and operates substantially in the same way to produce the same result. It is not whether the apron of the defendant's machine operates as perfectly as the apron of the plaintiff's machine, but whether it is the same in principle or not. And by the principle of a machine, or improvement of a machine, as used by us here, is to be understood the peculiar mode, manner, or device by which the proposed result or effect is produced.

With this rule in view, as a guide to them, the jury will consider the evidence, and form their conclusions as to whether the apron of the defendant's machine acts upon the same principle as that of the apron of the plaintiff's machine. If it does, then the defendant is guilty as to this part of the case, otherwise not. The point is, whether the defendant has in the use of his apron, availed himself of the plaintiff's invention, as contained in his patent. If he has, no change of form merely will prevent it from being an infringement; but if there is a change in substance and principle, then there is no infringement.

Much has been said on both sides as to the slats which are found in the defendant's apron. It is for you to determine whether, by being placed there, it causes the apron of the defendant's machine to operate in substantially the same way, and to produce substantially the same result as that of the plaintiff.

The main point as to this is, whether it is a mere colorable alteration of the plaintiff's apron in this respect.

The fact that some separation takes place in the defendant's apron, of the grain from the straw, as it moves with the apron, will not constitute of itself an infringement of the plaintiff's patent in this particular.

Such separation may be a mere incident of the motion of the machine. It is probable, judging from the testimony, that an incidental separation takes place on Lane's apron as it carries the grain and straw from the threshing machine to the sieve, as described in his patent, and yet as already stated, ad-

mitting Lane's patent to be valid, the claim of the plaintiff's patent for the apron is not invalidated.

The main point, I repeat, is, do the aprons of the plaintiff's and defendant's machines operate substantially and in principle alike?

The foregoing remarks have been chiefly confined to the first three claims in the plaintiff's patent, because they all depend upon the use of the plaintiff's apron by the defendant.

We will now proceed to the last claim in the plaintiff's patent.

As already intimated, the defendant may not have violated any one of the first three claims, and yet he will be guilty of an infringement, if he has used the combination as described in the fourth claim.

It remains, therefore, for you to consider whether the defendant has used this combination of the plaintiff.

And upon this part of the case, the counsel for the defendant have rested the defense upon the point, as they allege, that the defendant has not used the side elevator of the plaintiff's machine as described in his patent. The facts on this point are not disputed; and it is for you to determine whether the change that is made in the elevator used by the defendant changes the principle upon which it operates. The plaintiff states, in the patent, the manner in which his elevator operates. He places one sieve beyond another into which the light grain, that may have passed over, may be received, passing through into a shoe underneath and out at a spout on an elevator which carries the light grain into the sieves again for a more effectual cleaning.

It will thus be seen that the elevator of the plaintiff's machine takes the "tailings," as they have been called by most of the witnesses, and raises them upon a band of elevators, to be thrown upon a sieve to be recleaned.

This is the description and result of his combination. And you will understand that the same rule applies here as in the other claim, that is, the whole combination of this claim must be violated, and that the elevator is a material part of this claim, and we only consider the question of the elevator because the defendant's counsel rest their defense, in this respect, on the elevator. And it is true, in point of law, if the defendant does not use the elevator of the plaintiff's machine, as described in his patent, he does not infringe this claim.

The elevator, which has been used by the defendant, takes the tailings and raises them upon a band of elevators, to be thrown upon the thresher for a more effectual threshing as well as cleaning, and the question of fact, to be determined by you, is whether the defendant's method is substantially the same as that of the plaintiff's.

The superior utility of the defendant's elevator is not, of itself, a certain test upon this question, because the defendant's might contain the whole substance of the plaintiff's and something in addition, and the addition would not prevent it from being an infringement.

For example, if the defendant's elevator took the tailings and carried them on the sieve, and after that did something in addition which rendered it more useful than that of the plaintiff, that circumstance would not prevent it from being an infringement of the plaintiff's claim.

A truer test, it seems to me, is whether the elevator of the defendant, and its mode of operation, would constitute it, with reference to the elevator of the plaintiff, a substantial invention, sufficient to support a patent as for a new thing.

After a patent has been obtained for a particular thing by one person, another person, without appropriating that patent, may invent a new mode of accomplishing the same or a similar object, and the latter will be entitled to a patent for his discovery. He must, however, invent something material and new—that is essential to the subject matter of the invention. If what he has done is only to vary the invention of another in certain particulars, without affecting the principle, then the subject matter remains the same. But if he has introduced a new element or principle into the subject matter of the invention, then there is no infringement.

You will apply these rules to the question involved in this part of the case. You will recollect the testimony as to the tailings. It was stated by all the witnesses that there would be unthreshed heads of wheat or grain under certain circumstances. And it was said to be the practice, when the short elevator was used, to gather them in a basket and throw them into the thresher.

The point is, whether this adds a new principle to the elevator, not contained in the combination of the plaintiff, notwithstanding the tailings, as thus thrown into the thresher, may eventually reach the sieve where they are thrown by the combination of the plaintiff.

The question is, whether this is or not a mere incident to the operation of the defendant's elevator, or whether or not the latter is substantially the same thing, under a mere change of form.

If it is in fact substantially different, and acts upon a different principle, then the plaintiff's patent, would not prevent another patent for the long elevator from being valid, but both might stand, otherwise not.

It will thus be seen by the jury that, as the case is presented to them, there are two main questions of fact to be found by them. First. Did the defendant in his machine, use the apron of the plaintiff as described in his patent? Second. Did the defendant in his machine, use the side elevator of the plaintiff's machine as described in his patent?

If the jury should find both or either of

these questions in the affirmative, then the defendant is guilty, and they will so render their verdict.

If the jury should find both of these questions in the negative, then the defendant is not guilty and they will so render their verdict.

If the jury should find in the affirmative on one or both of these questions, they will please to state whether they find on one or both.

The jury found for the defendant.

The opinion of McLean J., on previous trial of this case is reported [Case No. 11,195].

[Patent No. 542 was granted to H. & J. Pitts December 29, 1837. For other cases involving this patent, see Pitts v. Whitman, Case No. 11,196, and Pitts v. Hull, Id. 11,193.]

Case No. 11,195.

PITTS et al. v. WEMPLE et al.

[6 McLean, 558.] [1]

Circuit Court, N. D. Illinois. July Term, 1855.

PATENTS—INFRINGEMENT—USE OF LESS THAN ENTIRE COMBINATION — IMPROVEMENT ON A COMBINED MACHINE—RIGHTS GRANTED BY PATENT.

1. A patent for a combination of machinery is not infringed if less than the entire combination is used.

2. A combination is usually formed by using known processes or mechanical powers, in which case the invention consists in the union of those powers.

3. The constituent parts remain with the public, as before the combination. But the combination cannot be used though something be added to it.

4. An improvement on a combined machine, for which a patent may be obtained, gives no right to use the combined machine. Nor, under such circumstances, has the inventor of a combined machine the right to use the improvement. The inventions of the original and improved machine, are separate and distinct.

[This was an action on the case by Pitts & Pitts against Wemple and others for the infringement of letters patent No. 542, granted to H. & J. Pitts, December 29, 1837.]

Chickering & James, for plaintiff.

Larned & Goodrich, for defendant.

McLEAN, Circuit Justice. This action is brought to recover damages from the defendant, for an infringement of the plaintiffs' patent for a new and useful improvement in machines for threshing, separating and cleaning grain. The patent was dated the 27th of December, 1837. In their specifications they say, "We claim as our invention, the combination and use of an endless apron divided into troughs and cells in a machine for cleaning grain, operating substantially in the way described." This is not a claim to the invention of an endless apron only, but for an apron divided into troughs and cells in the machine, operating substantially as stated. "We claim, also, the revolving rake, for shaking out the straw, and the roller for throwing it off the machine, in combination with a revolving apron. We claim the guard slats in combination with a belt, constructed as above described, to receive the grain, straw and chaff from the thresher." And they also claim the combination of the additional sieve and shoe with the elevator for carrying up the light grain, in the manner and for the purpose herein set forth. Here are four distinct claims, each of which is a combination, and the whole of which constitute the machine claimed to have been invented by the plaintiffs, and which they denominate "a new and an improved combination of machinery for separating grain from the straw and chaff, as it proceeds from the threshing cylinder." The defendant, Wemple, in his patent, claims as his invention, and desires to secure by letters patent, "the employment of a cylinder (H,) having tangential or other suitably projecting plates across or along its periphery, for the purposes of separating the grain and breaking the impinging effect produced by the threshing cylinder on an endless apron; the said cylinder being so situated and operating in the rear of the threshing cylinder, as gently to feed over the straw and headings as they are delivered from the threshing cylinder." A patent was also issued to Samuel Lane, on the 6th of April, 1831, on his claim of having invented "a new and useful improvement in the machine for threshing and cleaning wheat and other grain."

The three patentees claim an improvement in the machine for threshing and cleaning grain. The endless apron is claimed as a part of the combination of each. The apron performs important functions in each. It is used in each to carry the threshed grain and straw thrown upon it by the thresher to the upper cylinder, where the grain is separated from the straw and chaff. In Lane's machine the straw and grain, after the threshing is completed, are received by the apron, and passing on rollers are carried up to the endless sieve and rake. In Wemple's machine, the grain, straw and chaff, are thrown by the thresher upon a cylinder, which feeds over the straw and headings, and breaks their force on the endless apron. This is called a separator of the grain from the straw, both of which are carried on the apron to the machinery for separating the grain from the straw and chaff. The function performed by the endless apron in each of these two machines, is substantially the same. In Wemple's machine there is a cylinder which breaks the force of the threshing operation; and there are slats on the apron at certain distances, but these make no substantial difference in the effect produced. The Wemple machine, by reason of its additional cylinder and slats, may separate a small portion of the wheat from the chaff, but in regard to the

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

endless apron they operate substantially on the same principle. But the endless apron of the plaintiff's machine produces a different effect and operates on different principles. The apron in Lane's and Wemple's machine merely carries the wheat in the chaff. In the plaintiff's machine it operates not only as a carrier, but as a separator of the wheat from the straw. And this is clearly indicated by the plaintiffs, in calling their machine, "a new and improved combination of machinery for separating grain from the straw and chaff, as it proceeds from the threshing machine." To save the apron from the force of the contents of the thresher, guard slats are used. The endless apron in plaintiff's machine is divided into cells, so that in passing over the rollers the grain is shaken from the straw and falls into the cells, which are deep and narrow, while the straw passes over them. This mechanical contrivance should have been called a separator, or an endless apron separator. This shows that in the use of the apron by the plaintiffs, there was no infringement of Lane's patent, nor of the plaintiff's patent by the use of the apron in Wemple's machine. The endless apron separator is materially different in its form and principle, and the effect produced by it, from the aprons used by the two other machines. The slats can in no correct sense be considered as mechanical equivalents, for the cells in the plaintiff's apron. The cylinder F, near the thresher, is substituted in Wemple's machine for the guards used by the plaintiff. And these are different in their mode of operation, although the effect may be somewhat similar. The rule is, that where the invention consists of a combination of known mechanical powers, the use of less than the whole will be no infringement. If the whole of the combination be taken, though something be added, still it is an infringement. An improvement on a combined machine may be patentable; but in such a case, the patentee cannot use the combined machine without a license; nor can the owner of such machine use the improvement, without a license. As the endless apron used by Wemple is materially different from the one used by the plaintiffs, and as that constitutes only a material part of his entire combination, it follows that it cannot be considered as an infringement of his patent. As Wemple's endless apron is substantially on the same principles as Lane's, if Wemple's be considered as an infringement, in this respect, of the plaintiff's patent, the same rule of construction would invalidate the plaintiff's patent, as being the same as Lane's, of prior date. But it will be perceived that in the four specific claims of invention by the plaintiffs, each one consists of combinations of mechanical powers which produce a given result, and these minor combinations are claimed as new, and if they are new, they are entitled to protection.

The first claim under this view is, for the endless apron connected with the other machinery. The second claim, of the revolving rake, is connected with the apron, so as not to be separated from it. The third claim of the guard to break the force of the contents of the thresher, thrown upon the apron as already stated, has not been infringed by defendants.

The fourth claim of the plaintiffs seems to present the only difficulty. That is the claim of the additional sieve and shoe, with the elevator for carrying up the light grain to the sieve, for a more effectual cleaning. This appears to be new and distinct. Where the parts of a combination have been invented, whether such invention be of a new machine, or a combination of mechanical powers, it is protected in its distinctive character. The defendants' model has the elevators which return the grain for a more perfect winnowing. The only difference I perceive between the two modes is, that Wemple's elevators convey to the thresher the imperfectly cleaned wheat, whilst the plaintiff's return it to the sieves. The only difference is, that the heads of the wheat, by passing through the thresher, may produce a somewhat better effect than where they are thrown upon the sieves. I find no specific claim for the elevators in Wemple's patent, but they are represented in his model, and if used, they are an infringement of the plaintiff's patent.

On this opinion being given, the counsel of the defendants stated, that they did not use the elevators, and had not for sometime, and that they did not consider them as an improvement of their machine.

[For a subsequent trial of this case, in which there was a verdict for defendant, see Case No. 11,194.

[For other cases involving this patent, see note to Pitts v. Wemple, Case No. 11,194.]

Case No. 11,196.

PITTS v. WHITMAN.

[2 Story, 609; 2 Robb, Pat. Cas. 189; Merw. Pat. Inv. 313.] [1]

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

PATENTS—CONSTRUCTION—COMBINATION—RECORDING ASSIGNMENTS — VALIDITY — INSTRUCTION TO JURY.

1. Where the plaintiff, in the specification of his patent, described his invention to be "a new and useful improvement," whereas, in fact, it consisted of a combination of several improvements, distinctly set forth in the specification, it was *held*, that the patent was good, not only for the combination, but for each distinct improvement, so far as it was his invention, and that the descriptive words were to be construed in connection with the specification.

[Cited in Geier v. Goetinger, Case No. 5,299; Emerson v. Hogg, Id. 4,440; Hogg v. Emer-

[1] [Reported by William W. Story, Esq. Merw. Pat. Inv. 313, contains only a partial report.]

son, 6 How. (47 U. S.) 483; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 805.]

[Cited in brief in Rheem v. Holliday, 16 Pa. St. 350.]

2. Where the plaintiff claimed, as his invention, "the construction and use of an endless apron, divided into troughs and cells, in a machine for cleaning grain, operating substantially in the way described," it was *held*, that the claim was for a combination of the endless apron with the machine for cleaning grain, and that, if the combination were new, it was patentable, although a part of the apparatus were old.

[Cited in Seymour v. Osborne, 11 Wall. (78 U. S.) 555.]

3. Act 1836, c. 357, § 11 [5 Stat. 121], relating to the recording of assignments of patents, is merely directory, for the protection of bona fide purchasers without notice, and does not require the recording of an assignment within three months, as a prerequisite to its validity.

[Cited in Gibson v. Cook, Case No. 5,393; Hall v. Speer, Id. 5,947; Perry v. Corning, Id. 11,004; American Solid Leather Button Co. v. Empire State Nail Co., 47 Fed. 743.]

[Cited in Burke v. Partridge, 58 N. H. 353; Hildreth v. Turner, 17 Ill. 185; Louden v. Birt, 4 Ind. 568; McKernan v. Hite, 6 Ind. 429.]

[See Chambers v. Smith, Case No. 2,582.]

4. It is immaterial whether an assignment of a patent, offered in evidence, was recorded before or after the suit was brought.

5. The court is never bound to give an instruction to a jury on a point of law, in the precise form and manner in which it is put by counsel, but only in such a manner as comports with the real merits and justice of the case.

[Cited in Emerson v. Hogg, Case No. 4,440.]

6. A motion having been made in arrest of judgment in this case, on the ground, that no description of the patent was set forth in the declaration, it was *held*, that the profert of the letters patent made them, when produced, a part of the declaration, and gave the invention all the requisite certainty.

[Cited in brief in La Republique Francaise v. Schultz, 57 Fed. 37.]

This was a case for the infringement of a patent granted to Hiram A. Pitts and John A. Pitts, as inventors of "a new and useful improvement in the machine for threshing and cleaning grain." The patent was dated on the 29th of December, A. D. 1837 [No. 542]. The writ was dated on 3d. of October, 1840; and the plaintiff in his declaration alleged an assignment by John A. Pitts to himself of all his (John A. Pitts') right in the invention, for, in, and within the state of Maine; and the breach alleged was, that the defendant [Luther Whitman] after the assignment, unlawfully made, used, and vended the said improvement in the said state of Maine. The cause was tried upon the general issue before the district judge, at the last May term; and a verdict was then taken for the plaintiff.

In order to understand the case, it is necessary to state, that the patent was for "a new and useful improvement in the machine for threshing and cleaning grain," and the specification annexed to the letters-patent was in the following terms: "To all whom it may concern: Be it known, that we, John A. Pitts and Hiram A. Pitts, of Winthrop, in the county of Kennebec and state of Maine, have invented a new and improved combination of machinery for separating grain from the straw and chaff, as it proceeds from the threshing machine; and we do hereby declare, that the following is a full and exact description thereof." The specification then describes the invention, referring to an accompanying drawing. The claim was as follows: "(1) We claim as our invention the construction and use of an endless apron, divided into troughs or cells, in a machine for cleaning grain, operating substantially in the way described; (2) we claim also the revolving rake for shaking out the straw, and the roller for throwing it off the machine, in combination with such a revolving apron, as set forth; (3) we claim the guard slats, E, in combination with a belt constructed substantially as above described; and (4) the combination of the additional sieve and shoe with the elevator for carrying up the light grain in the manner and for the purpose herein set forth."

A motion was afterwards made, on behalf of the defendant, in arrest of judgment, and, also, for a new trial, and was argued at the present term, by—

Mr. Preble and Samuel Fessenden, for defendant.

Codman & Fox, for plaintiff.

The motion in arrest of judgment was substantially as follows: "(1) Because it is not alleged in said writ what is the new and useful improvements in the machine for threshing and cleaning grain, which the plaintiff claims to have invented, and which he alleges, that the defendant has violated. (2) Because the plaintiff has not, in his said writ and declaration, any where set forth what he does claim as his invention, or the extent of his claims. (3) Because the plaintiff, in his said writ and declaration, has not set forth, or in any manner described the new and useful improvement in the machine for threshing and cleaning grain, which he claims as his invention."

The motion for a new trial was founded upon the following grounds stated by the defendant: "The plaintiff offered in evidence a deed from John A. Pitts to the plaintiff, dated April 17, 1839, and recorded in the patent office, April 19, 1841; to the admission of which the plaintiff objected, for the reason, that the said deed was not recorded within three months from its date, and because it was not recorded until long after the action was commenced. But the judge admitted it as evidence to the jury, and overruled the objection. For which erroneous ruling, the defendant moves, that the verdict be set aside and a new trial be granted. The counsel for the defendant contended, that by his claim the plaintiff claimed, that John A. Pitts and Hiram A. Pitts did claim to be the inventors of said endless apron, so as aforesaid constructed, i. e. divided into troughs or

cells, in a machine for cleaning grain, and operating substantially in the way described, and that if, in fact, they were not the inventors of an endless apron divided into troughs or cells, but were the inventors only of an application of such an apron to a machine for threshing and cleaning grain in the way described, then, that their claim was too broad, and therefore void. And they contended further, that if, in fact, they were not the inventors of an endless apron, divided into troughs or cells, then the application of it to a machine for threshing and cleaning grain substantially in the way described, was not the subject of a patent, as an application of an old machine to a new use or purpose was not patentable. And the judge was requested to give the construction contended for by the defendant's counsel, to the said claim; but the judge refused, and ruled, that the claim could not, and ought not to be so construed. That the true construction was that the said Pittses did not claim to be the inventors of an endless apron or an endless apron of troughs or cells, but that they claimed it only in a machine for threshing and cleaning grain, operating substantially in the way described; and that their claim was good and valid, as the inventors of its application to such a machine in the manner described. And for this ruling, which the defendant contends is erroneous, he moves the court for a new trial. The counsel for the defendant further contended, if an endless belt of troughs or cells was known and used at the time of, and prior to the supposed invention of said Pitts & Pitts, then the mere application of an endless belt of troughs or cells to the new purpose of separating straw and grain, in a machine for threshing and cleaning grain, is not the subject of a patent, and any patent taken out for the use of such a belt for that purpose is void. The judge declined to give such instructions, for which cause the defendant moves for a new trial. The counsel for the defendant further contended, that, if the claim of the plaintiff to the construction and use of an endless belt, with troughs or cells, embraces any other different form substantially of construction, than the one by him particularly specified, the claim, in that case, would be too broad, and the action could not be sustained. This instruction the judge declined to give. For which cause, also, the plaintiff moves for a new trial."

There was also an exception taken to another supposed ruling of the judge at the trial, which was afterwards abandoned, as it turned out to be incorrectly stated, and therefore it is here omitted.

Preble & Fessenden, for defendant, in their argument, mainly relied upon the grounds stated in the foregoing motions. They cited Patent Act 1836, c. 357, § 11; Wyeth v. Stone [Case No. 18,107]; Prouty v. Draper [Id. 11,446]; s. c., 16 Pet. [41 U. S.] 336.

Codman & Fox, for plaintiff, argued as follows: To the objection, that plaintiff cannot maintain this action, because his deed from his co-patentee was not recorded within three months, and not till long after this suit was commenced, the answer is, that it is not necessary as between these parties. The defendant does not claim title by purchase, extent of execution, or otherwise; he resists the validity of the patent. It is enough, that it was recorded, before it was offered in evidence. The object of the requirement of the statute, that such a record should be made within three months, was to protect subsequent purchasers, &c. and to give sufficient time for first purchasers to have their deed recorded. The case of Wyeth v. Stone [supra], cited by defendant, does not apply to this case. It was based upon the statute of 1793 [1 Stat. 318], which, in terms and substance, is materially different from the statute of 1836. See U. S. v. Slade [Case No. 16,312]; Prescott v. Pettee, 3 Pick. 331; Welsh v. Joy, 13 Pick. 477, Emerson v. Towle, 5 Greenl. 197. Under the general registry statute of Massachusetts and Maine, it has been repeatedly held, and is well settled law, that notice or even possession is equivalent to registry. Priest v. Rice, 1 Pick. 165; and see Brooks v. Byam [Case No. 1,947]. As to the motion to set aside the verdict, we are unable to perceive any just ground of support for either branch of it; it is believed to be in strict conformity with both law and evidence. Moreover, there is no report of the evidence, and we believe that this court cannot entertain the motion to set aside the verdict on the ground of its being against the evidence.

STORY, Circuit Justice. There is no ground to support the motion in arrest of judgment, which indeed ought properly to be heard after the motion for a new trial, which, if granted, might supersede the other motion. The short answer to be given to the motion in arrest of judgment is, that the profert of the letters-patent (of which the specification constitutes a part,) makes the letters-patent, when produced, a part of the declaration, and so gives all his certainty as to the invention and improvement patented, which is required by law. It would indeed be more formal to annex a copy of the letters-patent and specification to the declaration, and to refer thereto in the declaration. But the common practice is according to the declaration in the present case; and there seems to be no substantial objection to it.

The first objection, taken upon the motion for a new trial is, that the deed of assignment from John A. Pitts to the plaintiff, dated on the 17th of April, 1838, was not recorded in the patent office until the 19th of April, 1841, after the present suit was commenced; whereas it ought to have been recorded within three months after the execution thereof. By the patent act of 1793 (c. 55, § 4) every assignment, when recorded in

the office of the secretary of state, was good to pass the title of the inventor, both as to right and responsibility; but no time whatever was prescribed within which the assignment was required to be made. By the eleventh section of the act of 1836 (chapter 357) it is provided, "that every patent shall be assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of an exclusive right under any patent to make and use, and to grant to others to make and use, the thing patented within and throughout any specified portion of the United States, shall be recorded in the patent office within three months from the execution thereof." Now, it is observable, that there are no words in this enactment, which declare, that the assignment, if not recorded, shall be utterly void; and the question, therefore, is, whether it is to be construed as indispensable to the validity of an assignment, that it should be recorded within the three months, as a sine qua non; or whether the statute is merely directory for the protection of purchasers. Upon the best reflection, which I have been able to bestow upon the subject, my opinion is, that the latter is the true interpretation and object of the provision. My reasons for this opinion are, the inconvenience, and difficulty, and mischiefs, which would arise upon any other construction. In the first place, it is difficult to say, why, as between the patentee and the assignee, the assignment ought not to be held good as a subsisting contract and conveyance, although it is never recorded by accident, or mistake, or design. Suppose the patentee has assigned his whole right to the assignee for a full and adequate consideration, and the assignment is not recorded within the three months, and the assignee should make and use the patented machine afterwards; could the patentee maintain a suit against the assignee for such making or use as a breach of the patent, as if he had never parted with his right? This would seem to be most inequitable and unjust; and yet if the assignment became a nullity and utterly void by the non-recording within the three months, it would seem to follow as a legitimate consequence, that such suit would be maintainable. So strong is the objection to such a conclusion, that the learned counsel for the defendant admitted at the argument, that as between the patentee and the assignee, the assignment would be good, notwithstanding the omission to record it. If so, then it would seem difficult to see why the assignment ought not to be held equally valid against a mere wrong-doer, piratically invading the patent right.

Let us take another case. Could the patentee maintain a suit against a mere wrong-doer, after the assignment was made, and he had thereby parted with all his interest, if the assignment was not duly recorded? Certainly it must be conceded, that he could not, if the assignment did not thereby become a mere nullity, but was valid as between himself and the assignee; for then there could accrue no damage to the patentee, and no infringement of his rights under the patent. Then could the assignee, in such a case, maintain a suit for the infringement of his rights under the assignment? If he could not, then he would have rights without any remedy. Nay, as upon this supposition, neither the patentee nor the assignee could maintain any suit for an infringement of the patent, the patent right itself would be utterly extinguished, in point of law, for all transferable purposes. Again; could the assignee, in such a case, maintain a suit for a subsequent infringement against the patentee? If he could, then the patentee would be in a worse predicament than a mere wrong-doer. If he could not, then the assignment would become, in his hands, in a practical sense worthless, as it would be open to depredations on all sides. On the contrary, if we construe the tenth section of the act to be merely directory, full effect is given to the apparent object of the provision, the protection of purchasers. Why should an assignment be required to be recorded at all? Certainly not for the benefit of the parties, or their privies; but solely for the protection of purchasers, who should become such, bona fide, for a valuable consideration, without notice of any prior assignment. By requiring the recording to be within three months, the act, in effect, allows that full period for the benefit of the assignee, without any imputation or impeachment of his title for laches in the intermediate time. If he fails to record the assignment within the three months, then every subsequent bona fide purchaser has a right to presume, that no assignment has been made within that period. If the assignment has not been recorded until after the three months, a prior purchaser ought, upon the ground of laches, to be preferred to the assignee. If he purchases after the assignment has been recorded, although not within the three months, the purchaser may justly be postponed, upon the ground of mala fides, or constructive notice of the assignment. In this way, as it seems to me, the true object of the provision is obtained, and no injustice is done to any party. In respect to mere wrong-doers, who have no pretence of right or title, it is difficult to see, what ground of policy or principle there can be in giving them the benefit of the objection of the non-recording of the assignment. They violate the patent right with their eyes open; and as they choose to act in fraudem legis, it ought to be no defence, that they meant to defraud or injure the patentee, and not the assignee. Indeed, if the defence were maintainable, it would seem to be wholly immaterial, whether they knew of the assignment or not. In furtherance, then, of right, and justice, and the apparent policy of the act ut res magis

valeat quam pereat, and in the absence of all language importing that the assignment, if unrecorded, shall be deemed void, I construe the provision as to recording to be merely directory, for the protection of bona fide purchasers without notice. And assuming that the recording within the three months is not a prerequisite to the validity of the assignment, it seems to me immaterial (even admitting that a recording at some time is necessary) that it is not made until after the suit is brought. It is like the common case of a deed required by law to be registered, on which the plaintiff founds his title, where it is sufficient, if it be registered before the trial, although after the suit is brought; for it is still admissible in evidence as a deed duly registered.

The next objection taken is to the ruling of the district judge upon the point of the construction of the claim in the specification in the patent. The learned judge ruled "That the true construction of the patent was, that the Pittses did not claim to be the inventors of an endless apron, or an endless apron of troughs or cells. But the true construction must be that they claimed it only in a machine for threshing and cleaning grain, operating substantially in the way described; and that their claim was good and valid as the inventors of its application to such a machine in the manner described." I am of opinion that the construction thus given by the learned judge of the claim of the patentees in the specification is the true one. What is the language of the specification? "We claim as our invention the construction and use of an endless apron, divided into troughs or cells, in a machine for cleaning grain, operating substantially in the way described;" that is, described in the specification. It is, therefore, clear that it was not a claim of an invention of an endless apron of troughs or cells; but of an endless apron of troughs and cells combined with a particular threshing machine, described in the specification. If this combination was new, and invented by the patentees, then it was valid in point of law, which is all that the learned judge purported to state. And this disposes in effect of the next objection; for if the combination was new, it is a patentable matter, although a part of the apparatus might have been applied to similar purposes in other and different machines. Under such circumstances it would not be a mere application of an old apparatus to a new purpose, but a new combination of machinery, incorporating, in part, an old apparatus for a new purpose.

The third instruction asked and refused by the court is objectionable in several respects. It proceeds upon the assumption of the existence of facts, which it was no part of the duty of the court to assume or affirm. It undertakes to put a construction upon the invention, as claimed by the patentees, which is not (as has been already suggested) correct. It separates the consideration of the endless belt of troughs from the other machinery, with which it was combined, as though it were claimed as a distinct invention, and not in combination, and asks the court to give an instruction founded upon that supposition. It was no part of the duty of the court thus to break up the case into fragments, or to give an instruction as to abstract points, not actually presented by the state of the cause. The like answer may be given for similar reasons to the fourth instruction asked and refused.

The fifth instruction, asked and refused, involved matter of fact, viz. the character of Parsons' machine, and in what respects it was identical with, and in what respects it differed from, the machine of the Pittses, and that of Whitman; and therefore was properly refused; for the learned judge had no right to determine upon any such matters, or to give the instruction prayed for. The instruction upon this point supposed in the motion for a new trial to have been given by him, was in fact (as he states) never given. On the contrary, he gave the instruction in the form and manner, which are stated by the counsel for the plaintiff in their written objection to the motion for a new trial. In short, he left the whole as a matter of fact for the consideration of the jury, with such observations on his own part, as were fit to be submitted by way of commentary on the evidence, for their consideration.

It may here be proper to add, that the court is never bound to give an instruction to a jury upon a point of law, even when pertinent, and relevant to the fact of the case, precisely in the form and manner in which it is put by counsel; for that may sometimes have a tendency to mislead the jury, and withdraw their attention from the merits of the case. All that is the duty of the court, is to give such instructions to the jury in point of law, as clearly arise upon the evidence, and are proper for the consideration of the jury, upon the issue before them, in such terms and in such a manner as shall comport with the real merits and justice of the case, and enable the jury to give a proper verdict in point of law. Having done this, the court has discharged its entire duty, and is not bound to respond to instructions asked, which are of a more general form, or of an abstract nature, or are not necessary for a just decision of the cause.

Before closing this opinion, it is fit to take notice of an objection, raised in the argument at the bar on behalf of the defendant, that the present patent is professedly for "a new and useful improvement," and not for new and useful improvements (in the plural); and that consequently it covers only the whole combination in its entirety; and not the several improvements specified in the claim, separately and distinctly from each other. The conclusion, intended to be de-

duced from this argument, is, that inasmuch as the evidence did not show a violation of the whole combination, but of one only of the asserted improvements, therefore, the present suit is not maintainable. I cannot assent either to the premises, or to the conclusion; and in my judgment, each is unsupportable in point of law. There is, in my judgment, no difficulty in maintaining the validity of a patent (as in the present case), for a machine combining several distinct improvements, each of which is the invention of the patentee, and also of including in the same patent a right to each of these several and distinct improvements. In other words, the patentee may in such a case take out a valid patent for the combination, and also include therein a right to each distinct improvement severally contained in the same machine. Such was the doctrine maintained by this court in Wyeth v. Stone [Case No. 18,107], and it stands confirmed by the obvious intent of the ninth section of the patent act of 1837, c. 45 [5 Stat. 191], which gives to the patentee a right of action for a piratical use of any one of his invented improvements, which is distinctly stated in his patent, although he may, by mistake, accident, or inadvertence, have claimed others in his specification, of which he was not the inventor.

In construing a patent for an invention we are not to look alone to the descriptive words contained in the letters patent, but we are to construe those words in connection with the specification, which in our law is always annexed to and made a part of the letters patent. Here, indeed, the letters patent described the invention to be "a new and useful improvement (this is the common formulary) in the machine for threshing and cleaning grain;" but then it is afterwards added, "a description whereof is given in the words of the said John A. Pitts and Hiram A. Pitts, in the schedule hereto annexed, and is made a part of these presents." So, that for the nature and character of the improvement and the claim of the invention we are to look to the specification. Now, in the specification, the patentees begin by saying, that they "have invented a new and improved combination of machinery for separating grain from the straw and chaff, as it proceeds from the threshing machine;" so that we here clearly see, that the patentees claim the entire combination of the machinery as new. In the summing up of their invention they claim four distinct improvements in the machinery, as their invention. The words are: "(1) We claim as our invention the construction and use of an endless apron divided into troughs or cells in a machine for cleaning grain, operating substantially in the way described (i. e. in the specification); (2) we claim also the revolving rake for shaking out the straw, and the roller for throwing it off the machine, in combination with such a revolving apron as set forth; (3) we claim the guard slats, E, in combination with a belt constructed substantially as above described; and (4) the combination of the additional sieve and shoe, with the elevator for carrying up the light grain in the manner and for the purpose herein set forth." It is plain, therefore, that the patentees not only claim the entire machinery in combination, but also the four improvements above enumerated as their invention. And if they are their invention, there is no objection, in point of law, to their claim. And a violation of any one of the specified improvements, without any violation of the others, by the defendant, is sufficient to entitle the patentees, or their assignees, to an action for the infringement. So that in every way, in which I am able to contemplate the case, the motion for a new trial and in arrest of judgment ought to be overruled. The district judge concurs in this opinion, and, therefore, the motion is overruled.

[For other cases involving this patent, see note to Pitts v. Wemple, Case No. 11,194.]

PITTSBURG (EVANS v.). See Cases Nos. 4,567 and 4,568.

PITTSBURG & C. R. CO. (BALTIMORE v.). See Case No. 827.

PITTSBURG, FT. W. & C. R. CO. (KNOWLES v.). See Case No. 7,899.

PITTSBURGH, The (KELLY v.). See Case No. 7,674.

PITTSBURGH (OEBRICKE v.). See Case No. 10,442.

PITTSBURGH (OELRICH v.). See Case No. 10,442.

PITTSBURGH (ROCKMUHL v.). See Case No. 11,982.

Case No. 11,197.

PITTSBURG, C. & ST. L. RY. CO. v. COLUMBUS, C. & I. C. RY. CO. et al.

[8 Biss. 456.] [1]

Circuit Court, D. Indiana. April, 1879.

POWER OF RAILROAD CORPORATIONS IN INDIANA TO EXECUTE LEASES—PLACE OF EXECUTION—POWER TO LEASE RAILROADS IN OHIO — EVICTION — MORTGAGE — DECREE OF SALE — STIPULATION IN LEASE—CLASSIFICATION OF RAILROAD INDEBTEDNESS — TIME OF PERFORMANCE—RESCISSION OF CONTRACT—CONSTRUCTION OF CONTRACTS.

1. There being no statute in Indiana which in terms forbids or prohibits railroad corporations of that state from executing leases of their property, a lease made by such a corporation, and which is neither in violation of any statute, nor against the public policy of the state, is valid.

2. The laws of Indiana, and the decisions in that state bearing upon this point, considered.

3. One of the defendant corporations—a corporation of the state of Indiana—leased its lines to the plaintiff—a corporation of the state of Ohio. The lease was made for the purpose of forming a connecting line of travel and traffic: *Held*, that such lease was not in contravention

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

of the statutes or public policy of Indiana, and that the lessor corporation had power to execute it.

4. It is not essential to the validity of such a lease, (in the absence of express statutory provision,) that its original execution or subsequent ratification should have been evidenced by corporate action taken by the lessor within the limits of the state by which it is created.

5. The lessee corporation was not forbidden by the laws of Ohio to take the lease in question, of the road in Indiana.

6. An unexecuted decree, for the sale of a portion of the demised railroad, for the purpose of satisfying a mortgage made prior to the lease, is not such an eviction of the lessee, by paramount title, as to terminate the lease.

[Cited in Moran v. Pittsburgh, C. & St. L. Ry. Co., 32 Fed. 888.]

7. So, also, the appointment of receivers for the lessor corporation, but with instructions not to disturb the possession of the lessee, is not an eviction.

8. A stipulation by the lessor corporation to arrange, provide for, adjust and classify its indebtedness, was *held* to be one of substance which it must perform.

9. And the lessee is not bound to wait for an indefinite or an unreasonable time for such arrangement, adjustment and classification of the lessor's indebtedness, to be effected.

10. But in such case, where the lessee has acted under the lease before such arrangement and classification has been made, the court will not decree a rescission of the contract upon the application of such lessee, until the lessor is given a reasonable time within which to comply with the stipulation; especially, where by the frame of its bill of complaint, the lessee has prayed for a rescission, unless the lessor shall specifically perform within a reasonable time to be fixed by the court.

11. In this case the court considered that eight months from the date of the order would be a reasonable time within which the lessor should carry out the agreement.

12. Contracts, when their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they by their conduct have given to the provisions in controversy.

Bill to cancel and set aside lease of railroad.

Stanley Matthews, Baker, Hord & Hendricks, and John Scott, for complainant.

Evarts, Southmayd & Choate, Hoadly, Johnson & Colston, and McDonald & Butler, for defendant.

HARLAN, Circuit Justice. The more important facts out of which this litigation has arisen, are as follows: The complainant, the Pittsburg, Cincinnati and St. Louis Railway Company, an Ohio corporation, was formed in 1856 by the consolidation of the Steubenville and Indiana Railroad Company, an Ohio corporation—the Holiday's Cove Railroad Company, a West Virginia corporation—and the Pan-Handle Railway Company, a Pennsylvania corporation. At the date of the lease hereafter referred to, it operated a continuous line of railroad from Pittsburg, via Steubenville, to Columbus, Ohio.

The history of the organization of the defendant corporation, the Columbus, Chicago and Indiana Central Railway Company, is as follows: The Columbus and Indianapolis Central Railway Company was formed in 1864, by articles of consolidation between the Columbus and Indianapolis Railroad Company, an Ohio corporation, and the Indiana Central Railway Company, an Indiana corporation—the consolidated company operating a line of railroad extending from Columbus to Union City, on the state line between Ohio and Indiana, with a branch from the main line, in Miami county, Ohio, to the Indiana state line, where the track of the Indiana Central Railway touches the same, through Richmond to Indianapolis.

The Columbus and Indiana Central Railway Company was formed by a consolidation of the Columbus and Indianapolis Central Railway Company and the Union and Logansport Railway Company, an Indiana corporation, whose line extended from Union City to Logansport, and the Toledo, Logansport and Burlington Railway Company, an Indiana corporation, whose line extended from Logansport to the west state line of Indiana.

The Chicago and Great Eastern Railway Company, an Indiana corporation, was consolidated in 1863 with the Galena and Illinois River Railroad Company, the consolidated company retaining the former name. The latter was subsequently consolidated with the Chicago and Cincinnati Railroad Company, an Indiana corporation, retaining the name of the Chicago and Great Eastern Railway, and the company last named, in 1865, consolidated with the Cincinnati and Chicago Air Line Railroad Company, an Indiana corporation, whose line extended from Richmond to Logansport. The company last formed by consolidation retained the name of the Chicago and Great Eastern Railway Company, owning and operating, as an Indiana corporation, the line from Richmond through Logansport to the Illinois state line, and as a corporation in Illinois, the line from that point to Chicago.

Finally, in December, 1867, the Columbus and Indiana Central Railway Company, and the Chicago and Great Eastern Railway Company (last named), consolidated and became the Columbus, Chicago and Indiana Central Railway Company, owning and operating lines of railroad extending from Columbus to the Indiana state line, four miles east of Richmond, from Union City to the junction of the main line, from Union City to Logansport, from Logansport to the Illinois state line, from the Ohio and Indiana state line, four miles east of Richmond, through that city to Logansport, and from Richmond to Indianapolis, and from a point on the eastern line of Indiana to Chicago—the entire line being about 586½ miles in length.

It should be here stated that the Cincinnati and Chicago Air Line Railroad Company, to which reference has been made, was formed in 1860 by the associate purchasers, at judicial sale, of the railroad from Richmond to Logansport. The decree was to foreclose a mort-

gage given by the Cincinnati, Logansport and Chicago Railway Company, and the sale was subject to the continuing lien of a prior mortgage on 27 miles of the road, between Richmond and Newcastle, given by the Newcastle and Richmond Railroad Company, then the owner of that portion, which was the same corporation as the Cincinnati, Logansport and Chicago Railway Company, with its name changed and its line of road extended from Newcastle to Logansport. After the organization of the Cincinnati and Chicago Air Line Railroad Company a bill in equity was filed in this court by James Pullan, trustee, against the last named company, to enforce said subsisting mortgage, given by the Newcastle and Richmond Railroad Company. And on July 30, 1874, a decree was rendered, adjudging that there remained due on account of said bonds and interest the sum of $933,500.44. For that sum the road from Richmond to Newcastle was directed to be sold.

On the 20th of February, 1868, the Columbus, Chicago and Indiana Central Railway Company executed to Roosevelt and Fosdick, trustees, a mortgage upon the entire railroad property of said company, with all its franchises, equipments, property, tolls, issues, profits, lands, tenements, buildings, fixtures, machinery, goods and chattels, connected with or used in the operation of said railroad, including all the property of every kind then owned or possessed, or thereafter acquired by the mortgagor, but excepting certain property which need not be here mentioned, to secure the payment of bonds then about to be issued, to the amount of $15,000,000, payable twenty years after date, with seven per cent. interest, payable semi-annually.

The mortgage recited: That the several corporations composing the mortgagor company had, prior to its consolidation, become indebted by mortgage bonds, which were still unpaid and continued a lien on the respective parts of the road and property so consolidated and united, in the amounts following, to-wit:

The Columbus and Indiana Central Railway Company, for the sum of $3,200,000 on the road from Indianapolis to Columbus, and from Richmond Junction to Union City, and for the sum of $2,000,000 on its road from Union City to Logansport, and for the sum of $800,000 on its road from Logansport to the Illinois state line, in all, the sum of $6,000,000; the Chicago and Great Eastern Railway Company, for the sum of $5,600,000, in several liens on different parts of its road, as follows: $298,000 on line between Richmond and Newcastle; $1,283,000 on line between Richmond and Logansport, and $1,820,000 on line between Logansport and Chicago, and $2,199,000 on the line between Richmond and Chicago, the last named sum being part of an issue of $5,600,000 made to take up previous liens, and $3,040,000 of said issue being unexchanged, and delivered at time of consolidation to the Columbus, Chicago and Indiana Central Railway Company.

The mortgage also recited: That it was issued in pursuance of the resolutions adopted on February 13, 1868, by the board of directors of the mortgagor corporation, by which it was declared among other things, that it was expedient to reduce to simple forms and classes all of the bonded debts aforesaid of the corporations of which the mortgagor corporation was constituted, and for which indebtedness that corporation was, by lien upon its property or otherwise, liable; that to that end an issue be made of consolidated mortgage bonds to the amount of $15,000,000, secured by mortgage upon the property, rights and franchises of the property of the consolidated company,—$11,500,000 of such issue to be used for the redemption and payment, dollar for dollar, of the like amount of the said first mortgage bonds of the several companies already mentioned.

On the 15th of December, 1868, the Columbus, Chicago and Indiana Central Railway Company, in compliance with resolutions of the board of directors, executed to Fowler and Thomas a mortgage for $5,000,000 upon its franchises, income, equipments and property, to secure the redemption or exchange of certain outstanding bonds, viz.: $821,000 of 20-year mortgage bonds of the Columbus and Indianapolis Central Railway Company; $1,243,000 income bonds of the Columbus and Indiana Central Railway Company; $400,000 of the Chicago and Great Eastern Railway Company construction and equipment bonds, and other indebtedness, estimated at $2,500,000.

On the 22d of January, 1869, the Columbus, Chicago and Indiana Central Railway Company leased to the Pittsburg, Cincinnati and St. Louis Railway Company upon certain terms its entire lines of railroad, 586½ miles in length, with all its franchises and property of every kind and description, except such property as the lessor company then owned or might thereafter acquire which need not be used for any purposes incident to the management or operation or repair of the railroad, or in the business of said railway company.

The lease was for the term of ninety-nine years, renewable at the election of the lessee, for like periods forever, on the same terms, stipulations, and conditions, subject, however, to its earlier determination as in the lease provided. The lease provided that the lessee would, at its own cost, risk, and expense, during the term, keep, preserve and maintain the demised railroad in good working condition and repair as a first-class railroad, and operate the same to the end that as large an amount of earnings and profits may be made and realized therefrom as can lawfully and reasonably be made and realized under the terms of the lease; that during the term of the lease, the lessee should have the exclusive right to manage and control the demised railroad and premises, and to regulate, determine, and collect tolls, freight,

and charges, and enjoy all the corporate powers, rights and privileges appertaining to said demised premises, as fully as the lessor company could do.

In consideration of the rights secured by the lease it was agreed that the lessee should pay out of the annual gross earnings all taxes and assessments of every kind, imposed or assessed against the lessor of the leased property, including the business done upon the line, in the same manner and to the same extent that the lessor would have to pay, if operating its own line; that of the surplus of the annual gross earnings the lessee should be entitled to receive 70 per cent. for its own sole and exclusive use; that the remaining 30 per cent. of gross annual earnings should be applied and paid by the lessee as follows:

First—To the payment of the interest that may accrue after February 1, 1869, being at the rate of seven per cent., on all the mortgage bonds of the party of the first part, to the extent of $20,000,000, in accordance with their respective equities and priorities.

Second—To the payment of the interest upon the income bonds of the party of the first part, which may hereafter be issued to the party of the second part for the purposes of construction hereinafter mentioned, said interest to be deposited in ample time to meet the accruing coupons, at some bank, trust company, or agency, in the city of New York, as may be agreed upon from time to time by the parties of the first and second parts: Provided, nevertheless, that if the said 30 per cent. should not in any one year be equal to the sum required for the payment of the interest as aforesaid, then, and in that event, the party of the second part shall and will, at their own cost and expense, and without charge to the party of the first part, pay to said agency or agencies the amount required to pay said interest, as the same shall become due and payable.

Third—To the payment of whatever surplus may remain in any one year of the said balance of 30 per cent. to the treasurer of the party of the first part, annually on the 1st day of March; or if, in the opinion of the said party of the second part, the probable annual surplus shall justify the same, that semi-annually, on the first days of September and March, in each year, for dividends upon the stock, and for such other purposes as the party of the first part may determine.

In order to provide for the payment or redemption of the $20,000,000 of 7 per cent. mortgage bonds of the lessor, the lessee agreed to establish an annual sinking fund, as required of the lessor by the terms of the mortgages, and upon the redemption and cancellation of such bonds, the lessor agreed that it would, in consideration thereof, pay or issue to the lessee, at its option, 7 per cent. bonds at par for an equal amount, to be secured by a mortgage having a first lien, unless otherwise agreed upon, or issue to the lessee shares of the capital stock of the lessor.

It was further stipulated in the lease: That the lessee should provide means for and acquire any needful right of way and real estate, erect such necessary depot buildings, shops, engine-houses, side tracks, and appurtenances, and for other permanent construction as may be reasonably required to accommodate the traffic of the demised railroad, and for actual advances so made the lessee should be entitled to receive 7 per cent. income bonds, convertible into stock, at the option of the holder, at any time—all such expenditures not to exceed $2,000,000 for the (then) next three years;

That no issue of bonds beyond the $15,000,000 of first mortgage consolidated bonds, and the $5,000,000 second mortgage consolidated bonds, and the $2,000,000 of income bonds should be made by the lessor without the consent of the boards of directors of the parties to the lease; the one-half of the $5,000,000 second mortgage bonds to be used in taking up certain income and other bonds then outstanding, not included in the $15,000,000 loan aforesaid, on the different lines composing the leased lines; the other half to be used in paying off the debts due and to become due, of all kinds of the lessor, except the said borrowed debt of $22,000,000;

That no further issue of bonds should be made, except as provided, or stock issued beyond the sum of $13,000,000, except as the same may be increased by the conversion of bonds into capital stock of the company, in which case the bonds so converted shall be canceled, making, in the aggregate, of bonds and stock, $35,000,000;

That the lessee should pay for all supplies and equipments delivered on prior contracts, after it obtained possession of the railway, and the lessor pay for all supplies and equipments delivered before the lessee takes possession, including all pay-rolls and other floating indebtedness, so that the railroad and other property shall be made free of all debt, except first mortgage bonds to the amount of $15,000,000, second mortgage bonds to the amount of $5,000,000, and $2,000,000 of income bonds to be issued, as provided in the lease, for construction purposes;

That in case of default of interest on the bonds or sinking fund for sixty days after the same shall become due and payable, or default in carrying out any of the provisions of the lease by the lessee or the guarantor to be done or performed by them respectively, for the space of four months, the lessor might take possession of all the property leased and other permanent property added thereto, without prejudice to any right of damages which the lessor may have by reason of said default;

That upon the failure of the lessee to perform the covenants of the lease, the guarantor should perform the same on behalf of

the lessee, reserving all the profits and advantages therefrom to which the lessee would be entitled; and

That the leased lines shall, at all times, be placed upon a perfect equality with any other line or lines of railway that may connect at Pittsburg, as to the rate and facilities for joint transportation for all classes of traffic to and from all points east and west—the expressed intention of the parties being to place the leased lines, in respect to the Pennsylvania railroad and its eastern connections, upon terms equally favorable to those granted to any other line.

To the foregoing lease the Pennsylvania Railroad Company was a party. In consideration of the covenants and agreements recited, and of the benefits and advantages accruing and to accrue to it therefrom, that company guaranteed to the lessor corporation that the lessee corporation would keep and perform all the covenants and agreements of the lease, and, in default thereof, the Pennsylvania Railroad Company, upon notice to it in writing of the kind and reason of such default, would keep and perform such covenants and agreements for and on behalf of the lessee corporation—in which event, the lessor and lessee corporations agreed that the said company, at its option, should be entitled to all the profits and advantages which might or could arise or accrue therefrom to the lessee corporation.

After the execution of this lease, the Pittsburg, Cincinnati and St. Louis Railway Company took possession of the leased property. But very shortly after possession was taken, it expressed dissatisfaction with the lease, and sought a modification of its terms. There is some conflict in the evidence as to the grounds upon which the claim to such modification was based. It is, perhaps, not material to inquire now whether any just reasons existed for dissatisfaction, or whether the lessor corporation could have been required to accede to any alteration or change in the terms of the lease. It is sufficient to say that the parties to the original lease, on December 10, 1870, executed an additional agreement, dating it back to February 1, 1870.

That agreement is, perhaps, the most important document in this case, and is, therefore, given at length:

"Agreement made this first day of February, 1870, by and between the Columbus, Chicago and Indiana Central Railway Company, of the first part, the Pittsburg, Cincinnati and St. Louis Railway Company, of the second part, and the Pennsylvania Railroad Company, of the third part. Witnesseth: That for and in consideration of the covenants hereinafter contained, and of the benefits expected to result therefrom, the parties have agreed with each other:

"Art. I. The party of the first part agrees and undertakes to arrange, provide for and so adjust and classify all their indebtedness now existing, that $15,821,000 thereof shall be represented by bonds bearing seven per cent. interest, secured by mortgage upon the estate and property of the said party of the first part, the $821,000 being Columbus and Indianapolis Central Railway Company second mortgage bonds; and that all other indebtedness of said party, and all payments and advances heretofore made on or for interest, construction, operating and maintaining said road, accounts and expenditures made by the second and third parties, or either, in excess of the receipts heretofore derived from the business and transportation on and over said road, shall be represented by bonds bearing seven per cent. interest, entitling the holder to vote, secured by a mortgage upon all the estate and property of said company, which bonds shall be payable after twenty years, at the pleasure of said first party, and shall be convertible into preferred capital stock, bearing seven per cent. interest, at par, at any time within fifteen years, at the option of the holders of the same, which issue of bonds shall not exceed $10,000,000, to be received by the said second and third parties at par, in payment of their claims and advances, so far as they are entitled and may hereafter become entitled to same.

"Art. II. That hereafter the party of the second part covenants and agrees to pay and apply the thirty per cent., being the balance of the gross earnings of the railroad of the party of the first part, as follows: First—For the payment of the coupons, as they shall from time to time mature, upon the said bonds, representing and amounting to the aforesaid sum of $15,821,000. But if the same shall not be adequate to such payment in full in any one year, then the said party of the second part will pay any such deficiency out of its own proper moneys, without charge, reclamation, or subrogation therefor. Second—Out of any surplus of said thirty per cent. remaining after payment of said interest, to pay the same pro rata, as interest or dividends, to and among the holders of the convertible bonds provided for in the first article of this agreement, based on the entire amount of the income bonds convertible into preferred stock, as provided for in the first article of this agreement, actually issued, and the bonds which the holders have the option to convert into the said income bonds, and the holders of any stock into which any of said bonds may have been converted by the holder, in the exercise of the option so to do, provided for in the bonds, and also of any bonds hereafter to be issued under the provisions of a subsequent article of this agreement, to represent new constructions and additional equipment for the use of the railroad of the party of the first part; and Third—To pay to a sinking fund to be established for the redemption of said mortgage bonds, the one-half of one per cent., provided for in the mortgage to secure the payment of said $15,821,000 of bonds, for the use and

benefit of the first party; and after such payment, any surplus of said thirty per cent. remaining to be divided pro rata as a dividend upon the common stock of the said party of the first part.

"Art. III. All sums expended by the party of the second part after the date of the agreement of January 22, 1869, and the interest thereon at seven per cent., upon the cost of any new equipment provided by the party of the second part, necessary for the successful operation of the road of the party of the first part, shall be promptly liquidated and paid to the second party in said convertible bonds at par.

"Art. IV. Any defects of power or authority (if such there be) to enter into and effectuate the agreement of January 22, 1869, and of this present agreement existing between the parties hereto shall be removed, and the requisite authority therefor be obtained at the earliest practicable time; and thereupon either party may require of the other the due execution of such instruments as will perfect, confirm and render operative and binding said agreement.

"Art. V. Whenever this agreement shall conflict with the provisions of the agreement of January 22, 1869, by and between the parties hereto, the said agreement of January 22, 1869, shall, in those particulars and to that extent, be deemed and taken to be changed and modified, and the party of the third part unites in the execution of this agreement in testimony of its assent to such modification.

"It is understood that annual gross earnings, mentioned in the sixth article of the original lease, shall be held to mean the annual gross revenues of the road of the party of the first part, after the deduction therefrom of all pro rata bridge tolls, drawbacks allowed on freight traffic, terminal expenses allowed to other railroad corporations on through business between the East and West, and whatever amount is paid to the Chicago and Northwestern Railroad Company per passenger and per hundred on freight for the use of their road, until the road of the party of the first part is completed to its proper terminus in Chicago.

"It is understood and agreed between the parties hereto that the thirteenth article of the original lease shall be amended and modified so as to read as follows, viz.: 'Passenger trains shall be so run as to develop and increase the local and through business upon said road of the party of the first part, and where connections are made between Chicago and the East, via Pittsburg, the speed thereof shall be pro rated upon the needs of all parties hereto, and the party of the third part shall not run trains at higher rates of speed for any other connecting line, nor grant facilities of any kind that shall not be equalled by those given to the parties of the first and second parts; and in case the organization of the party of the second part, for the procurement of either passengers or freight in the Eastern cities or in the West shall not be satisfactory to the party of the first part, then the said party of the first part may use its own organization, at its own expense, for the procurement of above traffic in the East or West, being governed in the securing of such traffic by the rates fixed or agreed to by the party of the second part; and no consolidation of earnings or running arrangements shall be made by the party of the second part with any other company, for competing business or traffic, without the consent of the party of the first part.'"

On the 28th of April, 1870, the board of directors of the Columbus, Chicago and Indiana Central Railway Company, by resolution, directed the issue of bonds to an amount not exceeding $10,000,000, convertible at any time within fifteen years from date into preferred capital stock at par, bearing a dividend of seven per cent. interest, out of an interest fund to be provided, and prior to the payment of any dividend on the common stock of the company. The interest fund, and the amount thereof which could be applied to the payment of the seven per cent. interest on the said convertible bonds, and the seven per cent. on the preferred stock created by the conversion of said bonds into such stock, was to be ascertained annually, as follows: From the gross and entire revenue and income of the railroad and its appurtenances owned by the company, there shall each year, commencing February 1, 1870, be deducted payments on certain designated accounts. Thirty per cent. of the remaining balance was to be applied as follows: First, To pay the interest on $15,000,000 of bonds being the interest on bonds of the Columbus, Chicago and Indiana Central Railway Company, and on the bonds which they are to represent and be exchanged for, as provided in the mortgage deed of said company, dated February 20, 1868. To pay, also, the interest on $821,000 of outstanding second mortgage bonds of the Columbus and Indianapolis Central Railway Company, dated November 1, 1864. Second, To pay the salaries and other expenses incident to the corporate organization, not exceeding, however, $20,000. Third, To pay out of said thirty per cent. so much thereof as may be net earnings, and required by the provisions of said mortgages to be so applied to the sinking fund. Fourth, The balance and residue of said thirty per cent. to be deemed and taken to be the interest fund for the payment of the interest on the then outstanding convertible bonds and on the preferred stock created by the conversion of said bonds into preferred stock.

The resolutions of the board further provided: That so much of said interest fund as, in the opinion of the company, might be necessary for that purpose may, from time to time, be used in adjusting the (then) present

outstanding bonds of the company, and the companies merged in that company by consolidation, so as to make the bonded debt of the company conform to the agreement by which said bonded debt is to be reduced to $15,821,000.

That said convertible bonds should be negotiated under the direction of the board of directors, to take up, retire, and cancel so much of all the bond indebtedness then existing, whether made by it or by any company merged in that company by consolidation, "as that the said bond indebtedness shall be reduced to $15,821,000, leaving outstanding the present existing bonded debt the $15,000,000 first mortgage bonds of this company, and $821,000 of the second mortgage bonds of the Columbus and Indianapolis Central Company;" also, to fund and pay all other existing indebtedness of the company, and also to issue so many of said convertible bonds as may be further required by, and in performance of, the terms of an agreement between the company, and the Pittsburg, Cincinnati and St. Louis Railway Company, and the Pennsylvania Railroad Company, dated February 1, 1870.

In accordance with those resolutions a mortgage was executed upon the property of the railroad, containing the foregoing stipulations, to Parkhurst and Thompson, trustees, to secure the payment of $10,000,000 of convertible bonds.

About the date of the actual execution of the amended lease, (December, 1870,) the following letter, signed by the presidents respectively of the Pennsylvania Railroad Company and the Pittsburg, Cincinnati and St. Louis Railway Company, was prepared and delivered to the persons to whom it was addressed:

"To Messrs. W. R. Fosdick and James A. Roosevelt, trustees, and A. Parkhurst, trustee: Gentleman: Under the contract and lease of the Columbus, Chicago and Indiana Central Railway, dated January 22, 1869, as amended by the contract of February 1, 1870, the Pittsburg, Cincinnati and St. Louis Railway Company, as lessee, which lease the Pennsylvania Railroad Company has guaranteed, will, by the terms of said lease, pay the interest as it matures on the $15,000,000 of the first mortgage consolidated bonds of the Columbus, Chicago and Indiana Central Railway Company, or on the bonds which they represent, and on $821,000 of the second mortgage bonds of the Columbus and Indianapolis Central Railway Company, which bonds are secured by deed of trust, made respectively to you. You are, therefore, authorized to inform the holders of said bonds, and to give such further public notice as you may think proper, that the interest on the said $15,821,000 of bonds will be regularly paid by the Pittsburg, Cincinnati and St. Louis Railway Company or the Pennsylvania Railroad Company, according to the tenor of said amended contract and lease."

On 27th of October, 1874, a written notice was given by the Pittsburg, Cincinnati and St. Louis Railway Company to the Columbus, Chicago and Indiana Central Railway Company, which, after reciting the execution of the original and amended lease and the mortgages aforesaid, proceeded:

"And whereas, four years and nine months have elapsed since the date of said supplemental agreement, yet the Columbus, Chicago and Indiana Central Railway Company has not complied with the covenants in said agreement, and by reason thereof suits have been instituted against them by holders of certain of their obligations prior in date to the date of the original agreement, namely, the 22d day of January, 1869; and a decree having been rendered by the circuit court of the United States for the district of Indiana for the sale of a part of the demised premises, twenty-seven miles of road, lying between Richmond and Newcastle, for an unpaid debt of $932,500.44, whereby the Pittsburg, Cincinnati and St. Louis Railway Company, as lessees, are in imminent risk of being ousted from the possession of said property and having legal proceedings instituted against them for an accounting of rents, issues, and profits derived by their operation and management of the line of railway of the Columbus, Chicago and Indiana Central Railway Company, or portions thereof.

"And whereas, the duties of the Pittsburg, Cincinnati and St. Louis Railway Company, while they remain in possession of said property derived from the Columbus, Chicago and Indiana Central Railway Company, as well as their obligations to the public as common carriers over the line of said road, to provide safe roadway and equipment, and proper facilities for the transaction of public business, have heretofore required, and will continue to require, large expenditures of money by the Pittsburg, Cincinnati and St. Louis Railway Company, all of which said money, already amounting to more than three million of dollars is jeopardized and endangered by reason of the default of the Columbus, Chicago and Indiana Central Railway Company in not complying with the terms of their said agreement.

"Now, therefore, you are hereby notified that unless your company, namely, the Columbus, Chicago and Indiana Central Railway Company, shall, on or before the 1st day of January, 1875, carry out and fulfill in good faith your said covenant and agreement, as set forth in said amended lease, dated 1st day of February, 1870, this company, namely, the Pittsburg, Cincinnati and St. Louis Railway Company, will institute proceedings to compel the specific performance of the agreement dated the 22d day of January, 1869, and the agreement supplemental thereto, dated the 1st day of February, 1870, and, in the alternative, such relief as they may be entitled to in equity."

On the 28th of January, 1875, the Pitts-

burg, Cincinnati and St. Louis Railway Company gave the Columbus, Chicago and Indiana Central Railway Company another notice, which, after reciting the notice of October 27, 1874, declares:

"The 1st of January, 1875, having expired without your company having carried out and fulfilled your covenant and agreement, as referred to in said notice, the Pittsburg, Cincinnati and St. Louis R. W. Co. hereby notify you that they have, through their counsel, commenced the preparation of a bill in equity to compel the specific performance of the existing leases, and, in the alternative, such relief as they may be entitled to in equity, which bill it is their intention to file in a court of competent jurisdiction without delay; and that, under these circumstances, the Pittsburg, Cincinnati and St. Louis Railway Company are advised that it is their duty to decline and refuse to make any payments under said lease or amended lease, or otherwise, except under and according to such orders or decrees as a court of competent jurisdiction may finally make in these premises, defining the legal and equitable rights and liabilities of the parties. But pending the submission of said bill to said court for its decree and orders we will make an advance to your company, if desired by you, but under protest, of $24,836, to meet certain of your coupons maturing Feb. 1, prox., as per your notice. This advance will only be made under protest, and with the distinct understanding and notice that it shall not affect, in any manner, the said notice of October 27, 1874, which we gave you, or our rights in any form as lessees of your property. Our company will hold itself ready at all times to account to any court of competent jurisdiction that may have the case in charge, for all net earnings that may have been received from your property since 1st of January, 1875."

On 2d of February, 1875, Roosevelt and Fosdick filed their bill in the circuit court for the Northern district of Illinois, the district of Indiana, and the Southern district of Ohio, against the Columbus, Chicago and Indiana Central Railway Company. The object of the bill was to foreclose the first consolidated mortgage. It alleged the failure of the defendant to comply with its agreement, contained in the mortgage, to create a sinking fund for the redemption of the bonds issued under the mortgage; that the company had failed to pay the interest due upon bonds secured by prior mortgages upon certain portions of the road, or the interest on the second consolidated mortgage bonds due August 1, 1874; that in view of its large floating debt, and its insolvency, its net earnings were liable to be diverted and misapplied, unless a receiver of its earnings and income was appointed, and such earnings and income properly applied through him. The bill sets out the original and amended lease and says: "The said lease is one beneficial to the lessors and their creditors, or parties claiming under them, and that the interest of the mortgage bondholders secured by the mortgage * * * does not require that for the present, at all events, the possession of the said lessees should be disturbed, provided they comply with the terms and conditions of such lease and contract; but that the rights and interests of your orators, and of the bondholders secured by the said mortgage to them, will be for the present sufficiently secured and protected by the appointment of a receiver of the said mortgaged premises, and the incomes and earnings thereof, with the directions to the said receiver, until further ordered by the court, not to disturb the possession of the said lessees under their lease, but to collect and receive the rental payable by said lessees or their guarantors, under and pursuant to the provisions of said lease, and apply the same in such a manner as shall be provided by the order of this court, and as shall be agreeable to equity."

The appearance of the company was entered on the same day the bill was filed and an order immediately made appointing Roosevelt and Fosdick receivers of the railroad and other property covered by the mortgage to the complainants, and of the earnings and income, rents and profits thereof, with directions not to disturb the lessee corporation in the possession of the property, but to collect and receive the rental stipulated in the lease and amended lease, and apply the same in such manner as shall be provided by the further order of the court. The defendant company was further ordered to transfer and convey to said receivers the railroad and other mortgaged premises, and the income, rents, issues, and profits thereof.

In the suit just referred to, Roosevelt and Fosdick filed a supplemental bill alleging additional defaults in the payment of interest due on the first consolidated mortgage bonds, which said trustees were without funds to pay, all the funds received by them having been inadequate to pay the interest due upon the outstanding sectional mortgage bonds prior in lien to the first consolidated mortgage. It was further alleged in the supplemental bill that any sale of the mortgaged property under a decree of foreclosure, should be made without abrogating the lease and guaranty, but subject to the lease and guaranty in such manner that the purchaser should succeed to and be vested with the right to receive and collect the stipulated rent.

By an order entered June 1, 1875, Roosevelt and Fosdick, as trustees or receivers, were authorized, by judicial proceedings in any court of competent jurisdiction, to enforce the provisions of the lease and amended lease against the Pittsburg, Cincinnati and St. Louis Railway Company, and the Pennsylvania Railroad Company, or either of them. Such a suit was instituted in the supreme

court of New York against the Pennsylvania Railroad Company, and removed to the circuit court of the United States.

On the 25th of February, 1875, the Pittsburg, Cincinnati and St. Louis Railway Company commenced suit in this court against the Columbus, Chicago and Indiana Central Railway Company and Roosevelt and Fosdick, making the Pennsylvania Railroad Company and Pullan also defendants. The bill set out at length the history of the lease and the amended lease, and also the notices already referred to.

The relief sought is shown in the prayer that the court "will order, adjudge, and decree that said defendant, the Columbus, Chicago and Indiana Central Railway Company, is in default for failing to perform its said agreement to classify and fund said indebtedness, and, by reason thereof, that said lease and the relation of lessor and lessee thereby intended to be created and continued between said parties has been ended, and that said lease and amended lease be rescinded, set aside, and delivered up to be canceled, and that the plaintiff recover of the said defendant such sums of money as shall, in an account duly taken, appear to be justly due by reason of their mutual dealings under said lease, and that the said defendant resume possession of said railroad and all other demised property, free and discharged of said lease, unless the defendant shall, within some reasonable time to be fixed by the court, specifically perform its said covenant aforesaid, and arrange, adjust, classify, and fund its said indebtedness, as by the terms of said agreement of February 1, 1870, it is bound to do. And in the meantime, pending this suit, the complainant prays, inasmuch as from the nature and situation of said described property and its public character as a highway for trade and travel, it would be improper for the complainant, notwithstanding its strict legal right so to do, to abandon immediately its possession and refuse to continue its occupation of said railroad and other property, your honorable court to appoint a receiver to take possession of the same and operate it, under the orders of the court, until final decree, the complainant hereby offering, until such appointment, to hold and operate the same, accounting to the court for the receipts arising from the same, paying the net profits thereof from time to time into the registry of the court as it may order, for the benefit of any and all parties showing themselves entitled thereto; and for such other and further relief as to the court may seem equitable and just."

After the institution of this action, an order was entered requiring the Pittsburg, Cincinnati and St. Louis Railway Company to pay into court, from time to time, the net earnings of the road, to be applied, by direction of the court, to payment of interest upon bonds secured by mortgages upon parts of the consolidated road, prior to the consolidated mortgage, but without prejudice to the claims of any of the parties. Thereupon the order under the authority of which Roosevelt and Fosdick brought the suit in New York was suspended, and all proceedings thereunder stayed.

Roosevelt and Fosdick then filed their cross-bill in this cause against the Pittsburg, Cincinnati and St. Louis Railway Company, the Pennsylvania Railroad Company, the Columbus, Chicago and Indiana Central Railway Company to enforce the lease and amended lease, and to recover the rental due thereunder. To this cross-bill the two companies first-named filed an answer. To the original bill answers were filed by the Columbus, Chicago and Indiana Central Railway Company, Roosevelt and Pullan. The latter also filed a cross-bill, seeking the enforcement of his decree against the Columbus, Chicago and Indiana Central Railway Company, and to compel the Pittsburg, Cincinnati and St. Louis Railway Company to pay to him the proportion of the earnings due to him. To the cross-bill of Pullan the Columbus, Chicago and Indiana Central Railway Company demurred.

The foregoing statement does not, perhaps, recite all the facts to which counsel in their oral and printed arguments have adverted, but it is sufficient to present all the substantial issues made by the pleadings.

It will not be expected, I am sure, that I shall review the numerous authorities cited, or discuss with any elaboration the difficult and important propositions of law which arise in the case. The onerous character of my duties during the present term of the supreme court have rendered it impossible for me to pursue that course. While I have examined, with care, the adjudged cases and the elementary works to which counsel have referred, and while, under some circumstances, I should be glad to prepare an extended opinion, I can do nothing more, at this time, than indicate briefly and in very general terms the conclusions which I have reached upon the vital points in dispute.

The right to the relief asked in the bill is placed by complainant upon numerous grounds.

First—It is claimed by the Pittsburg, Cincinnati and St. Louis Railway Company that the lease in question was void ab initio. In support of this general proposition it is argued: That the Columbus, Chicago and Indiana Central Railway Company, under the laws of Indiana, had no authority to make such a lease of its railroad in Indiana; that if such authority existed, it has not been pursued, there having been no corporate power exerted, in Indiana, nor according to its laws; that under the laws of Ohio the Pittsburg, Cincinnati and St. Louis Railway Company was not authorized to take a lease of a railroad in Indiana; and, that the parties are not estopped from asserting the invalidity of the lease.

Upon examining the laws of Indiana in force when the lease and amended lease were executed, I find—

1. There is no statute of Indiana which in terms forbids or prohibits railroad corporations of that state from executing leases of their property.

2. By an act, approved February 23, 1853, it is provided that any railroad company theretofore organized under the general or special laws of that state, shall have the power "to intersect, join, and unite their railroad with any other railroad constructed, or in progress of construction, in this (that) state, or in any adjoining state, at such point on the state line, or at any other point, as may be mutually agreed upon by said companies, and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint-stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state with whose road or roads connections are thus formed: Provided their charters authorize said railroads to go to the state line, or to such point of intersection." 1 Gavin & H. Ind. St. 526.

3. By the same act an Indiana railroad corporation, organized for the purpose of constructing a railroad from any point within that state to the boundary line thereof, is empowered to extend its road into or through any other state or states under such regulations as may be prescribed by the laws of such state or states into or through which said road may be extended.

4. By the same act any Indiana railroad corporation which may have constructed, or commenced the construction of its road so as to meet and connect with any other road in an adjoining state at the boundary line of that state, is empowered "to make such contracts and agreements with any such road constructed in an adjoining state, for transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper."

5. By the act approved March 4, 1863, providing compensation to the owners of animals killed or injured by the cars, locomotives, or other carriages of the railroad companies in that state, the same remedy is given against lessees as against others. 3 Ind. St. [Davis' Supp.] 413. See, also, 35 Ind. 291.

6. By an act passed December 18, 1865, to secure a just valuation and taxation of all railroad property of "railroad companies having the whole or any portion of their lines within this (that) state," it is provided that "in case any railroad or part thereof shall have been, or shall hereafter be leased, conveyed, or mortgaged to any other railroad company, and shall be in the possession of such other company under such lease, conveyance, or mortgage, the road or part thereof so leased, conveyed or mortgaged, shall, during the continuance of such possession, be assessed for taxation as the property of the company having such possession, in the same manner as if it were a part of the road of such lessee, grantee, or mortgagee under its own charter; and such lessee, grantee, or mortgagee shall, during the continuance of such possession, have all the rights and be subject to all the duties and liabilities in relation to the road, or parts thereof so held, which are created by this act, and both its property and the road or parts thereof so held, shall be liable for the payment of such taxes in the same manner as railroad property is, in other cases, made liable for taxes properly assessed against the same." 3 Ind. St. [Davis' Supp.] 418–421.

7. By an act passed April 29, 1869, for the organization of companies to construct lateral roads, it is provided that in cases of sale or assignment "the purchasers, assignees, or lessees thereof shall file the same in such recorder's office." 3 Ind. St. [Davis' Supp.] 406.

8. The question of power to lease seems not to have been conclusively determined by any decision in the supreme court of Indiana. In the case of Board of Com'rs of Tippecanoe Co. v. Lafayette, M. & B. R. Co., 50 Ind. 85, it appears that a stockholder, in a direct suit for that purpose, assailed the right of an Indiana railroad corporation to transfer, or provide for the sale of, to an Illinois railroad corporation, a part or division of its road. The authority for such transfer was based upon the act of February 23, 1853, already cited. The court said: (page 110) "Even if this section could be held to authorize the transfer of the use of one road to another, the words cannot fairly mean the transfer of one division of a road to the injury of another division of the same road, thus putting the two divisions in direct antagonism, both in their interests and connection." But further along in the opinion the court says: (page 115) "We do not decide that railroad companies cannot become lessors or lessees of other railroad companies, or make other contracts with other railroad companies for the purpose of running their lines in conjunction, facilitating commerce, travel, and transportation, or for any of the legitimate purposes for which railroad companies are organized. There is much in the legislation of the state favoring this view, and many decisions of this court sustaining the advancing enterprise of the country, but all such contracts must come within the powers of the corporation, must not exceed the powers of the agency that makes them, must not violate the rights of stockholders, or contravene public policy." That the precise question here presented was not intended to be decided by the supreme court of Indiana is entirely clear from the following language in the opinion delivered in that case in response to a petition for a re-hearing:

(page 119) "The appellees seem to think that we ought to have decided the general question, whether railroad companies can lease their roads under the laws of this state. * * * When such a question is properly raised before us upon a lease made for the legitimate purposes of commerce and travel, and in accordance with the proper use of railroads, it will be our duty to decide whether such a lease is authorized and can be upheld by the laws of this state." It is evident that the decision in 50 Indiana is an authority only for the proposition that an Indiana railroad corporation cannot legally transfer to another corporation one division of its road, so as to bring it in direct antagonism with the other divisions of the same road. Nothing more was decided. We are, therefore, uninformed by any decision of the supreme court of Indiana upon the precise question under consideration.

My own conclusion is that the lease made by the Columbus, Chicago and Indiana Central Railway Company to the Pittsburg, Cincinnati and St. Louis Railway Company was neither in violation of the statutes, nor against the public policy of Indiana. The road of the lessor company met and connected at the boundary line of the state with another railroad which was constructed under the authority of an adjoining state. That company was given, by express words, the broad power of contracting for the use of its said road, with any company whose road was thus constructed in an adjoining state. The lessor and lessee companies are connecting roads, within any fair meaning of the act of February 23, 1853. We have seen that, by the same statute, the Columbus, Chicago and Indiana Central Railway Company was authorized to unite its road with the road of an adjoining state on the state line, or at any other point agreed upon, and the two companies whose roads were thus united, could merge and consolidate their stocks and make one joint-stock company, in accordance with the laws of the adjoining state. Under the same statute, it could have extended its line into and through an adjoining state, under such regulations as that state might prescribe. In its capacity as lessee of the Columbus, Chicago and Indiana Central Railway Company, the Pittsburg, Cincinnati and St. Louis Railway Company is unquestionably liable, in the state of Indiana, to the taxation which is imposed in that state upon railroad property in the possession of lessees. As such lessee corporation it may be held liable in that state and by virtue of its statutes, for damages arising from the killing or injury of stock through the negligence of its employés.

In view of the powers thus conferred, and the liabilities thus imposed, by statute, upon railroad corporations created under the laws of Indiana, and in the absence of any direct adjudication upon the subject by the highest court of that state, I am unwilling to hold that the lease in question is in contravention either of its statutes or its public policy. I should be very slow to reach such a conclusion since the parties stipulated that any defects of power or authority (if such there be) to enter into and effectuate the agreement of January 22, 1869, or that of February 1, 1870, should be removed, and the requisite authority therefor be obtained at the earliest practicable time. Had the conclusion been reached that there was a want of statutory authority or power in the lessor corporation to make the lease in question, I should have felt obliged, both by the letter and spirit of the agreement between the parties, before decreeing rescission upon that ground, to give reasonable time for an application for relief to the legislative department of Indiana.

Second—I cannot yield my assent to the next proposition of the lessee company, that it was essential to the validity of the lease that its original execution or subsequent ratification should have been evidenced by corporate action taken by the lessor corporation within the limits of the state of Indiana. The general rule undoubtedly is, that corporate action taken, or corporate acts performed, by the body of the corporation, beyond the bounds of the sovereignty granting the charter, may, generally, be treated as null and void. But that rule, in the very nature of the case, cannot apply to the case of a consolidated company, whose road extends through three states, and where there is no express statutory prohibition against the corporate body taking corporate action in any one of the states through which the road of the consolidated company extends. The state of Indiana could, by statute, require corporations, whether originally created or consolidated under its laws, to take no corporate action beyond its limits. But it is sufficient to say that the state has passed no such statute.

Third—The objection that the Pittsburg, Cincinnati & St. Louis Railway Company were not authorized by the laws of Ohio to take the lease in controversy, depends upon the construction to be given to the 24th section of a statute of that state approved May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the state of Ohio," 50 Laws Ohio, 1852, p. 281, as amended by an act passed March 19, 1869. 66 Laws Ohio, 1869, p. 32. The effect of the amendment can be best understood by putting that section as it appeared in the original act in juxtaposition with the amendment of 1869:

Act of 1852.	Amendment of 1869.
"Any railroad company heretofore or hereafter incorporated may at any time, by means of subscription to the capital of any other company or otherwise, aid such company in the construction of its railroad for the purpose of forming a connection of said last-mentioned road with the road owned by the com-	"Any railroad company heretofore or hereafter incorporated may at any time, by means of subscription to the capital of any other company or otherwise, aid such company in the construction of its railroad, *within or without the state*, for the purpose of forming a connection of said last-mentioned road

pany furnishing such aid; or any railroad company, organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of said road are continuous or connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies, whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created," etc.

with the road owned by the company furnishing said aid; *or* any railroad company organized in pursuance of law, may *lease* or purchase any part or all of any railroad, *the whole or part of which is in this state, and* constructed, *owned or leased* by any other company, if said companies' lines of said road are continuous, or connected *at a point either within or without this state*, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies, whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created," etc.

I perceive no difficulty in ascertaining the intention of the act of 1869. According to its express provisions a railroad company organized under the laws of Ohio may lease or purchase any railroad which is in whole or in part in that state, and owned or leased by any other company, if said companies' lines of road are continuous or connected at a point either within or without Ohio. The power thus given to Ohio railroad corporations was exerted in this case by the Pittsburg, Cincinnati & St. Louis Railway Company when it took the lease in question. I cannot assent to the proposition that the power to lease thus conferred was intended to apply only to railroads, or such parts thereof, as are situate in Ohio. The act, among other things, was plainly intended to give Ohio railroad corporations power to take leases of railway lines within or without Ohio where the road of the lessee was connected at a point either within or without the state with the lines of the lessor company, thus establishing direct connections between railroads constructed in Ohio, under the authority of its laws, with lines of road constructed in other states. The manifest object of the statute was to attract business from other states over the lines of the Ohio railroads.

My conclusion, therefore, is that the lessee corporation was not forbidden by the laws of Ohio to take the lease in question.

Fourth—The next proposition to be considered is whether, if originally valid, the lease has been terminated by the eviction of the lessee by paramount title. In support of this proposition the complainant refers: 1st, to the decree of July 30, 1874, in the Pullan Case, whereby the road, in Indiana, from Richmond to Newcastle, twenty-seven miles in length, and part of the lines leased to the Pittsburg, Cincinnati & St. Louis Railway Company was ordered to be sold to satisfy the claim of the Pullan trustee. 2d. To the proceedings in the suit instituted by Roosevelt and Fosdick, trustees in the first consolidated mortgage, under which they were appointed receivers, with power to receive rents and profits due from the lessee corporation.

I am of opinion that neither the Pullan decree nor the proceedings in the suit of Roosevelt and Fosdick against the Columbus, Chicago and Indiana Central Railway Company furnish just grounds for the absolute rescission at this time of the contracts of leasing.

The eviction complained of is not an actual but a constructive eviction. Pullan, it is said, has the power at any moment to turn complainant out of a portion of the demised premises, and the existence of this power is permitted by the lessor corporation. But that in every essential sense was the case when the lease was executed. The mortgage under which Pullan claimed was then a mere incumbrance. And that is all that may be said of the unexecuted decree entered in a suit to which neither the Pittsburg, Cincinnati and St. Louis Railway Company nor the Columbus, Chicago and Indiana Central Railway Company were parties. He may never execute that decree, and so long as he does not disturb the possession of the lessee corporation or imperil its permanent control of the demised property, according to the terms of the lease, his decree should not, according to the weight of authority, especially in Indiana, be regarded an eviction by paramount title, entitling the lessee to withhold rental or to rescission.

The same general remarks are applicable to the proceedings in the suit of Roosevelt and Fosdick. They are receivers of the income, rents, issues, and profits which are due and owing by the lessee corporation under and pursuant to the provision of the lease. They have not yet disturbed the possession of the lessee, and at present they are under instructions not to do so. They are asserting, for the bondholders, and as to the income and profits of the leased property, only such rights as the Columbus, Chicago and Indiana Central Railway Company claims to have under the original and amended lease. The possibility, during the term of the lease and pending proceedings for the consummation of the agreements between the parties, of such suits as those instituted by Pullan, Roosevelt and Fosdick must have been in the minds of the parties when the lease and amended lease were executed. Nothing which has occurred in those suits, up to the present time, would justify rescission.

Fifth—On behalf of complainant it is further claimed—

That the covenant to reduce and classify the mortgage indebtedness of the lessor company and the covenant of the lessee to pay and apply the stipulated rent are dependent, the former being a condition precedent, the performance of which must be alleged and shown before any liability can be enforced against the lessee, and the continued failure to perform which gives to the latter a right to rescind the agreement and cancel the lease;

That even if this covenant is not technically at law a condition precedent to the performance of the covenants of the lessee, it is, in equity, one which, coupled with the insolvency of the lessor, the lessee is entitled to have specifically performed, or, failing in that, to have the lease rescinded and canceled.

These two propositions may be considered together.

"The rule has been established, by a long series of adjudications in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case, and to which intention, when once discovered, all technical forms of expression must give way." This language from Stavers v. Curling, 3 Bing. N. C. 368, is cited with approval in Lowber v. Bangs, 2 Wall. [69 U. S.] 736, where the following was added: "Rules have been elaborately laid down and discussed in many cases for determining the legal character of covenants and their relations to each other; but all the leading authorities concur in sustaining these propositions. Contracts, where their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy."

Guided by these established rules, I am of opinion that the covenant on the part of the lessor corporation, "to arrange, provide for, and so adjust and classify all their indebtedness now (then) existing, that $15,821,000 thereof shall be represented by bonds bearing 7 per cent. interest," secured by mortgage upon the estate and property of the lessor, is not technically a condition precedent to the performance by the lessee corporation of its covenant to pay the stipulated rent. The language employed by the parties, in the light of attendant circumstances, and in view of what, in time and labor, was plainly necessary to be done in order that the indebtedness of the lessor corporation might be arranged, provided for, adjusted, and classified, as required by the amended lease, renders it perfectly certain that the lessee remaining in possession, and enjoying the fruits of the lease, was not entitled to withhold payment of the stipulated rent until the adjustment and classification were accomplished. Such was the practical interpretation given by the lessee company to the contract. It did not, after the execution of the amended lease, withhold the stipulated rent, but promptly and regularly paid, up to the commencement of this litigation, such annual rent as it conceded to be due according to the terms of the original and amended lease. It was clearly the expectation of the parties that the lessee should pay the stipulated rent, pending such steps as the lessor corporation, exercising due diligence, might be required to take in order to comply with its covenant to arrange, provide for, adjust, and classify its indebtedness.

But it does not follow from all this that the lessee company is bound to wait for an indefinite or an unreasonable time for such arrangement, adjustment, and classification of the lessor's indebtedness to be effected. The stipulation, in the amended lease, upon that subject, is obviously matter of substance, not mere form. It constituted, beyond question, a very material part of the consideration for the amended lease. It would not, as I infer, have been executed by the lessee corporation without the covenant upon the part of the lessor company to arrange, provide for, adjust and classify its indebtedness to the extent stipulated. The parties by their contract have made that stipulation material, and it is not for the court to decline to give it effect according to the fair and reasonable interpretation of the words employed. What then did the parties mean by the words in the amended lease, "to arrange, provide for, and so adjust and classify." Some light is thrown upon this question by the first item of the fourth resolution passed by the lessor's board of directors at the time they determined to issue and negotiate $10,000,000 of convertible bonds for the following purposes: "First, to take up, retire, and cancel so much of all the bonded indebtedness now existing, prior in date to these presents, against the company (made by it or made by any company merged in this company by consolidation) as that the said bond indebtedness shall be reduced to $15,821,000, leaving outstanding of the present existing bonded debt, the $15,000,000 first mortgage bonds of the company and $821,000 of the second mortgage bonds of the Columbus and Indianapolis Central Railway Company." The same idea is expressed in the proviso to the second resolution of the board, which declares that "so much of said interest fund as, in the opinion of this company, may be necessary for that purpose, may, from time to time, be used in adjusting the present outstanding bonds of the company, and other companies merged in this company by consolidation, so as to make the bonded debt of this company conform to the agreement by which said bonded debt is to be reduced to $15,821,000, as provided in the first item of the fourth resolution of this board."

The lessor's indebtedness has not been arranged, provided for, adjusted, and classified, as required by the amended lease. When this bill was filed it had made very little progress in that direction. Before this suit was commenced it was twice notified by the lessee corporation that the provision in the contract requiring such adjustment and classification was insisted upon, and compliance therewith demanded. There are, no doubt, many difficulties in the way of com-

pliance. But the court cannot, upon that ground, discharge the lessor from the obligation of compliance. It has no right to make contracts for parties. Its duty is to construe and enforce those made.

The lessee corporation insists that the lessor has been guilty of such delay in performing its covenants that it has now the right to a decree of rescission. That is not the theory upon which compliance with the amended lease was demanded, nor upon which the bill was framed, nor would such a decree, at this time, be just or equitable. The notice given by the lessee, under date of October 27, 1874, was that unless the amended lease was complied with, legal proceedings would be instituted to compel specific performance. The subsequent notice was to the same effect. The bill prays for a rescission and an account, and that the lessor corporation resume possession of the railroad and other demised property, free, and discharged from the lease, "unless the defendant shall, within some reasonable time to be fixed by the court, specifically perform its said covenant aforesaid, and arrange, adjust, and classify, and fund its said indebtedness, as by the terms of said agreement of February 1, 1870, it is bound to do." It would be inconsistent with the whole frame of the suit to do more at this time than to decree a performance of the agreement by the lessor.

To such a decree the complainant in the original bill seems to be equitably entitled, but is not now entitled to more. The lessor company was in such financial condition at the commencement of this action that the complainant is justified in insisting that there shall be no further delay in the required adjustment of the lessor's bonded indebtedness. The time has come in the history of both the lessor and lessee companies when the latter is entitled to have it definitely ascertained whether the terms of the original and amended lease are to be complied with. Upon the question as to what time should be given to the defendant within which to comply with its covenant, I have had some difficulty. Too little consequence is attached by the lessor company to the time which elapsed from the execution of the amended lease to the date of the notice given in October, 1874, and too much consequence is attached by complainant to the lapse of time from that date to the submission of this cause. Under all the circumstances I have concluded that the lessor corporation may have until the 1st day of January next, within which to arrange, provide for, adjust, and classify its indebtedness, as required by the amended lease of February 1, 1870, and in default thereof the complainant has leave to move for a decree rescinding the contract between the parties, upon such terms, and with such provisions for a settlement of accounts as may be equitable.

It will be observed that I have said nothing upon the point earnestly discussed by counsel as to the rights of bondholders against the Pittsburg, Cincinnati and St. Louis Railway Company and the Pennsylvania Railroad Company, by reason of the guaranty given by the latter, and by reason of the published letter signed by the president of both companies at or about the date of the actual execution of the amended lease. I have omitted any consideration of that question because, in my judgment, it is not necessarily involved in the issues made in this case. What may now be the rights of such bondholders as against those companies, or what may be their rights in the event of a rescission of the contract of leasing, need not, and indeed cannot properly, be determined in this case. That may be the subject of distinct litigation between them and such companies, or either of them. The right of the complainant to a rescission as between it and the lessor corporation, is not affected by the obligation, if any, of the complainant, or of its guarantor, to pay the bonds issued or purchased upon the faith of the leases, and of the letter issued in December, 1874. I make no expression of opinion as to whether such obligation exists upon the part either of complainant or its guarantor.

Counsel may prepare such order as may be necessary to give effect to this opinion, and such further orders as may be necessary for the preparation of the cause for final hearing upon all issues not now disposed of.

PITTSBURGH, C. & ST. L. R. CO. (HUME v.). See Case No. 6,865.

PITTSBURGH, FT. W. & C. R. CO. (EMIGH v.). See Case No. 4,449.

PITTSBURGH, FT. W. & C. R. CO. (HAIGHT v.). See Case No. 5,903.

Case No. 11,198.

PITTSBURGH LOCOMOTIVE & CAR WORKS v. STATE NAT. BANK OF KEOKUK.

[2 Cent. Law J. 692; 1 Law & Eq. Rep. 56; 8 Chi. Leg. News, 41; 1 Thomp. Nat. Bank Cas. 315; 1 N. Y. Wkly. Dig. 332; 21 Int. Rev. Rec. 349; 12 Alb. Law J. 280.] [1]

Circuit Court, D. Iowa. Oct. Term, 1875.

CONDITIONAL SALE—PLEDGE—POWER OF NATIONAL BANKS TO TAKE PLEDGES OF CHATTELS.

1. A locomotive was leased by the manufacturers to a railroad corporation in Iowa, by an instrument in writing not recorded, for a sum equal to its value, to be paid in nine months; otherwise the manufacturers were to have the right to re-possess the same. The lessee pledged the locomotive to a bank to secure a loan of money. *Held*, under section 1922 of the Iowa Code (1873), which requires contracts for the conditional sale of chattels to be recorded in order to be valid against creditors and subsequent purchasers without notice, that the pledgee's right was superior to that of the manufacturers.

[1] [Reprinted from 2 Cent. Law J. 692, by permission. 1 Law & Eq. Rep. 56, and 12 Alb. Law J. 280, contain only partial reports.]

2. A national bank may take a pledge of chattels as security for money lent.

At law.

Howell & Anderson, for plaintiff.
Gilmore & Anderson, for the bank.

DILLON, Circuit Judge. Replevin for a locomotive engine. In July, 1873, the plaintiffs and the Miss. Valley & West. R. R. Co. (an Iowa and Missouri corporation) entered into a written contract, by the terms of which it "let" or leased to the railroad company the locomotive engine for nine months, for a sum equal to the value of the locomotive, one-fourth of which was paid at or near the date of the instrument, and the balance was to have been paid within the nine months. If paid, the plaintiff was to execute to the railroad company a bill of sale; if not paid, the plaintiff "was to re-possess and enjoy the engine as though the instrument had never been made." The instrument contained a stipulation on the part of the railroad company, that the said locomotive engine should be taken to Keokuk, Iowa, by the railroad company, and there kept and used and not removed from the control of the railroad company without the consent of the plaintiff. The engine was sent to the railroad company, and was received by it at a town on its line in Missouri. While there, to wit, in September, 1873, said railroad company borrowed of the State National Bank of Keokuk $1,250, and pledged the engine to the bank as security, placing the same in the actual custody of a third person for the security of the bank. The bank had no notice of the plaintiff's lease or claim on the locomotive, and the plaintiff's lease was never recorded. The question in the case is whether the pledge to the bank gives it a right to hold the locomotive as security for its loan to the railroad company as against the plaintiff.

At the date of these transactions there was in force in the state of Iowa the following statute: "No sale or contract or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages." Code 1873, § 1922.

DILLON, Circuit Judge (orally). 1. Conceding that the instrument of lease was executed in Pennsylvania, and that as between the parties it does not show a sale of the engine, and that, aside from the Iowa statute (Code 1873, § 1922), the plaintiffs would have the superior right, I am of the opinion, in view of the express stipulation of the contract, that the locomotive was to be taken to Iowa and there used by the railroad company, that the Iowa statute controls the case and has the effect to subordinate the rights of the plaintiffs to the lien of the bank as pledge.

2. I am furthermore of the opinion, that under the national banking act the bank had the right, on making the loan to the railroad company, to take a pledge of the locomotive as security. National banks are not, in my judgment, confined, in the taking of security for discounts and loans, to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, bills of lading, or other personal chattels. The words "loans on personal security," in the banking act, are used in contra-distinction to real estate security. Such has been the usage of the banks, and any other construction would throw a bombshell into the community, and injure both the banks and their customers.

Judgment for defendant.

NOTE. In Shoemaker v. Mechanics' Nat. Bank [Case No. 12,801], decided in the Maryland circuit, it was held by Mr. District Judge Giles that a national bank has power to lend money on a note or other personal obligation secured by a pledge of stock of a corporation as collateral security.

[This cause was carried by writ of error, to the supreme court, where it was heard on a motion to dismiss the case. The motion was granted. 154 U. S. 626, 14 Sup. Ct. 1180.]

Case No. 11,199.

The PIZARRO v. MATTHIAS.

[10 N. Y. Leg. Obs. 97.]

District Court, S. D. New York. Feb. Term, 1852.

COLLISION — LIABILITY OF FOREIGN SHIP OF WAR TO ARREST—JURISDICTION.

1. It is the proper mode of taking exception to the jurisdiction of the court in a civil action brought by a private suitor against an armed ship of a friendly power, for the U. S. attorney to file a suggestion in the name of the United States.

2. A ship of war belonging to a nation in amity with the United States, and not prohibited by the president a free entry into the ports of the United States, is not liable to arrest, on process from the local courts, for a wrongful collision within the territorial jurisdiction of the United States with an American merchant vessel.

The libel in this case was filed July 21, 1851, against the steamer Pizarro, for damages occasioned by a collision with the schooner Thomas Conner. It avers that the libellant [Cornelius H. Matthias] is a resident of Norfolk in Virginia, and owner of the schooner, which belongs to that port. That on the 17th day of July, 1851, the schooner was under way on a voyage from this port to her home port, and when off the light house at Staten Island, and about 200 yards from the shore, close hauled upon the wind, she met the steamboat Pizarro at about twelve o'clock at noon, coming into this port from sea, at the rate of twelve or fifteen knots the hour. That

the steamer attempted to pass in shore of the schooner, and thereby came in collision with her, breaking various parts of the vessel and doing her damage, which caused her delay in this port six days to make repairs. Process of attachment was prayed for and taken out in the usual course of practice the same day, and the marshal arrested the steamer thereon and made return to court of the arrest, on the 5th of August, 1851. On the 7th of November thereafter, the United States attorney for this district, on the part and behalf of the United States, and by direction of the executive power and authority thereof, filed a suggestion, and gave the court to understand upon the question of jurisdiction that the said steamer was a public armed vessel of war of her Catholic Majesty the Queen of Spain, and that there exists between the United States and the Queen of Spain a state of peace and amity, and that the public vessels of war of her majesty, while they conform to the law of nations and laws of the United States, can at pleasure enter the ports of the United States and depart therefrom without seizure, arrest, detention or molestation, by any civil process or other means, inconsistent with their rights by treaty or the laws of nations. The suggestion follows in large detail the statements set forth in one presented in the case of The Exchange, 7 Cranch [11 U. S.] 116, and is modelled in its averments upon that precedent. It is not necessary to rehearse more than the allegations of the libel showing the ground of action on which the point of jurisdiction is raised for the decision of the court.

J. Prescott Hall, U. S. Atty., in support of the suggestion.

George F. Betts, for libellant.

BETTS, District Judge. The case stated upon the libel is within the ordinary jurisdiction of this court, and the process prayed for is one which of right issues upon such complaint. Waring v. Clark [5 How. (46 U. S.) 441]. Under the established doctrines of the admiralty law ([Waring v. Clark] 5 How. [46 U. S.] 441), a libellant has his election in cases of maritime tort, to proceed in personam against the wrong-doer or in rem against the vessel as the instrument of the wrong and injury; and as a general rule, the vessel is held responsible in specie, to the same extent as her owner or master, for any injury sustained by others through negligence or misfeasance in her management, or other default of the master acting within the scope of his authority, equally in matters of tort as of contract. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344; 3 Kent, Comm. (6th Ed.) 162, 218; Abb. Shipp. (Perkins' Ed.) 161, 166, and notes. On the execution of the process and arrest of the ship, in this case, the government of the United States constituted itself a party to the action in its political capacity, and claimed a right to intercept the jurisdiction of the court over the subject matter of the suit, and to that end filed and presented through its proper law officer the suggestion addressed to the court. It is this feature which gives significancy and special importance to the case, because the effect of the procedure is to interdict to the citizen a right of resort to any judicatory of the country for redress of injuries sustained by him in time of peace, within the dominions of the United States, from a ship of war belonging to a foreign power. The regularity of the proceeding on the part of the government in the method in which the objection is raised, and the privilege to interpose it, must be deemed definitely settled by the judgment of the supreme court in the case of McFaddon v. The Exchange, 7 Cranch [11 U. S.] 116, and to be no longer a debatable question before the inferior tribunals. The prerogative of the government of the United States to subrogate itself a party in place of the nation owning the offending ship, with the right to supersede all inquiry into the merits of the suit by a preliminary exception to the competency of the court to take cognizance of it, being conceded, the only question for consideration is whether the position of law upon which the interference is founded, applies to and governs this case. The proposition of the suggestion is that a ship of war belonging to a nation in amity with the United States, and allowed by the government of the United States to enter its harbors, is not, whilst within its territorial jurisdiction, subject to arrest on any civil cause of action at the suit of an individual.

No case in the United States or England is produced in which the point in so broad a form has been directly presented for judgment, nor do I find the rule recognized in the writings of any publicist of authority to the extent propounded by the suggestion. The supreme court of the United States, in the case of The Exchange, 7 Cranch [11 U. S.] 116, stated as a general proposition that such is the doctrine of the law of nations. It is, however, to be observed that the point under consideration and adjudged by that court was, upon the authority of a court of this country, to attach an armed ship of a foreign friendly power within our waters at the suit of an individual, and inquire into and decide the title to such ship of war, between the individual suitor and the nation under whose flag and commission she sailed. It is manifest that a distinction in point of principle and policy may exist between a question so circumstanced and a claim which affects the responsibility of a ship of war to individuals for acts or obligations which by the sea laws common to maritime communities are binding upon vessels domestic and foreign, and are enforced against them by courts of law, in many instances upon the fact of their foreign character. In the first case the validity of the authority of a sovereign over a national ship, commissioned by him, and whose flag

she bears, and also his right of property in the ship, would be made the subject of contestation,—an inquiry which might be regarded, if entertained and carried out by a foreign tribunal, as trenching upon the dignity and independence of the nation, and tending to subject its attributes of sovereignty to review and control by foreign tribunals; whilst in the case of the arrest of a ship of war for a supposed liability to an individual upon contract or for tort the court would not be intermeddling with questions touching the rightful acquisition of property possessed and claimed by a foreign sovereign, but would be only allowing the remedy common to its functions, to enforce the rights of a suitor against property, the ownership of which is not in contestation, placed voluntarily by the nation to whom it belongs, within the territorial jurisdiction of the court.

The suggestion filed in this case distinctly avers that the Pizarro came voluntarily into this port whilst prosecuting the business of the Queen of Spain. She was not, accordingly, constrained to seek shelter here from stress of weather or the pursuit of enemies, and has no plea of immunity from detention here for these causes. Spanish Treaty, Oct. 27, 1795, art. 8. The suggestion does not raise the objection to the action that the libellant did not in the first instance apply for redress to the officers of the ship, or to the representatives of the Queen of Spain, or to the queen herself. In a fitting case the court would no doubt restrain a party from arresting a ship of war of a friendly power until he showed he had no other means of redress, and had fairly sought it by application to the government owning the delinquent vessel. The proposition submitted for judgment goes to the extent of denying the liability of this ship to arrest, although the party complaining is refused and excluded from all means of obtaining his right by peaceable adjustment. This doctrine is of the broadest bearing. It is in no way limited to cases of tort, but applies to demands by ship-wrights, artisans, material men, pilots, wharfingers or owners of docks for repairs, and all other industrial classes who supply the ship services or necessaries indispensable to her safety and preservation, or to the health and subsistence of the officers and crew. The proposition, in this aspect of it, if now presented for the first time, in view of its effect upon the business pursuits of artisans and others connected with the fitments, reparation and salvage of ships of war out of the dominions of the sovereign owning them, would demand, particularly in a maritime court, the gravest consideration, before being implicitly adopted. The rule, certainly to that extent, is not recognized in the English admiralty. In the case of the line of battle ship Prince Frederick, belonging to the King of the Netherlands, which was brought into an English port by pilots, disabled in a slight degree, and libelled by them for salvage, Lord Stowell held that the ship was subject to the jurisdiction of the court, and decreed salvage against her to the amount of £800.

The case of The Santissima Trinidad, 7 Wheat. [20 U. S.] 284, may be regarded as importing a jurisdiction of the local courts, in certain exigencies, at the suit of individuals over a foreign ship of war. The action was not directly against the body of the ships, but was an attachment of property brought into a port of the United States, by two armed vessels under the flag of the United Provinces of the Rio la Plata, captured by them as prize of war. Although the supreme court reserved themselves from saying the ships would be amenable to the action, yet by recognizing the jurisdiction of the court over their prize property, at the suit of an individual charging the capture to have been illegal, it is most forcibly implied that the jurisdiction would be upheld against the ships themselves if they interposed any resistance to it. [The Santissima Trinidad] 7 Wheat. [20 U. S.] 354. Nor is it noticed in the decision as a particular any way affecting the jurisdiction of the court, whether the property was arrested on board the ships or not by the process of the local court, in distinguishing the case from that of The Exchange. It cannot depend upon the circumstances of a ship of war endeavoring to prevent the execution of process upon property in her custody, within a port of the United States, whether she is subject to the jurisdiction of the local court, because if whilst there she has under the law of nations the immunity of a license to remain and depart at pleasure, no private citizen can, because of a misuse of the privilege, on her part, deprive her of the benefit of such license. The exercise of jurisdiction upon her in such case would seem rather to be justified on the consideration that it was indispensable to the maintenance and enforcement of the right of the citizen; and that reason ought to have no less weight when the authority of the court is employed directly in support of his right than when it is invoked incidentally and collaterally. The gist of the principle is the exemption of the ship, and when that does not exist in one case, by parity of reason it would appear not to accord by law in the other. Jurists are by no means agreed that the property of a sovereign, placed within a foreign country by his consent, has attached to it by the law of nations a privilege of exemption from arrest in such country in favor of its citizens, for the debts or liabilities of the sovereign, incurred otherwise than through the instrumentality of the property itself. Martens says that the property of a foreign sovereign, who is not upon the spot, as well as that which belongs to his state or subjects, is under the jurisdiction of the state where it is found, is liable to seizure not only at the suit of the state, but of the subjects also, when they demand it in the regular course of justice, however motives of

policy might justify a refusal. Law of Nations, bk. 5, § 9.

In the case of salvors then in the English admiralty, the right to hold the ship in specie amenable, alike whether a foreign ship of war or a merchantman vessel for maritime services bestowed upon her is judicially established; and it can hardly be doubted that other classes of claims of similar equity would have the same protection awarded them; there can be no higher order of merit in the eye of the law in a demand accruing against a vessel upon a maritime contract, express or implied, than one against her arising out of a maritime tort committed by her. Moreover, it may be asked, upon what principle an armed ship of a foreign nation should be freed from responsibility for wrongful collision with another vessel at sea, that would not also free her commander from liability personally therefor? The national sovereignty represented by the commission and rank of the one ought not to be less respected than when represented in the materials of the other. Yet the responsibility of the highest officer in a foreign navy to a personal action in the courts of another power in favor of a citizen of the latter, for an injury inflicted negligently by a ship of war commanded by such officer upon the vessel of the citizen, is well established in law.

The subject was examined with great learning and care by the supreme court of this state in the case of Percival v. Hickey [18 Johns. 257], which was an action in personam, to recover damages occasioned by a collision at sea. The defendant was commandant of a British sloop of war, sailing with a squadron of vessels under a superior officer. He was ordered to give chase to the libellant's schooner. She refused to obey the signals of the sloop of war and to heave to when fired upon. She made all sail to escape, and the sloop, whilst manœuvreing to intercept her, came in collision with her, and she was sunken, and totally lost in consequence thereof. The captain of the sloop and officer in chief command supposed from all the circumstances that the schooner was a French cruiser. The British and French government were at the time at war. A verdict was rendered against the defendant for $29,734.94 damages occasioned by the collision, and the supreme court, on a careful consideration of the question, affirmed the verdict. The liability of the defendant was not controverted by his counsel,—as able and experienced as any in the state,—but the defence on the merits was placed upon an objection to the jurisdiction of the state court, it being insisted that the cause was one of admiralty and maritime jurisdiction, and only triable in a district court of the United States. As the functions of the court allow a party to pursue his right against the person committing a trespass upon his vessel at sea, or against the ship which is the instrument of the wrong, the reason is by no means an obvious one which would place the commandant of a ship of war within its jurisdiction for acts done on the high seas under his commission and in obedience to orders, but would exempt his ship from the same jurisdiction. The dignity of the sovereign would not seem to be less implicated by the exercise of the jurisdiction in the one method than in the other. The general principle clearly is that when a subject matter is brought within the jurisdiction of a court, the remedy in relation to it will be conformably to the functions of the court, whether by arrest of the person or attachment of the thing.

These considerations, if the question presented to the court were an open one, would have great weight in inducing it to regard the ship liable in this case for the injury the plaintiff sustained in the collision caused through her wilful or negligent mismanagement. A nation is regarded as sustaining an injury when a wrong is unlawfully inflicted upon its citizens or their property (Vattel, bk. 2, c. 6, § 71, p. 161), and the license implied from the courtesy of nations to the armed ships of each other to enter, remain in and depart from their ports, without liability to arrest or detention therein by private suits, cannot reasonably be supposed intended to protect them in the breach of those obligations which good faith and friendship impose upon them which avail themselves of the privilege. But on a careful consideration of the judgments of the supreme court upon this subject, already referred to, I am constrained to say those authorities treat the exemption of a national ship under the circumstances of the Pizarro as absolute and unlimited in respect to proceedings in behalf of individuals against her, and only admit the privilege or license lost when the ship commits a wrong upon the nation itself which harbors her, either in violating its neutrality or by some direct act of aggression against the national authority. The Exchange, 7 Cranch [11 U. S.] 116; The Santissima Trinidad, 7 Wheat. [20 U. S.] 354. So also those decisions are understood by an American writer of distinction and authority upon national law. Wheat. Int. Law, 139, 182.

This court will sedulously avoid adopting any doctrine which trenches upon an opinion declared by the supreme court respecting the general principles of law applicable to a particular subject, whether the point adjudicated by the court was placed upon the principle declared or otherwise. This is necessary in order to maintain harmony in the administration of the law by inferior judicatories. It is not enough, in my opinion, that the leading case before the supreme court (The Exchange [supra]), and decided by that high tribunal, embodied facts and equities differing from the one here under consideration to withdraw this from the authority of that decision, inasmuch as the supreme court, base their judgment upon a principle

broader than the particular matter in demand in the suit, and one which applies directly to the Pizarro.

The reasoning of the court on the doctrine of the law of nations governing the condition of armed ships in foreign ports, results in the proposition that they are under a license or privilege, which exempts them from arrest at the suit of an individual. That extent of exemption was not needed to clear the Exchange from the suit pending against her, but under that doctrine she was discharged, and it manifestly disposes of the action instituted against her. That doctrine embraces the right of action in this case, and must control the decision of this court.

I shall accordingly pronounce against the maintenance of the action, and order the steamship Pizarro to be discharged from arrest and be delivered up to the officer of the Queen of Spain in command of her. Nevertheless, as the libel charges that the collision of the Pizarro with the vessel of the libellant was both wilful and through gross negligence on the part of those conducting the steamer, and as the suggestion does not contest that allegation, the court imposes no costs on the libellant. Decree accordingly.

Case No. 11,200.

In re PLACE et al.

[8 Blatchf. 302; [1] 4 N. B. R. 541 (Quarto, 178); 3 Chi. Leg. News, 218.]

Circuit Court, S. D. New York. April 1, 1871.

APPEAL IN BANKRUPTCY — FAILURE TO COMPLY WITH REQUIREMENTS OF ACT—REVIEW—ACT MARCH 2, 1867.

1. The claim of a creditor of a bankrupt was rejected by the district court. Within ten days after the decree to that effect, the creditor claimed an appeal from such decision, and gave notice thereof, as required by section 8 of the bankruptcy act of March 2d, 1867 (14 Stat. 520), but he did not file in this court the statement required by section 24 of the act and rule 26 of the general orders in bankruptcy, nor enter the appeal in this court during the ten days limited by said rule 26. *Held*, that the appeal must be dismissed.

[Cited in Re McEwen, 4 Fed. 16.]

2. After the expiration of ten days from the time of giving notice of the appeal, the creditor filed, in this court, a petition for the review of such decision of the district court: *Held*, that such decision could be reviewed only by an appeal taken in the manner prescribed by sections 8 and 24 of the act and said rule 26, whereon a trial by jury could be had in this court.

[Cited in Re Joseph, Case No. 7,532; Thistle v. Hamilton, Id. 13,884.]

3. Such petition for a review could not be treated as the statement so required, even assuming that it was filed within the time prescribed.

[In the matter of James K. Place and James D. Sparkman, bankrupts.]

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

Francis N. Bangs, for the motion.

Thomas C. T. Buckley and James K. Hill, opposed.

WOODRUFF, Circuit Judge. The claim of the firm of C. P. Fischer & Company, as creditors of James D. Sparkman [to the amount of about $46,000],[2] was rejected by the district court, and a decree to that effect was entered in that court, on the 25th of June, 1870. On the 5th day of July thereafter, the said firm, so claiming to be creditors, claimed an appeal from the decision of the district court, and gave notice thereof as required by section 8 of the bankrupt law. But, instead of following up their appeal by entering the same in this court, and filing therewith, within the ten days limited therefor, a statement in writing of their claim, setting forth the same substantially as in a declaration for the same cause of action at law, to which the assignee should plead and the cause proceed to trial as in an action at law commenced and prosecuted in the usual manner in this court—which, by section 24 of the act and rule 26 of the general orders in bankruptcy, such claimants are required to do—they did nothing by way of statement or declaration, and did not even enter such appeal in this court during the said ten days, nor have they at any time since filed such statement or declaration. Both the statute and the rule require that the statement shall be filed when the appeal is entered in this court. [The assignee now moves to dismiss the appeal.] [2]

I have heretofore held in Re Coleman [Case No. 2,979], in the Northern district of New York, that non-compliance with the provisions of sections 8 and 24 and of rule 26, were grounds for dismissing an appeal, or attempted appeal, to this court; and I find no reason to doubt the correctness of my decision in that case.

The counsel for the claimants appears, in this case, to have adopted another practice than that prescribed in sections 8 and 24 for the review of the decision made by the district court. After the ten days had expired, which are allowed to perfect the appeal, and on the 16th of July, he filed a petition for the review of that decision, as in cases provided for in section 2 of the act. In this, he has overlooked, or has not fully considered, the language of that section. The power of review given by that section is broad, but the mode of review by petition, bill, &c., there mentioned, is expressly confined to cases in which no special provision is otherwise made. For the case of persons claiming to be creditors, but whose claims are, on the one hand, rejected, or, on the other, allowed, special provision is made by sections 8 and 24; and these sections contemplate not a mere review of the adjudication in the district court, but a trial of the questions of

[2] [From 4 N. B. R. 541, and 3 Chi. Leg. News, 218.]

fact by a jury, upon pleadings and an issue, or an issue of law, if there shall be a demurrer. It was plainly intended to give to the party claiming to be a creditor and to the assignee contesting a claim, the privilege of such a trial.

It is suggested that the claimants should now be permitted to treat the petition for a review as such a statement as the statute requires. If the objection that it was not filed within the ten days prescribed by the general orders in bankruptcy could be obviated, by the assumption of this court to extend the rule or relieve from the consequences of disregarding it, it would not avail the appellants. The petition for review is neither in form or substance a declaration upon the supposed cause of action, to which the assignee can plead and go to trial. It is a statement of what took place in the district court, and avers that the proceedings there are erroneous. It requires that the proceedings in that court be brought into this court for examination, not upon any issue which can be tried by a jury, but upon the record and minutes of the proceedings; and, accordingly, the clerk of that court has returned those proceedings, and they are placed before me on this motion. If any further contest was to be had after the rejection of the claim, the assignee had the right that it not only be expedited in accordance with the general design of the bankrupt law to bring the settlement of estates to a conclusion as speedily as practicable, but also to have the further examination of the claim conducted like an ordinary action at law, in which, if the facts are disputed, there may be a trial by jury.

The appeal must be dismissed.

[This cause was again heard on appeal, when the appeal was dismissed, without costs. Case No 11,201.]

Case No. 11,201.

In re PLACE et al.

[9 Blatchf. 369.] [1]

Circuit Court, S. D. New York. Jan. 27, 1872.

APPEAL IN BANKRUPTCY—NOT TAKEN WITHIN TEN DAYS.

1. The district court, by an order entered June 25th, rejected and disallowed the claim of a creditor against the estate of a bankrupt, and awarded to the assignee costs against the claimant, to be taxed, and collected by execution. They were taxed April 8th, following. The district court refused to enter, on the application of the claimant, a further or more formal judgment against the claimant for the amount of the taxed costs, the assignee not asking to have such judgment entered. On April 18th, the claimant gave notice of an appeal to this court from the order of June 25th. The assignee moved to dismiss the appeal, on the ground that it was not brought within ten days after June 25th. *Held*, that the appeal must be dismissed, as not having been taken within the ten days limited by section 8 of the bankruptcy act of March 2, 1867 (14 Stat. 520).

[Followed in Sedgwick v. Fridenberg, Case No. 12,611.]

2. The order of June 25th was final, in such sense that an appeal would lie therefrom.

[In the matter of James K. Place and James D. Sparkman, bankrupts.]

Thomas C. T. Buckley, for creditors.

Francis N. Bangs, for assignee.

WOODRUFF, Circuit Judge. The appellants, Charles P. Fischer and others, claiming to be creditors of the bankrupt Sparkman, presented their claim against his separate estate. Objection being made, the matter was referred, proofs were taken, a report was made, a hearing thereon was had in the district court, and, on the 25th of June, 1870, an adjudication was made and duly entered, by which it was, in terms, ordered, adjudged and decreed, that the claimants are not creditors of said separate estate of James D. Sparkman, and that the said claim and proof be, "and the same hereby is, wholly rejected and disallowed," and, also, that the assignee recover against the said claimants the costs of the said reference, to be taxed by the clerk, and have execution therefor. On or about the 6th of April, 1871, the solicitor for the claimants requested the solicitor for the assignee to cause the costs thus awarded to be taxed, and the same were taxed on the 8th of April, 1871. Thereupon, the solicitor for the claimants requested the solicitor for the assignee to enter a further decree, in order that an appeal might be taken therefrom, and, on his refusal, application was made to the district court, in behalf of the claimants, for leave to enter such further decree, reciting the previous decree rejecting their claim, and awarding costs and execution therefor, and further reciting the subsequent taxation of costs at $220.26, and thereupon ordering, adjudging and decreeing that the assignee "have judgment" against the claimants for the said sum of $220.26. The district court refused to make this further order or judgment, unless the same was asked for by the assignee, and the solicitor for the assignee refused his assent to the entry thereof. On the 18th of April, 1871, the claimants gave notice that they claimed an appeal to this court, from the order of June 25th, 1870, refusing to allow their claim. The assignee now moves to dismiss the appeal, on the ground that it is too late, more than ten days having elapsed, after the making of the order rejecting the claim, before such appeal was taken.

The claimants appear to have acted in good faith, in their endeavor to bring the decision rejecting their claim under review. It appears that they took an appeal, in July, 1870, from the same order, which appeal was dismissed by this court. [Case No. 11,200.] The claim is said to be large, the estate of

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

the bankrupt is sufficient for its payment, and the consequences of its rejection are serious. Under these circumstances, if the matter rested in discretion, there would be much reason for relieving the claimants from any embarrassment arising from mistake or misapprehension in regard to the time for taking an appeal—not because the merits of the claim are before me, or because such relief would import doubt of the propriety of its rejection, but because the right of appeal given by the statute is an important right, and an appeal might, perhaps, be further prosecuted to the supreme court. But the objection goes to the jurisdiction of this court. It does not rest in discretion. I am, therefore, compelled to act upon my conviction that the appeal was not taken within the time allowed by law, and that the circuit court has not gained thereby any jurisdiction to review the decision appealed from.

1. The appeal is, in terms, from a decree made on the 25th of June, 1870. But, the appeal was not taken until the 18th of April, 1871, about ten months after the order was made and entered. Section 8 of the bankrupt law is explicit, that "no appeal shall be allowed in any case from the district to the circuit court, unless it is claimed and notice given thereof * * * within ten days after the entry of the decree or decision appealed from." According to the language of the statute, then, the appeal should not be allowed. It is, by its terms, an appeal taken nearly ten months after the decree or decision appealed from.

The claimants insist, that the ten days did not begin to run until the costs awarded by the decree or decision were taxed. The language of the said eighth section will not warrant this claim. The order or decree made by the district court, and the only order or decree which that court has made, was made in June, 1870. It was then entered. It is the order or decree appealed from. The statute forbids an appeal if not taken within ten days after the entry of the decree or decision appealed from. This does not leave open to discussion the question whether the order of June 25th, 1870, was final, or whether, in order to carry it into actual execution, some further step was necessary, either taxation, or a further decree or judgment. If the claimants desired to appeal from it, they should have appealed within ten days after the entry thereof.

2. I entertain no doubt, that, agreeably to the decisions of the supreme court in analogous cases, the decision of June 25th, 1870, was final, in such sense that an appeal would lie therefrom. Forgay v. Conrad, 6 How. [47 U. S.] 201, 204; Beebe v. Russell, 19 How. [60 U. S.] 283; Silsby v. Foote, 20 How. [61 U. S.] 290; Craig v. The Hartford [Case No. 3,333]. The decision or decree settled the rights of the parties, it finally rejected the claim, and it awarded a recovery of costs and execution therefor. No act of the court was, I think, necessary to the full and final effect of its order. If any such act of the court was necessary for any purpose, no further action by the court has been had in the matter.

The appeal must be dismissed, but I deem it proper to make such dismissal without costs.

PLACE (BEERS v.). See Case No. 1,233.

Case No. 11,202.

PLACE et al. v. The CITY OF NORWICH.

[1 Ben. 89.] [1]

District Court, E. D. New York. Dec., 1866.

PRACTICE — COLLISION — BONDING VESSEL WHERE THE DAMAGES EXCEED HER VALUE—OWNER'S LIABILITY UNDER ACT OF 1851.

1. A steamer bound from New London to New York, met with a collision, from the effects of which she sunk. She was afterward raised and repaired, and was then libelled by a freighter, to recover $8,000 damages for loss of his goods on board. The vessel being in custody in the action, the claimants filed a petition, claiming that the liability of the owners was limited to the value of the vessel and her freight, according to the act of congress of March 3, 1851 [9 Stat. 635], entitled "An act to limit the liability of ship owners." They alleged that the amount of losses exceeded the value of the vessel and freight, and that there was reason to anticipate actions against her to recover amounts exceeding her value, and prayed the court for leave to file a stipulation in the appraised value of the vessel and freight, for the benefit of all persons entitled to liens upon her for losses occasioned by the collision; and that on the filing of that stipulation, the vessel and also her owners might be declared to be discharged from all liability for losses arising out of the collision. The court directed notice to be published for fourteen days, of the time and place of making the application for the order on the petition. Other libellants, having claims in all to the amount of $30,000, appeared, and opposed the application. *Held* by the court, that the act of 1851 does not authorize the discharging the vessel from the liens created by law, on giving the stipulation tendered. Although it declares a limitation of the liability of the owners of ships, it nowhere undertakes to modify the law which creates a lien upon the ship for cargo lost, or undertakes to regulate or limit the liability of the vessel for such losses, or in any way provides for the enforcement or discharge of that liability, or for the taking of any sort of bond or stipulation for any purpose.

[Cited in The Vivid, Case No. 16,977.]

2. The provision in the fourth section of that act, authorizing the owners to take "appropriate proceedings" for the purpose of apportioning the sum for which the ship owners may be liable among the parties entitled thereto, does not warrant this application.

3. The discharge of the vessel from the liens created by law, as asked for in the petition, could not be obtained by virtue of the act of 1851.

4. A court of admiralty cannot under that act, in an action in rem against the vessel alone by a single freighter, make upon a petition a sum-

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

mary order declaring the owners of the vessel free from personal liability to any freighter on filing a stipulation as proposed. Such an order would be neither an assignment of the vessel to a trustee for the benefit of the persons having claims for losses, nor "appropriate proceedings in any court to apportion the sum for which the owners may be liable, among the parties entitled thereto," which are the only forms of proceeding authorized by the act.

[Cited in The City of Norwich, Case No. 2,762; The Epsilon, Id. 4,506; Thomassen v. Whitwell, Id. 13,930; In re Norwich & N. Y. Transp. Co., Id. 10,362.]

5. Such "appropriate proceeding" must be a proceeding in personam, where the parties to be affected are duly brought before the court, and in which a trial can be had on issues properly framed.

6. Such a proceeding would not be within the jurisdiction of an admiralty court. Cootes, Prac. p. 9; The Saracen, 6 Moore, P. C. 74.

[Overruled in The Epsilon, Case No. 4,506.]

7. The English authorities cited, have reference to the English act, which expressly gives to the admiralty court, in such cases, the jurisdiction exercised by the court of chancery.

[Cited in Wright v. Norwich & N. Y. Transp. Co., Case No. 18,086.]

8. The relief sought for the vessel and her owners, could not therefore be afforded under any of the provisions of the act of 1851.

9. The application might be treated as one for a release of the vessel on bail, addressed to the ordinary discretion of the court.

10. The power to release property from arrest on bail, does not depend on any statute, but is one of the inherent powers of the court. The Alligator [Case No. 248].

11. Under the circumstances of the present case, a stipulation in the form tendered, would protect all the rights of the lien creditors, and as effectually release the vessel from all the liens provided for in it, as the ordinary stipulation does from the claims made in the particular libel, which that stipulation is intended to secure.

[Cited in Re New York & W. Steamship Co., Case No. 10,200.]

12. Therefore the application to bond the vessel in this way might be granted.

The steamboat City of Norwich, while on a voyage from New London to New York, on the 18th day of April, 1866, collided with a schooner Gen. Van Vliet—was seriously injured and set on fire thereby, and finally sank. She was afterwards raised and repaired, and was then seized in this action, which was brought by [George Place,] a freighter to recover of the vessel the sum of $8,000 as damages, occasioned by loss of cargo in the collision and fire above mentioned. The steamboat being in the custody of the court in this action, the claimants filed a petition showing the liabilities of the owners to be limited to the value of the vessel and her freight, according to the act of March 3, 1851, entitled "An act to limit the liability of ship owners" (9 Stat. 635), and averring that the amount of losses by this collision and fire exceeded the value of the vessel and the freight then pending, and that there was reason to anticipate actions against her to recover amounts exceeding her value; whereupon they prayed the court for leave to file a stipulation in the appraised value of the vessel and her freight, such stipulation to be taken for the benefit of all persons who should show themselves entitled to liens upon the vessel for losses occcasioned by the collision and fire aforesaid, and that upon the filing of such stipulation the vessel be declared discharged of such liens. And they further prayed, that the owners of said vessel might be declared to be entitled to the benefit of the act of 1851, and be also declared, upon the filing of the stipulation aforesaid, to be discharged from all liability for any losses arising out of the accident in question. Upon the presentation of the petition, notice was directed to be published for fourteen days of the time and place of making the application, at which time several libellants, having filed libels to recover of the vessel some $30,000, appeared and opposed.

Mr. Leveridge and Mr. Owen, for claimants, in support of the application, made the following points:

(1) The facts make out a case which entitles the owners of the steamer to the benefit of the act limiting their liability to the value of the boat and her freight pending (9 Stat. 635). The language of the third section is broad enough to include not only their liability to the owners of the cargo on board the boat, but also their liability to the owners of the schooner and her cargo; and so it has been decided. Moore v. American Transp. Co., 24 How. [65 U. S.] 39; Walker v. Western Transp. Co., 3 Wall. [70 U. S.] 150; Wells v. The Ann Caroline [Case No. 17,389], decided by Judge Nelson in the United States circuit court; The Ariadne [Id. 522], decided by Judge Betts in the United States district court. The exception at the close of the act does not apply to this case. The navigation of Long Island Sound is not "inland navigation." [Moore v. American Transp. Co.] 24 How. [65 U. S.] 1; [Walker v. Western Transp. Co.] 3 Wall. [70 U. S.] 150. Nor is the river Thames or the East river a "river" within that exception. And even if the collision and fire were occasioned by the carelessness of the master and crew of the boat, still it occurred without the knowledge or privity of the owners, and therefore does not affect their rights under the act. The act does not extend to the officers and crew as representing the owners. [Walker v. Western Transp. Co.] Id. 153.

(2) As the owners are entitled to the benefit of the act, the question is as to their remedy against those who claim to enforce against them a greater liability.

(a) If there was but one libellant, the owners would easily avail themselves of the benefit of the act.

(b) In cases where there are several libellants, the fourth section provides that if the vessel and freight is not worth enough to pay all, they shall recover "in proportion to their respective losses."

(c) Each libellant, therefore, in such case, has an interest in the res, which he cannot be de-

prived of by another's recovering a judgment or filing a libel first. The owners are not therefore liable to any one party for more than his proportionate share in the res or its proceeds. 1 Pars. Mar. Law, p. 398.

(d) Even if the question of the limit of the liability could be raised in each action, it would lead to troublesome litigation, and would be unsatisfactory to all. It is for the interest of all that the amount of the fund out of which they are to be paid should be ascertained.

(e) There is no difficulty arising from a want of proper parties, or of jurisdiction. All persons having claims against the boat and her owners might have been made parties as having an interest in her, or the action might be for the benefit of the libellants and all others interested. The Commander in Chief, 1 Wall. [68 U. S.] 43, 51, 52. The libel being in rem, all persons interested, and all the world, are parties to the suit, and bound by the decree made in it. The Mary, 9 Cranch [13 U. S.] 144; Ben. Adm. p. 203; 2 Brown, Civ. & Adm. Law, 112. Moreover, in this case, all parties having claims have been called in by the notice published, and might intervene in this suit (Betts, Adm. Prac. 203), or if they instituted separate suits, such suits would be consolidated with this (The William Hutt, 1 Lush. 25).

(3) As the court has jurisdiction of the suit and possession of the boat, it has power to order her to be delivered to her owners on their giving a stipulation to her full value. It could order her sold, and the purchaser would take her free from all liens. It may retain possession of her till final decree and sale, or may surrender her upon a bond for her value. The Phebe [Case No. 11,066]; The Amalia, 32 Law J. Prob. Div. & Adm. 191. No injustice would be wrought to the libellants by so doing, and all other parties would have a valid bond to the full amount of the owner's liability.

(4) The court may also order the freight money to be brought in, and thus become possessed of the entire fund. The court administers justice on principles of equity, and therefore having jurisdiction of the cause, and possession of the res, it will retain it so as to do justice to all parties. Moreover, the act itself (section 4) gives this court all the power needful to effect its purposes. This motion contemplates the end proposed by this section. Giving such a bond may be regarded as equivalent to acting under the provision authorizing the owners to assign the boat for the benefit of all parties. That proceeding is merely cumulative. The act does not require it to be done. The language is permissive. It does not require the owners to confess the wrong; that may be litigated.

(5) Having such jurisdiction, the court may also by order declare that the vessel and her owners, after filing such stipulation, shall be exempt from all liability for the collision, except under the stipulation. This was so decided by Judge Betts in the case of The Ariadne. It has been so decided also in England under their statute. The Amalia, 32 Law J. Prob. Div. & Adm. 191; 1 Moore, P. C. (N. S.) 471.

Huntley & Place, R. W. Townsend, Martin & Smith, A. McCue, P. S. Crooke, and Dimmick & Perry, for the various libellants, opposed.

BENEDICT, District Judge. The application now made to this court upon this petition is supposed to be authorized by the provisions of the act of 1851. It is novel in the relief sought, and raises questions hitherto but rarely discussed in the courts of this country.

The first question raised is whether the act of 1851 authorizes the relief prayed for, so far as such relief affects the vessel herself, by discharging her from the liens created by law, upon the filing of the stipulation which is here tendered. The answer to this question seems to be obvious when the provisions of the act of 1851 are carefully considered, for it will be seen that that act, although it declares a limitation of the liability of the owners of a ship, nowhere undertakes to modify or declare the law which creates a lien upon the ship for cargo lost or damaged, nor does it undertake to regulate or limit the liability of the vessel for such losses, or in any way provide for the enforcement or discharge of that liability, neither does it anywhere provide for the taking of any sort of bond, or stipulation for any purpose. Still the claimants insist that the provision in the fourth section which authorizes the owner to take "the appropriate proceedings in any court for the purpose of apportioning the sum for which the owners of the ship may be liable, among the parties 'entitled thereto'" should be held to warrant the discharge sought by this proceeding.

But taking a stipulation, and discharging a vessel from the liens on her, is a very different proceeding from a proceeding to apportion among various creditors the sum for which the owners of a vessel may be liable under the act. Releasing a vessel on bail is simply substituting a stipulation in place of the vessel, to save expense, risk and loss. Neither the taking of the stipulation nor the order to discharge, involves the consideration of any question of apportionment of any sum, and it is difficult to suppose that the language of the fourth section was intended to include the well known proceeding of discharging a vessel on bail. It seems therefore quite clear that if this portion of the relief asked for in this petition can be obtained at all, it must be by virtue of other powers than those conferred by the act of 1851.

The next question raised by this petition is, whether a court of admiralty, in an action.

like the present, in rem against the vessel alone, by a single freighter, can upon a petition make a summary order or decree, declaring the owners of the vessel free from personal liability to any freighter, upon filing a stipulation for the amount of their liability, as limited by the act of 1851.

Now the act authorizes but two forms of proceeding, one an assignment of the vessel to a trustee for the benefit of the persons having claims for losses, the other, "appropriate proceedings in any court to apportion the sum for which the owners may be liable among the parties entitled thereto."

If these claimants proposed to assign this vessel, now in custody of the marshal, to an officer of the court, for the benefit of the parties entitled to make claim for losses, an order effecting their discharge from further liability could doubtless be made. But they do not propose to assign the vessel or their interest therein. What they do propose is to take the vessel upon giving a stipulation, which is not equivalent to delivering her up to an assignee as provided in this act; and as before remarked in regard to a discharge of the vessel herself, so in regard to a discharge of the owner it must be said that discharging the owners upon a stipulation is not "apportioning the sum for which they may be liable among the parties entitled thereto." But if taking a stipulation, and thereupon granting a discharge of the owners, could be considered one step towards apportioning the sum among the creditors, and so the proceeding, or part of the proceeding authorized by the fourth section of the act, still the mode of procedure here adopted cannot be sustained, for it is not an appropriate proceeding to accomplish the end contemplated by the statute.

This is a petition filed in an action in rem, and seeking a summary order as part of the proceedings in the action; but a proceeding to be an appropriate proceeding for the purpose intended by the act, must in my opinion be a proceeding in personam, where the parties to be affected are duly brought before the court, and in which a trial can be had on issues properly framed. Here the parties before the court, and whom it is sought to bind by the order prayed for, are only before the court so far as regards their right, title and interest in the vessel as lien creditors.

Their liens can undoubtedly be cut off by the sale of the vessel, and the affectation of the vessel in their favor may be intentionally waived or abandoned by them, but I am unable to see how the court in this cause can declare their right of action in personam against the owners to be cut off. If the giving of such a stipulation as is here proposed would be a good defence in any future action, brought by freighters against the owners, it will hardly do upon the petition of these owners to treat this action against the vessel as such an action, and now give judgment for the defendants accordingly.

Nor would the case be improved if all the parties to be affected were brought before the court and issue duly joined by them; for such a proceeding would be no part of an admiralty cause, and not within the jurisdiction of the admiralty. The general words, "any court," in the fourth section of the act, may give the district court jurisdiction of such an equitable proceeding, but it by no means follows that it can be taken upon the instance side of the court. The jurisdiction of the admiralty, as exercised in every case, is indeed legal and equitable, but it does not follow that every proceeding which a court of equity may entertain, can be taken in a court of admiralty, and I know of no authority for holding that the court of admiralty can entertain a proceeding commenced for the purpose of apportioning among various creditors a common fund. Such a jurisdiction has been expressly denied in the case of The Saracen, 6 Moore, P. C. 74; Coote, Prac. p. 9.

But, further, if this proceeding could be entertained as a proceeding within the admiralty jurisdiction of the court, I see no necessity for making it a part of this suit. The condition of an action in rem, compelled to bear within it, through the stages of this and of the appellate courts, an equity suit, in which the original libellants, with various others, would be defendants, and the claimants the plaintiffs, would be so anomalous, and tend so greatly to deprive the suit in rem of that simplicity and dispatch which properly characterize it, that I should hesitate long before giving my sanction to the practice.

My conclusion therefore is, that the relief here sought for this vessel and her owners, cannot be afforded under any of the provisions of the act of 1851. Nor is this conclusion in conflict with the English authorities cited by the claimants. Those decisions were made under the British act, which differs from the American act in material respects. Thus, after declaring the limitation of the owner's liability, the British act provides as follows (section 514): "In cases where any liability has been * * * incurred by any owner in respect of * * * damages to ships, boats, or goods; and several claims are made or apprehended in respect of such liability, * * * it shall be lawful in England for the high court in chancery * * * to entertain proceedings at the suit of any owner, for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount ratably among the several claimants, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject matter. And any proceeding entertained by such court may be conducted in such manner, and subject to such regulations, as to making any persons interested parties to the same, and as to the exclusion of any

claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the court thinks just." These provisions, it will be seen, confer more extended powers than are contained in the American act, and they are exercised by the English admiralty only by virtue of the admiralty court act of 1861 (24 Vict. c. 10, § 13), which declares, that "when any ship or vessel, or the proceeds thereof, are under arrest of the high court of admiralty the said court shall have the same powers as are conferred upon the high court of chancery by the ninth part of the merchants' shipping act of 1854."

It is by virtue of these two statutes that Dr. Lushington has entertained petitions for relief similar to the one now presented, and those cases, if examined, show that such petitions are not received by the English court of admiralty as part of the proceedings in rem, but form independent actions with demurrers and answers. The Wild Ranger, 1 Marit. Law Cas. p. 206. They go up to the privy council independent of any action in rem. The Amelia, Id. 362. They are described in the reports as suits brought by plaintiffs against defendants. The Wild Ranger, Id. 275. The English cases seem therefore rather to sustain than overthrow the view which I have thus far taken of the present application.

This view derives support from the final determination of the supreme court in the case of The Ann Caroline, 2 Wall. [69 U. S.] 538, where "the whole matter of damages being open to revision" (page 546), and the point being expressly taken that the act of 1851 did not apply in an action in rem to limit the recovery to the value of the claimant's vessel and freight, the court held that in an action in rem against a vessel for a collision, although it appeared that the amount of the personal liability of the owners under the act of 1851 was less than the value of the libellant's vessel, the true measure of damages in that action was the value of the libellant's vessel, and that the decree must be for that sum if a stipulation for value to that amount had been given.

The views here expressed make it unnecessary to consider the point raised in opposition to this petition, and decided in 14 Gray, that none of the provisions of the fourth section of the act of 1851 are applicable to cases when the losses have arisen out of a collision.

Thus far I have treated the application before me as a proceeding taken under the act of 851, but it may without injustice to any one be treated as an application for a release on bail, addressed to the ordinary discretionary powers of the court, and the more important portion of the relief sought may be thus obtained. So considered, the motion differs from the ordinary motion for leave to bond only in this, that the claimants, instead of a stipulation which shall be available to the libellant alone, tender a stipulation in the full value of the vessel and her freight, which shall be available for all the libellants who have filed, or may hereafter file, libels in this court, to recover damages caused by this collision and fire, and instead of a discharge which shall release the vessel from the claim of the libellants alone, they seek a discharge which shall release the vessel from all the claims secured by such stipulation.

Now the power to discharge from arrest property seized in a court of admiralty, does not depend upon the provisions of any special statute, but is one of the inherent powers of the court conferred upon it with its other general powers. The Alligator [Case No. 248]. From "motives of public convenience," the claimant is allowed to substitute an equivalent security in place of the res. Coote, Prac. p. 5.

This power is daily exercised in actions in rem, because "a ship is made to plow the sea, and not to rot by the wharf,"—because serious damage to her owners is caused by her detention without benefit, and expenses are thereby increased,—all which may be obviated without injury to the rights of creditors by a delivery on bail. Ben. Adm. p. 246. These considerations which lead to the ordinary discharge on bail, seem to me to press with their full force in favor of the discharge here sought. This vessel is detained from regular trips by the process against her. Her value, together with the amount of her freight, is insufficient to pay the amount of claims likely to be brought against her. A discharge on bail in each case would involve her owners in liability exceeding her value. The Ann Caroline, 2 Wall. [69 U. S.] 550. It is manifest, therefore, that no prudent owner will give stipulations in the ordinary form for each claim. The consequence is, that unless a stipulation in the form tendered can be taken, the vessel must remain in custody until the termination of perhaps a long controversy, to the detriment of every interest concerned.

Some form of stipulation seems to be demanded by the circumstances of the case, and I see no reason why the one proposed will not protect all the rights of the lien creditors, and as effectually release the vessel from all the liens provided for in it, as does the ordinary stipulation from the claim or claims made in the particular libel which such stipulation is intended to secure, which libel often includes several distinct parties, such as owners of a vessel and of the cargo, several seamen of one crew, different sets of salvors, and the like. A somewhat analogous effect is produced by the ordinary stipulation when taken in good faith without fraud or mistake, for a less sum than the whole lien intended to be secured by it. The English bond for latent demands is also analogous.

While, then, the stipulation proposed will secure the end which is required by "public

convenience," and always sought by a court of admiralty, the taking of it, and the consequent release of the vessel, will improve rather than impair the position of the lien creditors. For the vessel is now under proceedings in rem, which must, sooner or later, terminate in a sale under a decree, or a sale as perishable. That sale will cut off all their liens and transfer them to the proceeds in court, reduced as those proceeds will be by the expense of custody and the rapid deterioration of a ship while lying idle. Instead of that fund as their sole resort, if the vessel be discharged on the stipulation tendered, the creditors will have a stipulation as available as the vessel now is, and for its value, with the addition of the amount of the freight. Proper precaution being exercised in the examination of the sureties, and in ascertaining the value of the vessel, which the court will by its order always secure—represented as all creditors will in effect be upon the justification of the sureties and the appraisement of the vessel by the other libellants before the court,—as public a notice of the proposed discharge having been given as is required to be given of a condemnation and sale—it cannot be said that the position of any lien creditor will be impaired by the release of the vessel in the manner proposed.

Nor is it seen that any inconvenience will arise, if the practice here indicated should be adopted; but, the contrary. One effect would be to bring before one court all demands claimed to be liens arising out of the same occurrence, a result certainly desirable if not made necessary by the opinion expressed by the supreme court in the case of The Commander in Chief, 1 Wall. [68 U. S.] 43. Another effect, and one often beneficial to the owners of ships, would be to afford a method by which a ship can be promptly relieved from liens arising out of a collision. In the absence of any such method, every vessel having been in collision must remain subject to all liens thereby created, until the demands shall have been prosecuted or become stale; and these liens are uncertain in amount and often unknown. They therefore interfere with a sale of the vessel, and form one of the disabilities affecting this class of property which such a discharge on bail will remove, and in a much cheaper and more effective manner than the formality of a collusive sale under decree, to which ship owners have sometimes been driven in the absence of any other method of relief.

In addition to the facts above stated, it also appears in this case that the owners of this vessel are willing to furnish stipulators of unquestioned ability, while they are themselves a corporation with a place of business in this port and abundantly able to respond to any decree that may be rendered. The voyage in question was between New London and this port, where the persons having claims upon the vessel may be supposed to be, or to be represented. Public notice of the intention to apply for the release of the vessel in this manner has moreover been given by special advertisement. There is, therefore, little danger of surprise, certainly none of detriment, to the lien creditors not actually before the court, if this relief be granted.

A single question remains to be determined, that is, as to the time when the value of the vessel is to be taken for the purpose of fixing the amount of the stipulation. Were the vessel of the value now that she was immediately prior to the accident, that value would be taken, but it is suggested by the papers before me that she has been altered, and her value increased since that time by the act of her owners, and it may be that her value has changed by reason of a change of the market, and therefore, under the views which I have above expressed, a question arises whether the lien creditors are not entitled to have the benefit of any increase of her value. See The Aline, 1 W. Rob. Adm. 119; Coote, Prac. 4. This question can be more safely disposed of upon the settlement of the order, when the facts attending the repairing of the vessel may be shown. It is accordingly reserved until that time.[2]

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[2] This question of value was not made the subject of dispute, but agreed upon between the parties. The stipulation which was given under the above decision was as follows: It set forth the filing of the libel by Place, and the arrest of the vessel under the process; the subsequent filing of other libels; the valuation of the vessel at $70,000; the filing of a claim by the owners in each of the suits, and their application to have the vessel discharged on giving this stipulation. It then proceeded in the following words: The parties hereto agreeing, that the said claimants and owners, the Norwich and New London Transportation Company, parties hereto, in all cases in which libels may hereafter be filed in this court against the said steamboat to enforce liens or claims upon or against the said steamboat by reason of said collision and fire, upon notice to them or their proctor, to be given by publication or otherwise, as the court may direct, will, within the time limited by the court, enter an appearance without service of process, which is hereby waived, and that in default of such appearance such proceedings may be had and such decree made in such causes respectively, as to the court may seem proper, and with like effect as if said owners and claimants, and their sureties, the parties hereto, had appeared and consented thereto.

And the parties hereto further consenting and agreeing, that they will, to the extent of the amount of this stipulation, abide by and perform all orders and decrees of this court, made or to be made in any proceeding taken or to be taken in this court, or in any appellate court, to secure the payment of any lien upon the said steamboat, her engines, &c., in place of which this stipulation is substituted, which may have arisen by reason of the collision and fire above referred to, and that in case of default or contumacy on the part of the said owners or claimants, or their sureties, execution or executions, not in all to exceed the amount of this stipulation for the value of said steamboat, viz., $70,000, with interest thereon from this date, may issue against their goods, chattels, and lands.

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall, upon the final order or decree of the said

I have been thus particular in considering this application, on account of its importance, and also because it was claimed on the hearing that an order made by the judge of the Southern district as late as February, 1866, in the case of The Ariadne [Case No. 522], indicates an opinion on his part that the act of 1851 confers upon the district court in admiralty, the power to grant all the relief here prayed for. No opinion was delivered by that learned judge in the case referred to, and it does not appear that his intention was called to the difference between the English and American statutes. However this may be, the result which he arrived at, so far as it affected the vessel before him, which is the substantial portion of the relief sought to be obtained, was the same as that arrived at by me, and the practice of the two courts will therefore coincide.

An order may be entered in accordance with these views, which will be settled before me on notice to all the libellants who have filed libels against this vessel, in this court.

[NOTE. The vessel was discharged under the stipulation, and the cases of all the parties who came in were heard together, a decree entered for the respective libelants, and a reference ordered, to ascertain and report the amount of the damages. Case No. 2,760. Exceptions were taken to the report of the master, which were overruled. Id. 2,761. In 1872 the supreme court rendered a decision in the case of Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. (80 U. S.) 104, on an appeal from the circuit court for the district of Connecticut. See Case No. 18,087, affirming Id. 18,086. By leave of the court, the Norwich & New York Transportation Company commenced a proceeding against the City of Norwich. It was held that the petitioners were entitled to an order directing an appraisement of the value of their interest in the City of Norwich, and it was referred to a commissioner to hold such appraisement, and report the value and amount to the court. Id. 2,762. On the coming in of the commissioners' report, exceptions were taken thereto, which were overruled. Case unreported. A final decree was entered, distributing the fund in court, and discharging the petitioners from further demands. Case unreported. An appeal was then taken to the circuit court, which affirmed the decree of the district court. Case unreported. On appeal to the supreme court the decree of the circuit court was affirmed. 118 U. S. 468, 6 Sup. Ct. 1150.]

district court made and entered in the above suit, and in any suit or proceeding commenced, or which may be commenced, in said court, to establish and enforce any lien or claim upon the said steamboat, &c., by reason of the collision and fire in the aforesaid libel and in the said petition mentioned, or upon the final decree of any appellate court to which any or either of such suits or proceedings may be carried, and upon notice of such order or decree to the parties hereto, or either of them, or to the proctor for the claimants, abide by all interlocutory orders and decrees of the court, and pay the money awarded to the respective parties in and by all such final decrees rendered in this court or the appellate court, (if any appeal intervene,) no exceeding in the aggregate the said sum of $70,000, and interest, then this stipulation to be void, &c.

PLACE (RUSSELL v.). See Case No. 12,161.

PLACE (SEDGWICK v.). See Cases Nos. 12,619–12,623.

PLAINFIELD, The (BRUSH v.). See Case No. 2,058.

Case No. 11,203.

The PLANET.

[Brown, Adm. 124.] [1]

District Court, E. D. Michigan. April, 1864.[2]

COLLISION—VESSEL AT ANCHOR—ANCHOR WATCH.

1. A schooner lying at anchor with her sails up, in a channel 1,500 feet wide, was damaged by a steamer coming down the channel at the rate of 12 miles an hour, and endeavoring to pass between the schooner and another vessel which lay about 400 feet ahead of her. *Held*, that the schooner had a right to lie where she did with her sails up, though there was a puffy wind.

[Cited in The Worthington and Davis, 19 Fed. 838; The Ogemaw, 32 Fed. 924.]

2. No anchor w tch was necessary in the day time.

3. The steamer was solely in fault for not giving the schooner a wider berth.

Libel for collision. The facts conceded and the facts proved to the satisfaction of the court were substantially these: The schooner Stella, of 176 tons burden, was pursuing her voyage from Buffalo to Milwaukee, when, for want of wind, she came to anchor at midday, in the St. Clair river, above Port Huron, about 400 feet from the American shore, the river being at that point about 1,500 feet wide, and the current nearly five miles an hour. The Stella was in company with another sail vessel called the Elida, and the wind, which had been rather light all the morning, failed them at noon, and died away altogether; so that at this time and place, neither vessel being able to proceed up the current, they came to anchor, the Elida some 400 feet in advance of the Stella, and about the same distance from the American shore. The Stella kept her mainsails up, as her anchorage was but a short distance from the lake, and she had every reason to expect being towed by the Sarnia, which was then gone to the Elida to attach her first to her tow. The river is about 1,500 feet wide at this place, and there was ample space for vessels ascending or descending to pass on either side of the Stella. While thus at anchor, the steamer Planet came down the river at a speed of twelve or thirteen miles an hour, heading down stream, passing on the starboard side of the Elida, and attempting to run between the Stella and the American shore. ported her helm, and with the power of the current and steam, in a few minutes after passing the Elida, ran into the Stella, occasioning the damage alleged to both vessels.

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

[2] [Affirmed by circuit court; case unreported.]

W. A. Moore, for the Stella.
J. S. Newberry, for the Planet.

WILKINS, District Judge. Many witnesses swear to the wind being puffy and capricious, when but a few minutes before the collision the Elida and Stella were forced to come to anchor because the wind had died away. Another witness, on board the Forrester, swears that he had seen from her deck the Stella ranging off and on all the morning, when it is unquestionable, and not denied, that both the Elida and Stella only reached their anchorage at noon. Some of the witnesses swear that the Stella swung and sheered while at anchor about one hundred and sixty feet, a statement certainly inconsistent with the admitted fact of the length of her chain and weight of her anchor. Such a breeze as would make her thus range was sufficient to take her at once to Lake Huron, without the aid and expense of a tug. The speed of the Planet, her size, and the consequent undulation of the water, forbade accuracy of observation by those on her decks, and would mislead the judgment of the most truthful.

On the part of the Planet, it is urged that the Stella was at fault, in being at anchor, with her sails up, and neglecting a watch at her helm. It was midday; the channel broad and deep—on the starboard and larboard sides—to the east and the Canadian shore, 1,000 feet, and to the American, more than 300 feet, with sufficient depth of water to within a few feet of the shore; the anchorage was only for a short time, and no necessity existed for a watch at the helm, no more than for a light at her bow, or for a watch and light when lying at dock in port. Such a requisite presupposes powerful steamers to be without government, and that sailing vessels must keep a lookout when at anchor in a channel 1,500 feet wide, in order to protect descending steamers from being run into by sheering.

She had a right to keep her sails up when at anchor, under the circumstances proved. Having ample room to pass on either side, if there was wind to make the Stella sheer, the Planet was, nevertheless, to take that into consideration, and avoid passing the Stella so near as to render a collision possible. A steamer must avoid a sail vessel when both are under weigh; much more should a sail vessel at anchor be avoided, even on the eve of departure, and when her sails are up. It is no excuse for the steamer—with ample space safely to pass—that the wind was puffy, and the anchored vessel so sheered as to run into the steamer, or cause the steamer to run into her. The fault is in the steamer; and the sheering of the sail vessel, whether caused by undulation or wind, does not shift the fault from the steamer to the sail vessel.

It is unnecessary to attempt to reconcile the conflict in the testimony as to the fact of sheering. Fish and Cottrel of the Forrester, swear to the ranging, and the crew of the Planet to the same fact—with much probability, as the undulation would cause some ranging, though not to the extent that the crew fancied, in their rapid flight down a current of five miles an hour, while the captain and crew of the Stella, and the master and mate of the Elida testify to the contrary, Merrill, the mate of the Stella, stating positively that he was on deck all the time the Stella lay at anchor, until the collision, except for a few minutes at dinner, when he was told the Planet was coming, and that the Stella lay all the time steady at anchor. A sailing vessel at anchor even with sails up, and about to start, must be carefully avoided by a steamer coming into port; and it constitutes no defence to the latter that the former sheered, so as to cause collision. The steamer must keep off. There is no doubt that there was some ranging in the Stella, for a short period, on the rapid approach of so large a vessel as the Planet, causing a corresponding undulation. But this ranging cannot be attributed to the wind. And whether she ranged or not, while at anchor, under the sudden puffs of wind playing on her sails, the Planet was bound to guard against the exigency, by taking a wide berth, either to the larboard or starboard. This she could do. This she ought to have done. Where there is ample sea room, a steamer must avoid a sail vessel at anchor, or under weigh, and the law imposes no duty upon the latter when anchored, as to an approaching steamer in daylight. At night, the usual light and watch are necessary, but in the day time, all the duty to avoid a collision is with the steamer. It is not allowable for the latter to run any risk as to the anchored vessel, or attempt the experiment of a dangerous proximity. Sailing vessels, especially when at anchor, enjoy the broad protection of the law.

The fact has been established that with reference to the Elida, the Stella lay inside, and not outside, and not at a greater distance than five or six hundred feet below.

This fact being fixed in the judgment of the court, the fault in the Planet is fixed. With space abundant on either side, it is inexcusable that she ported on passing the Elida, a movement that brought her inevitably across the bows of the Stella. If it was desirable to hug the American shore, she ought to have done so before she reached the Elida, and not after she had passed that vessel. Had she done so, the collision would have been avoided.

Decree for libellant.

On appeal to the circuit court, this case was affirmed. [Case unreported.] But see, as to necessity of anchor watch, The Masters [Case No. 9,267].

Case No. 11,204.

The PLANET.

[1 Spr. 11; 4 Law Rep. 353.] [1]

District Court, D. Massachusetts. Nov., 1841.

ADMIRALTY—SUIT FOR WAGES—SETTLEMENT —COSTS.

During the pendency of a suit for wages by a seaman, the libellant, without the knowledge of his proctor, settled his claim, receiving only the wages due. The proctor was allowed to proceed for and to recover costs.

[Cited in Angell v. Bennett, Case No. 387; Collins v. Nickerson, Id. 3,016; Purcell v. Lincoln, Id. 11,471; The Ontonagon, 19 Fed. 800.]

The libellant, a boy of about nineteen years of age, shipped at St. John, N. B., his native place, for a voyage described in the articles as being from St. John to the West Indies, thence to Sydney, and thence to St. John. Instead of returning to St. John, however, the vessel came to Boston. On arriving here the boy demanded his discharge and wages; both which were refused him. The master also refused to give up his clothes. He then applied to the British consul, who refused to aid him, and told him he would be arrested as a deserter. (This was owing to a set of articles, different from those signed by the boy, and which included Boston in the voyage, having been left at the consul's office.) In this situation he applied to a proctor, who commenced admiralty process. As soon as the process was served, the master and agents sent for the boy, and without consulting or notifying the proctor paid him his wages and took a receipt in full, but paid him nothing for costs. It appeared that the boy told them that he should have little left from his wages, after paying his costs. The question for the court was, whether process should continue against the vessel for costs. The respondents produced the libellant's receipt in full, in defence.

C. C. Nutter, for respondents, offered, in defence, the receipt in full of the seaman, and the testimony of the agent who paid him, that at the time of settlement the boy agreed to pay all the costs which had accrued; and it was contended, that, since no evidence appeared to impeach the fairness of the compromise, or to show that any advantage was taken of the seaman, the claimants were not liable for the costs.

R. H. Dana, Jr., for libellant.

SPRAGUE, District Judge. The proctor is an officer of the court, and the practice in admiralty has been to allow him to proceed for costs, when there is reason to believe the seaman has been designedly induced to settle, after service of process, without his proctor's knowledge. The seaman is under a disadvantage in dealing with the other party, especially as to costs and matters of law, and is entitled to the aid of his proctor. In this case the libellant, being a minor, was peculiarly under the protection of the court. He had been brought on a voyage, contrary to his agreement, to a place in which he was an entire stranger; denied his legal right to a discharge and to his wages; and on applying to the consul, his proper protector, had been refused all aid (through a misapprehension on the consul's part), and as a last resort had applied to a lawyer. He was, then, clearly entitled to his costs as well as to his wages; and obliging him to pay his own costs was, in effect, deducting so much from his wages. There may be cases of settlements made with seamen, without consulting their proctors, which will stand; but in this case there seems to be good reason for allowing the proctor to proceed for his costs, notwithstanding the settlement with his client. Decree for costs.

See Collins v. Nickerson [Case No. 3,016].

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

Case No. 11,205.

PLANT et al. v. GUNN et al.

[2 Woods, 372.] [1]

Circuit Court, S. D. Georgia. April Term, 1874.[2]

DURESS—CONTRACTS—THREATS OF CRIMINAL PROSECUTION — WHAT IS A JUDGMENT — RECORD — CODE OF GEORGIA — EVIDENCE OF VERDICT —LIEN.

1. A contract will not be avoided on account of duress by imprisonment, unless the imprisonment was unlawful, and the contract was made during the imprisonment, and in consideration of release therefrom.

[Cited in Wolf v. Troxell's Estate, 94 Mich. 576, 54 N. W. 384; Sanford v. Sornborger, 26 Neb. 306, 41 N. W. 1105.]

2. Under the Code of Georgia, the threat of a criminal prosecution is not such duress as would avoid a contract.

3. Where A. is justly indebted to B., and B. threatens A. with a criminal prosecution if A. does not secure the debt, which, in justice, A. ought to do, and A. gives a mortgage, the mortgage is not void on the ground that it was executed to compound a felony.

4. A judgment is the decision or sentence of the law, pronounced by a court and entered upon its records.

5. The record of a judgment is notice only of what it contains.

6. The Code of Georgia and the practice of the courts of the state require the proceedings and judgments of the courts to be entered upon the minutes, which are the authentic record of what is done by the courts.

7. Where the only evidence of a verdict and judgment was the indorsement thereof by the plaintiffs' attorney upon the declaration and the words "Nov. T., 1866, verdict," on the bench-docket: *Held*, that this was not such a judgment as constituted a lien upon the defendants' prop-

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

[2] [Reversed in 94 U. S. 664.]

erty, and a subsequent order of the court entering judgment nunc pro tunc would not give the judgment a lien upon the property of defendant, superior to a mortgage executed by him prior to the nunc pro tunc order.

[Cited in Charles Green's Son v. Salas, 31 Fed. 108.]

[Cited in Bode v. Trimmer, 82 Cal. 517, 23 Pac. 187.]

In equity. Submitted for final decree upon pleadings and evidence.

Clifford Anderson and W. U. Garrard, for complainants.

A. R. Lawton and C. N. West, for defendants.

Before WOODS, Circuit Judge, and ERSKINE, District Judge.

WOODS, Circuit Judge. In the year 1869, a firm composed of James H. Woolfolk and two other partners was adjudicated bankrupt, and Joseph E. Murray was appointed trustee of the bankrupts' estate. Some time thereafter, certain real estate, the individual property of James H. Woolfolk, was sold by the trustee for the sum of $5,834, and the proceeds were held by the bankrupt court, subject to its order for proper distribution. This fund is now claimed by the complainants on the one hand, and by the defendant, Daniel F. Gunn, as guardian, on the other. The prayer of the bill is that the fund may be applied to the payment of complainants' judgment. The claim of Gunn is based upon a judgment which he says he recovered at the November term, 1866, of the Bibb county superior court, for $11,212, against Thomas J. Woolfolk and the said James H. Woolfolk as principals, and John W. Woolfolk as surety. The claim of the complainants is based upon a mortgage executed by James H. Woolfolk to them on the 7th day of December, 1868, upon the lands sold by Murray, to secure certain debts due from the firm, of which James H. Woolfolk was a member. A judgment of foreclosure was obtained on this mortgage at the October term, 1869, of the Bibb superior court, against James H. Woolfolk for $4,963.

A judgment of a court of record in Georgia is a lien upon all the real and personal property of the judgment debtor within the state, and if the defendant Gunn recovered a valid judgment against James H. Woolfolk in 1866, it became from its date a lien upon all the real estate of which Woolfolk was then seized, among which was the land afterwards mortgaged to the complainants. The complainants, however, claim that their lien is the older and better one, although apparently subsequent in point of time, because the judgment of Gunn was not, as they say, a valid judgment at the time it purports to have been rendered, nor until after the execution of their mortgage. This claim is based upon the following facts: At the November term, 1866, of the Bibb superior court, at which Gunn claims to have recovered his judgment against James H. Woolfolk and others, no verdict or judgment was entered upon the minutes of the court, nor at any subsequent time until the April term, 1871, of the same court, when an order was made that the verdict, which the court at that time found was rendered at the November term, 1866, be entered upon the minutes. And at the same term, it appearing that judgment for the interest found by the verdict had not been taken, the court entered judgment for the interest, nunc pro tunc. The only evidence of any verdict or judgment in the case of Gunn v. James H. Woolfolk and others, at the November term, 1866, is the verdict of the jury indorsed upon the declaration, and a judgment for the principal sum due, also written upon the back of the declaration by the plaintiff's attorney and signed by him. There is also an entry on the bench docket in the judge's handwriting, immediately opposite the case of Gunn v. Woolfolk and others, of these words: "Nov. T., 1866, verdict." According to the practice in Georgia, courts of record, such as the Bibb superior court, are required to keep minutes of their proceedings, in which must be entered all verdicts of juries, and judgments, decrees and other proceedings of the court. These minutes are the authentic record of what transpires in or is done by the court.

There is no entry to be found upon the minutes of the Bibb county superior court, of any verdict or judgment, or of any other proceeding whatever in the case of Gunn v. James H. Woolfolk and others, until the April term, 1871, when this entry appears: "It appearing to the court that the plaintiff failed to enter his judgment for the interest as contemplated by the verdict, it is therefore ordered, upon motion of plaintiff's counsel, that plaintiff have leave to amend said judgment, so far as the interest is concerned, nunc pro tunc." At the same term, it being made to appear to the court, from the bench docket and original papers, that a verdict was rendered by the jury in the case at the November term, 1866, and not entered upon the minutes, the court ordered the verdict to be entered, nunc pro tunc. At a subsequent day of the same term a formal judgment was rendered nunc pro tunc, for interest on the said sum of $11,212.38, from the 14th day of April, 1860, until paid, "this judgment for interest to take effect now for then." It is not pretended that any judgment for interest had ever been in fact rendered before the April term, 1871, nor do the minutes of the court show that any judgment whatever had ever been rendered for the principal sum, nor do they show any judgment nunc pro tunc for such principal sum.

The defendant Gunn claims that before the execution of the mortgage to complainants by James H. Woolfolk, they had notice of his judgment against Woolfolk and others,

which he claims was rendered at the November term, 1866. The evidence upon this point is as follows: James H. Woolfolk testifies, that at the time of giving the mortgage, he told Plant, the complainant, that he, Woolfolk, was defendant in a judgment in favor of Gunn, against himself and John W. Woolfolk as sureties and Thomas J. Woolfolk, principal. Thomas J. Woolfolk testifies, that he was present at the execution of the mortgage to Increase C. Plant and others. Plant asked the witness whether there were any incumbrances upon the property about to be mortgaged, and witness told him none, except a judgment in favor of Gunn for an old debt against Thomas J. Woolfolk, principal, and James H. and John W. Woolfolk, sureties. The defendant Gunn attacks the mortgage of complainants, and asserts that it was obtained either by duress or for the compounding of a felony.

The facts upon this branch of the case are these: The firm of Woolfolk, Walker & Co., in which James H. Woolfolk was a partner, held in their warehouse a quantity of cotton, which was pledged to secure a debt due from Woolfolk, Walker & Co., to Plant & Co., for money advanced by them upon said cotton. Plant & Co. held the warehouse receipts of Woolfolk & Co. for the cotton. The latter firm appropriated the cotton, and were not able to produce it upon the demand of Plant & Co. I. C. Plant thereupon said to James H. Woolfolk, that if he did not pay the debt due from Woolfolk, Walker & Co., to Plant & Co., he would commence a criminal prosecution under the law of Georgia, for misapplying the cotton left with them in trust; that he would send him to the penitentiary if he did not secure the debt by mortgage or otherwise. The result was that James H. Woolfolk gave the mortgage to Plant & Co., to secure their debt. James H. Woolfolk was actually arrested, whether on a civil or criminal process does not appear, and taken before a magistrate and threatened with a criminal prosecution, for having obtained money upon cotton receipts after the cotton had been sold. There is no evidence that the mortgage was executed while James H. Woolfolk was in arrest, but Woolfolk testifies that he gave it on account of the threats of I. C. Plant, above stated.

These facts present the only question which, in the view we take of the case, it is necessary to pass upon. These questions are: (1) Was the mortgage executed by James H. Woolfolk to Plant & Co. void, because given under duress, or because the consideration therefor was the compounding a criminal prosecution; and, (2) if the said mortgage is not void, is it prior in date and equity to the judgment of the defendant Gunn? Of these in their order. Was the mortgage obtained by duress? By duress is meant, "an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract or to discharge one." 1 Bouv. Inst. 226. "If I be arrested upon good cause, and being in prison or under arrest, I make an obligation feoffment or any other deed to him at whose suit I am arrested, for my enlargement, and to make him satisfaction, this shall not be said to be by duress, but is good and shall bind me." 1 Shep. Touch. 62. If a man be illegally deprived of his liberty until he sign and seal a bond, he may allege this duress and avoid the bond. But if a man be legally imprisoned, and either to procure his discharge or on any other fair account, seal a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. 2 Co. Inst. 482; Watkins v. Baird, 6 Mass. 506.

The testimony in this case shows no actual or threatened violence to the person, nor any illegal imprisonment to obtain release from which the mortgage was executed. In fact, the testimony does not show that there was any imprisonment, legal or illegal, at the time of the execution of the mortgage, or that the mortgage was executed in pursuance of a promise to execute it on condition of release from imprisonment. There is nothing in the record that in the slightest degree tends to establish the fact of duress, as defined by the common law. "Duress," as defined by the Code of Georgia (section 2637), "consists in any illegal imprisonment or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." There was no imprisonment, legal or illegal, in this case, which was used to coerce the execution of the mortgage. There were no threats of bodily or other harm. Was a threatened criminal prosecution such "other means," mentioned in the Code, as would amount to duress? The supreme court of Georgia, in the case of Russell v. McCarty, 45 Ga. 197, in construing section 2637 of the Code, say it is not. We are of opinion, therefore, that neither by the common law nor the statute law of Georgia was there any duress in this case.

Was the note given for the compounding of a felony? In our judgment the evidence utterly fails to establish this position. There is no evidence that a criminal prosecution was commenced. The arrest spoken of by James H. Woolfolk may have been on a civil process. The proof simply goes to this extent, that Plant threatened Woolfolk that he would prosecute him and send him to the penitentiary if he did not pay or secure the debt due to Plant & Co. To avoid an obligation on the ground that it was given for compounding a felony, it must appear that the compounding of the felony was the consideration of the obligation. Such is not the case here. The consideration of the mortgage was a bona fide debt due from Woolfolk and his partners to Plant & Co. It was the duty of Woolfolk, under the circumstances, to pay or secure this

debt. A threat of a criminal prosecution, unless the mortgage were given, does not compound the offense. Besides, it appears from the evidence of James H. Woolfolk, that he had been guilty of no criminal offense, that the cotton had been disposed of by his partners in his absence and without his knowledge. If this be true, and it is uncontradicted, there was no felony to compound. We are of opinion, therefore, that the mortgage to complainants was a valid mortgage.

It remains to consider, which was the older and better lien upon the property which produced the fund in court about which this controversy has arisen. This will depend upon the date when the judgment of Gunn is to have effect, as to persons not parties to it. A judgment is the decision or sentence of the law upon facts found or admitted by the parties or upon their default in the course of a suit. Tidd, Prac. 930. But a bare decision of a court is not a judgment; there must be a formal order entered upon it. Boker v. Bronson [Case No. 1,606]. A judgment is, therefore, the decision or sentence of the law pronounced by a court and entered upon its dockets, minutes or records. The judgment of a court can only be shown by its records. Where there is no record there is no judgment.

What constitutes the record of a court according to the law and practice of Georgia? By the Code of Georgia (section 267) it is made the duty of the clerk to attend all sessions of the court, and keep fair and regular minutes of its proceedings from day to day, including a transcript of the judge's entries on his docket, when not more fully shown in a book kept for that purpose. All proceedings of the court, even continuances, should be placed upon the minutes. Brady v. Little, 21 Ga. 135. "The entry on the bench docket, as we have repeatedly held, is not the proper evidence as to what has been done or adjudicated by the court." Harwell v. Armstrong, 11 Ga. 330. In the case of Lea v. Yates, 40 Ga. 56, the supreme court of this state held: "That a confession of judgment for a sum of $——, with interest and costs of suit, would not sustain a judgment entered up for a specified sum; that such a judgment was no lien on the property of the defendants, and a subsequent order of the court amending the confession by filling the blank will not create a lien on the property purchased from the defendant, bona fide, prior to such order. The record was only notice of what it contained, and was not notice that there was any legal judgment against the defendants or any lien upon their property." Under such a practice, there is no room left for doubt, that the records of the Bibb superior court contained no evidence of the judgment of Gunn until more than two years after the mortgage to complainants had been executed. As to third parties, there was no judgment until the nunc pro tunc order directing an entry upon the minutes.

The memorandum of a judgment which the attorneys for Gunn indorsed upon the declaration at the November term, 1866, was only for the principal sum due. There is no claim that any judgment for interest was rendered at that time. Down to this day, so far as the record shows, there has never been a judgment entered upon the minutes of the court, either by nunc pro tunc order or in any other manner for the principal sum claimed to be due Gunn. The only judgment ordered to be entered nunc pro tunc was a judgment for interest, and this was entered for the first time at the April term, 1871. It cannot be said, that what Woolfolk told Plant about the judgment against himself can make a judgment when there was none. Suppose Plant had gone to the record to find the date and amount of the judgment of which Woolfolk spoke. The minutes of the court and judgment docket would have shown that no such judgment existed. He cannot be charged with notice of anything more than the records of the court revealed. All that he could have learned, even by reading every paper in the case, would be that the jury had rendered a verdict which had never been entered on the minutes of the court, and upon which the court had never pronounced any judgment. Such a record as that is notice of lis pendens and nothing more. The subsequent action of the court, in ordering the verdict and judgment to be entered upon the minutes, could not affect the rights of intermediate incumbrancers. It would avail, at most, as between the parties to the judgment.

We think, therefore, that the mortgage of the complainants and the judgment recovered thereon is valid and binding, and that it constitutes a lien upon the fund in court, the proceeds of the mortgaged premises, superior to the lien of the judgment recovered by defendant Gunn.

[NOTE. On appeal to the supreme court, the decree of this court was reversed. 94 U. S. 664. Subsequently complainants amended their bill, and it was submitted for final decree upon pleadings and evidence. The bill was dismissed. 7 Fed. 751.]

PLANT (GODY v.). See Case No. 5,499.

Case No. 11,206.

PLANT v. HOLTZMAN et al.

[4 Cranch, C. C. 441.] [1]

Circuit Court, District of Columbia. March Term, 1834.

CONFESSION OF JUDGMENT—SUPERSEDEAS—MARYLAND STATUTE OF 1791.

The confession of judgment, in order to operate as a supersedeas, must be made in the very words of the statute of Maryland, 1791, c. 67; and an execution issued upon a judgment confessed in any other form by way of supersedeas is null and void, and the justice who issued the

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

execution, the constable who served it, and the party who ordered it, were trespassers, and liable to the party injured thereby, for his damages.

Trespass, against the justice of the peace, who issued five writs of fieri facias against the plaintiff upon five supersedeas judgments supposed to have been confessed by the plaintiff, but not confessed in the form required by the statute. The only evidence of the confession of judgment was an indorsement by Mr. Justice Clark on the warrant of arrest of one Richard Wright at the suit of the present defendants, James and Alexander Heron, in these words: "Superseded June 29th, by James K. Plant."

C. Cox, for defendants, contended that it was not necessary that the certificate of the confession should be made out in full and signed by the justice. And the uniform practice had been otherwise; and that the justice's indorsement that the debt was superseded, was conclusive.

CRANCH, Chief Judge (nem. con.). This is an action of trespass brought by James K. Plant against John Holtzman, a justice of the peace, and James and Alexander Heron, for causing five writs of fieri facias to be levied on the goods of the plaintiff, at the suit of the defendants, James and Alexander Heron. The facts of the case appear to be as follows: The plaintiff's goods were seized by one Trunnell, a constable, upon five writs of fieri facias issued against the plaintiff by the defendant Holtzman, whose only authority for issuing the same was the following indorsement on each of five warrants of arrest issued by John Cox, a justice of the peace for the county of Washington, against one Richard Wright, at the suit of the other defendants, James and Alexander Heron, namely: "1833, June 6th. Judgment for plaintiff confessed. Debt, forty-five dollars and two cents, on interest from date; cost, fifty-eight cents. John D. Clark. Superseded June 29th, by James K. Plant. John D. Clark." The said John D. Clark was a justice of the peace for the county of Washington. The original warrant of arrest, issued by Mr. Justice Cox, commanded the constable to have the said R. Wright "before a justice of the peace" for the said county on the 8th of June, 1833, to answer to James and Alexander Heron, "in a plea of debt under a warrant."

By the second section of the act of congress of the 1st of March, 1823 (3 Stat. 743), extending the jurisdiction of justices of the peace in the District of Columbia, it is enacted "that in all cases where judgments shall be rendered by a justice of the peace, it shall be lawful for the defendant to supersede the said judgment at any time within sixty days from the rendition of the same; which supersedeas shall stay execution for six months thereafter, and shall be taken by the justice who rendered the judgment, and no other." And by the ninth section, it is provided "that any justice of the peace before whom supersedeas may be taken, or any other justice of the peace of the said county, may and shall, at the request of the plaintiff," etc., "issue execution, by way of capias ad satisfaciendum or fieri facias, against the principal debtor and his sureties, or against either of them, after the expiration of the time so mentioned in the said supersedeas." That act does not prescribe the form or manner of superseding a judgment. This is done by the Maryland act of 1791, c. 67; by the first section of which act, it is enacted, that no execution shall issue upon any judgment obtained in the court of appeals, or general court, or upon any decree in the court of chancery, provided the person against whom such judgment or decree is obtained, shall come before one judge of the general court, one of the justices of the county court, or two justices of the peace of the county, etc., "within two months after the rendition of such judgment, and, together with two other persons, such as the said judge," etc., "shall approve of, confess judgment for his debt, and costs of suit, adjudged or decreed, with stay of execution for six months thereafter, which confession shall be made in manner and form following; that is to say: 'You, H. M., A. B., and C. D., do confess judgment to E. F. for the sum of ——, and —— costs, which were recovered by the said E. F. against H. M. on the —— day of ——, in the —— court; the said —— to be levied of your bodies, goods or chattels, lands or tenements, for the use of the said E. F., in case the said H. M. shall not pay and satisfy to the said E. F. the said —— so as aforesaid recovered against him, with the additional costs thereon, on the —— day of —— next;'" which confession shall be signed by the said "judge, justice, or justices, before whom the same is made, and certificate thereof shall be procured under the hand or hands, of the said judge, justice, or justices, and such certificate shall be a sufficient supersedeas to the sheriff to forbear serving execution upon the body or goods of the person so obtaining such certificate."

By the third section it is enacted, that no execution against any person shall issue on any judgment rendered by a single magistrate, provided such person shall go before any justice of the peace of the county within two months, etc., "and together with security, such as the justice shall approve of, confess judgment for the debt and costs of suit adjudged, with stay of execution as aforesaid; which confession shall be in manner and form as aforesaid; and shall be signed by the justice taking the same; and certificate thereof shall be procured under his hand, which shall be a sufficient supersedeas as aforesaid."

It is admitted, that Mr. Justice Clark did

not take the confession of judgment in the manner and form prescribed in the act; having never spoken to the debtor and his surety the precise words required by the act to make a valid confession, or recognizance; and that no such words had been spoken or written by Mr. Justice Clark, or certified to Mr. Justice Holtzman before the executions were issued and served. Mr. Justice Clark, however, has, since the service of the executions, signed a paper purporting to be a confession of judgment something like that required by the act; but what words were addressed by the justice to Mr. Wright and Mr. Plant, or what words were spoken by them to him, which he thought justified him in writing the words, "superseded by James K. Plant," on the back of the warrant of arrest, do not appear. That indorsement does not affirm that Mr. Wright confessed a new judgment jointly with Mr. Plant.

The power of the justice to render a new judgment upon the confession of the debtor and his surety, is a special power given by statute, and to be exercised in a precise and exact form; and the general rule is, that such an authority must be strictly pursued, or the act is a nullity.

It is stated that the entries on the justice's docket, and the judgment of the justice, were the only forms then generally observed. Those entries are the same which are before mentioned as having been indorsed on the original warrants of arrest. They are certainly not the forms required by the statute to constitute a valid confession of judgment. A mere declaration by any person, that he is willing to supersede a judgment for the debt of another, is not such a solemn confession of judgment as the act requires. The debtor and his surety should go before the magistrate at the same time, and should enter into recognizance in the very words required by the act; and the magistrate should not certify that to be done which was not done. In order to prevent mistakes and misunderstandings in so important a matter as a confession of judgment, which may involve a man in ruin, the legislature has thought proper to give a peculiar solemnity to the transaction, and to require it to be done in a precise form. If not done in that form, it cannot be a judgment; for the whole validity of the transaction is derived from the statute itself, and it must be done exactly according to the prescribed forms, or it is of no avail. The legislature has required certain forms and ceremonies. The magistrate dispenses with them. If this can be done, there is no use in making laws. Whatever may have been the practice of Mr. Justice Clark, or any other magistrate, it cannot alter the law.

In the present case, the confession of judgment, not having been made in the manner and form required by the statute, no judgment was rendered against Mr. Plant, and Mr. Justice Holtzman had no authority to issue the writs of fieri facias, and he and the other defendants who procured the writs, and the constable who served them, must be considered as trespassers. See, also, Bac. Abr. "Trespass," D; Yates v. Lansing, 5 Johns. 290; The Marshalsea, 10 Coke, 68; Terry v. Huntington, Hardr. 480.

Case No. 11,207.

The PLANTER.

[7 Pet. (32 U. S.) 324.]

District Court, E. D. Louisiana. Dec. 10, 1830.[1]

ADMIRALTY—JURISDICTION—DIVERSE CITIZENSHIP—REPAIRS.

[1. The admiralty jurisdiction of a federal district court is not dependent upon diversity of citizenship, but extends to suits between citizens of the same state.]

[Cited in The Calisto, Case No. 2,316.]

[2. A contract for repairs on a vessel, their extent being unknown, provided that an account should be kept, subject to the approval of the captain, who made no objection to the account, when submitted, but expressed himself as satisfied with the work, saying that he was not surprised at it, "because there was a great deal more work done than he had any idea of." *Held*, that the owners of the vessel could not thereafter object to the price, or the workmanship.]

[3. The failure of repair men to deliver a vessel within the stipulated time should not subject them to any forfeiture or reduction of charge, when it appears that the work was subject to the captain's approval, who caused the delay by opposing certain repairs afterwards found to be necessary, and promised indemnity for such delay.]

[See note at end of case.]

A libel was filed on the 10th of December, 1830, by William L. Howard and Francois Varion, shipwrights, residing in New Orleans, against the steamboat Planter (Sylvan Peyroux, claimant), claiming the sum of two thousand one hundred and ninety-three dollars and thirty-five cents, being the balance asserted to be due to them for the price of work, labor, materials furnished, and repairs made on the said boat, under contracts of 13th September and 19th October, 1830, and alleging that by the admiralty law, and the law of the state of Louisiana, they had a lien on the said boat for the payment of the same, and that she was about leaving the port of New Orleans, and praying process, etc. The account for the work, materials, etc., was annexed to the libel.

The owners of the steamboat Planter filed a claim and plea setting forth that they were all citizens of Louisiana, all resided in the city of New Orleans, and that the libelants were also citizens of that state, and that, therefore, the district court of the United States had not jurisdiction of the case. By a supplemental answer the respondents denied all the facts set forth in the libel.

The plea to the jurisdiction of the court was overruled and dismissed, and the parties

[1] [Modified and affirmed by supreme court. 7 Pet. (32 U. S.) 324.]

proceeded to take the testimony of witnesses by depositions, which were filed as part of the proceedings in the case. By the first contract the shipwrights stipulated to do certain specified work and furnish certain materials, the same to be approved by "experts," for which they were to be paid the sum of one thousand one hundred and fifty dollars. By the contract of the 19th of October, the Planter was to be hauled on shore, and in consideration of four hundred and seventy-five dollars, of which two hundred were to be paid in cash, and two hundred and seventy-five in one month, after the boat should be launched and set afloat, certain other repairs were to be done to her, and she should be delivered and ready to receive a cargo by the 20th of November, under a penalty of twenty-five dollars per day for each day her delivery should afterwards be retarded by the shipwrights.

THE COURT [2] made the following decree: "The libelants claim a balance due them of two thousand one hundred and ninety-three dollars and thirty-five cents for work and materials furnished in the repairs of the steamboat Planter at the request of the claimants, and for which they have a lien by the local law. The claimants, in their first answer, deny the jurisdiction of the court, on the ground that all the parties were citizens of the same state, to wit, of Louisiana; that objection, however, was not insisted upon at the trial, and is not sustainable on the admiralty side of this court. In their supplemental answer they deny generally the allegations of the libelants, and pray for the dismissal of the libel, and damages. The whole account of the libelants against the owners amounts to three thousand six hundred and ninety-three dollars and thirty-five cents, including the amount of the written contracts entered into between the parties; of this sum, they acknowledge the payment of one thousand five hundred dollars, leaving, as they allege, a balance of two thousand one hundred and ninety-three dollars and thirty-five cents due them. By the first contract, made on the 11th September, 1830 (the boat being then in the water), the libelants agreed, for the sum of one thousand one hundred and fifty dollars, to make certain repairs on that part of the boat which was above water, from the wheel house to the bow; and it was further stipulated that if they made any other repairs, by replacing unsound timbers in any other part of the boat above water, not then discovered, they were to be paid separately for so much. After commencing the work, it was perceived that the boat required repairs under the water, as well as above, and in consequence of that discovery the claimants, through Captain Jarreau, master of the boat, and one of the owners, agreed to pay the libelants four hundred and seventy-five dollars for hauling out the boat, and for launching her when she should be repaired; and, as the quantity of work to be done was uncertain, it was stipulated that an account of it should be kept, and if approved of by Captain Jarreau, under whose inspection the work was to be done, the claimants bound themselves to pay the amount thus to be ascertained. This latter contract was made on the 19th October last. After the boat was hauled out, it appears the work under both contracts was carried on simultaneously. On a first view of the account current exhibited in this case, it would seem, from the dates, that at least a part of the work to be done under the first contract was again charged, but the subsequent testimony taken in this case shows that these charges were made on account of the extra repairs provided for under the first contract; and it further appears that all the charges made after the 19th of October have no relation to the first agreement, but all relate to the work contemplated by the second contract. From the complexion of the testimony taken by the complainants, their real defence seems to be that the prices of the work charged are greater than they should be, that it was not executed in a proper manner, and that the libelants have forfeited a considerable sum of money in consequence of not delivering the boat within the time stipulated in the contract.

"As to the two first objections, the evidence is conclusive in favor of the libelants. Captain Jarreau himself, upon being shown the account, did not object to it; on the contrary, expressed himself satisfied with the work, and said he was 'not surprised at it, because there was a great deal more work done than he had any idea of.' With respect to the nondelivery of the boat at the time agreed upon, the fault chiefly attaches to Captain Jarreau, who, in several instances, retarded the work by opposing repairs which were proposed by the libelants, but which turned out to be indispensable, and were afterwards ordered by him to be made; besides, he promised them indemnity against their obligation to pay twenty-five dollars a day for every day they were in default in delivering the boat, and gave as the reason that they had to do more work than was at first anticipated. The charge of four hundred and seventy-five dollars is for the specific service of hauling out and launching the boat, and must be allowed as such. On the whole, the evidence and exhibits in the case fully sustained the demand of the libelants. It is therefore ordered, adjudged, and decreed that the claimants pay to them the said sum of one thousand one hundred and ninety-three dollars and thirty-five cents, and costs of suit."

[NOTE. An appeal was taken to the supreme court, which affirmed the decree, except as to a balancing item of $275 for hauling out the steamboat. Peyroux v. Howard, 7 Pet. (32 U. S.) 324. Mr. Justice Thompson, in delivering the opinion, said: "The want of jurisdiction in the district court is not put on the ground set up in the plea in the court below,—that all the

[2] [Samuel A. Harper was district judge for the district of Louisiana at this time.]

parties were citizens of the same state. This has been very properly abandoned here, as entirely inapplicable to admiralty proceedings in the district court. * * *"

[The jurisdiction was then sustained on the ground that the tide has some influence on the waters of the Mississippi at New Orleans, causing them to swell, although it is not enough to slacken the current. In the later case of The Genesee Chief, 12 How. (53 U. S.) 443, the court finally established the principle that the admiralty jurisdiction was dependent on the navigability of the waters, and that the presence of a tide was immaterial.

[The second objection to the jurisdiction—that the vessel was to be employed in navigating waters beyond the influence of the tide—was overruled on the ground that the service was maritime, since the voyage was to begin at New Orleans, within the admiralty jurisdiction; following The Thomas Jefferson, 10 Wheat. (23 U. S.) 428.

[Continuing, the learned justice said: "An express contract having been entered into between the parties, under which these repairs were made, is no waiver of the lien, unless such contract contains stipulations inconsistent with the lien, and from which it may fairly be inferred that a waiver was intended, and the personal responsibility of the party only relied upon. * * * In the first contract no time is fixed for the payment of the one thousand five hundred dollars; it became payable, therefore, as soon as the work was completed. And the repairs under the second contract were to be paid for as soon as the account was approved by Captain Jarreau. There is nothing, therefore, from which it can be inferred that any time of credit was to be allowed. The balance of two hundred and seventy-five dollars, for hauling out the steamboat, * * * was to be paid in one month after the boat was launched and set afloat. A credit was here given, and a credit, too, beyond the time when, in all probability, the boat would have left the port of New Orleans; for it can hardly be supposed that it would have taken thirty days to load her. And by the Civil Code of Louisiana (article 2748) the privilege ceases if the ship or boat is allowed to depart without exercising the right. As to this sum, therefore, the decree is erroneous. * * * By the second contract, payment was to be made when the account was approved by Captain Jarreau; no formal approval appears to have been made. But he was a part owner, and superintended the repairs; and one of the witnesses says he was present when the account was presented to Captain Jarreau, who said he was not surprised at it, because there was a great deal more work than he had any idea of, and that he did not think at first that she required so much. This, although not a direct, was an implied, approval of the account. The delay in not delivering the boat to the appellants by the time specified in the contract was occasioned by her unexpected state and condition, and the extent of repairs required. And, besides, the delivery at the time mentioned in the contract was dispensed with by Captain Jarreau."]

Case No. 11,207a.

The PLANTER.

[2 Woods, 490.] [1]

Circuit Court, S. D. Alabama. Dec. Term, 1874.

SHIPPING — SEAWORTHINESS OF VESSEL — AFFREIGHTMENT — LIABILITY FOR LOSS — IMPLIED WARRANTY—UNDERWRITER'S RIGHTS—SUBROGATION.

1. A vessel is unseaworthy that is not manned by the necessary officers and crew, but no recovery can be had against her on that account for a loss that was not attributable to such deficiency.

[Cited in Holland v. Seven Hundred and Twenty-Five Tons of Coal, 36 Fed. 787.]

2. The fact that a vessel without having encountered any tempestuous weather, suddenly springs aleak within twenty hours after leaving port, so that her officers are compelled, in order to save her from sinking, to throw overboard more than one-third her cargo, raises the presumption that she was unseaworthy when she commenced her voyage.

3. The fact that a vessel is not a common carrier does not relieve her from the warranty implied in a contract of affreightment, that she is sound, staunch and seaworthy.

4. When the underwriters have paid the loss, a suit may be maintained in the name of the insured for their benefit, against the vessel through whose fault the loss occurred.

[See Amazon Ins. Co. v. The Iron Mountain, Case No. 270.]

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

On November 7, 1871, the libellant, the West India and Pacific Steamship Transportation Company, Limited, had possession of and a special ownership in 889 bales of cotton in the city of New Orleans, which it desired to have transported and delivered to the steamship Australian, lying in Mobile Bay. At the date named, the steamer Planter was lying in the port of New Orleans, and her master received on board of her, from the libellant, the 889 bales of cotton to be transported and delivered as aforesaid. Early in the evening of November 7, the Planter left the port of New Orleans with the cotton on board. She proceeded on her voyage that evening and night, the weather being neither stormy nor unusually rough. A little before day of the morning of November 8, the Planter, then being in Missisippi Sound, was examined and found not to be leaking. As soon, however, as she got opposite one of the passes between the Gulf and the Sound, where the water was rougher, at about 6 o'clock a. m., she was found to be leaking rapidly. All her pumps were at once set going, but they could not keep down the water. The master headed her for the land, but she soon became waterlogged and unmanageable, and came to anchor in ten feet water. It soon became apparent that she must be lightened or she would sink. Accordingly 359 bales of cotton were thrown overboard. The consequence was, that the leakage diminished, the pumps gained on the water, and the steamer became manageable, and was run into the port of Ocean Springs. The next day, having been pumped dry, she proceeded on her voyage and delivered the residue of her cargo in good order to the Australian. Of the cotton jettisoned, seven bales were lost. The others were recovered in a damaged condition. To recover for the loss and damage was the purpose of this suit.

Wm. G. Jones and Peter Hamilton, for libellant.

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

Thomas H. Herndon and John Little Smith, for claimants.

WOODS, Circuit Judge. The libellant claims, that by the contract of affreightment, there was an implied warranty of seaworthiness on the part of the master and owners of the Planter, and that at the time of the receipt of the cotton on board, and during the voyage, she was unseaworthy (1) because she was not staunch and sound, and (2) because she was not provided with the necessary officers and crew; and that being unseaworthy, she must be held to respond in damages for the loss.

It is unnecessary to consider whether the Planter was fully manned or not, because there is no evidence that any deficiency of officers and crew contributed to the disaster, and without such proof there can be no recovery. 2 Pars. Mar. Law, 142, 143, note 1; Id. 151, note. I therefore proceed to consider the question, was the Planter staunch, sound and seaworthy at the time of the contract of affreightment? That she did not make the voyage and deliver her cargo according to the contract of affreightment is not disputed. Without having encountered any tempestuous weather, she suddenly sprung aleak within less than twenty hours after leaving port, so that her officers were compelled, in order to save her from sinking, to throw over more than one-third of her cargo. These facts raise the presumption that she was unseaworthy when she started, and throw on claimants the burden of proof to show that she was seaworthy. 2 Pars. Mar. Law, 138, 139; 1 Arn. Ins. 689-691. This the claimants have attempted to prove by evidence tending to show, that in coming through the canal leading from New Orleans to the lake, she ran upon a snag or her wheel picked up a stump, and that in consequence one of her knuckle chains was broken, by which the seams along her kelson were opened. The evidence on this point is the merest conjecture. There is no proof that the knuckle chain was broken at that time, and the effect attributed to the breaking of the knuckle chain by the witness for claimant is denied by some of the witnesses for libellant.

It is in evidence, that there were six or seven knuckle chains in the Planter. The breaking of a single chain would not, it seems to me, be sufficient to account for the results which followed. But the conclusive answer to the theory of the claimants, that the vessel sprung aleak from the breaking of one of her knuckle chains, after the voyage commenced, is found in the following facts: Early in October, 1871, about one month before the voyage from New Orleans to the Australian, the Planter made a trip from Stockton, on the Tensas river, above Mobile, to New Orleans, with a quantity of wood and lumber, making a cargo of about one-third her capacity. She ran from Stockton to the obstructions at the head of Mobile Bay over smooth water with no unusual leakage. She lay all night at the obstructions, and next day proceeded down the bay. A stiff norther commenced to blow and the waves to run high. She had not proceeded more than ten miles down the bay when she commenced to leak rapidly; so much so that it was necessary to run her in towards the western shore in shallow and more quiet water. She was brought to anchor with her head to the wind, and all her pumps set going. After a few hours she was clear of water and proceeded on her voyage. These two voyages of the Planter demonstrate, it seems to me, that there was some material defect in her hull, from which, whenever she encountered a rough sea, she sprang aleak. When the Planter was docked, a few days after her trip from New Orleans to the Australian, she was found to have a rotten plank under her fender in which were holes of considerable size. These holes were a foot above the load-water line, and could not be discovered from the inside on account of the sheeting, nor from the outside on account of the wheel and fender. The situation of these holes appears to account for the fact that she did not leak in smooth water, and to account for her sudden leakage when she got into rough water.

My conclusion from the evidence is, therefore, that when the contract of affreightment was made, and the cargo received on board, the Planter was not staunch, sound and seaworthy.

It is conceded by the claimants that when a vessel is a common carrier, there is an implied warranty of seaworthiness, but they say that this warranty does not arise unless the ship is a common carrier. In my judgment, the authorities do not sustain this view. The warranty of seaworthiness does not depend upon the common law notions of a common carrier. The common law does not give a lien upon the instrument of carriage; there is no lien on a railroad car or wagon. The rule insisted on by libellant is the creature of the admiralty, and exists in all cases of affreightment on vessels. The vessel is hypothecated to the shipper for his security that the contract will be performed by the ship, viz. that the ship will carry the goods in safety, in due season, and by the proper route; that she is in all respects seaworthy, and has a proper master and crew who will take good care of the cargo and properly deliver it. The vessel is subject to a lien in favor of the shipper that he may enforce this contract, as well as the goods to the vessel, for the payment of charges for carriage. 1 Pars. Shipp. & Adm. 171, 172, and notes; The Keokuk, 9 Wall. [76 U. S.] 517; Dupont de Nemours & Co. v. Vance, 19 How. [60 U. S.] 162; The Rebecca [Case No. 11,619]; Fland. Mar. Law, § 204.

I am of opinion, therefore, that the fact that the Planter was not a common carrier does not relieve her owners from the implied

warranty that she was staunch, sound and seaworthy.

It is objected by claimants that the libellant had insurance on the cotton, and, having been paid for the loss, cannot maintain this action. The record shows insurance, but does not show payment of the loss. But if libellant had been fully paid, this suit might be maintained in his name for the benefit of the underwriters by way of subrogation. 2 Phil. Ins. §§ 1723–1725, 1728, 1729; Hall v. Railroad Co., 13 Wall. [80 U. S.] 367; Hart v. Western R. Co., 13 Metc. [Mass.] 99; Garrison v. Memphis Ins. Co., 19 How. [60 U. S.] 317.

My conclusion is, therefore, that there must be a decree for libellant for the value of the seven bales of cotton lost, and for the damage sustained by the 352 bales jettisoned and recovered, deducting therefrom the amount due as freight upon the cotton actually delivered to the Australian.

PLANTER, The (UNITED STATES v.). See Case No. 16,054.

Case No. 11,208.

PLANTERS' BANK v. ST. JOHN.

[1 Woods, 585.] [1]

Circuit Court, S. D. Alabama. Dec. Term, 1869.

STATE CITIZENSHIP—UNITED STATES—CIVIL WAR—EFFECT UPON PARTNERSHIPS—LOYALTY OF COPARTNER.

1. A citizen of the United States owes his first and highest allegiance to the general government, and not to the state of which he may be a citizen.

2. A citizen of one of the late insurgent states, who adhered to the cause of the United States and retired within the federal lines, and remained there during the Rebellion, continued to be a citizen of the United States, notwithstanding the secession and belligerency of his own state, and notwithstanding his purpose to return to that state after hostilities might cease.

3. A declaration of war or the commencement of actual hostilities between two states ipso facto dissolves the partnership relation existing between citizens of the hostile states.

4. Where a partnership consisted of three members, citizens of and doing business in one of the late insurgent states, and soon after the commencement of hostilities, one of the partners removed within the federal lines and adhered to the federal cause, and the other partners remained and assumed to continue the business in the firm name, their acts only bind themselves; the partnership is dissolved by the existence of hostilities between the sections and the relations of the partners as enemies.

5. Under such circumstances an agreement between the partners that the partnership shall continue is against public policy and void.

6. A dissolution of partnership by the fact of war renders express notice of the dissolution unnecessary.

The facts, as disclosed by the evidence, were substantially as follows: Before the late war of Rebellion the plaintiff was an incorporated bank, domiciled at Nashville, Tennessee, and St. John, Powers & Co., was a firm of private bankers doing business in Mobile, Alabama. The firm consisted of Newton St. John, Benj. Whitaker and Wm. G. Chandler, all of whom were resident citizens of Mobile. On the 29th of May, 1861, on account of the war which had then recently broken out, St. John removed with his family from Mobile, and went to New York City. In June of the same year he procured a passport from the department of state at Washington and went with his family to Europe, returning in the following November. After this he continued to reside in New York until October, 1865, when he returned to Mobile. St. John was opposed to the secession of the state of Alabama, and claimed that he adhered to the cause of the United States. When he went to New York, he left in Mobile valuable real estate. During his absence an unsuccessful attempt was made to confiscate his property as an enemy of the Confederate States. There was no formal dissolution of the firm of St. John, Powers & Co. The other partners continued to reside in Mobile and carried on the business in the firm name, and an attempt was made to show that this was with the concurrence of St. John. In January and February, 1862, the Planters' Bank of Tennessee sent for collection to St. John, Powers & Co., at Mobile, certain accepted drafts on citizens of Mobile, with the understanding assented to by St. John, Powers & Co., that the firm, for a compensation of one-forth of one per cent., should collect the amounts due on the drafts and remit the same to Nashville if the drafts were paid on presentment, if not so paid, that the drafts should be returned to the Planters' Bank upon demand. The sum due on these drafts amounted to $46,785. No part of this sum was ever paid by St. John, Powers & Co., to the Planters' Bank, and upon demand made, on March 2, 1866, for the drafts, they failed to deliver them to the bank. Wm. G. Chandler, one of the firm of St. John, Powers & Co., died in June, 1862. This action was brought against St. John and Whitaker, as surviving partners, to recover the amounts due on said drafts, with interest. Judgment by default was taken against Whitaker; St. John plead the general issue.

A. R. Manning and Percy Walker, for plaintiff.

Robert H. Smith and Thomas H. Herndon, for St. John.

WOODS, Circuit Judge (charging jury). The defendant, St. John, pleads the general issue. This puts the plaintiff upon proof of all the material averments of the declaration, and under it the defendant may show either that he did not promise, as alleged in the declaration, or may show any facts impeaching the validity of the promise, and,

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

with some few exceptions, not necessary here to be specified, may show any matter of defense which tends to deny his debt or liability. In order to maintain the issue on his part, the defendant St. John, not controverting the fact that prior and up to the 29th of May, 1861, he was and had been a member of the firm of St. John, Powers & Co., yet, claims that, at the date just mentioned, war having broken out and being then flagrant between the United States and the combination known as the Confederate States, he left the city of Mobile and the state of Alabama—went with his family beyond the military lines of the Confederate States, and within the lines of the United States. That he adhered, during the war, to the cause of the United States, continuing and maintaining his allegiance thereto, recognizing their authority, holding and claiming citizenship in the United States; that he remained beyond the Confederate lines and, except for a short interval, within the United States, and within their military lines, until the close of the war in 1865. That his partners, Whitaker and Chandler, remained in and carried on business in the city of Mobile, in the Confederate States, until the death of Chandler in July, 1862; and that, by reason of this state of facts, the partnership of St. John, Powers & Co. was dissolved before any obligation was incurred to the plaintiff; and that therefore, he, not being a partner in the firm at the time of the transactions with the plaintiff in January and February, 1862, is not liable. "It is a settled rule that when two nations or peoples are at war, all trade with the enemy, unless by permission of the government, is interdicted, and subjects the property engaged in it to confiscation." "The war puts every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other. All treaties, contracts and rights of property are suspended. The citizens of the belligerent nations are, in all respects, considered as enemies. They have no power to sue in the courts of the enemy nation. Not only all trading, but all communication and intercourse with the enemy is forbidden." The Rapid [Case No. 11,576]; s. c. 8 Cranch [12 U. S.] 155.

In a state of war, nation is known to nation only by armed exterior, each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist as to each other in a state of utter occlusion. If they meet, it is only to combat. The universal sense of nations has acknowledged the demoralizing effects which would result from the admission of individual intercourse. Every individual in one nation must acknowledge every individual of the other nation as his own enemy because the enemy of his country. The Rapid, 8 Cranch [12 U. S.] 155. See, also, The Julia, Id. 181. It has even been held that a debtor cannot make remittances to his creditor belonging to a nation at war with his own. Griswold v. Waddington, 16 Johns. 438. These rules of law were applicable to the citizens of the United States and of the seceding states during the late war. It is therefore clear that a partnership could not continue between citizens of the United States and the Confederate States during the war. "The intercourse necessary between partners in the conduct of their business is cut off and forbidden by the laws of war, when the partners are citizens of belligerent nations. A state of war creates disabilities, imposes restraints and exacts duties altogether inconsistent with that relation. If one alien enemy could go on and bind his hostile partner by contracts in time of war, when the other can have no agency, consultation or control concerning them, the law would be as unjust as it would be extravagant." Griswold v. Waddington, supra. Whatever enriches the citizens of a state increases the power of the state to maintain war. It furnishes property for taxation from which the sinews of war are to be drawn. It is therefore utterly inconsistent with the laws of war that a citizen of one state should have capital employed, and devote his skill, knowledge and effort to a partnership business or adventure with the citizens of a hostile state. Such a connection and such an employment of capital would be giving aid and comfort to the enemy. Griswold v. Waddington, supra. See, also, Ouachita Cotton, 6 Wall. [73 U. S.] 521; Coppell v. Hall, 7 Wall. [74 U. S.] 542; McKee v. U. S., 8 Wall. [75 U. S.] 163; U. S. v. Lane, Id. 185.

I therefore instruct you that a declaration of war or the commencement of actual hostilities, which is equivalent thereto, between two nations ipso facto dissolves the partnership relation existing between citizens of the hostile states. You will therefore address yourselves to the inquiry, whether St. John, after the outbreak of the late war and before the transactions set out in the plaintiff's declaration, adhered to the United States, while Whitaker and Chandler adhered to the insurgent states. It is not disputed that up to the commencement of the war, St. John was a citizen of the United States as well as of the state of Alabama. He owed a paramount allegiance to the United States. To continue a citizen thereof he was not compelled to assume any new relation. It was only necessary for him to maintain the old one towards his government. If after the outbreak of hostilities he removed with his family beyond the military lines of the insurgent states, and put himself within the military lines of the United States; if he went not as an agent of the insurgent states, or in their service; if on arriving within the borders of the states adhering to the government of the United States, he acknowledged his allegiance to that government, by submitting to and obeying its laws, then I instruct you that he continued a

citizen of the United States, notwithstanding the state of which he had been a citizen was in armed insurrection against the government of the United States. He continued a citizen of the United States, notwithstanding he may have entertained a purpose at some future day, when hostilities should cease, of returning to the state of Alabama, and notwithstanding he left his property or a portion of it in the insurgent states. And to retain the character of a citizen of the United States it was not necessary for him to settle permanently within the military lines of the United States and without any intention of returning to the insurgent states. If he left the states in rebellion for the purpose of sojourning within the military lines of the United States, and not with any purpose to aid or assist the insurgent states, I charge you that so long as he remained within the lines of the United States, adhering to the United States, obeying their laws and acknowledging his allegiance to them, he was a citizen of the United States. If on the other hand Whitaker and Chandler continued to reside in the insurgent states, whether they engaged in rebellion or not, the simple fact of their residence made them in law enemies of the United States and of every citizen of the United States. Mrs. Alexander's Cotton, 2 Wall. [69 U. S.] 404.

If under these instructions you shall find that St. John continued a citizen of the United States, and Whitaker and Chandler continued to reside within the insurgent states, then St. John was the enemy of Whitaker and Chandler and they were his enemies, and this relation between them put an end to the partnership. Its continuance became illegal against public policy and the laws of war. It was unlawful for them to have any business relation the one party with the other; it was unlawful for them to hold any intercourse; all contracts between them became suspended during the war. In short, a continuous partnership became impossible. The partnership was dissolved by the condition of public affairs and the relation which the partners bore to each other as enemies. And this would be true even if the parties desired and consented that the partnership should continue. The partnership ceases because it is unlawful, because the laws of war forbid it, because the public safety which is the supreme law forbids it. And therefore, no acknowledgment by one partner or another can make or continue a partnership when the public law says that it cannot and shall not exist. If the law holds all partnerships in war, between citizens of the hostile states unlawful, it is not in the power of the parties to create or continue a partnership in defiance of law. Nothing can be plainer than the proposition that if the parties cannot lawfully form or carry on commercial business together during the war, every agreement for such a purpose would be null and void. Griswold v. Waddington, supra.

The public law and public policy forbidding the partnership relation between citizens of hostile states, it is not in the power of the partners to continue a partnership during war, by failing to give notice of its dissolution. A dissolution of partnership by the fact of war demands no notice to any person whatever to make it effectual as to all persons whomsoever. If the contrary doctrine were held, enemy partners might continue their partnership relation to a great extent in spite of public law and the public welfare, by a mere failure to give notice of its dissolution. Griswold v. Waddington, supra. If then you shall find from the proof and under the instructions I have given you, that St. John continued a citizen of the United States after the outbreak of the war, and his partners Whitaker and Chandler continued to reside within the limits of the insurgent states, then these facts dissolved the partnership which had existed between them without notice, and in spite of any agreement between them, if any such there was, that the relation should continue, and your duty in this case will end so far as St. John is concerned by a verdict in his favor. But if on the other hand you shall find that the defense set up by St. John is not made out, you will proceed, if the plaintiff has established the averments of the declaration to your satisfaction, to assess the damages.

You will determine in what amount the plaintiff has been damaged by the failure of defendants to pay over the money collected on the drafts, if any was collected, or to return the unpaid drafts on demand. The plaintiff is entitled to the money actually collected, with interest, and to the value of the bills unpaid and not returned, also with interest from the time demand was made for them. You will arrive at the value of the unpaid drafts by estimating from the evidence what amount could have been collected on them at the time they were sent for collection, deducting reasonable costs and charges for collecting. Whatever amount the plaintiff has shown could have been made upon the unreturned drafts, that you will allow as damages, with interest from the time demand was made for the return of the drafts.

Default has been taken against Whitaker. If you find for St. John, you will still assess the damages against Whitaker. If you find against St. John, you will assess the damages against both him and Whitaker.

The jury returned a verdict in favor of St. John and assessed the damages against Whitaker at $65,742.63.

See Philips v. Hatch [Case No. 11,094]; Montgomery v. U. S., 15 Wall. [82 U. S.] 395; Woods v. Wilder, 43 N. Y. 164.

Case No. 11,209.

PLASTIC SLATE-ROOFING JOINT-STOCK CO. et al. v. MOORE.

[1 Holmes, 167.] [1]

Circuit Court, D. Rhode Island. June, 1872.

PATENTS—VALIDITY OF REISSUE—ANTICIPATION—IMPROVED ROOFING COMPOSITION.

1. The reissued patent granted to William L. Potter, July 16, 1867, for an "improved composition for roofing and other purposes," as limited by disclaimer of May 10, 1871, *held* valid for the use for roofing purposes of pulverized argillaceous rock mixed with coal-tar to the consistency of plasterer's mortar.

2. An invention consisting in the use for a roofing, of a mixture of pulverized argillaceous rock and coal-tar, of the consistency of plasterer's mortar, hardening on exposure into a solid slate roof, is not anticipated by prior use of thin mixtures of pulverized slaty material and oil or coal-tar, as paints for the sides and roofs of buildings.

In equity.

James H. Parsons and James A. Hudson, for complainants.

B. F. Thurston, for defendant.

SHEPLEY, Circuit Judge. This is a bill in equity, brought by the complainants, the Plastic Slate-Roofing Company as owner, and Edson A. Sammis, its licensee for the state of Rhode Island, of the rights under the reissued letters-patent, issued on the sixteenth day of July, 1867 [No. 2,684], to William L. Potter, and assigned to the complainants, for "an improved composition for roofing and other purposes," against the defendant, John A. Moore.[2]

Pendente lite the complainants filed a disclaimer in the office of the commissioner of patents, whereby they disclaim all combinations of matters, and the uses thereof, mentioned in the reissued Potter patent, save only the combination or mixture of pulverized slate or argillaceous rock with coal-tar, otherwise known as gas-tar, for roofing purposes. Complainants' title is proved, and is not in question.

Defendant's answer alleges knowledge and use of the composition claimed as the invention of Potter prior to the date of his letters-patent, by many different persons named in the answers; and especially alleges that the invention claimed as Potter's was substantially described in letters-patent granted by the United States to Abraham Straub on the seventeenth day of November, 1863. The answer also denies infringement, and admits that the defendant is, and has been, engaged "in the business of grinding up stone to mix with other materials for roofing and other purposes;" and alleges that such composition is made by him in accordance with instructions contained in letters-patent granted to John A. Moore, the defendant, on the twenty-first day of July, 1868, "for improved roofing cement."

As the reissued patent describes the object of the invention to furnish "an improved composition for roofing and similar uses (all other uses being covered by the disclaimer), which shall be of such a nature that when exposed to solar or artificial heat it will harden into a solid body of slate," and consists in the use of slate or argillaceous rock mixed with coal-tar or gas-tar for roofing purposes, it becomes necessary to define the meaning of the terms "slate or argillaceous rock" as used in the patent, and stated in the patent to be also called "schist and shale."

The words "slate," "slate-rock," "schist," and "shale," have both a technical and also a more general and a popular meaning. Technically they refer exclusively to the structural formation of the rock, without any reference to its chemical constituents. In the popular and general sense they refer to rocks containing clay, argillaceous rocks, of whatever structural formation,—the argillaceous quality being the characteristic, without regard to structural formation. "Slate-rock" is a term universally used by geologists and practical quarrymen to indicate an argillaceous rock, or a rock in which alumina or the silicate (clay) is a characteristic constituent. Argillaceous rocks are well known generally by the name "slate-rocks," as rocks containing a large amount of argillaceous matter are mostly found laminated. These words are undoubtedly used in the patent in their general sense, as indicating argillaceous rock of any textural formation. The patentee states in the specification that he takes "what is generally known as slate or argillaceous rock, also called schist and shale;" that "it is not necessary that it should be slaty in its structure, as that which breaks in cubes, or fractures irregularly, will answer the purpose equally as well, provided it is argillaceous." He also says, "It is necessary that the rock should possess this peculiarity, in order to produce the desired result." This language of the patentee clearly shows that the rocky material of the compound covered by the patent is simply pulverized argillaceous rock, whether found in slates, shales, or other form.

The main ground of defense relied upon by the defendant, upon the question of novelty of invention, is in the allegation that the invention of Potter was substantially described in letters-patent issued by the United States to Abraham Straub on the seventeenth day of November, 1863.

Professor Hedrick, who was the chief examiner in the patent office, who examined and allowed both the Potter and the Straub patents, states clearly the distinction between the two inventions. He says the thing that was new with Straub, was to combine a species of limestone, known as shell or shale rock, in powder with coal-tar asphaltum, sometimes known as artificial asphaltum, which is produced by boiling down coal-tar until it

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [The original letters patent were granted Feb. 1, 1865, No. 46,495.]

becomes hard and brittle, resembling natural asphaltum. The combination was effected by heat; and the compound had to be spread or formed into shape while hot, as it was not plastic when cold. It became hard by cooling. The basis of Potter's invention, he says, is pulverized slate or slate-rock, ordinarily known as clay-slate, and by mineralogists as argillite. Chemically, it is a silicate of alumina; geologically, it belongs to the older formations. This material is ground to a fine powder, and used in combination with coal-tar, oil, or other cementitious material, to form a plastic compound to be used in forming roofs. It may, in a cold state, be applied to the material to be covered, and hardens by exposure to air and heat.

Without recapitulating in detail the evidence of Professor Antisell, and of Marcellus Bailey, which clearly elucidates the distinction between the two patents, it is sufficient to state briefly that the material points of difference between them are these: The Straub patent calls for the use of limestone, calcareous matter, and impliedly excludes argillaceous matter and silex; Potter's patent calls for argillaceous matter, and includes silex. Straub boils coal-tar until he makes artificial asphaltum of it, and stirs into this boiling mass his pulverized limestone, until the desired hardness is obtained by means of heat; Potter mixes his pulverized argillaceous matter with unboiled coal-tar, without any aid of heat. The resultant compounds are different, and the modes of application are not the same. Straub's mixture is applied while the compound is hot; it hardens by mere loss of heat, becoming soft again whenever sufficient heat is absorbed, and hardening again upon its escape. Potter's mixture is applied cold, and it hardens by exposure either to solar or artificial heat.

A general expression used by Straub in his patent, that "any fine-grained rock having a slaty structure may be used," is relied upon by the defendant as showing that he intended to include argillaceous rock; but we think that this expression, taken in connection with the fact as testified to by Professor Hedrick, that Straub's application originally contained the claim for the use of clay also, and was only allowed after he had disclaimed its use, was intended by him rather to show that the calcareous rock which he uses has undergone a change toward a hard and rocky state. But even if clay or argillaceous rock like that described in the Potter patent had been used by Straub, the granting of his patent for a boiled cement would not have anticipated the Potter patent.

Several witnesses examined on behalf of the defendant have testified to the use, anterior to the date of Potter's invention, of mineral paints. Some of these paints appear to have been made from a mixture of a pulverized slate-rock, or rock of a slaty or shaly structure, with oil or viscous materials, and sometimes with coal-tar. The answer to this evidence is found in the fact, apparent upon a careful examination of the testimony, that all such uses were uses of the compound simply as a paint, whether applied to the sides or roofs of buildings. The mixture in all such cases was made thin, and, when applied to the roof, was mixed in the manner described by Boutwell, the most important witness for the defence, who says, he mixed it "about as stiff as we mix paint, and put it on with a brush; and as it got old and leaked I repainted it a good many times in the same way." This is a different compound, and differently applied, from Potter's, which, being mixed to the consistency of plasterer's mortar, forms of itself a permanent roof of stone, hardening by exposure to the elements into a solid body of slate.

On the whole evidence in the cause, in the opinion of the court, since the filing of the disclaimer limiting the claim, as previously stated, the patent may be sustained for the use of argillaceous rock pulverized and mixed with coal-tar to the consistency of plasterer's mortar for roofing purposes. Disregarding the evidence in relation to abandoned experiments and trials which did not result in practical or useful operation, and did not put the public in practical and useful possession of the compound, and throwing aside, as inapplicable to the present posture of the case, the evidence in relation to the use of a compound in some respects similar to Potter's for a paint only, we think Potter is fairly to be considered as entitled to claim to be the first and original inventor of the improved composition for roofing purposes, as described in his claim, as now limited by the disclaimer.

Little need be said on the question of infringement, after what has been already stated, as to the construction of the claim in the Potter patent. The rock which defendant pulverizes and uses, is proved incontestably by the testimony of Professors Stone and Appleton to be an argillaceous rock. This he mixes with coal-tar to the consistency of plasterer's mortar, and applies the mixture to form a permanent roof. His composition for roofing purposes was not merely similar to Potter's, but was correctly described by himself, in his statement to Charles H. Perkins, as "the same thing."

Decree for injunction and account, without costs.

Case No. 11,210.

The PLATINA.

[3 Ware, 180;[1] 21 Law Rep. 397.]

District Court, D. Massachusetts. July, 1858.

ADMIRALTY—STATE CLAIM—PLEADING AND PROOF—SET-OFF IN CAUSE OF DAMAGE—ABDUCTION OF MINOR—ADVANCES FOR CLOTHING.

1. In the admiralty, when the respondent intends to rely on the objection of the staleness of the claim, or any other defence that does not go to the merits, it should be propounded by

[1] [Reported by George F. Emery, Esq.]

formal plea, or by a distinct allegation in the answer. Otherwise, evidence will not ordinarily be received to support it.

[Cited in The G. H. Starbuck, Case No. 5,378. Southard v. Brady, 36 Fed. 561; The Queen of the Pacific, 61 Fed. 215.]

2. A set-off, or compensation founded on contract, express or implied, is no defence to a libel in a cause of damage. But in a suit by a parent for the wrongful abduction of his minor son, where the damage, substantially, is loss of service, the court is not absolutely precluded from taking into consideration, in determining the amount of damage, the advances of clothing and other necessaries for the minor during the time.

[3. Cited in Cutting v. Seabury, Case No. 3,521, to the point that knowledge of the minority by the respondent is essential to the maintenance of an action by a father for the loss of his minor son.]

In admiralty.

C. G. Thomas, for libellant.

A. S. Cushman, for respondents.

WARE, District Judge. This is a libel brought by James N. Luce, of Edgarton, the father of James W. Luce, against Andrew Hicks, in a cause of damage. He propounds and alleges in his libel, that on the 13th of July, 1850, Hicks, at New Bedford, being then the owner of the bark Platina, shipped James W. Luce, his son, at that time a minor of the age of nineteen years and three months only, for a whaling voyage in said bark to the Pacific Ocean, without his knowledge or consent; thus wrongfully depriving him of the labor and services of his child, and withdrawing him from his custody and control for the remaining period of his minority. He claims damages for the loss of his son's services, as well as for the violation of his paternal rights, by this wrongful abduction. The bark returned to New Bedford July 11th, 1853, after an absence of three years.

The answer admits the shipment of J. W. Luce at the time alleged in the libel, but alleges that he was shipped as a man of full age, and for full wages; and that, if he was a minor, he had been emancipated, and had been permitted to act for himself, and enjoy the proceeds of his own labor and industry; that he was settled with at Talcahuana, a port in Chili, and there paid the full amount of his lay, and by his own consent discharged from the bark for the purpose of going on another whaling voyage.

The minority of the young man was satisfactorily proved, as it is alleged in the libel, and there was no proof of a formal nor of an informal and constructive emancipation, as by his leaving his paternal home, being allowed to dispose of his own time, and appropriate to himself the proceeds of his own industry. On the contrary, the proof is that he continued an inmate of his father's family, and worked with him on his farm for his benefit. And also it appeared that it must have been known, if not to the owner personally, at least to his agents, whose acts are imputable to him, at the time of the shipment, that he was a minor, as in the crew list he is, in the description of his person, put down as of the age of nineteen. The minor having been shipped without the father's consent or knowledge, there can be no pretence that he carried with him an implied authority to receive his wages, and the master, who made the settlement, must be held to have done it in his own wrong. There is, therefore, no legal bar to the father's recovering, in the form of damages, of the actual value of his son's services during his minority, and his wages may be assumed as a reasonable measure of the value of those services, of which he was deprived by the act of the respondent.

The libellant also claims further damages for the violation of his paternal rights by the wrongful abduction of his child, in withdrawing him from his control, and depriving him of the comfort and satisfaction of his son's society, and the child of the benefit of the influence, counsels, and examples of a parent in forming his habits for his future life. This claim would stand on stronger ground, if the boy had been of a tender age, and thus having more need of domestic training, and of the care and watchfulness of a parent in regard to his education and morals; or, if it appeared that the father had purposed and intended his son for a different employment. But he had arrived nearly at full age. He had been on one whaling voyage before, and, as far as appears, without objection on the part of the father, if not with his consent. It does not appear that the father had any objection to his son's engaging in a seafaring life. No complaint of this kind was made on the return of the vessel. He was disappointed and dissatisfied when he found that the wages had been paid, but did not complain of the voyage. There may be a legal ground of action for the violation of his paternal rights; and these, when exercised in the true spirit of a parent, I think the law ought not to allow to be wantonly invaded with impunity; but this is not a case requiring a court to mark it with exemplary damages of this kind.

But the counsel for the respondent has urged an objection that goes to the whole libel; it is that the demand is stale, and not fit to be entertained by a court of justice. If it were the intention of the respondent to rely on this defence, it should have been regularly pleaded. According to the practice of the admiralty, a defence that does not meet the merits of the case cannot avail the respondent unless he gives the adverse parties notice of such defence by a plea or a distinct allegation in the answer. But in this case enough has been shown by the testimony to overcome this defence if it had been formally propounded. The voyage terminated in July, 1853, and the libel was filed in June, 1857. The claim is therefore not barred by the statute of limitation, even if that statute applied in the admiralty, which it does not. But courts of admiralty, like those of equity, though not bound by the statute, considering it as a law of repose, have always acted in

deference to the principles and reason of the statute. They will not actively lend their aid to enforce stale demands. But the objection of staleness properly applies, at least with the most stringency, when the demand has been suffered to sleep for a considerable time in silence, and the pretended debtor has been left to rest in security until, by lapse of time and inattention, he may have lost the means of making an effectual defence to an unfounded or doubtful claim. If, then, an action is suddenly sprung upon him, he may justly call in aid the reason and equity of this statute of repose and oblivion. In the present case the creditor has not slept on his demand. From the beginning he expressed his dissatisfaction with the settlement and payment by the master. He wanted and had calculated on his son's wages to pay for some land which he had added to his farm. He continued to insist on his rights. He offered a compromise, which was rejected. A reference was agreed upon, and afterwards declined by the respondent; and he was finally driven to a libel as his only resource. Had this defence been pleaded, it must have been overruled on the evidence.

The respondent has offered in evidence certain advances made during the voyage as a set-off or compensation against the demand in this libel. Such advances are a natural and proper charge on wages. But this is not a suit for wages on a contract, actual or implied; it is in a cause of damage, and a set-off, being a right or title, founded on contract, is no defence to a libel founded on a tort. But the damages, as to the amount, are referred to the discretion and conscience of the court, on the whole case, and all its circumstances; and I do not know that it is absolutely precluded from taking these into consideration in a case like the present, when the loss of service is the principal measure of damage. The whole lay, as it is set forth in the libel, amounted to $578.80. The period of service was three years; one year and nine months of which were during the boy's minority. This would make the father's share $337. The answer states the whole lay a little less. Upon all the circumstances of the case, if the damages are fixed at $12 a month, for twenty-one months, to cover the loss of service, and the wrong done to the libellant's parental right, it does not appear to me to be an unreasonable measure.

Case No. 11,211.

In re PLATT.

[1 Ben. 534;[1] 1 Tomp. Nat. Bank. Cas. 181.]

District Court, S. D. New York. Nov., 1867.

RECEIVER OF A NATIONAL BANK—JURISDICTION—COMPROMISING DEBT.

The national banking act (13 Stat. 115), in the fiftieth section, provides that a receiver appointed under the act may compromise doubtful debts "on the order of a court of record of competent jurisdiction." *Held*, that this court was such a court.

[In the matter of the petition of F. A. Platt, receiver of the Farmers' and Citizens' National Bank.]

In this case a receiver, appointed under the national banking act, applied, on a petition setting forth the circumstances, for leave to compromise a debt. The national banking act, in the fiftieth section, provides that the receiver may compromise doubtful debts "on the order of a court of record of competent jurisdiction." The question arose whether this court was a court of competent jurisdiction. The court, after consideration, decided that it had jurisdiction, and ordered the matter to be referred to a commissioner to take proof of the facts in the case, with his opinion thereon.

[For an action by the receiver against a debtor of the bank, see Case No. 11,215.]

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

Case No. 11,212.

In re PLATT et al.

[7 Ben. 261;[1] 19 Int. Rev. Rec. 132.]

District Court, S. D. New York. April, 1874.

CONSTITUTIONAL LAW—SEIZURE OF BOOKS AND PAPERS—IMPORT ACTS.

1. In June and July, 1873, warrants were issued under the 2d section of the act of March 2, 1867 (14 Stat. 547), under which the marshal seized and took possession of books, papers and correspondence, belonging to P. and B., the parties named in the warrants. In March, 1874, they presented to the judge who issued the warrants, a petition for the return of the papers, &c. On the hearing on this petition, it appeared that, in January, 1874, they had applied to the district attorney of the United States for such return; that such attorney had the books, &c., brought to his office by the marshal, that he might examine them to see which could be properly returned, and of which he desired copies, and which he desired to retain till the trial of suits which had been commenced on behalf of the United States against P. and B. But, the attorneys of P. and B. refusing to consent that such examination might be there made, the books were returned to the marshal's office. Thereupon, the district attorney wrote to the attorneys to say that he was ready to make such examination whenever they would give such consent, to which they answered, offering to stipulate to produce the books on the trial under objection to their admissibility, and to certify to the correctness of any copies taken. Thereupon this petition was filed: *Held*, that the section of the act in question was a provision in aid of the due enforcement of the revenue laws, and was not unconstitutional, as being contrary either to the 4th amendment to the constitution, prohibiting unreasonable searches and seizures, or to the 5th amendment, prohibiting the taking of property without due process of law.

[Cited in Boyd v. U. S., 116 U. S. 635, 6 Sup. Ct. 535.]

2. Under the circumstances of this case, nothing was shown to warrant the further retention of the books and papers.

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

3. The proper proceedings to be taken, when books and papers have been taken under such a warrant, stated.

[In the matter of the petition of John R. Platt and Edward A. Boyd.]

Stanley, Brown & Clarke, for petitioners.
George Bliss, Dist. Atty., and Thomas Simons, Asst. Dist. Atty., for the United States.

BLATCHFORD, District Judge. The petition in this matter prays for an order directing the return to the petitioners of certain books, papers and correspondence mentioned in the petition. It also prays that three certain warrants named in the petition may be vacated. It alleges that the first warrant was issued on the 14th of June, 1873, the second on the 16th of July, 1873, and the third on the 30th of July, 1873, and that the books, papers and correspondence, the return of which is prayed for, were taken by the marshal under the warrants.

The principal question discussed on the hearing on the petition was as to the constitutionality of the provision of the statute under which the warrants were issued. That provision is the 2d section of the act of March 2, 1867 (14 Stat. 547). It is in these words: "Whenever it shall be made to appear to the satisfaction of the judge of the district court for any district in the United States, by complaint and affidavit, that any fraud on the revenue has been committed by any person or persons interested, or in any way engaged, in the importation or entry of merchandise at any port within such district, said judge shall forthwith issue his warrant directed to the marshal of the district, requiring said marshal, by himself or deputy, to enter any place or premises where any invoices, books or papers are deposited relating to the merchandise in respect to which such fraud is alleged to have been committed, and to take possession of such books or papers and produce them before the said judge; and any invoices, books or papers so seized shall be subject to the order of said judge, who shall allow the examination of the same by the collector of customs of the port into which the alleged fraudulent importation shall have been made, or by any officer duly authorized by said collector. And such invoices, books or papers may be retained by said judge as long as, in his opinion, the retention thereof may be necessary; but no warrant for such seizure shall be issued unless the complainant shall set forth the character of the fraud alleged, the nature of the same, and the importations in respect to which it was committed, and the papers to be seized. And the warrant issued on such complaint, with report of service and proceedings thereon, shall be returned, as other warrants, to the court of the district within which such judge presides."

It is urged, that the provisions of the statute are in conflict with the 4th and 5th amendments to the constitution of the United States. The 4th amendment provides, that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The 5th amendment provides, that no person shall "be deprived of life, liberty or property without due process of law." These amendments were proposed by resolution of congress in 1789, and were ratified by the states before 1791.

The constitution (article 1, § 8) gives power to congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States," and "to make all laws which shall be necessary and proper for carrying into execution" the other powers given to it. The fifth act passed by the first congress was the act of July 31, 1789 (1 Stat. 29), "to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States." This act contains numerous regulations to insure the collection of duties on imported goods. Among other things it provides (section 22) that, in any case where a collector is suspicious of fraud, and that goods which have been entered are not fairly invoiced, it shall be his duty to take them into his possession, and retain them until their value is ascertained and the duty is paid or secured; also (section 23) that it shall be lawful for the collector, or other officer of the customs, on suspicion of fraud, after goods have been entered, to open and examine them; also (section 24) that "every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed, and therein to search for, seize and secure, any such goods, wares or merchandise; and, if they shall have cause to suspect a concealment thereof in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application, on oath or affirmation, to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and, if any shall be found, to seize and secure the same for trial." These provisions of law were enacted by the same congress which proposed the two amendments to the constitution referred to; and it cannot be suggested, with any force, that these provisions of law could have been regarded as in conflict with those amendments, or that the congress which proposed, or the states which ratified, those amendments, could have regarded those amendments as forbidding the enactment of

the provisions of the act of July 31, 1789, or of kindred provisions. Those provisions relate to the high and sovereign power of congress to collect duties on imports, and they extend to the authorizing of the seizure, on the mere suspicion of the collector, and without a warrant, of imported goods; and of the opening and examination of the same, after seizure, on the mere suspicion of the collector or other officer of the customs, and without a warrant; and of the searching of any ship or vessel, on the mere suspicion by the collector, naval officer and surveyor, of the concealment of goods subject to duty, by such officers or persons specially appointed by either of them for that purpose, and without a warrant; and of the searching of any particular dwelling-house, store, building, or other place, in the day time, under a warrant to be issued by any justice of the peace, on oath or affirmation, on the application of such officers, if they have cause to suspect a concealment therein of goods subject to duty. These searches and seizures, certainly, were not contemplated to be unreasonable, within the meaning of the fourth amendment, either by those who proposed or those who ratified it, nor could they, so far as they were authorized to be made without a warrant, have been contemplated to be unreasonable for want of a warrant. So, too, these searches and seizures could not have been contemplated to be in conflict with the fifth amendment, as depriving a person of property without due process of law. These searches and seizures were summary and severe, but they were in the exercise of the power of congress to collect duties on imports, and cannot be said not to have been necessary and proper to that end. As is said by the supreme court in Murray's Lessee v. Hoboken Land & Imp. Co., 18 How. [59 U. S.] 272, "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown;" and "probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land;" and "imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to." A search for and a seizure of goods subject to duty is made part of a system for the recovery of duties, and is a necessary and proper part of such a system. Such searches and seizures as the act of 1789 authorizes have never been held to be unreasonable, or to be made without due process of law.

The above provisions of sections 22, 23, and 24 of the act of July 31, 1789, were re-enacted in the 46th, 47th, and 48th sections of the act of August 4, 1790 (1 Stat. 169, 170), and were again re-enacted in the 66th, 67th, and 68th sections of the act of March 2, 1799 (Id. 677, 678). These provisions of the act of 1799 have never been repealed. Provisions like these, in force from the foundation of the government, are a legislative construction of the fourth and fifth amendments of the constitution, and are a construction to the effect that such provisions, to aid in the collection of revenue by duties, are not repugnant to such amendments. These provisions were enacted when the first occasion for establishing a manner of proceeding arose; they have continued throughout the existence of the government, and they have been repeatedly acted on by the other departments of the government. These considerations are entitled to no inconsiderable weight on the question as to whether the proceedings those enactments authorize are in conflict with the amendments referred to. Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539, 621; Murray's Lessee v. Hoboken Land & Imp. Co., 18 How. [59 U. S.] 272, 279, 280.

In aid of these provisions of the act of 1799, congress, by the 7th section of the act of March 3, 1863 (12 Stat. 740), the title of which act is, "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes," enacted as follows: "Whenever it shall be made to appear, by affidavit, to the satisfaction of the district judge of any district within the United States, that any fraud on the revenue has been, at any time, actually committed or attempted by any person or persons interested, or in any way engaged, in the importation or entry of merchandise at any port within the United States, said judge shall forthwith issue his warrant, directed to the collector of the port at which the merchandise in respect to which said alleged frauds have been committed or attempted, has been imported or entered, directing said officer, or his duly authorized agents or assistants, to enter any place or premises where any invoices, books or papers relating to such merchandise or fraud are deposited, and to take and carry the same away to be inspected; and any invoices, books or papers so received or taken shall be retained by the officer receiving the same, for the use of the United States, so long as the retention thereof may be necessary, subject to the control and direction of the solicitor of the treasury." This provision of the act of 1863 was repealed at the time the 2d section of the act of 1867 was passed. The latter was substituted for the former. The latter confines the warrant to cases of committed fraud, while the former extended it to cases of attempted fraud as well as committed fraud. By the latter the warrant is to be issued to the marshal, while by the former it was to be issued to the collector of the port. By the latter the books and papers taken are made subject to the order of the judge who issues the warrant, and may be retained by him as long as, in his

opinion, the retention thereof may be necessary, he being required to allow the same to be examined by the collector, or by any officer duly authorized by the collector, while, by the former, they were to be retained by the collector so long as the retention thereof might be necessary, subject to the control and direction of the solicitor of the treasury. By the latter it is required that the complaint, on the application for the warrant, shall set forth the character of the fraud alleged, the nature of the same, the importations in respect to which it was committed, and the papers to be seized, and that the warrant shall be returned to the district court, while the former made no affirmative provision as to the contents of any complaint or affidavit, or for any judicial control in the matter after the issuing of the warrant. The provisions of the act of 1867 seem intended to guard the proceeding, by requiring that the marshal, if he takes possession of any books or papers under the warrant, shall produce them before the judge; and by directing that the warrant shall so require the marshal; and by directing that the books and papers taken shall be subject to the order of the judge; and by directing who shall be allowed by the judge to examine the books and papers; and by confiding to the judge the determination of the question as to how long it shall be necessary to retain the books and papers; and by requiring the complainant to set forth the nature and character of the fraud alleged, and the importations in respect to which it was committted, and the papers to be seized; and by requiring the warrant, in respect of service and proceedings thereon, to be returned to the district court, as other warrants. After the books and papers are taken under the warrant, the marshal has no right to examine them himself, or to permit any other person to examine them, until the judge gives the direction as to allowing them to be examined; and the judge is not affirmatively required to allow them to be examined by any person other than the collector, or some person duly authorized by the collector, nor has the marshal, under a direction by the judge allowing them to be examined by the collector, or by an officer duly authorized by the collector, any right to examine them himself, or to allow any person to examine them other than the collector or an officer duly authorized by the collector. These restrictions are, of course, subject to the qualification, that the party whose books and papers are taken under a warrant, may, by consent, waive the safeguards provided by the statute, or modify his rights thereunder.

The basis of the proceeding authorized by the act of 1867 is the commission of a fraud on the revenue by a person interested or engaged in importing or entering merchandise at a port in the United States. This means a fraud which deprives the government of revenue. The revenue from imported merchandise is duties. The proceeding, therefore, concerns the enforcement of the laws for the collection of revenue from duties, and is in aid of such collection. The complaint and the warrant should set forth the importations in respect to which the fraud was committed, so as to identify them as nearly as may be, as, for instance, the names of the vessels, the dates of the importations, the marks on the packages, and the nature of the goods. The frauds alleged in the complaints and warrants in the present case were frauds depriving the government of duties. It would have been competent for the officers of the customs to have seized the goods described in the complaints and warrants in this case, for non-payment of the duties of which the government was deprived by the alleged frauds. This might have been done without warrant, as far as a seizure without warrant is authorized by the statute, or under a warrant, as far as a seizure, when authorized, is required by statute to be made under a warrant. By the act of July 18, 1866 (14 Stat. 178), it is provided (section 2) that it shall be lawful for any officer of the customs, &c., to search any vessel, and any person, trunk or envelope on board, and to seize any goods liable to forfeiture for a violation of law; and (section 3) that it shall be lawful for the same officers or persons to search and examine any vehicle or person on which or on whom he or they shall suspect there are goods subject to duty, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there are goods which were imported contrary to law, and to seize any goods found on such search which he shall have reasonable cause to believe are subject to duty, and that any person willfully refusing to permit the search and examination shall be punished, on conviction; and (section 5) that any person authorized by the act to make searches and seizures, or any person assisting him, or acting under his directions, may, if deemed necessary by him or them, enter into or upon, or pass through, the lands, inclosures and buildings, other than the dwelling-house, of any person whomsoever, in the night or in the day time, in order to the more effectual discharge of his or their official duties; and (section 6) that any person forcibly resisting or interfering with any officer or person authorized by the act to make searches or seizures, in the execution of his duty, or rescuing any property seized by him, or, in order to prevent a seizure, destroying or removing goods, shall be punished, on conviction.

The regulations of law requiring the payment of duties on imports, and providing means for enforcing their payment, properly extend to punishment for the violation of such regulations. They also embrace, properly, the forfeiture of goods, to be enforced through their seizure for trial; and a search is a proper part of the means of seizure. The foregoing provisions for the search for and seizure of goods have never been questioned, as in conflict with the constitution. If imported goods may be searched for and seized, because alleged to have been imported or entered in fraud of the revenue, it is difficult

to see why books and papers which relate to the goods in respect to which such fraud is alleged to have been committed may not be searched for and seized and examined. Of course, what is to be searched for and seized is books and papers which not only relate to the goods but will show the fraud. The fourth amendment to the constitution is directed against a search for and seizure of "effects" as fully as it is against a search for and seizure of "papers," and is no more fully directed against a search for and seizure of "papers" than it is against a search for and seizure of "effects." Under the fifth amendment, merchandise is as fully "property" as books and papers are, and books and papers are no more fully "property" than merchandise is. Books and papers appertaining to and evidencing frauds on the revenue in respect to imported goods cannot be said to be unreasonably searched for and seized, in the abstract, if a search for and a seizure of the goods themselves be not, in the abstract, unreasonable; and if a seizure of goods imported in fraud of the revenue does not, in the abstract, deprive a person of the property without due process of law, a seizure of books and papers appertaining to and evidencing such fraud cannot be said, in the abstract, to deprive a person without due process of law of his property in the books and papers. A search and seizure may be unreasonably conducted, in execution, under the statute authorizing it, and thus the right of security sought to be protected by the fourth amendment may be violated; and, under what is due process of law, as authorized by the statute, a person may be deprived of his property, when the statute did not contemplate or authorize such deprivation, and thus the fifth amendment may be violated. But these things are not the fault of the statute as it stands. They grow out of the fact that the statute is administered, .in the particular case, in a manner not authorized by the statute. They are violative alike of the statute and of the constitution, but they have no effect to make the statute unconstitutional.

Congress, by the 8th section of the act of March 3d 1863 (12 Stat. 740), has provided that "if any person shall willfully conceal or destroy any invoice, book or paper relating to any merchandise liable to duty, which has been, or shall hereafter be, imported into the United States from any foreign port or country, after an inspection thereof shall have been demanded by the collector of any collection district within the United States, or shall at any time conceal or destroy any such invoice, book or paper, for the purpose of suppressing any evidence of fraud therein contained, such person shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding two years, or both, at the discretion of the court." This enactment, so far as it relates to the punishment of the offence of concealing or destroying any invoice, book or paper for the purpose of suppressing any evidence therein contained of a fraud on the revenue in the importation of merchandise liable to duty, is valid and constitutional, under the principles laid down by the supreme court, in its opinion given by Chief Justice Marshall, in McCulloch v. State of Maryland, 4 Wheat. [17 U. S.] 316, 416–421. If it may be made an offence to conceal or destroy books or papers containing evidence of a fraud on the revenue in the importation of merchandise liable to duty, for the purpose of suppressing such evidence, it is difficult to perceive why such books and papers may not be sought for and taken, by the sovereign power, to be examined, to see the evidence which they so contain. The end—the collection of duties—is legitimate and within the scope of the constitution, and the means —the examination of the record of the fraud —are appropriate and plainly adapted to the end of recovering the withheld duties, notwithstanding the fraud. These means are not prohibited by the constitution, as has been shown, but consort with its letter and spirit. They are, therefore, constitutional.

This statute, the 2d section of the act of 1867, was held to be constitutional, against the objections above considered, by the circuit court for the district of Maine (Clifford and Shepley, JJ.), in Stockwell v. U. S. [Case No. 13,466] in affirmance of the decision of the district court for that district to the same effect. The judgment of the district court, which was in favor of the United States, was affirmed by the circuit court, and the defendants removed the case, by writ of error, to the supreme court, which affirmed the judgment. 13 Wall. [80 U. S.] 531. But, although the defendants raised in the circuit court the question of the unconstitutionality of the 2d section of the act of 1867, they did not raise it before the supreme court.

Kindred enactments have been held to be constitutional, against like objections. Section 14 of the internal revenue act of June 30, 1864, as amended by section 9 of the act of July 13, 1866 (14 Stat. 101), provides, that an assessor may require, by summons, the production of books of account containing entries relating to the trade or business of any person liable to pay tax, and that, if the summons be not obeyed, obedience to its requirements may be enforced by an attachment to be issued against the person summoned, by a judge of the district court; and that the assessor may enter the premises of any person neglecting to make a return of taxable property, and himself make the list of taxable property. The 49th section of the act of July 20, 1868 (15 Stat. 144), provides that a supervisor of internal revenue "shall have power to examine all persons, books, papers, accounts and premises, and to administer oaths, and to summon any person to produce books and papers, or to appear

and testify under oath before him, and to compel a compliance with such summons in the same manner as assessors may do." In Re Meador [Case No. 9,375], a supervisor of internal revenue issued a summons under the said 49th section, for the production of books and papers, which was not obeyed, and the district judge for the district of Georgia was then applied to to issue an attachment to compel obedience to the summons. It was objected that the provisions referred to were in conflict with the fourth and fifth amendments to the constitution, but the objection was overruled by the court (Erskine, J.), after full consideration. In Stanwood v. Green [Id. 13,301], the 49th section of the act of 1868 was upheld as constitutional by the district court for the Southern district of Mississippi (Hill, J.), against an objection that it was repugnant to the fourth amendment to the constitution. In Re Strouse [Id. 13,548], the same view was taken of the 14th section of the act of 1864, as amended, against the like objection. See, also, In re Phillips [Id. 11,097].

In the present case the alleged frauds are charged, in the complaints and warrants, to have been committed by the persons whose premises are to be entered and whose books and papers are to be taken, and to have consisted, in the particulars described and set forth in the complaints and warrants, in the defrauding of the government, by such persons, of duties on goods imported by them. There can be no valid objection, therefore, to the scope of the warrants.

The 7th section of the act of 1863 provided, that the collector might take and carry away the invoices, books and papers relating to the merchandise or fraud, "to be inspected," and might retain them "for the use of the United States so long as the retention thereof may be necessary." The 2d section of the act of 1867 provides, that the invoices, books and papers taken shall be subject to the order of the judge, who shall allow the examination of them by the collector, or by any officer duly authorized by the collector, and that the judge may retain them as long as, in his opinion, the retention thereof may be necessary. The words "for the use of the United States" are not found in the act of 1867, but they are necessarily implied in that act, for, the proceeding being one in aid of the collection of the revenue by the United States, the books and papers must be not only for the use of the United States, but cannot be for the use of any other than the United States. The manifest object of the act is examination of the books and papers, in respect to the alleged fraud, and retention thereof as long as, in the opinion of the judge, may be necessary, not only for the purpose of examination, but for the purpose of the use, on behalf of the United States, of the evidence which the books and papers may, when examined, afford in respect to the fraud alleged. This is necessarily confided to judicial discretion, in view of all the circumstances of the particular case.

I am, therefore, now called upon to say whether the retention of the books and papers in the present case is longer necessary. The warrants were issued and executed in June and July, 1873. The petition for their return was sworn to on the 12th of March, 1874. No earlier application was made to this court for their return. It appears, by said petition, that three suits are pending, brought by the United States against the petitioners, in August, 1873, to recover moneys, founded on the frauds alleged in the warrants. It must be assumed that the books and papers were adequately examined before the suits were brought, or, if not, that abundant time has elapsed, not only for their examination but for the taking of such copies of and extracts from them as relate to the frauds alleged in the warrants. Copious extracts from letters, alleged to show the frauds, were presented to the court on the hearing on the petition, showing that the papers had been searchingly examined. The defendants set forth, in their petition, that the books and papers are necessary to them for their preparation for trial in the suits referred to. The books and papers are or ought to be in the custody of the marshal, under the warrants. It is alleged, in the petition, that they, or the principal part of them, are in the office of the marshal; that the marshal, on being applied to to return them, referred the matter to the district attorney; that the petitioners applied, many months since, to the district attorney for their return, but unsuccessfully; that they renewed their application to the district attorney on the 5th of February last, by a letter, of which they set forth a copy; but that the application has not been complied with. The district attorney makes affidavit that the petitioners did not apply to him several months since for the books and papers, but first applied about the middle or latter part of January; that he stated, in reply, that he would examine as to the matter; that, on inquiry, he found that the papers and the entries in the books which are, in his opinion, essential for the government to retain until the trials of the suits referred to, are very numerous; that thereafter he arranged, as he supposed, with the attorney for the petitioners, that all the books and papers should be brought to the district attorney's office, and that he, the district attorney, would, as rapidly as possible, examine them, and see if any, and which ones, could be properly returned to the petitioners, of which, if any, he desired to have copies made, and which, if any, he desired to retain until the trials; that, accordingly, the marshal sent the books and papers, in a box, to the district attorney's office, where they were opened in the presence of said attorney, and, as the district attorney was about to

commence to examine them, he remarked to the said attorney that, of course, it was understood that the bringing of the books and papers to the district attorney's office was with the consent of the petitioners, and that they assented to the making of such examination by the district attorney; that the said attorney then stated that he could give no consent of any kind; that thereupon the district attorney told him that he would not touch the books and papers, or retain them in his office; that the district attorney then, in the presence of said attorney, had them nailed up, and ordered them to be returned to the marshal, telling said attorney that if, at any time, he would give a consent that the district attorney might go over them, or would get any order from the court to that effect, the district attorney would do so, and that, in the mean time, the district attorney would request the marshal to give to the petitioners and their counsel all possible access to the books and papers; that he then addressed to the petitioners' attorneys, on the 3d of February last, a letter, of which he sets forth a copy, and received in reply the said letter of February 5th; and that the district attorney is, and has always been, ready to examine the books and papers, and to arrange, if possible, for their return to the petitioners. The district attorney states, in his affidavit, as the reason for his action, that he knew the petitioners had commenced a suit against one person for the taking of the books, and he did not desire to subject himself to a similar suit. The letter of the 3d of February from the district attorney to the attorneys for the petitioners was in these words: "In accordance with what I understood to be your wishes, I requested the marshal to bring the books and papers of Platt & Boyd to my office, in order that you might examine them with more convenience to yourselves, and that I might the more readily see which, if any of them, I should be justified in delivering to you. But, when, on opening the box in the presence of your Mr. Stanley, he declined to consent to their being here, or to make any stipulation whatever, I at once nailed up the box and requested the marshal to take it into his personal custody. I have since requested the marshal to give you or your clients constant access to them. If you desire, I will cause an examination to be made, to see whether any, and which, can be returned to you, with a due regard to the interests of the government." The letter of the 5th of February from the attorneys for the petitioners to the district attorney was in these words: "We have your favor of the 3d instant, relative to the books and papers of Platt & Boyd. We shall be glad to receive, on behalf of our clients, from any one, such of their books and papers as may be returned to them, and, on their behalf, we request the delivery of all their books and papers to them, as we have heretofore requested such delivery. They have now been out of the possession of our clients for upwards of seven months, and there has been ample time to take copies. Our clients need them in their business, and to enable them to prepare for trial in the suits pending. We offer to stipulate to produce them upon the trial, reserving our right to object to their admissibility in evidence upon the same grounds that we might object on the trial had they not been returned to us, or, in default thereof, to admit secondary evidence of their contents, subject only to such objection as might be made to the originals. We are also ready to certify as correct any copies which have been or may be taken. Our Mr. Stanley did not object to their being at your office, but declined to assume the risk of their loss or injury by fire or otherwise, as we contend that the taking of them was illegal and a trespass, and we do not desire to prejudice the claims of our clients for their seizure, while we do not wish to give you any unnecessary trouble in the matter, nor apply to the court for them, if we can, by any reasonable delay, obtain them without such application."

Nothing is shown to me on which I can base a satisfactory opinion that the further retention of any of these books and papers is either necessary or proper. On the contrary, there having been ample time for their examination, and the petitioners having offered, in the letter of February 5th, to stipulate to produce them upon the trial, or, in default thereof, to admit secondary evidence of their contents, and to certify as correct any copies which had been or might be taken, and such offer not having been accepted by the district attorney, and he having declined to examine the papers unless the petitioners should affirmatively assent to his doing so, or express a desire that he should do so, there can be no propriety in retaining the papers longer. The statute contains nothing indicating an intention that the books and papers taken under a warrant shall be retained until and unless the party from whom they are taken shall assent to their examination. They ought, in all cases, to be examined promptly, with a view to the identification of such or such parts of them as answer the description in the warrant, and to the taking of such copies as it may be deemed important to take for the purposes of evidence, and to their restoration, as soon as possible, to the custody from which they were taken. The question of retaining any of them, instead of retaining merely copies of them, until an approaching trial can be had, is one which must be determined by the judge, in each case, as it arises, on the circumstances presented. In the present case, I think the petitioners are entitled to an order that the marshal return the books and papers to them forthwith, and without further examination by any person, and unconditionally.

Case No. 11,213.

PLATT v. ARCHER.

[9 Blatchf. 559;[1] 6 N. B. R. 465.]

Circuit Court, S. D. New York. May 31, 1872.

BANKRUPTCY — JURISDICTION OF PROCEEDINGS AGAINST DISSOLVED CORPORATION — SERVICE — SUBSEQUENT DISSOLUTION BY STATE COURT — INJUNCTION AGAINST RECEIVER — PROCEEDINGS FOR THE APPOINTMENT OF TRUSTEE.

1. A banking corporation being insolvent, a receiver of its property was appointed by a state court, on the 13th of October. On that day, its cashier gave up to the receiver the keys of the bank, and became his clerk, on a salary, and, from that time, ceased to act as cashier, but was never displaced from his official relation to the corporation as cashier. On a petition in involuntary bankruptcy, filed on the 23d of December, against the corporation, in the district court, alleging the appointment of such receiver as an act of bankruptcy; an order to show cause was served on such cashier, on the 28th of December. On the 29th of December, a judgment was entered in a state court, dissolving the corporation. On the 6th of January, the corporation was adjudged bankrupt: *Held*, that the service of the order to show cause was sufficient to give the district court jurisdiction to make the adjudication.

[Cited in Re New Amsterdam Fire Ins. Co., Case No. 10,140.]

2. *Held*, also, that the district court had jurisdiction to make the adjudication, notwithstanding the dissolution of the corporation.

3. A corporation, subject to the provisions of the bankruptcy act [of 1867 (14 Stat. 517)], and which has committed an act of bankruptcy, and is in existence when the petition against it is filed, and when the proper papers are served on its proper officer, cannot oust the jurisdiction of the bankruptcy court to proceed, on the return day, to an adjudication, because a decree dissolving the corporation has been made after such service and before such return day.

4. It appearing, by the order of adjudication, that no one appeared in opposition, and that the corporation was called in open court, and came not, but made default to appear, and it not appearing that the receiver appeared and asked, as representing the corporation and its property, to be heard, by answering the petition, and was refused leave to do so, it cannot be said that the corporation, although dissolved, had no opportunity to be heard.

5. A proceeding in involuntary bankruptcy is, substantially, a proceeding in rem, especially in a case against a corporation.

6. An assignee in bankruptcy of the corporation having been appointed, he brought a suit in equity, in this court, against the state court receiver, to set aside, as in fraud of the bankruptcy act, the transfer of the property of the corporation to such state court receiver, made by the operation of the order of the state court appointing such receiver. On the filing of the bill, and on notice to such receiver, this court granted an injunction restraining him from executing the trusts of his receivership, and appointing, pending the suit, a receiver of the property transferred to him, and of its proceeds.

7. At the first meeting of the creditors under the bankruptcy, the defendant was nominated a trustee, under the 43d section of the act, and three persons were nominated a committee of the creditors, under that section. No assignee was chosen, and the meeting was finally closed, votes for an assignee having been given for another person than the defendant. The district court refused to confirm the action in regard to a trustee and a committee, and appointed the plaintiff to be assignee in bankruptcy of the corporation. The defendant and two of the three persons nominated as a committee, brought a petition, in this court, for a review and reversal of the order of adjudication, and of the order refusing to confirm the nomination of a trustee and a committee, and appointing the plaintiff assignee. The petition had not yet been brought to hearing. It being suggested, that the defendant's claim of title, as trustee, and the plaintiff's claim of title, as assignee, ought not to be decided until the action of this court on such petition, it considered the points sufficiently to be able to say that it did not perceive in them any ground for refusing any relief it would otherwise grant.

8. The plaintiff was appointed receiver, on stipulating to charge no commissions on such assets of his receivership as should pass therefrom to the trust represented by the assignee of the bankrupt.

[This was an action by John H. Platt, assignee in bankruptcy of the Stuyvesant Bank, against Oliver H. P. Archer.]

[Points for Plaintiff.

[2] [First.—The appointment of Mr. Archer as receiver of the property of the bankrupt was equivalent to an assignment, transfer and conveyance by the bankrupt to him, because

[1. It vested in him the legal title to the property of the bankrupt, as against the bankrupt. 2 Rev. St. N. Y. p. 460, §§ 67, 68, 71; Id. p. 462, §§ 36, 39, or 3 Rev. St. (5th Ed.) top p. 763, § 44, and top p. 770, §§ 78, 79. Ex parte Berry, 26 Barb. 55.

[2. The bank consented (fol. 105) to his appointment and to all its consequences.

[Second.—The taking of the property by the defendant, by authority of the orders appointing him receiver was a taking under legal process, within the meaning of the bankruptcy act. In re Bininger [Case No. 1,420]; In re Merchants' Ins. Co. [Id. 9,441].

[Third.—The bankruptcy act, in its fourteenth, thirty-fifth, thirty-ninth sections, purports to operate upon not only assignments, conveyances and transfers, but upon legal process issued out of state courts; and in and by those sections it purports to set up a standard or standards by which the validity of such assignments, transfers, conveyances, and legal processes may be measured. It operates upon such acts and processes.

[1. By declaring, in section fourteen, that property conveyed in fraud of creditors vests in the assignee.

[2. By enacting, in section thirty-five, that conveyances, attachments, sequestrations, seizures, payments, sales, pledges, assignments, transfers and conveyances of a specified description, or made with a specified intent, shall be void, and by providing for the recovery of the property affected thereby, and the transfer of such property to the bankruptcy court, for administration.

[3. By furnishing, in section thirty-five, a

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

[2] [From 6 N. B. R. 465.]

rule of evidence by which, prima facie, the bona fides of a sale, judgment, transfer or conveyance, is to be tested.

[4. By prescribing, in section thirty-nine, tests of the validity of such payments, conveyances, sales, assignments, transfers and conveyances as are there described, and giving the assignee a right of action for the property affected thereby.

[Fourth.—The bankrupt act not only professes to act upon certain transfers of property, and upon certain legal processes, by subjecting them to certain tests of their validity, but also furnishes, in section two, tribunals, viz.: this court and others, to apply those tests in cases where any party, under color of legal process, or of a sale, transfer, or assignment, claims an interest adverse to the assignee, touching any property or rights of property of the bankrupt, transferable to or vested in the assignee. This jurisdiction was exercised against a receiver in Smith v. Buchanan [Case No. 13,016]. And the cases in which like jurisdiction has been exercised are collected in an opinion of Hillyer, J. (In re Mallory [Id. 8,991]).

[Fifth.—This court having, therefore, jurisdiction to apply to the legal process, assignment, transfer, conveyance and sale—under which the defendant claims an interest adverse to the assignee touching the property and rights of property of the bankrupt—the tests prescribed by the bankrupt law, the question is, do such legal processes, &c., retain their vitality and validity as against the assignee, when subjected to those tests?

[The tests are applied by the inquiry:

[1. Under section fourteen, whether these processes were in fraud of creditors?

[2. Under section thirty-five, whether they were made to or in favor of a person having reasonable cause to believe the bankrupt to be insolvent or acting in contemplation of insolvency; or to a person having reasonable cause to believe that they were made with a view to prevent the bankrupt's property from coming to its assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defeat, &c., the object of the act; and whether they were made in the usual and ordinary course of business of the debtor?

[3. Under section thirty-nine, whether they were made with intent to delay, defraud or hinder creditors or to defeat or delay the operation of the act?

[Sixth.—The assignment, transfer and conveyance effected by operation of law in this case to the defendant, vested the property of the bankrupt in the plaintiff upon his appointment, under section fourteen of the bankrupt act, because such property was thereby conveyed in fraud of creditors, within the meaning of that section. Such assignment, transfer, and conveyance are said to have been made under, and the legal process through the medium of which the conveyance was effected, are alleged by the defendant and his advisers to have been authorised by the general law of the state of New York relative to insolvent corporations. Those laws are above referred to; and they, together with continued usage and judicial decisions, constituted, at the time of the passage of the bankrupt law, a partial system of bankruptcy or insolvency as to corporations; that is, they fulfilled so much of the office of a bankrupt law as concerns the distribution of the property of an insolvent corporation. This system gave the body of the creditors no choice in the selection of a person to execute the trust, but authorised one creditor or the attorney general to force a trustee upon creditors. The bankrupt act has, within the state of New York, the same operation and effect as if it had been enacted by the legislature of that state. It is in pari materia with the statutes last referred to, and may be treated and applied as if it were a state law. As such, it has additional weight as a supersedeas of former legislation, from the fact that the legislature passed it with the design (avowed in its title) of making the bankrupt system of New York uniform with the bankrupt system of every other state, the same law being enacted in every other state.

[The question then arising is, how does the bankrupt law of March second, eighteen hundred and sixty-seven, considered as a law of paramount authority in the state of New York, act upon the assignment impliedly sanctioned and expressly regulated by pre-existing statutes of the same state, the new statute being passed with a view not only to distribute the debtor's property, but to harmonise the insolvent laws of New York with those of other states? Referring to the words of the bankrupt law, as above quoted, it is probable, if not indisputable, that if any of those words, or similar words, had been used in like statutes in this and other countries, and if so used, they had received a well considered construction, then, when the words were re-enacted, the established construction was enacted with them. In England, some form of bankrupt law has been in force since before the time of James I. All the bankrupt acts there passed have provided in substance, that "fraudulent conveyances" should be deemed acts of bankruptcy, and that such conveyances might be set aside as against the assignee in bankruptcy. Of course, the question soon arose as to what was a fraudulent conveyance within the meaning of those laws; and in determining that question it was held that the term "fraudulent conveyance" (which is synonymous with "conveyance in fraud of creditors," as used in section fourteen of our present bankrupt law; and with "assignment with intent," &c., as used in section thirty-nine) refers not only to conveyances which were covinous and fraudulent at common law and under the statutes of Elizabeth, but

also to those which, although not fraudulent and covinous in that sense, become so, when compared with the operation and effect of the bankrupt law. In other words, a conveyance not fraudulent before, might become so under the bankrupt law, because contrary to the policy of that law.

[Assignments of all a trader's effects, under certain circumstances, were held contrary to the policy, spirit, operation and effect of the bankrupt law, and out of the ordinary course of business, and therefore fraudulent. And there was no exception in cases where the assignment was for the benefit of all the creditors of the assignor. Griff. & T. Archb. Bankr. 119; Wilson v. Day, 2 Burrows, 830; Worseley v. De Mattos, 1 Burrows, 467; Alderson v. Temple, 4 Burrows, 2235; Linton v. Bartlet, 3 Wils. 47; Compton v. Bedford, 1 W. Bl. 362; Law v. Skinner, 2 W. Bl. 996; Rust v. Cooper, 2 Cowp. 629; Newton v. Chantler, 7 East, 138; Hassells v. Simpson, 1 Doug. 92, note; Butcher v. Easto, Id. 296; Eckhardt v. Wilson, 8 Term R. 140; Nunn v. Wilsmore, Id. 528; Tappenden v. Burgess, 4 East, 230; Kittle v. Hammond, Cooke, Bankr. Law, 86; Hoffman v. Pitt, 5 Esp. 22; Botcherby v. Lancaster, 1 Adol. & E. 77; Siebert v. Spooner, 1 Mees. & W. 714; Bowker v. Burdekin, 11 Mees. & W. 128. And this has been so well understood in England that the bankrupt acts of George IV. of eighteen hundred and forty-nine and eighteen hundred and sixty-one, especially save voluntary assignments for the benefit of creditors from avoidance, unless proceedings in bankruptcy are commenced within a limited period afterwards; and such assignments are drawn as acts of bankruptcy; and in the costs of bankrupt proceedings allowances are made for the expense of such assignments, when drawn for that purpose. 2 Archb. Bankr. (Ed. 1869) § 68 of act; also Id. p. 1271.

[In this country we have had the bankrupt law of eighteen hundred and forty-one. Its first and second sections provided as follows: Law of eighteen hundred and forty-one (6 Stat. 441):

[Section 1. "All persons being merchants, &c., * * * shall be liable to become bankrupts * * * whenever such person * * * shall make any fraudulent conveyance, assignment," &c.

[Sec. 2. "All future payments, conveyances, &c., made by any bankrupt, in contemplation of bankruptcy for the purpose of giving a preference; and all other conveyances or transfers of property made by such bankrupt in contemplation of bankruptcy to any person or persons whatever, not being a bona fide creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act," &c.

[Under these sections, voluntary assignments were held void by Judges McLean, Prentiss, Ware, and Conkling, in Barton v. Tower [Case No. 1,085], Conkling, J.; McLean v. Meline [Id. 8,890], McLean, J.; Gassett v. Morse, 21 Vt. 627, Prentiss, J.; Jones v. Sleeper [Case No. 7,496], Ware, J. In New York there was an insolvent system in force when the Case of Hurst, 7 Wend. 241, arose in eighteen hundred and thirty-one. It was there held that a disposition of property for the benefit of creditors, although otherwise untainted with fraud, and not prohibited in terms, was against the policy of the statute and in fraud of the law, and was, therefore, prohibited by necessary implication, and was void. Judge Nelson was a member of the court which decided that case. All through the cases above quoted, it was held that the motive and intention of an act was to be tested by its natural and necessary consequences, and that the actor is conclusively presumed to intend those consequences; a fundamental principle which is very strongly stated by NELSON, J., in Cunningham v. Freeborn, 11 Wend. 240. Such was, or had been, the state of the law in this country and in England, when the bankrupt law of eighteen hundred and sixty-seven was passed. It used language synonymous with what had thus been construed. If the legislature had intended to except assignments or other insolvency trusts, the exception would have been made expressly.

[In view of these authorities, it hardly admits of a doubt that the act of eighteen hundred and sixty-seven, in transferring, by section fourteen, to the assignee in bankruptcy property conveyed "in fraud of creditors," and in nullifying, by section thirty-nine, assignments made with "intent to defraud creditors," meant to include such an assignment as the one now in question, without regard to peculiar features of it arising from the state laws. There are, however, special inconsistencies between the operation of such an assignment and the operation of the bankrupt law, more glaring than those which existed under the English bankrupt laws. A review of these inconsistencies fortifies the position, that if the legislature of New York had passed the bankrupt law of eighteen hundred and sixty-seven, it would, by necessary construction, have repealed the system previously in force.

[1. Under the law of New York, the trustee is forced upon creditors by one creditor or the attorney-general. Under the act of congress, the creditors force the assignee on the debtor.

[2. Under a state law of eighteen hundred and fifty-eight (page 506, c. 314), certain rights of action, for instance, to recover property conveyed by the assignor in fraud of creditors, are given to the voluntary assignee. By the fourteenth section of the federal law, which has the same force and effect as if enacted by the state legislature, the same right of action is vested in the assignee in bankruptcy. Which shall prevail?

[3. The state law regulates the adjustment of the trustee's account in a manner varying

from that prescribed by the act of congress.

[4. The state law postpones the inventory until after choice of trustee is made. But the act of congress makes the petition and inventory simultaneous, in voluntary cases, and in involuntary cases, it makes the inventory and the choice of assignee simultaneous, so that the assignee is chosen in view of a well ascertained responsibility.

[5. The right to participate in dividends is determined under the act of congress by one set of tests; under the state law by another.

[6. The act of congress remits the administration of bankrupt estates to federal tribunals, whose peculiar duty it is to expound federal law. The state law confines such administration to local tribunals, and withdraws bankrupt estates from all administration under federal law. In re Bininger [Case No. 1,420].

[In these and other particulars the two systems conflict, and upon established principles the last enactment must prevail, not merely because it emanates from a paramount authority, but because, if both systems had the same origin, the two cannot co-exist. Van Nostrand v. Carr, 30 Md. 128; In re Reynolds, 8 R. I. 485; Com. v. O'Hara [6 Phila. 402]; Goodwin v. Sharkey, 5 Abb. Prac. (N. S.) 64; Sturgis v. Crowninshield, 4 Wheat. [17 U. S.] 122; Ogden v. Saunders, 12 Wheat. [25 U. S.] 273; Ex parte Eames [Case No. 4,237]; In re Independent Ins. Co. [Id. 7,017].

[Seventh.—Departing from section fourteen and comparing the transaction in question with the general policy and spirit of section thirty-five, and with so much of section thirty-nine as vitiates transfers and legal process made or issued with intent to hinder, delay or defraud creditors, or defeat or delay the operation of the act, the legal process in question is void as against the assignee, and the property affected by it is recoverable by him. The thirty-fifth section is not wholly borrowed from any other statute of bankruptcy, but as an enactment is in many respects original and peculiar; although apparently suggested by the language of judicial decisions. It aimed at something which was perhaps not definitely enough indicated by other parts of the enactments. It is such a section as the scope and sphere of federal legislation (designed to sweep away conflicting and hostile local arrangements, and to replace them by uniform methods) would suggest. It is devised for the sake of producing the uniformity which the remaining provisions of the act might have failed to produce. The words are consequently general and comprehensive. They are not confined to abrogating what conflicts with the details or machinery of the law, but they comprehensively remove all that obstructs, impairs, hinders, impedes, defeats, or delays the operation, effect, object or provisions of the act; so that under this section the given transaction cannot be tested without considering, not only the words of the law, but the operation, effect and object of the transaction. And this section was enacted after the courts of England and of the United States had held the necessary effect of a voluntary assignment or transfer to be to impair, impede, hinder, delay and defeat the object of a bankrupt law. Beattie v. Gardner [Case No. 1,195]; Shawhan v. Wherritt, 7 How. [48 U. S.] 627.

[Eighth.—Tested by a close analysis of the words of section thirty-five and section thirty-nine, the legal process in question, and the transfer effected thereby, are void as against the plaintiff.

[1. The assignor or debtor must be bankrupt or insolvent, or acting in contemplation of insolvency or bankruptcy. Insolvency is defined in Re Bininger [supra]; Toof v. Martin [13 Wall. (80 U. S.) 40]. "Contemplation of insolvency" therefore needs no definition. "Contemplation of bankruptcy" was defined in Buckingham v. McLean, 13 How. [54 U. S.] 150. If the appointment of a receiver was an act of bankruptcy, the debtor joining in that act was, because he must have been, in contemplation of bankruptcy, as thus defined; for it knew that such act invited and would sustain an adjudication.

[2. As to the grantee, sections thirty-five and thirty-nine require only that he should have "reasonable cause" to believe certain things. And "reasonable cause" is defined by the supreme court of the United States, in Toof v. Martin [supra].

[3. The thing which the grantee must have reasonable cause to believe is that the assignor or debtor is insolvent, or acting in contemplation of insolvency, and that the assignment is made "with a view," to prevent his property from coming to his assignee in bankruptcy, &c.

[4. "His assignee" clearly does not mean an assignee already appointed, but means an assignee thereafter to be appointed in bankruptcy. So the meaning is, that the grantee must have reason to believe that the assignment is made in such a way as necessarily to prevent the property from coming to any assignee who may thereafter be appointed. That was clearly the effect in this case.

[5. It is also enough, if the grantee has reasonable cause to believe that the assignment is made with a view of preventing the property from being distributed under the act. Certainly it could not be distributed under the act if it was distributed under some other act. In this clause the section gives importance to the machinery of the act.

[6. It is enough if the grantee has reasonable cause to believe that the assignment is made "with a view" to defeat the object of the act. The object of the act is to establish a uniform system of bankruptcy; that is, to have the property of an insolvent debtor in one state distributed in the same order and proportion, and to the same classes of creditors, and under the supervision of the

same class of tribunals and within the same period, as in all other states. But the necessary effect of the assignment was to have the property distributed in different orders and proportions, and to different classes of creditors under the supervision of different tribunals, and within different periods, from those provided in other states. Another object of the law is to open the federal courts to all creditors without distinction, and give them in those courts a remedy against the debtor's property. This assignment defeats that object by driving the creditor to a state court, unless he can go into a federal court on some peculiar ground of jurisdiction, such as alienage or citizenship in another state.

[7. It is also enough if the grantee has reasonable cause to believe that the assignment is made "with a view" to impair, hinder, or delay the "operation and effect" of the act. Here again the section raises the machinery of the act into importance, and sweeps away what obstructs its practical working. The operations of the act are manifold. Its operation on debtors is to compel them to put their property in the control of a federal court, for the purpose of being distributed among creditors who may establish their status as such by proper proof; and such distribution is effected by means of an agent selected by creditors. The assignment in question defeats that operation of the act by promoting a distribution of the property in other methods. The act operates upon creditors in many beneficial ways, which need not be pointed out in detail. In general it requires them to prove their status as creditors, and to surrender special advantages, and it gives them summary and speedy realization upon their claims. The assignment in question defeats this operation of the act, and hinders, impedes and delays it. No creditor claiming the benefit of the assignment need purge himself as he is required to do by the bankrupt law. The answer which may be suggested to this objection is that the object of the assignment in question, on its face, appears to be the equal distribution of the property among creditors; and as that is the object of the bankrupt law, the assignment is not at cross purposes with the law. This answer is more plausible than substantial. The words "operation and effect," in the law, refer to the machinery provided by the law; but even if this is not so, yet, taking the whole law together, its ultimate operation and effect is to distribute the property among those who prove themselves creditors in the federal court and submit to the conditions there exacted of them; while the ultimate operation and effect of the assignment in question is to distribute the property among those who may establish their claims in some other way. These are not concurrent, but are substantially inconsistent, trusts. Ex parte Hurst, 7 Wend. 241.

[8. "In view of" and "with intent to" produce certain specified consequences are phrases referring to a state of mind of which the law does not require proof, but which it conclusively presumes to exist, where the consequences necessarily or naturally flow from the act; and the inquiry which these words suggest is—"What consequences did naturally and necessarily flow from the act?" When these consequences are ascertained, they are conclusively imputed to design; and so conclusive is the inference of the law, that sworn denials of the inferred intent are wholly immaterial. Cunningham v. Freeborn, 11 Wend. 240; In re Bininger [Case No. 1,420]; Newman v. Cordell, 43 Barb. 448.

[9. The effect of the bankrupt law is to vest in the assignee in bankruptcy property previously conveyed in fraud of creditors. The effect of the assignment, under the law of New York, is to vest a right of action for such property in an assignee selected by one creditor or by the attorney-general. This is a vital difference of the greatest practical consequence.

[10. The effect and operation of the bankrupt law is to put the property of the debtor out of the reach of process, while giving the assignee retroactive rights, so as to equalize the distribution of the property as of a period four or six months prior to the proceedings in bankruptcy. This operation and effect is defeated by the making of a voluntary assignment, which, while changing the title to the property, does not at the same time create any agency competent to revoke preferences already carried into effect.

[11. The effect and operation of the bankrupt law is to put the property under the control of the district and circuit courts and the supreme court of the United States. The effect of the voluntary assignment is to leave it within the jurisdiction of the state courts. While there, it is subject to various hazards from which it would be free under the bankrupt law. For instance, it is subject to be swept away by prior lien. It is subject to suit brought to set aside the assignment as fraudulent, and the first suitor in any such proceeding has a preference over the rest. It is no answer to repeat the phrase—"The only object was to make an equal distribution," &c., when the effect is manifestly the contrary.

[12. It is also sufficient, if the assignee has reasonable cause to believe that the assignment was made "with a view" to evade any of the provisions of the bankrupt act. This clause says nothing about the policy, spirit, operation or effect of the law, but refers solely to its provisions, without distinction between the provisions relating to intermediate steps and those effecting final results. There are provisions of the bankrupt law which are evaded by a distribution of property under a voluntary assignment. All the provisions of the involuntary branch are so evaded. The provisions of the voluntary branch are so evaded—such as those relating

to the selection of an assignee, the proving of debts, the surrender of securities, the retroactive rights of an assignee, the compensation of an assignee, &c.

[13. It may be suggested, in answer to these points, that the voluntary branches of the law are permissive only, and not imperative, and that it is not expressly made the duty of a debtor to avail himself of that branch. So much may be safely conceded, though in fact the position is unsound. But the fact that a debtor violates no duty by not petitioning, does not give validity to a transfer which the law nullifies. It may be true that the law does not say to the debtor, "You shall petition," but it is equally true that it does say, "You shall not evade any of the provisions of this act, nor make any assignment which has the effect to prevent your property from coming to any assignee in bankruptcy hereafter appointed, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, impede, or delay the operation and effect of this act. If you form the wish voluntarily to distribute your property through the medium of a third person, and not directly by your own hand, it must be to such persons as bring themselves within the provisions of this uniform law, and not to such as you may designate; and in other particulars, you must subordinate your wishes to the machinery, object, effect, and provisions herein pointed out and provided." If, then, the debtor does not choose to proceed under the act, he must not proceed in conflict with it. If he is not bound to comply with its provisions, he is bound not to violate them. He must not remove his property out of the reach of process, nor yet convey in fraud of creditors, nor against the policy of the act. If these prohibitions do not create a positive duty they give rise to a necessity which the debtor must submit to.

[14. The thirty-fifth section further provides, that if such assignment is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud; not of fraudulent intent solely, but of fraud intended, consummated, or directly or indirectly produced. Under the English statutes it was constantly held that a voluntary assignment was out of the ordinary course of business; so that the framers of the present bankrupt law have enacted into law what was previously a judicial definition.

[15. It may be said, also, that there is no more harm in a debtor making an assignment in trust for his creditors, than in his making the distribution himself. The answer is, that the law does not nullify the latter act, while it does the former. The framers of the law judged of the difference for themselves. The first clause of the thirty-fifth section impliedly permits payment directly to creditors, if not made by way of preference, while the second clause points to payments and assignments to third persons not creditors, or not acting wholly in their own right as creditors. If, without design to give a preference, the debtor makes a payment directly to a creditor, there are no words in the law to avoid it. The difference between payments and securities directly to creditors, and assignments in trust for creditors, is very distinctly stated in Cunningham v. Freeborn, 11 Wend. 256; as follows: "I would hold a debtor in failing circumstances to pay, or give security to, his creditor or creditors, directly, without the intervention of a trustee, who is often the creature of the debtor, without interest or sympathy on behalf of the creditor. In this way the creditor would obtain the control of the fund the moment the debtor parted with it, and if favored creditors were preferred, they would be obliged to see to it that they took no more than was a fair security for their debts. They should not be permitted to justify their possession under the cover of trusteeship for others. Each creditor should be his own trustee. If inconvenient for creditors personally to execute the trust, they could appoint a trustee in their place. This modification would have the effect to give the possession and control of the fund, in the first instance, to the creditors, or to a person appointed by them; as the law now stands, the debtor may control the appointment, and a bill in chancery is often necessary to enable the creditor to get possession of the fund. If, in the preference, actual payment was required, or security directly to the person of the creditor or creditors, for his or their debts, and, of course, the immediate control of the property given, the great inducements to these fraudulent assignments would be removed. The hope of profit or control of the property by the debtor, after he parted with it, would be extinguished, and he could have no other interest in the preference than to see that it was made. He might still gratify unkind, or worse, feelings, against particular creditors; but he must, at the same time, deny himself the use of the fund of which he deprives them." This is the language of Nelson, J.

[Independently of the authorities above quoted, and treating the question as an original one upon the words, policy and object of the bankrupt law, the following arguments, some of which are repetitions of what has been already said, are submitted as pertinent and controlling:

[1. The bankrupt law introduced new elements into the relation of debtor and creditor, so that what was not fraudulent before may be so now.

[2. The intent is to be determined by the actual and natural effect.

[3. The fourteenth section, in using the words "in fraud of creditors," points the mind not only to what is intended to be a fraud, but to what is, per se, or consequentially, or technically, or inferentially, a withholding of

a right, duty, or advantage due to creditors, under the bankrupt law or otherwise.

[4. The reasons assigned by English and American judges in expounding the bankrupt laws which existed prior to eighteen hundred and sixty-seven are applicable now, and are convincing, if not authoritative.

[5. The debtor owes to the body of his creditors the duty of yielding them voluntarily every advantage in the distribution of his property which they could obtain by adverse proceedings; and not less than any other does he owe them the duty of yielding them every advantage which the bankrupt law furnishes. When he not only withholds such advantages, but bars the creditors' way to them, he violates a duty created by law; which is another way of saying that he commits a fraud upon the law.

[6. By making a voluntary assignment, the debtor withholds privileges, advantages and securities which, by his voluntary act under the bankrupt law, he might bestow; and so he defrauds his creditors.

[7. A voluntary assignment is a fraud upon creditors, because, by means of it the debtor is enabled, under our political system, to make a fraudulent use of the bankrupt law. He makes the assignment. That, if valid, takes the property out of the juris diction of the federal courts; then he may invoke the bankrupt law, and, by means of an injunction upon creditor, gets the property out of their reach in the state courts. In that view of it, if the assignment is not a fraud, the bankrupt law is.

[8. A denial of an intention to institute voluntary proceedings in bankruptcy is not an affirmation, nor is it, if true, proof of honest intent. It is only a denial of an intention to furnish to creditors the advantages which accrue to them under the bankrupt law. It is consistent with a design to defraud. For instance, a debtor pays a favored creditor in full; he knows that if he goes into bankruptcy within four months he puts that creditor in peril. Therefore, to defraud the law, he intends not to go into bankruptcy. So as to attachments and other liens. It is supposed by the plaintiff that the defendant may rely, in opposition to this motion, on Sedgwick v. Place [Case No. 12,622]; Sedgwick v. Menck [Id. 12,616]; Langley v. Perry [Id. 8,067]; Hawkins' Appeal [34 Conn. 548]; Beecher v. Bininger [Id. 1,222]. It is therefore submitted.

[9. That those authorities are not in conflict with the plaintiff's position here. In Sedgwick v. Place [supra], the case was heard on a preliminary motion founded on the bill only. Whatever fraud was averred in the bill was denied in the answer, and no proofs were offered in support of the bill. A preliminary motion for an injunction was denied by Nelson, J., solely on the assumption, as he expressly states, that the assignment then in question was untainted with fraud either against creditors or against the bankrupt law. In some respects, it is difficult to reconcile every sentence of the opinion in Sedgwick v. Place with Judge Nelson's views expressed in Cunningham v. Freeborn, 11 Wend., and Hurst's Case, 7 Wend. As matter of fact, it is true that in Sedgwick v. Place, when that case was before Nelson, J., no actual argument was had. The papers were submitted to him in the expectation and belief, on the part of counsel on both sides, that he would grant the motion. In Sedgwick v. Menck [Case No. 12,616], the assignee sought to deprive creditors of a lien which they had acquired many years before the passage of the bankrupt law. No case within either of sections fourteen, thirty-five, or thirty-nine was made. The decision in that case was clearly right, and was acquiesced in by all parties. In Langley v. Perry [supra], the assignment in question was made on May twenty-five, eighteen hundred and sixty-seven, which was before the bankrupt law took effect, and when neither the debtor nor his creditors were able to put the law in motion. Of course an intention to defeat or delay the operation of an inoperative law could not be imputed. In Farrin v. Crawford [Case No. 4,686], Swayne, J., says, "I do not mean to impute any intention to defraud or do wrong to either party, but here are the facts, and the legal result is inevitable." He thus recognizes and applies the rule adopted by Nelson, J., in Cunningham v. Freeborn. In Hawkins' Appeal [supra], no question arose between an assignee in bankruptcy and a voluntary assignee. The question was between creditors of a debtor and the vountary assignee of the debtor. What the questions were, the report of the case does not disclose. Nor does it appear how creditors, on the settlement of the accounts of a voluntary assignee, in a state court, could avail themselves of the provisions of the bankrupt law. The case is worthy of observation, in that it erroneously states Judge Nelson's decision in Sedgwick v. Place. Judge Nelson did not dismiss the bill, he only denied a preliminary motion. See Judge Nelson's comment on Sedgwick v. Place [Case No. 12,623]. In Beecher v. Bininger [Id. 1,222], the questions now arising were not raised at all. The plaintiff in that case, Beecher, did not found his suit either on the fourteenth, thirty-fifth, or thirty-ninth section of the bankrupt law, nor did he attack the process under which the receiver took the property, as fraudulent. His theory was, that by means of the receivership, a trust had been created for the benefit of Clark & Bininger, in a suit in a state court; that the title of Clark & Bininger to, and their interest in the property had passed to the assignee, and that, therefore, the action in the state court had abated; that the receivers were functi officiis, and the assignee had a right to call upon them in this court for an account. On the

merits of that theory, the court did not pass then, and has never passed since. It only denied a motion, putting the denial on the ground that, no fraud being alleged, there was no sufficient reason shown for apprehending loss or waste. On the other hand, see In re Smith [Case No. 12,974]; 3 N. B. R. 79, letter from Judge Nelson; In re Pierce [Case No. 11,141]; In re Randall [Case No. 11,551]; In re Bininger [Case No. 1,420]; Van Nostrand v. Carr, 30 Md. 128; In re Reynolds, 8 R. I. 485; Dehon v. Foster, 4 Allen, 545.

[10. The proper method of obtaining relief against a fraudulent transfer of a bankrupt's property, or against an attempt to take the property out of this jurisdiction, is by bill in equity, fraud being the ground of jurisdiction. Particularly is this so, where a discovery and account is necessary. And the only method of determining conflicting claims of an assignee and an adverse holder of property is by a plenary suit in equity or a formal action at law. Dehon v. Foster, 4 Allen, 545; In re Kerosene Oil Co. [Case No. 7,725]; In re Bonesteel [Case No. 1,628]; In re Ballou [Case No. 818]; Smith v. Mason, 6 N. B. R. 1.

[11. The utmost which the plaintiff needs to do on this motion is to establish three propositions: (1) Color or appearance of superior title, and probability of ultimate recovery. This he has done. (2) Danger of loss or misappropriation. (3) Necessity for this court taking the property into its custody pendente lite.

[12. The defendant is a fraudulent grantee, not merely by construction, but actually so. When he became receiver, the law was too well settled to be misunderstood, that he was becoming a participant in a scheme to defraud the law. He has not only become the trustee under a fraudulent trust, but he has furnished security that he will execute that trust. The court will presume that he will execute the trust unless restrained. Hence the necessity and propriety of an injunction. Danger of loss will be presumed to exist when the property is in the hands of a fraudulent grantee pledged to devote it to unlawful purposes. The property is alleged in the bill (fols. 14, 15) to be of various descriptions, and much of it capable of easy transfer or alienation. If the defendant is permitted to transfer it pendente lite, the plaintiff may be compelled to follow it, by a variety of proceedings, in various courts, into the possession of numerous purchasers, and thus encounter the evil, so odious to a court of equity, of multiplicity of suits, and great diminution of a trust fund in legal expenses. The defendant's refusal to deliver the property, his claim of title under a fraudulent conveyance, his refusal to attorn to this court, his obtaining orders from the state court without notice to the assignee, all constitute continuing threats to misappropriate the property, and the case is brought within the principle of the cases referred in 2 Story, Eq. Jur. §§ 905-908, 918, 953, and of Onslow v. ——, 16 Ves. 173; Douglass v. Wiggins, 1 Johns. Ch. 435; Watson v. Hunter, 5 Johns. Ch. 170; Winship v. Pitts, 3 Paige, 259; Frewin v. Lewis, 4 Mylne & C. 254; Dehon v. Foster, 4 Allen, 545, 7 Allen, 57; Church of Holy Innocents v. Keech, 5 Bosw. 691; Galwey v. United States S. S. R. Co., 13 Abb. Prac. 211; Mohawk & H. R. Co. v. Artcher, 6 Paige, 88; Shaw v. Dwight, 16 Barb. 536; Gillott v. Kettle, 3 Duer, 624; McLean v. Lafayette Bank [Case No. 8,885]; Cropper v. Coburn [Id. 3,416]; Rateau v. Bernard [Id. 11,579]; McKenzie v. Cowing [Id. 8,856]; Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738; Sawyer v. Gill [Case No. 12,399]; City Bank of New York v. Skelton [Id. 2,740]; St. Luke's Hospital v. Barclay [Id. 12,241]; Green v. Hanberry [Id. 5,759]; Wilson v. Bastable [Id. 17,789]; In re Mallory [Id. 8,991]. It is not merely the danger that if the plaintiff recovers, the property may not be forthcoming, which is to be considered, but danger in a peculiar sense suggested by the bankrupt law. The danger is, that if the fraudulent grantee is permitted to execute his trust, the creditors whom the plaintiff represents may lose the benefit of the bankrupt law. Many months must elapse before a final decree can be obtained. Meanwhile, the defendant, by ex parte applications in the supreme court, may get authority to pay out a large part of the fund for purposes not authorised by the bankrupt law. A short statute of limitations is running against the plaintiff. If he should undertake to sue parties to whom the bankrupt made prior fraudulent conveyances, he would be met by an assertion of the defendant's title. Nearly two months have now elapsed since the plaintiff was appointed. In another month his duty will be to call a meeting of creditors. If this court takes possession of the fund, it may, pendente lite, apply it to the satisfaction of undisputed claims, without injustice. Each party is a trustee, and the cestui que trust on both sides are identical, or can be made so, upon compliance with the terms of the bankrupt law. Hence the propriety of a receivership in this suit, through which the fund may, pendente lite, go directly to those ultimately entitled to it, and who are the real parties in interest. And an injunction of the kind here asked for necessarily draws after it a receivership. Osborn v. Heyer, 2 Paige, 342; Bloodgood v. Clark, 4 Paige, 574; Mitchell v. Bettman, 25 Barb. 408.

[13. The plaintiff, Mr. John H. Platt, asks that he may be appointed receiver, he stipulating to charge no commissions on what may be ultimately transferred from the receivership to the trust represented by himself as plaintiff. This is the course which has been uniformly pursued, for the sake of convenience and economy, in the

district court, in like cases. The plaintiff as assignee is always under the direct control and order of the court, and cannot dispose of the property, even on a final recovery, without leave of the court. In his hands, therefore, the property is in the safest and most economical custody. Any reasons which, in the ordinary exercise of equity jurisdiction, would be valid against the appointment of a party, are inapplicable in cases of this description. The district court acted in that way in Sedgwick v. Place [Cases Nos. 12,619 and 12,623], and the practice there adopted has been generally followed since, in like case, with the acquiescence of suitors and lawyers, wherever the parties to whom the plaintiff and defendant are accountable, are identical.] [2]

Francis N. Bangs, for plaintiff.

David Dudley Field and Dudley Field, for defendant.

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

BLATCHFORD, District Judge. On the 13th of October, 1871, the supreme court of New York, in a suit brought by William R. Barr against the Stuyvesant Bank, and on a verified complaint and sundry affidavits therein, made an order restraining the bank from exercising any of its corporate franchises, and from collecting or transferring any of its moneys or property, until the further order of the court, and appointing the defendant in this suit to be receiver of its property. Such suit was commenced on the 12th of October. The gravamen of the complaint was, that the bank was insolvent and unable to pay its debts. The bank appeared in the suit by attorney, on the 12th of October, and its counsel consented, in open court, to the making of the order of the 13th of October.

On the 13th of November, the supreme court, in a suit brought by the people of the state of New York against the bank, and on a summons, a complaint, affidavits, and due notice, counsel for the bank appearing and opposing, made an order enjoining the bank from exercising any of its corporate franchises, and from collecting or transferring any of its moneys or property, and appointing the defendant in this suit to be receiver of its property. The complaint set forth the insolvency of the bank.

On the 23d of November, no answer or demurrer having been put in, in the suit brought by Barr, a judgment was entered therein, awarding a perpetual injunction against the bank, and appointing the defendant in this suit to be its receiver, but not dissolving the corporation.

On the 23d of December, John Mack filed, in the district court of the United States for this district, a petition in involuntary bankruptcy against the bank, setting forth, as one of the acts of bankruptcy, the procuring and suffering its property to be taken on legal process by the defendant in this suit, as receiver, with intent to defeat the operation of the bankruptcy act. On the filing of the petition, an order to show cause, returnable on the 6th of January, 1872, was, on the 23d of December, issued. The order directed that a copy of the petition, and of the order, should be served on the president of the bank.

On the 27th of December, an answer of the bank, in the suit brought by the people, denying, on information and belief, its insolvency, was sworn to by John Van Orden, who, in the affidavit, says, that he "is cashier of the Stuyvesant Bank." This answer was subsequently put in in the suit.

On the 28th of December, on an affidavit of the absence of the president of the bank, and that Van Orden was cashier, an order was made by the district court, that a copy of the petition, and of the order to show cause, be served on the bank, by serving it on Van Orden, its cashier. Such service was made on Van Orden on the 28th of December.

On the 29th of December, in the suit brought by the people, judgment on the answer as frivolous was given against the bank, and it was adjudged that the charter of the bank "is declared to be forfeited, and the said corporation, composing the said bank, is hereby dissolved," and that the defendant in this suit be continued as receiver, and be appointed receiver of all the property of the bank, and that the bank be enjoined from collecting any debts, and transferring any money or property, and from transacting any business whatever.

On the 6th of January, 1872, on proof of such service of a copy of the petition and order to show cause on the cashier of the bank, no one appearing in opposition, and the bank being called in open court, and making default in appearing pursuant to the order to show cause, the usual order of adjudication was made by the district court, setting forth, that, on consideration of the proofs, it was found that the facts set forth in the petition were true, and adjudging that the bank became bankrupt, within the true intent and meaning of the bankruptcy act, before the filing of said petition, and declaring and adjudging it bankrupt accordingly, and referring it to a register to take the proceedings required by the act.

At the first meeting of the creditors of the bankrupt, held, in pursuance of the warrant issued to the marshal, for the choice of assignee, it was resolved, by three-fourths in value of the creditors whose claims had been proved, that it was for the general interest of the creditors of the bankrupt that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors, by trustees, under the inspection and direction of a committee of creditors, and that the defendant in this suit be nominated as trustee, to take, hold, and distribute said estate; and that Richard Kelly, the Reverend

[2] [From 6 N. B. R. 465.]

John Orcutt, and Richard H. Bull, president of the New York Savings Bank, be the committee of creditors, under whose direction the said trustee should act. This resolution was duly certified to the district court by the register. The register also certified, that the first meeting of creditors was convened on the 7th of February, and was finally closed on the 13th of February; that, at the meeting, votes were cast for assignee, the names of the voters, and the amounts of the debts on which they voted, and the name of the person for whom such votes were cast, being returned, and such person not being the defendant herein; that there was an opposing interest to the appointment of an assignee by the register, in the action of the creditors in nominating a trustee; that no choice of assignee was made by the creditors; and that the register had made no appointment of assignee, believing that such action of the creditors was such an opposing interest as would render his appointing one irregular and void.

On the 16th of March, the defendant in this suit, on notice and on affidavits, applied to the district court for the confirmation of the action of the creditors, in respect to a trustee and a committee. This motion was opposed on affidavits, and, by an order made on the 22d of March, the court denied the motion, and appointed the plaintiff in this suit to be assignee of the estate and effects of the bankrupt. [Case No. 13,581.] From the decision rendered by the district judge, it appears that he was of opinion, on the papers before him, that the interests of the creditors would not be promoted by the appointment of the defendant in this suit as trustee, and that, therefore, he declined to confirm such resolution. The principal ground stated for this conclusion was, that, as the appointment of the defendant in this suit as receiver by the state court was one of the grounds on which the bank was adjudged bankrupt, and he still continued to be such receiver, and claimed to hold, as such receiver, what remained in his hands of the property of the bank which had passed to him, and had been dealing with the rest as such receiver, and, if he was to account for it at all to the district court, must account for it as of the day the petition in bankruptcy was filed, and to a trustee or assignee to be appointed by the district court, and, as it appeared that he did not intend to voluntarily surrender to any trustee or assignee to be appointed by the district court, the property still in his possession, and did not intend, if confirmed as trustee by the district court, to cease acting as receiver, but announced his intention to act both as receiver and as trustee, and to have his acts authorized by the state court, and by the district court, it was not proper that he should, as trustee, be plaintiff, and, as receiver, be defendant, in respect to the matters involved, and he could not be allowed to occupy the incompatible position of being a trustee under the bankruptcy act, and looking to the state court as partly the source of his authority, or of holding the property as receiver, under the state laws, and administering it under the authority or direction of the district court. It further appears, from the decision of the district judge, that he regarded it as an objection to confirming the proceedings, that the bank of which Mr. Bull, one of the three persons named as the committee of creditors, was president, claimed, by its proof of debt, to be entitled to a preference under the statutes of New York, and to be paid in full, in priority to others, in a distribution of the assets under the bankruptcy act, and that such claim of preference was contested by creditors who were unsecured, and who claimed no preference. The view of the judge was, that the creditors had undertaken to select a committee consisting of three persons, and had thus expressed their desire that the committee should consist of three persons; that their action under the statute was a unit, and their resolution must be confirmed as a whole, or not at all; and that it was improper that Mr. Bull should be one of the committee, under whose direction the estate of the bankrupt was to be wound up and settled. The judge regarded the case as having arisen where, under section 13 of the act, it became the duty of the court to appoint an assignee, the resolution nominating a trustee not being confirmed, and no choice of an assignee having been made by the creditors.

An assignment, in due form, under the act, was executed by the district judge to the plaintiff in this suit on the 22d of March, of all the estate which the bankrupt had on the 23d of December, 1871. On the 23d of March, the defendant in this suit and Bull and Orcutt filed in this court a petition praying for a review and reversal of the order of adjudication made by the district court, and of the order refusing to confirm the nomination of a trustee and a committee, and appointing the plaintiff in this suit to be assignee. The petition of review sets forth, as objections to the orders: (1) That the district court had no jurisdiction over the bankrupt, it having been dissolved by a judgment of a competent court before the adjudication; (2) that it had no jurisdiction over the assets of the bankrupt, they having become vested in a receiver duly appointed by the state court. If it should be held that the district court had such jurisdiction, then it is objected, by the petition, to the order of the 22d of March, that it refused (1) to confirm the resolution nominating the defendant in this suit as trustee; (2) to confirm the resolution nominating the three persons as a committee; (3) to confirm at least two of the committee. If it should be held that the district court had such jurisdiction, and that it was proper for the district judge to refuse to confirm as aforesaid, then it is objected, by the petition, to the order of the 22d of March (1) that it appoints the plaintiff in this suit assignee, when less than one-tenth of all the creditors who had proved their

claims had voted for him, while more than nine-tenths had voted for the appointment of a trustee; (2) that the appointment of such assignee was not authorized by law, it having been the duty of the court to direct the bankruptcy to proceed as though no resolution had been passed, and to make all necessary orders for resuming the proceedings, and thereupon to direct that all further proceedings (if any proceedings whatever were, under the circumstances, valid) be remitted to said register, and that an election of a new trustee or an assignee thereupon take place. This petition of review has not yet been brought to hearing before this court.

On the 25th of April the plaintiff in this suit obtained an order from the state court, granting him leave to bring this suit. The bill in this suit sets out that, on the 13th of October, 1871, the Stuyvesant Bank was a corporation created by the state of New York, and was insolvent; that it was adjudged a bankrupt by the proceedings before mentioned; that, within four months before the filing of the petition against it, it, being insolvent, made a transfer of its property to the defendant, who then had reasonable cause to believe it to be insolvent, within the 35th section of the bankruptcy act, the transfer being made by means of the order made on that day in the suit brought by Barr; that the defendant had reasonable cause to believe the bank to be insolvent, and that the transfer was made in fraud of the provisions of said act, and with a view to prevent the property of the bank from coming into the possession of its assignee in bankruptcy, and to prevent it from being distributed under said act, and to defeat the object of, and impair, hinder, impede and delay, the operation and effect of, and evade the provisions of, said act; that the transfer was not made in the usual and ordinary course of business of the bank; that, on the said 13th of October, the bank, being insolvent, did, with intent, by such disposition of its property, to defeat and delay the operation of said act, and with intent to delay, defraud and hinder its creditors, transfer its property to the defendant in this suit, and procure and suffer its property to be taken by him on legal process; that such legal process consisted in the orders and judgments of the state court, before referred to; that the trust created by said legal processes, and transfer, and appointment of the defendant as receiver, was a trust created in fraud of the creditors of the bankrupt, and the property affected thereby was conveyed by the bankrupt to the defendant in fraud of its creditors, within the meaning of the 14th section of the bankruptcy act, and the transfer was void within the meaning of the 35th section, and the legal process was void within the meaning of the 39th section, and the defendant had reasonable cause to believe that a fraud on the act was intended, and that the said debtor was insolvent; that the defendant has, on demand, refused to give to the plaintiff (whose title is set out) an account and the possession of such property, and claims a title and interest adverse to the plaintiff touching said property; that such property consisted of real, personal and mixed property; that a large proportion of it consisted of claims and choses in action against persons who were indebted to the bankrupt at the time such orders were made by the state court; and that, to reduce the same to the possession of the plaintiff by actions at law, or to compel the defendant to respond for the value of the property in actions at law, would require a large number of suits, and a discovery and an accounting by the defendant. The bill prays that said transfer may be decreed to be void as against the plaintiff, and that the said legal processes may be adjudged to be, as against the plaintiff, void, and that the property affected thereby may be adjudged to be vested in the plaintiff, and that the defendant may account for the same, and for the disposition made by him of the same, and of the proceeds thereof, and deliver to the plaintiff so much of such property as remains in his hands, and the proceeds of such of it as he shall have disposed of, and that he be enjoined from disposing of or interfering with said property, and from setting up and asserting, as against the plaintiff, any title to, or right of action for, any of said property, and that, pending this action, and by final decree, he may be enjoined from doing any act to carry out or effectuate the trusts purporting to be created by his appointment as receiver, or from distributing the property affected by such receivership, otherwise than by the permission and direction of this court, and that, pending this action, and by final decree, a receiver of the property transferred to him, or in his possession, and of its proceeds, may be appointed, with the usual powers of a receiver in like cases. The plaintiff now moves, on notice, for an injunction restraining and enjoining the defendant, pending this action, pursuant to the prayer of the bill, and also for the appointment of a receiver, pending this action, pursuant to the prayer of the bill.

It is claimed that the district court had no jurisdiction to adjudge the bank a bankrupt, because the petition and the order to show cause were not served on any one who did or could represent the bank, and that Van Orden was not, at the time of the service, the cashier of the bank. This allegation is made on the ground that, on the 13th of October, Van Orden gave up to the defendant the keys of the bank, and became his clerk, on a salary, and ceased to act as cashier, and did not act as cashier from that time prior to the judgment of dissolution. But there was nothing in this which displaced Van Orden from his official relation to the corporation as cashier, as is also apparent from his own oath on the 27th of December, that he was then cashier. The corporation was in being on the 28th of December, when the papers were served on Van Orden, and he was still its cashier for the

purpose of being served, as its proper representative, with such papers. If, at any time prior to the judgment of dissolution, the state court had discharged the receivership, and directed the property of the corporation to be restored to its officers, Van Orden would have been a proper officer, as its cashier, to receive the property, without any new appointment of him as such.

It is also objected, that the bank had no existence when the adjudication was made. But we cannot admit it to be a tenable proposition, that a corporation, subject to the provisions of the bankruptcy act, and which has committed an act of bankruptcy, and is in existence when the petition against it is filed, and when the proper papers are served on its proper officer, can oust the jurisdiction of the bankruptcy court to proceed, on the return day, to an adjudication of bankruptcy, because a decree dissolving the corporation has been made after such service and before such return day. The papers having been properly served on an officer of the bank, while the bank was in being, and the bank being called and making default to appear, the order of adjudication is substantially a proceeding in rem, and not one in personam, the order being, that, the facts in the petition being found to be true, it is adjudged that the bank became bankrupt before the filing of the petition, and is accordingly adjudged bankrupt. The judgment is, that the bank became bankrupt before the filing of the petition, by having committed the acts of bankruptcy set forth in the petition, and which it committed while it was in being, and that it is adjudged bankrupt in respect of the administration of its property subject to the act, by reason of so having committed such acts of bankruptcy.

Independently of this view, no doctrine can be admitted which would place it in the power of a state, or of the courts of a state, to render nugatory the operation of the act in respect to such corporations as are subject to it. To concede that what was done in the present case operated to deprive this court of the jurisdiction which attached by the filing of the petition and the service of the order to show cause, would be to concede that the legislature of the state might lawfully provide, by a statute to be carried into effect by proceedings in its courts, that the institution of proceedings in bankruptcy against an insolvent corporation, and the service of an order to show cause on its officers, should operate to dissolve the corporation, to be followed, as a consequence, by a defeat of the jurisdiction of the bankruptcy court. The authority of congress to pass the bankruptcy act is paramount and exclusive, and so is the jurisdiction of the district court thereunder. The 39th section of the act provides, that the debtor who commits any of the acts specified in that section shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereinafter prescribed, shall be adjudged a bankrupt. It is not one of those conditions that a corporation debtor, if in being when the petition is filed and the order to show cause is served, shall continue undissolved until after the adjudication. As respects a corporation proceeded against involuntarily, the proceeding is eminently one in rem against its property, as it cannot be discharged from its debts, nor can its members be discharged from their liability as such for its debts, and the proceeding is one solely for the distribution of its assets among its creditors. The prayer of the petition in this case, according to the form prescribed, was, that the corporation might be declared a bankrupt, and that a warrant might be issued to take possession of its estate, and that the same might be distributed according to law. Although the assignment to the assignee relates back to the commencement of the proceedings in bankruptcy, as declared by the 14th section, yet, by the 14th, the 35th and the 39th sections, the assignee is vested with the title to recover, as assets of the bankrupt, property conveyed or transferred by or out of the bankrupt, in fraud of his creditors, or in fraud of the act, before the filing of the petition in bankruptcy. We are entirely satisfied that the dissolution of the corporation in the present case had no effect to deprive the district court of its jurisdiction.

The suggestion that judgment was pronounced against the corporation without giving it an opportunity of being heard, is answered by the considerations already adverted to. The corporation had all the opportunity of being heard which the district court could or was bound to afford to it. Regarding the proceeding as one in rem, there is nothing in the record of the proceedings in the district court to show that the receiver, as claimant of the property, desired to be heard as presenting the corporation and such property, and was refused a hearing. In the case of In re Independent Ins. Co. [Cases Nos. 7,017 and 7,018], receivers of a dissolved state corporation were admitted to file a plea to the jurisdiction of the bankruptcy court, and such plea was heard on the merits and overruled. In the present case, the order of adjudication recites that no one appeared in opposition, and that the bank was called in open court, and came not, but made default to appear. If the receiver had appeared and asked, as representing the bank and its property, to be heard by answering the petition, and been refused leave to do so, a different question would be presented.

Nor do we perceive any force in the position, as applied to this proceeding in bankruptcy, that it abated by the dissolution of the corporation, so as to be incapable of being proceeded with thereafter. The views we have already announced involve the kindred conclusion, that the proceeding did not abate.

On the undisputed facts in this case, the plaintiff is entitled to the relief he seeks on this motion. In regard to the points raised

by the petition of review respecting the action of the district court in not confirming the resolution of the creditors nominating a trustee and a committee, and in appointing the plaintiff to be assignee, the petition has not been heard before this court, but, in view of the suggestion by the defendant, that his claim of title, as trustee, and the claim of title by the plaintiff, as assignee, ought not to be decided until the action of this court on the petition, we have considered those points sufficiently to be able to say, that we do not perceive in them anything which ought to constrain us to refrain from granting to the plaintiff any relief which we should otherwise deem it proper to grant.

It is proper that the injunction asked for should issue, and that the plaintiff should be appointed receiver, he stipulating to charge no commissions on such assets of his receivership as shall pass therefrom to the trust represented by the assignee of the bankrupt.

[For hearing on exceptions to master's report, see Case No. 11,214.]

Case No. 11,214.

PLATT v. ARCHER.

[13 Blatchf. 351.] [1]

District Court, S. D. New York. May 22, 1876.

BANKRUPTCY—ALLOWANCE OF COUNSEL FEES TO RECEIVER APPOINTED BY STATE COURT.

1. A. was appointed receiver of an insolvent corporation, by a state court. The corporation being afterwards adjudicated a bankrupt, the assignee in bankruptcy, in this suit against A., obtained a decree that the appointment of A. as receiver, and the transfer thereby of the property of the corporation to him, was void, as against the rights of the plaintiff under the bankruptcy act, and that A. must account to the plaintiff for the property. In taking such account, *held*, that the services of attorney and counsel were properly and necessarily rendered to A., as receiver, so far as such services benefitted and preserved the estate, and were not hostile to the proceedings in bankruptcy.

[Cited in Wald v. Wehl, 6 Fed. 169; Hunker v. Bing, 9 Fed. 279; Re Cook, 17 Fed. 329.]

[Cited in Clark v. Sawyer, 151 Mass. 66, 23 N. E. 726.]

2. Nothing can be allowed to A., out of the fund, for the services of his counsel in this suit, or in reference to the bankruptcy proceedings, he having unsuccessfully resisted such proceedings, or in the matter of the accounting of A. before the state court, which took place after this suit was brought, or for the referee's fees in such accounting.

[This was a bill in equity by John H. Platt, as assignee in bankruptcy of the Stuyvesant Bank, against Oliver H. P. Archer. See Cases Nos. 13,581 and 11,213.]

Francis N. Bangs, for plaintiff.

David Dudley Field and Dudley Field, for defendant.

BLATCHFORD, District Judge. In disposing of the exceptions to the master's report, I held that the services of attorney and counsel were properly and necessarily rendered to the defendant, as a receiver appointed by the state court, of the property of the insolvent corporation, so far as such services "benefitted and preserved the estate of the corporation, and were not hostile to the proceedings in bankruptcy." I also held that "the principle on which allowances for such services out of a fund in court, or in the hands of an officer of the court, are made, and the only principle upon which they can be supported, is, that the services rendered were rendered for the benefit of the fund." I also held, that nothing could "be allowed the defendant out of the fund for the services of his counsel in this suit;" that "the services in reference to the bankruptcy proceedings, and to this suit, were services in hostility to the fund, not for its benefit, and were unsuccessful;" and that "whatever claim the defendant might have had upon the assets in his hands as receiver in the state court, for reimbursement of his expenses for the services of counsel out of such assets, if he had successfully resisted the bankruptcy proceedings and this suit, this court has no right to divert the fund to pay the expenses of such unsuccessful resistance." I regard these principles as established by the weight of authority in like proceedings under the bankruptcy act [of 1867 (14 Stat. 517)]. Street v. Dawson [Case No. 13,533]; In re Stubbs [Id. 13,557]; Burkholder v. Stump [Id. 2,165]; In re Cohn [Id. 2,966]; In re Hope Mining Co. [Id. 6,682].

I am earnestly pressed, however, to allow to the defendant, out of the fund, all the expenses he has incurred for the services of attorney and counsel in resisting the bankruptcy proceedings and in defending this suit. It is contended, for the defendant, that, having been appointed receiver by a court of the state, he has been compelled, as a part of the execution of such trust, to have the services of attorney and counsel down even to the present time; that he has been guilty of no breach of his trust, and has committed no fraud in fact, but has only done what was voidable, as in legal fraud of the bankruptcy act; and that a trustee is always to be reimbursed out of the trust fund for his expenses incurred bona fide in the execution of his trust.

It is not possible to recognize any legal distinction, under the bankruptcy act, between the position of a person who is appointed a receiver by a state court, and, in accepting such trust, makes himself amenable to the provisions of law which prohibit certain transfers, and a person who makes himself amenable to such provisions in any of the other ways specified in the statute, such as becoming a vendee, assignee or transferee by a direct sale, assignment or transfer from the insolvent debtor. The transferee is a voluntary transferee, whether he be appointed by a state court or by the insolvent

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

debtor, and he takes upon himself the risk of the impeachment of the transfer by an assignee in bankruptcy. The right and title of the assignee in bankruptcy are paramount, and, although the transfer which he attacks was not void, but only voidable, yet, when the assignee in bankruptcy succeeds in his suit to set aside the transfer, it necessarily follows, that, from and after the commencement of the suit, the resistance of the transferee was wrongful, as against the assignee in bankruptcy, and as against the fund which becomes his as of the time of the commencement of the suit. The fund which may have been, up to that time, a trust fund in the hands of the transferee, by virtue of his trust appointment, ceases from that time to be held in his hands by virtue of such trust appointment, and, from that time, passes out from under such trust appointment. The decree in the suit, so far as such trust appointment is concerned, relates back to the commencement of the suit, and, from that time, the fund becomes a trust fund in the hands of the assignee in bankruptcy, under his trust appointment. Therefore, in such case, there is not, after the commencement of the suit, any trust fund for the defendant to administer, as between himself and the authority which created such trust, and no trust fund out of which such authority can reimburse to him his expenses incurred after that time. All his expenses after that time are incurred to diminish a fund which is, in judgment of law, the property of another and a hostile trustee. If the doctrine contended for were to be admitted, there would be little benefit to be derived, in many cases, from the provisions of the statute in respect to prohibited and fraudulent transfers, for, the expenses of all parties to the hostile proceedings to set aside such transfers would, if to be paid out of the fund, leave but a scanty residuum for the creditors, and encouragement would be offered for the incurring of needless expenses.

So, too, the expenses of the defendant for the services of counsel in resisting the bankruptcy proceedings cannot be regarded as expenses incurred for the benefit of that fund in the hands of the assignee in bankruptcy, out of which it is now asked that such expenses should be paid. Such expenses had no tendency to make such fund larger, but, if now paid, they will make it smaller. They were not expenses incurred to ensure the passing over of the fund intact to the party now adjudged to be entitled to it, or to preserve the fund from the hostile attacks of those who were seeking to prevent the fund from passing to the assignee in bankruptcy.

There is nothing in these views that is inconsistent with the well established principles in regard to trustees, that their expenses in protecting the trust property against unsuccessful hostile attacks, shall, in case of a distribution under the trust, be paid out of the fund; and that their expenses in protecting and administering the trust property shall, even in the case of a successful hostile attack, be paid out of the fund, so far as they were incurred prior to the commencement of the hostile suit. Nor is there anything inconsistent with the principle of such cases as Poole v. Pass, 1 Beav. 600, and Holford v. Phipps, 4 Beav. 475, which proceed upon the ground that the defendant to whom expenses and costs are allowed was a trustee for the plaintiff. In setting aside a transfer which the statute declares "shall be void," and was made "in fraud" of its provisions, and "contrary" to its provisions, the transferee can, in no proper sense, be regarded as a trustee for the plaintiff, within the sense of the decisions which give costs and expenses to a defendant who is a trustee for the plaintiff, in some cases where the plaintiff has a decree in his favor.

I find it stated in the affidavit of Mr. Archer, now presented, that this suit was commenced March 12th, 1872. This is, I think, a mistake. I stated the date, in my former opinion, as being May 11th, 1872. I think that is correct, as the bill was filed May 10th, 1872, and the subpœna was, I believe, served the next day. The defendant claims that, as receiver appointed by the state court, he did not, under the order made by this court, on the 6th of June, 1872, appointing the plaintiff receiver in this suit, turn over to the latter the assets in question until June 12th, 1872, and that he was obliged to retain such property until that time, and to employ attorneys and counsel until that time. But, no time can properly be taken as the dividing line, as respects this suit, between unquestioned possession by the defendant and hostile action by the plaintiff, other than the commencement of this suit, and, from that time, as against any claim on the funds for the services of counsel, the defendant took the risk of an adverse result in the suit of which he then had full notice. The same rule must apply to the services of attorney and counsel in the matter of the accounting of the defendant before the state court, which took place after this suit was brought. The observations of Judge Cadwalader on this subject, in Burkholder v. Stump [Case No. 2,165], where he refused an allowance of this kind, meet my approval. These views make it necessary that I should hold, also, that the items of referee's fees for accounting in the supreme court are not allowable.

As regards any suits or matters in which, on the request or retainer, express or implied, of the plaintiff, the services of attorney and counsel were rendered for the benefit of the estate, either before or after the commencement of this suit, whether such suits or matters were prosecuted in the name of the defendant or otherwise, of course, such services must be paid for by the plaintiff out of such estate.

I do not perceive that any departure from

the principle I have adopted can be properly predicated upon the fact that the plaintiff may, in the course of the proceedings before the master, have made claims which the master disallowed.

The defendant put in an answer in this case denying the plaintiff's title and his right to recover. There was a decree for the plaintiff, on proofs, and then an accounting. Costs to the plaintiff would properly follow a recovery on such accounting, and, as a general rule, the defendant would be required to pay the fees of the master on such accounting. The plaintiff proposes that the master's fees for his services in this cause, not already paid for, shall be taxed by the clerk, upon notice to the respective parties, and that one half of the amount thereof, as taxed, shall be paid by each party. I see no reasonable objection to this provision.

The order on the master's report and exceptions may be again presented for settlement, so that it may conform to this decision where that modifies the one before rendered.

Case No. 11,215.

PLATT v. BEACH.

[2 Ben. 303;[1] 1 Thomp. Nat. Bank Cas. 182.]

District Court, E. D. New York. March, 1868.

BANKING ACT — RECEIVER — UNITED STATES OFFICER—JURISDICTION.

1. A receiver of a national bank, appointed under the thirty-first section of the national banking act (13 Stat. 99), is an officer of the United States.

[Cited in Stanton v. Wilkeson, Case No. 13,299; Frelinghuysen v. Baldwin, 12 Fed. 397.]

[Cited in McCornick v. Thatcher, 8 Utah, 294, 30 Pac. 1093.]

2. This court, therefore, has jurisdiction of an action at common law, brought by such receiver (Act March 3, 1815, § 4 [3 Stat. 245]), to collect a claim which was due to the bank at the time of his appointment.

[Cited in Frelinghuysen v. Baldwin, 12 Fed. 397; Price v. Abbott, 17 Fed. 508; Stephens v. Bernays, 41 Fed. 402; Fisher v. Yoder, 53 Fed. 565.]

This was a suit brought by the plaintiff [Frederick A. Platt, receiver of the Farmers' and Citizens' National Bank] to recover a sum of money, alleged by the plaintiff to have been due from the defendant [Oren M. Beach] to the bank, of which the plaintiff was appointed receiver by the comptroller of the treasury, with the concurrence of the secretary of the treasury, under the provisions of the thirty-first section of the national banking act (13 Stat. p. 99, § 31). The defendant demurred to the complaint, assigning as the grounds of his demurrer: First. That this court had no jurisdiction of the subject of the action. Second. That the plaintiff had not the legal capacity to sue. Third. That the complaint did not state facts sufficient to constitute a cause of action.

R. H. Huntley, in support of the demurrer, argued as follows:

The first section of the national banking act establishes a separate bureau in the treasury department, which bureau is "charged with the execution of this and all other laws that may be passed by congress, respecting the issue and regulation of a national currency secured by United States bonds." The chief officer of this bureau is the comptroller of the currency, and he is under the general direction of the secretary of the treasury. He shall be appointed by the president, and shall have a competent deputy appointed by the secretary. He shall, from time to time, employ the necessary clerks to discharge such duties as he shall direct, which clerks shall be appointed by the president, and shall have a competent deputy appointed by the secretary. He shall, from time to time, employ the necessary clerks to discharge such duties as he shall direct, which clerks shall be appointed and classified by the secretary of the treasury, in the manner now provided by law. Section 31 provides that, in a certain case, "the comptroller may, with the concurrence of the secretary of the treasury, appoint a receiver to wind up the business of such association, as provided in this act." Section 50 provides that, in certain other contingencies, the comptroller may appoint a receiver, whose duties are clearly defined, and, among them, are these: "He shall collect all debts, dues, and claims belonging to such association, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts," &c. Section 56 provides that "all suits and proceedings arising out of the provisions of this act, in which the United States, or its officers or agents, shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the solicitor of the treasury." It will readily be seen that none of these provisions authorize the plaintiff to bring this action, or this court to entertain it. The inferior courts of the United States (circuit and district courts) have no jurisdiction, except such as congress, by constitutional laws, has conferred upon them. Hubbard v. Northern R. Co. [Case No. 6,818]; Ex parte Cabrera [Id. 2,278]; Shute v. Davis [Id. 12,828]; Livingston v. Jefferson [Id. 8,411]; Turner v. Bank of North America, 4 Dall. [4 U. S.] 8. But it is claimed that Act March 3, 1815, § 4 (3 Stat. 245), confers this jurisdiction. That section is as follows: "The district court of the United States shall have cognizance, concurrent with the courts and magistrates of the several states and the circuit courts of the United States, of all suits at common law, when the United States, or

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

any officer thereof, under the authority of any act of congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars."

Therefore, the defendant's counsel submits these two propositions: First. The receiver is not an officer of the United States; and, Second. Even if he were such officer, no act of congress has authorized him to sue.

First.—This receiver is not an officer of the United States. 1. He fills no office. That is not an office which is not established by law or usage, but which is occasional or transitory, depending upon fluctuations and exigencies. An office must be fixed and established. The duties exercised by the incumbent may be occasional and transitory, but the office must be one always open, and ready for performance when such occasions arise—the incumbent may die or be removed, but the office remains, while, if the office is abolished, the officer ceases to exist. A servant or agent may be appointed to do a particular thing, or perform a specific duty, and, as soon as the thing is done or the duty performed, his agency or service ceases. But he is no officer, and fills no office. "An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested." Wood's Case, Hopk. Ch. 7, 2 Cow. 30, note. Thus a village tax collector is a public officer. People v. Bedell, 2 Hill (N. Y.) 196. "Lexicographers generally define office to mean public employment; and I apprehend its legal meaning to be an employment on behalf of the government in any station or public trust, not merely transient, occasional, or accidental." In re Oaths to be Taken by Attorneys and Counsellors, 20 Johns. 493, per Platt, J. "The phrase, 'civil officers,' in a constitutional provision prescribing the power of appointment of civil officers,—held, to embrace those officers only, in whom part of the sovereignty, or municipal regulations, or general interests of society are vested, and not to include such functionaries as canal commissioners." U. S. v. Hatch, Burn. 22; cited in 2 Abb. Nat. Dig. 120, p. 48. 2. The position occupied by this receiver is simply that of trustee, not an office in which the public, as the public, are interested, but in which only particular individuals have any legal interest, viz: the stockholders and depositors of the bank. These are not the public. "Trustees are private or public. The former hold property for the benefit of an individual, or more than one, but who are distinctly pointed out, personally, or by other sufficient description. Public trustees are those who hold for the benefit of the whole public, or for a certain large part of the public, as a town or a parish, and they are usually treated as official persons, with official rights and responsibilities." 1 Pars. Cont. (2d Ed.) 101, 102, 104. This receiver is trustee for the depositors and stockholders, but not for the bill holders. Section 47 of the act; also sections 48, 49. But neither the stockholders nor depositors, nor yet the bill holders, of a bank, are the public in a legal sense. They are persons who are distinctly pointed out personally, or by other sufficient description. Pars. Cont., supra. 3. The same law that authorizes the appointment of this receiver, authorizes the election of a president of a bank, and all its other officers (section 8), but it cannot be pretended that the president of a national bank is a United States officer. Christman v. Floyd, 9 Wend. 342; New York & H. R. Co. v. Mayor, etc., of New York, 1 Hilt. 584, where it is held that the metropolitan police commissioners are not state officers; and see Id. 569, O'Conor, arguendo. 4. The constitution of the United States (article 1, § 9, par. 7) provides that "no person holding any office of profit or trust under the United States, shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state." Under this clause it has been held that a marshal of the United States cannot, at the same time, hold the office of commercial agent of France. 6 Op. Attys. Gen. 409. But can it be claimed that this receiver is under such interdiction? Again, article 2, § 1, provides that no person holding an office of trust or profit under the United States, shall be appointed an elector. Cannot this receiver be an elector? Again, article 2, § 2, par. 2, provides that the president "shall nominate, and by and with the consent of the senate, shall appoint ambassadors," &c., * * * "and other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." The effect of this and the other clauses in the constitution, on the subject of appointment to office, is to declare that all officers under the federal government, except in cases where the constitution itself may otherwise provide, shall be established by law. U. S. v. Maurice [Case No. 15,747]. But there is no office of receiver of national banks established by law. Again, article 2, § 2, par. 2, provides, "but the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments." But this receiver was appointed by the comptroller of the currency, who is not the head of a department, but the "chief officer of a bureau." Bank Act, § 1. The comptroller has no authority of appointment, even as to his own clerks. They are to be appointed and classified by the secretary of the treasury, in the manner now provided by law. Id. § 1. 5. By act of congress of June 11, 1864 (13 Stat. 123), it is enacted, "that no member of the senate," &c., * * * "nor shall any head of a department, head of a bureau, clerk, or any other officer of the government, receive or agree to receive, any compensation whatsoever, directly or indi-

rectly, for any services rendered, or to be rendered, after the passage of this act, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military or naval commission whatever." Now, can it for a moment be pretended that this receiver is such an officer as is here named or referred to; or that he cannot appear against the United States in any matter involved in the section quoted? This language cannot apply to him by any construction. Yet, if he is an officer of the government, he is an officer of the United States, and, as such officer, he is under this interdiction. Wise v. Withers, 3 Cranch [7 U. S.] 336. In this case, Marshall, C. J., says: "A distinction has been attempted between an officer of the United States and an officer of the government of the United States, confining the latter more especially to those officers who are considered as belonging to the high departments; but in this distinction there does not appear to the court to be a solid difference. They are terms which may be used indifferently to express the same idea." Again, no officer of the government of the United States shall receive money for aiding to procure a contract of the government (2 Brightly, Dig. p. 105; Act July 16, 1862, § 1), nor act as a claim agent (1 Brightly, Dig. 132, § 3). Does this language include this receiver? Again, different classes of officers are spoken of in the various statutes and acts of congress, as "officers in a court of the United States" (1 Brightly, Dig. p. 213, §§ 63-65); "an officer of the customs" (Id. p. 214, § 66). Persons employed by the collector of customs are "declared to be officers of the customs." Id. p. 322, § 19. Custom house employees are called clerks. Id. p. 323, § 24. Inspectors of customs, weighers, and gaugers are not officers. Id. p. 319, § 3. The legislature makes a distinction between an officer and one discharging an official function under a department of the government, and also between an officer and "a person holding a place of trust or profit." Act Feb. 26, 1853, § 6 (10 Stat. 171). The attention of the court is particularly called to this entire section. Again, Act Sept. 30, 1850, § 1 (9 Stat. 452), declares that in no case shall one individual be paid the salaries of two different offices on account of having performed the duties thereof at the same time. If, being the receiver of one bank constitutes the plaintiff an officer, then, if he is the receiver of another bank at the same time, he will be filling two offices at once, but one of which he can be paid for. Is this either the letter or the spirit of the act authorizing his appointment? The act of congress of April 27, 1816 (3 Stat. 343), enacts that once in two years a register, containing correct lists of all the officers and agents, civil, military, and naval in the service of the United States, made up to the last day of September of each year in which a new congress is to assemble, shall be compiled and printed under the direction of the department of state. What secretary of state would think of including this receiver in such a list? 6. If this receiver is an officer of the United States, he cannot hold an office under the government of some of the separate states, even though he resided in them. He cannot in Kentucky. Rodman v. Harcourt, 4 B. Mon. 224; Id. 499. 7. This receiver does not represent the government. He only represents the creditors and stockholders of the bank. Gillet v. Moody, 3 N. Y. 488. He can no more be a United States officer than an assignee in bankruptcy under the bankrupt act can. 8. There is nothing in the nature of the institutions organized under the currency act, conferring jurisdiction on this court in this case. District courts had no jurisdiction of actions by the United States Bank. Bank of U. S. v. Martin, 5 Pet. [30 U. S.] 479; Bank of U. S. v. Deveaux, 5 Cranch [9 U. S.] 61. 9. The district court had jurisdiction of an action brought by the assignee of a bankrupt under the bankrupt act of 1841 [5 Stat. 440], only because the sixth section of that act especially conferred the jurisdiction. Kelly v. Smith [Case No. 7,675]. District courts have such authority and jurisdiction as is conferred on them expressly by statute, and no other; and it was, therefore, held that a district judge could not remove an assignee in bankruptcy, or compel him to account. Lucas v. Morris [Id. 8,587]. 10. The judiciary act of Sept. 24, 1789 (1 Stat. 78), contains this provision: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover such contents if no assignment had been made, except in cases of foreign bills of exchange." Under this act, it has been held that the general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in these courts. Sere v. Pitat, 6 Cranch [10 U. S.] 332. The receiver is in no better condition to sue than the bank would have been. Hyde v. Lynde, 4 Comst. [4 N. Y.] 392. Clearly, then, he cannot bring this action. Speaking of jurisdiction of courts in certain cases, Chief Justice Marshall says: "The act of 1815 contains a clause which does, we think, confer jurisdiction. It cannot be doubted that this clause vests jurisdiction expressly in the district courts, in all suits at common law, where any officer of the United States sues under authority of any act of congress. The postmaster general is an officer of the United States who sues under the authority of the act of 1810, which makes it his duty to sue for debts and balances due to the office

he superintends, and obliges him to sue in his own name." Postmaster General v. Early, 12 Wheat. [25 U. S.] 146. But where is there any act which makes it the duty of this receiver to sue in his own name; and, if such authority be shown or implied, where is jurisdiction of this action expressly conferred on this court? "A receiver can only sue in the circuit court in case the corporation which he represents could have done so." Bradford v. Jenks [Case No. 1,769].

Second.—But even if it be conceded that this receiver is a United States officer, no statute has given him authority to sue in this court. 1. The act of 1815 authorizes such officer to sue only where he is authorized by some act of congress. As such officer could not be in the contemplation of the legislature until the passage of the national currency act, that act must be looked to for his authority, and no other, unless it be subsequently enacted. Such authority must be express, and cannot be implied. It does not grow out of the fact that he has the common law powers of a receiver. Such powers enable him to go into a common law court, but not elsewhere. This principle is recognized in the act itself. Section 50 provides that, upon the order of a court of record of competent jurisdiction, he may sell or compound all bad or doubtful debts. This clearly refers to a court already having jurisdiction, and confers no new jurisdiction. 2. This whole question is very simple. A receiver who, by the terms of the act (section 50), is styled an agent, sues in a court which cannot entertain the action unless such receiver is an officer of the United States. That he is not such an officer has been clearly shown. It is for the plaintiff to discover, in the act authorizing his appointment, authority for him to sue here—such authority cannot be shown either expressly, or by implication.

B. F. Tracy, U. S. Dist. Atty., and R. D. Benedict, for plaintiff, argued as follows:

The question raised by the demurrer, is whether the plaintiff is an "officer of the United States?" If he is, this court has jurisdiction under the act of March 3, 1815 (1 Brightly, Dig. p. 231, § 13). First. Is plaintiff an officer? A receiver is always an officer. Edw. Rec. p. 3, and cases cited; Bouv. Law Dict. word "Receiver"; Parker v. Browning, 8 Paige, 388; Booth v. Clark, 17 How. [58 U. S.] 331. What is he, if he is not an officer? Second. Who have been held to be officers? 1. Inspectors of customs. U. S. v. Barton [Case No. 14,534]; U. S. v. Morse [Id. 15,820]. 2. Special deputy collectors under the act of March 2, 1799 (1 Stat. 644). Merriam v. Clinch [Case No. 9,460]. 3. Bonded warehouse keepers under the internal revenue act. U. S. v. Stern [Id. 16,389]. These keepers are appointed for every warehouse. Act 1866, § 40. 4. Inspectors of distilleries are officers. Id. §§ 29, 31. 5. A sailmaker in the Washington navy yard. Sanford v. Boyd [Case No. 12,311]. 6. A clerk in one of the departments appointed by the comptroller. Ex parte Smith [Id. 12,967]. Third. Why is he not an officer? Chief Justice Marshall (U. S. v. Maurice [Id. 15,747]) says: "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is employment, it does not follow that every employment is an office. A man may be employed under a contract, express or implied, to do an act or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters upon the duty appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs those duties from an officer." This receiver comes within every word of this definition. His duties continue. They are defined by statute, and not by contract. He is appointed by government to perform them, and they would continue though the person of the receiver should be changed. Fourth. If he is an officer, he is an officer of the United States. Wise v. Withers, 3 Cranch [7 U. S.] 331. Fifth. If the defendant criticises the mode of appointment, which he has no right to say any thing about, the appointment by a collector or a surveyor, with the approval of the head of a department, has been held to be an appointment by the head of a department. U. S. v. Sears [Case No. 16,247]; U. S. v. Bachelder [Id. 14,490]; Ex parte Smith [supra]. The appointment of the plaintiff, by the comptroller, "with the concurrence of the secretary of the treasury," is exactly analogous. Sixth. There are so many officers appointed in that way, that no court could, for a moment, think of holding that such a mode of appointment was unconstitutional.

Mr. Huntley, in reply, said:

It is usual in speaking of an office without an incumbent, to say, the office is vacant, or, there is a vacancy in the office, implying that the station or franchise exists independently of any incumbent: and such is not only the common language or speech of men, but it is also the language of the courts, as in Philips v. Bury, 2 Term R. 351, where the court say, "Suspension does not create a vacancy in an office; it is only an impediment to the officer enjoying any benefit from it." Also as in Johnston v. Wilson, 2 N. H. 202, where the court say, "An office, when once filled, cannot be considered vacant till the term of service expire, or till the death, removal, or resignation of the person appointed." And again, as in Wilcox v. Smith, 5 Wend. 231,

where the court say, "To constitute an officer de facto, a mere claim to be a public officer, and exercising the duties of the office, are not sufficient; there must be some color of right to the office, or such acquiescence of the public as will authorize the presumption of at least a colorable appointment or election." In Plymouth v. Painter, 17 Conn. 585, the court say, "An officer de facto is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office; being distinguished on the one hand from a mere usurper of an office, and on the other from an officer de jure." In the case of Conner v. City of New York, 2 Sandf. 355, Sandford, J., at page 368, says, "An office is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. 2 Bl. Comm. 36. And a public officer is every one who is appointed to discharge a public duty, and receives a compensation for the same. Per Best, C. J., in Henly v. Mayor, etc., of Lyme, 5 Bing. 91." * * * "Public offices, in theory at least, are held and exercised for the benefit of the community," and at page 369, the same judge says, "Where an office is created by statute, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away, without abolishing the office." At page 375, the same judge says, "In our opinion, a public officer is an agent, elected or appointed to perform certain political duties in the administration of the government." "An 'office' which legislators are forbidden to create and then enjoy, is any continuing charge, or employment, or duty, defined by rules prescribed by law, and not by contract." Shelby v. Alcorn, 36 Miss. 273. The fact that the receiver was appointed by the comptroller of the currency, with the concurrence of the secretary of the treasury, does not strengthen the complaint, or change the plaintiff's condition. 1. The act (section 50) confers the power of appointment on the comptroller of the currency, and not on the secretary of the treasury, and his concurrence or approbation is neither required nor directed. 2. If this were not so, the concurrence of the secretary is not an appointment by him. The first of these propositions has been passed upon by the courts, holding that an appointment by the head of a department, in a case where the constitution does not provide, must be authorized by law. In the case of U. S. v. Maurice [supra], the court holds, that appointments to office can be made by the heads of departments of the United States government, in those cases only in which congress has authorized it by law; and therefore, the appointment of an agent of fortifications by the secretary of war, there being no act of congress conferring that power upon that officer, is irregular. [See Case No. 11,211.]

BENEDICT, District Judge. This is an action at common law, brought by a receiver of a national bank. A demurrer has been interposed to the complaint, for the purpose of raising the question of the right of the plaintiff to maintain such an action in a court of the United States. The claim to this right, on the part of the plaintiff, is based solely upon the fourth section of the act of March 3, 1815, it being conceded that there is no provision in the act creating the national banks, which expressly gives to the national courts jurisdiction of such an action. The provision in the act of 1815 relied on, confers upon the district and circuit courts of the United States, jurisdiction of "all suits at common law where the United States or any officer thereof, under the authority of any act of congress, shall sue;" and the question is, whether a receiver of a national bank appointed by the comptroller of the currency, with the concurrence of the secretary of the treasury, in accordance with the provision in section thirty-one of the act of June 3, 1864 (volume 13, c. 10), which provides for the creation and winding up of the national banks, is an officer of the United States within the meaning of the fourth section of the act of 1815 above referred to? As to the construction of this latter act, it can hardly be doubted, I apprehend, that it includes all persons holding office under any act of congress, whose appointment is required, by law, to be made in the mode prescribed by the constitution for the appointment of officers of the United States. The provision of the constitution (article 2, § 2, subd. 2) is this:

"The president shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments."

If, then, this receiver, who is appointed under an act of congress to perform certain official duties by virtue of the act, is by law required to be appointed by the president, a court of law, or a head of a department, he must be deemed to have the right, under the act of 1815, to resort to this court to bring such actions as he may be required to bring in the discharge of the duties imposed upon him by law. The mode of his appointment is prescribed in the same provision which provides for the appointment of such a receiver, as follows: "The comptroller of the currency, may, with the concurrence of the secretary of the treasury, appoint a receiver to wind up the business of such association, as provided by the act." Section 13; 13 Stat. 709. An appointment so made is equivalent in law to an appointment by the secre-

tary of the treasury, who is the head of a department. This same question has arisen in regard to inspectors of the customs who are appointed under the act of March 2, 1799, which provides that the collector "shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, gaugers, measurers and inspectors." Under this act it was long ago decided that inspectors of the customs were, in law, officers appointed by the head of the treasury department. U. S. v. Barton [Case No. 14,534]; U. S. v. Morse [Id. 15,820]; Sanford v. Boyd [Id. 12,311]; Ex parte Smith [Id. 12,967]. The words of the banking act are certainly as strong as those used in the act of 1799, and must be held to have the like effect. It follows, then, that the plaintiff is an officer of the United States as defined by the constitution, and accordingly within the meaning of the act of March 3, 1815. The nature of the duties imposed upon a receiver of a national bank also leads to the same conclusion. These duties are not defined by any contract, but by law and rule prescribed by the government. They are similar to those appertaining to an ordinary receiver appointed by a court. But such receivers have always been considered to be officers (Bouv. Law Dict., word "receiver"; Edw. Rec., p. 3), and they are officers of the court which appoints them. The plaintiff, then, is an officer, and as it is not seen how he can be considered to be an officer of any court, he must be an officer of the government which appoints him, into whose treasury he is required to pay all moneys he shall collect, by whose district attorney he is required by law to be represented in court, and under the direction and supervision of whose solicitor of the treasury all his suits and proceedings are to be conducted. Section 56. The judgment must accordingly be in favor of the plaintiff upon the demurrer, with leave to the defendant to answer on payment of costs.

PLATT v. BOYD. See Case No. 11,212.

Case No. 11,216.

PLATT v. BROACH.

[36 How. Prac. 188.]

District Court, E. D. New York. Dec. 14, 1868.

TRIAL—EVIDENCE—QUESTION FOR JURY.

[1. Collection of a note being resisted upon the ground that it was not stamped as required by the revenue laws.]

[2. A note sued on bore upon its face the stamp required by the revenue laws, purporting to have been duly canceled on the date of the note, but the parties to it, who left it at a bank, swore that the note was not then stamped at all. The president of the bank, with whom it was left, testified that he did not stamp it, and the cashier testified that he did not. There was no evidence as to when the stamp was affixed, or that there were other persons connected with the bank having authority to stamp notes, or that the cancellation stamp was that of the bank. The holder of the note was not asked whether it was stamped when it came into his possession. *Held*, that in this condition of the evidence, defendant was entitled to go to the jury upon the question of fact in regard to the stamp.]

This action is brought by the receiver of the Farmers' and Citizens' National Bank, to recover the amount of a promissory note, made and indorsed by the defendants. It now comes before the court upon a motion for judgment upon a verdict for the plaintiff, which was taken by direction of the court subject to the opinion of the court.

BENEDICT, District Judge. Among the other points taken by the defendant in opposition to the motion is this, that the evidence did not show the note, upon which the suit is brought, to have been stamped as required by the revenue laws; while on the part of the plaintiff it is insisted that inasmuch as the note in evidence bears upon its face the proper stamp, purporting to have been duly canceled on the day of the date of the note, it is to be presumed to have been duly affixed on that day. There appears to have been some misunderstanding of the evidence given upon this point. As the notes of the trial show, the parties to the note, who left it at the bank, swear that the note was not stamped at all when they left it. The president of the bank, with whom they left it, says he did not put the stamp on and does not know who did, and the cashier of the bank shows that he did not put the stamp on. There is no evidence as to when the stamp was affixed, or that there were any other persons connected with the bank, than those sworn, who were authorized to stamp notes, or that the cancellation stamp is that of the bank, and the present holder is not asked whether the stamp was upon the note when it came into his hands. In this position of the evidence, the defendant was entitled to go to the jury upon the question of fact raised in regard to the stamp.

The motion for judgment must therefore be denied and a new trial granted. The cause will be placed upon the calender of the present term.

Case No. 11,216a.

PLATT v. DICKENSON et al.[1]

District Court, S. D. New York. June 13, 1878.

BANKRUPTCY — SUIT BY ASSIGNEE TO SET ASIDE CONVEYANCE—INJUNCTION.

[Where the assignee sues to set aside a conveyance of the bankrupt's stock of goods, made to his brother within three months of the bankruptcy, and the court enjoins, pendente lite, the sheriff and certain creditors of the brother from selling the same on execution, such injunction will not be dissolved merely upon the answer of

[1] [Not previously reported.]

one of the defendants and certain affidavits denying substantially the equities of the bill; for if the sale were made, and the proceeds paid over, the rights of the assignee and the bankrupt's creditors would be virtually gone.]

[This was a suit by John H. Platt, assignee in bankruptcy of John Dickenson, against Thomas Dickenson and others to set aside a conveyance and to enjoin an execution sale, etc.]

A. G. Fox, for assignee.
Robert Sewall, for defendants.

CHOATE, District Judge. Upon a bill in equity filed by the assignee of the bankrupt, John Dickenson, to set aside as void under the bankrupt law a conveyance of the bankrupt's stock of goods, made within three months before the bankruptcy, by the bankrupt to the defendant, Thomas Dickenson, his brother, an injunction was granted restraining the sheriff and certain judgment creditors of Thomas Dickenson, who were made defendants in the suit, from selling or disposing of the goods under levies made by the sheriff under executions issued upon their judgments against Thomas Dickenson recovered since the commencement of the bankruptcy proceeding. The question now is whether the injunction shall be continued pending the suit. These judgment creditors of Thomas Dickenson insist that the injunction should be vacated on the answer of one of them and on affidavits in behalf of all, which it is claimed substantially deny the equity of the bill.

Facts alleged in the answer and affidavits make it very probable that the sale from the bankrupt to Thomas Dickenson was made when he was insolvent, and to defeat the operation of the bankrupt law [of 1867 (14 Stat. 517)], and that Thomas Dickenson knew of the insolvency and of the purpose of the vendor in making it. If the sale is set aside the title of the assignee will relate back to the time of the sale and all title made under Thomas Dickenson will be cut off. By the commencement of the bankruptcy proceedings all controversies in relation to the property of the bankrupt come within the jurisdiction of this court, and this bill is filed under the jurisdiction given to this court in aid of its jurisdiction in bankruptcy. The fact that parties claiming adverse interest deny the facts on which the assignee relies does not make it proper that the injunction should be dissolved. If it were so the court would find very little property to administer under the bankrupt law, as the hostile claimant generally is able to produce a denial of the facts relied on to show that property the subject of controversy is the property of the bankrupt. If the sale under execution goes on, and the proceeds are paid over to the judgment creditors of Thomas Dickenson, the rights of the assignee and creditors of the bankrupt will be virtually gone; and pending the suit it is the duty of the court to preserve the property so that it may ultimately go to the party found entitled by the decree. The fact alleged that the plaintiff, as assignee, has come into possession of a note given by Thomas Dickenson to the bankrupt as part consideration for the sale of the goods, does not estop the plaintiff from maintaining this suit. The assignee consents to the sale going on, as the property is perishable. Injunction modified so as to allow the sheriff to sell the property and hold the proceeds subject to the further order of the court.

Case No. 11,217.

PLATT v. JEROME.

[2 Blatchf. 186.] [1]

Circuit Court, S. D. New York. April, 1851.

ACCOMMODATION DRAFT—BONA FIDE HOLDER—EVIDENCE OF CONSIDERATION—INQUIRY.

1. J., for the accommodation of M., accepted a draft drawn by M., payable to his own order. In a suit against J. on the draft, brought by P., to whom M. transferred it before due, J. set up that his acceptance was obtained by fraud: *Held*, that a receipt signed by M., expressing a consideration for the transfer of the acceptance to P., was not competent evidence against J. to prove the payment of value by P. for the acceptance.

2. Before the draft was passed to P., it was put by M. into the hands of one B., to negotiate. B. inquired of J. as to the draft, who said it was a business draft and would be paid at maturity. Afterwards, and before taking the draft, P. applied to B. to know what J. had said about the draft, and was told, and then took the draft: *Held*, that P. could not be in any more favorable position, as regarded the inquiries he made of B., than if he had made them of J. himself, in which case he would have been bound to disclose to J. any knowledge he had that J. had been defrauded in giving the acceptance.

3. *Held* further, that if P., when he applied to B., knew that J. had been defrauded in giving the acceptance, such knowledge would affect his title to the draft.

This was an action by [Obadiah H. Platt] endorsee against acceptor, on the following draft:

"$1,678 73. Poughkeepsie, N. Y., March 1st, 1844. Five months after date, pay to my order, at the Union Bank in the city of New York, sixteen hundred and seventy-eight 73-100 dollars, for value received, and place to the account of your obed't servant, Franklin Merrill.

"Mr. Chauncey Jerome, New Haven, Ct."

(Endorsed): "Franklin Merrill. Pay N. G. Ogden, Esq., Cashier. O. H. Platt."

The draft was accepted by Jerome. At the trial, before Nelson, J., in May, 1849, it appeared that the draft in question and several others were accepted by Jerome under an arrangement with Merrill, which was set forth in a receipt given by Merrill to Jerome at the time, as follows: "Received, New York, March 1st, 1844, of Chauncey Jerome, the following notes, which I receive as advances to raise money on for my own business, to purchase

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

wool before the clip, if deemed proper, and funds or wool I agree to put in his hands before the following notes and acceptances fall due, and agree to see the said Jerome harmless from all trouble for so doing, and have given the said Jerome a writing from H. Martin & Co., that this matter is guaranteed by them, that the wool or money shall be in his hands in season to raise or take up the notes and acceptances. I also agree to take the same up myself. Franklin Merrill." To this receipt was annexed a list of notes and acceptances amounting to $17,800, among which was the one in suit, and under the list was written: "The above notes and acceptances I receive as advancement on wool, and agree to save Mr. Jerome harmless, and am to take up the paper myself. Franklin Merrill." The draft in suit was transferred to the plaintiff on the 4th of April, 1844. He on that day deposited it in the Phœnix Bank, New York, for collection, where it remained till maturity, when it was protested for non-payment, and returned to the plaintiff.

The defendant insisted that the acceptance was without consideration, and for a particular purpose, namely, to purchase wool, under the agreement above set forth. He also introduced evidence to show that the acceptance was procured from him by fraud on the part of Merrill. The evidence went to show, among other things, that the firm of H. Martin & Co., mentioned in the above agreement, was insolvent and irresponsible at the time; that a guaranty, signed "Henry Martin & Co.," which was given to Jerome, was signed by one of that firm without the assent or authority of his partners; and that that fact was known to Merrill at the time. The guaranty was as follows: "Mr. Chauncey Jerome, Sir: Any arrangement which you and Mr. Franklin Merrill may enter into in regard to your making advances to Merrill we will hold ourselves responsible for, that the advances shall be met as may be agreed upon between you and him. New York, March 4th, 1844. Henry Martin & Co."

The plaintiff, then, for the purpose of rebutting the defence, offered in evidence a receipt given by Merrill to him, as follows: "Received of O. H. Platt his receipt in full for an account of four hundred dollars, due Reynolds, Platt & White for professional services; also a deed of one hundred and sixty-eight acres of land in Jackson, Mississippi, from said Platt, at a valuation of six hundred and twenty-eight dollars twenty one cents, and six hundred dollars in cash, for which I have placed in his hands and sold to him a draft upon Chauncey Jerome, New Haven, for sixteen hundred and seventy-eight dollars and seventy-three cents, at five months, dated March 1st, 1844, and accepted by him, payable to my order, and endorsed by me, which draft is fair business paper. Dated April 4th, 1844. Franklin Merrill." The defendant objected to the admission of the receipt in evidence, but it was admitted, and the defendant excepted. The plaintiff also showed, that in March and April, 1844, he was an attorney and counsellor at law, in the state of New York, and that, when the above receipt was given, he had an account against Merrill for professional services rendered to Merrill in New York in January, 1844. Merrill died in the winter of 1844.

The plaintiff further insisted that he took the paper on the faith and strength of representations made by the defendant in relation to it. For this purpose, he introduced as a witness one Burr, who testified that he was a broker; that, between the 15th and 20th of March, 1844, he had in his hands for negotiation the draft in question, with a number of other drafts and notes against Jerome, amounting in all to $9,500, all of which he had received from Merrill; that he at that time went to Jerome with the draft, and presented it to him, and he said it was a business transaction, and all right, and that they were all genuine business notes; that he told Jerome he wanted to know if it was all regular, that he might negotiate it; and he replied that it was, that it was a regular business transaction, that the draft was a business draft and was all right, and would be paid at maturity, Jerome having taken the draft into his hands and examined it before he answered; that the witness returned all the drafts to Merrill, having failed to negotiate them; and that, on or before the 1st of April following, the plaintiff called on the witness, and inquired of him in relation to his said conversation with Jerome about the draft, and the witness stated to him the substance of said conversation.

The defendant then introduced evidence to show, that the plaintiff, when he made the inquiry he did of Burr, and when he took the draft, knew that a fraud had been committed by Merrill on Jerome, in procuring the acceptance. Henry Martin, who signed the guaranty, testified that, a short time after he signed it, he became uneasy about it, from what he heard of Merrill, and said so to Merrill; that Merrill then took him to the plaintiff's office, and Merrill and the plaintiff went into a room by themselves, and were there together for some time: that, when they came out, the plaintiff said the guaranty was not binding on the firm, and that that was ten or fifteen days after the witness signed the guaranty.

The court charged the jury that, as to the fraud alleged by the defendant, it appeared that he was to be indemnified by the firm of H. Martin & Co., but that that house was not responsible, and the indemnity given was void and did not bind the firm; that there was ground, therefore, for saying, not only that the acceptance was without consideration, but that there was fraud; that, in this aspect of the case, the burthen would be thrown upon the plaintiff, to show that the paper came to him bona fide and for a consideration; that the plaintiff had set up, as one ground in answer

to the fraud, that he paid a consideration for the draft and in that respect complied fully with the rule of law; that, in this view, he had given in evidence the receipt from Merrill to him; that it appeared, that on the day of the date of the receipt the draft was in the plaintiff's possession, and was deposited by him on that day in the bank for collection; that putting together those facts, with the fact that the plaintiff had an account for professional services, as mentioned in the receipt, the court, though entertaining doubts on the point, was inclined to think the receipt admissible evidence, and entitled to such weight as the jury saw fit to give it; that, as to the proof of consideration given by the plaintiff, the account and land and cash, if they actually existed and were received by Merrill, constituted a valuable consideration, within the meaning of the rule of law requiring proof of consideration where paper has been procured by fraud; that the plaintiff further insisted, that he took the paper on the faith of representations made by Jerome, and was, therefore, not bound to prove a consideration for it, although it was originally obtained from Jerome by fraud; that this point depended on the testimony of Burr; that it was undoubtedly true, that notwithstanding the draft was originally procured by fraud, and under circumstances which would exonerate the acceptor from payment of it, unless it were in the hands of a bona fide purchaser, yet if, at the time, the party taking it inquired of Jerome as to its character, with a view to take it, it became Jerome to put himself on his rights; that if he was then satisfied there was fraud, he should have taken that ground; and that, if he had not discovered the fraud, still if he chose to represent the paper as good paper, he would be bound by the paper, the same as if no fraud existed in its concoction, because the party who inquired was about to take it, and his representations were sufficient to induce him to take it; that, in such case, the person taking it would be entitled to recover, although he did not show affirmatively that he paid full value for it; that if the plaintiff was privy to the original fraud in procuring the draft, he could not recover, but that he would not be affected by any knowledge he might have acquired of Merrill's fraud before he purchased the draft and before he made the inquiries of Burr.

The jury, after being out some time and being unable to agree, came into court and requested further instructions. They inquired whether it was important for the plaintiff to make any other proof of the payment of a consideration than the receipt of Merrill, and if the court considered that good evidence to prove it. The court replied, that the receipt was evidence of the payment of the consideration. The jury further inquired whether, if they believed that the plaintiff did not pay a full consideration for the draft, they were at liberty to find such an amount as they might believe he did pay. The court replied, that if the plaintiff had a right to recover at all, he had a right to recover the full amount. The jury then further inquired whether, in case they believed the receipt was true, still if they believed that the plaintiff knew when he took the draft that it had been dishonestly obtained, they should then find for the plaintiff or for the defendant. The court replied that, independently of the evidence of Burr, such knowledge on the part of the plaintiff would be fatal to his recovery; but that it would not be, if the jury believed the evidence of Burr that Jerome made the representations alleged, and that the plaintiff took the draft on the faith of them.

The defendant excepted to the several points of the charge. The jury found for the plaintiff, for the amount of the draft, with interest. The defendant now moved for a new trial, on a case.

John E. Burrill, Jr., for plaintiff.

Seth P. Staples and George C. Goddard, for defendant.

NELSON, Circuit Justice. 1. I am of opinion that an error was committed in admitting the receipt of Merrill, of the 4th of April, 1844, as evidence of the payment of value for the acceptance in question by the plaintiff at the time of the transfer to him. It would have been evidence against Merrill, but was not as against a third person, in a case where the fact became material. The question here was, whether or not the plaintiff had actually advanced money or property, or had cancelled an indebtedness from Merrill to him, as a consideration for the transfer of the acceptance, with a view to show that he was a bona fide holder for value. The fact, when material, must be made out, like any other fact in a cause, by competent evidence. Now, the receipt given by Merrill is of no higher evidence than his admission or statement not under oath, which would clearly have been inadmissible, as it respected any one but himself. I entertain no doubt, on reflection, that I erred in the ruling at the trial on this branch of the case.

2. I think an error was committed, also, in the ruling that knowledge, on the part of the plaintiff, of the fraud committed by Merrill in procuring the acceptance from the defendant, would not affect his title to the same, if such knowledge was acquired before he made the inquiries of Burr and received from him the information given by the defendant as to the character of the acceptance. This was carrying the protection of the holder, under the circumstances stated, too far—further than policy or justice requires, even in respect to commercial paper. The plaintiff cannot claim to be in a more favorable position, as it respects the inquiries made by Burr, than if he had himself applied to the defendant for the purpose of ascertaining the character of the acceptance; and then, if he had been aware that a fraud had been committed upon the defendant in the procurement of the paper by Merrill, he would have been bound, in good faith and fair dealing, to disclose the fact, so

that the defendant might, when he answered his inquiries, be fully possessed of all the circumstances attending the acceptance of the paper.

If the plaintiff knew that a fraud had been committed in procuring the acceptance, he might well have supposed that, when the defendant confirmed it, on the application of Burr, he was not aware of the fact. And, indeed, from the testimony of Martin, the plaintiff had reason to believe that when Burr applied to the defendant for the information, the latter had no knowledge of the fraud committed upon him. The plaintiff became advised of the fraud about the middle of March, for he gave the advice to Martin, professionally, that the guaranty delivered to the defendant, to indemnify him and keep him harmless against the acceptance, was good for nothing. Burr did not make his inquiries, according to the evidence, till a period somewhat later. At all events, the plaintiff had no reason to suppose that the defendant, when he confirmed the paper to Burr, knew what he, the plaintiff, did, namely, that the guaranty was worthless.

For the reasons above given, and upon a careful consideration of the case, I am entirely satisfied that it was not properly submitted to the jury; and, from their inquiries, and the response of the court, it is obvious that the errors led to the verdict that was given. There must, therefore, be a new trial, with costs to abide the event.

[NOTE. At the new trial there was a judgment for the defendant. Case unreported. The case was then taken to the supreme court on error. It was there dismissed upon stipulation. Platt's counsel, who was not a party to the stipulation, subsequently moved to restore the case to the docket. He claimed an interest in the suit. Motion denied. 19 How. (60 U. S.) 384.]

PLATT (LELAND v.). See Case No. 8,235.

Case No. 11,218.

PLATT v. McCLURE et al.

[3 Woodb. & M. 151.] [1]

Circuit Court, D. Maine. May Term, 1847.

UNRECORDED MORTGAGE—POWER TO SELL—INJUNCTION.

1. A temporary injunction will be granted against the sale of mortgaged premises under a power to sell in the conveyance, if the assignee of the mortgagor bought in ignorance of the existence of such a power and the mortgage containing it was not recorded.

2. But he will be allowed time only to raise the mortgage money now, instead of the end of three years, unless he alleges and proves fraud in the transaction by both parties to it.

3. Such a power to sell in a mortgage is legal, but has been questioned in some places and in others held to be illegal, and is not so common here as to raise a presumption of its existence when the deed has not been seen.

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

This was a bill filed May 22, 1847, praying for an injunction against the respondent. But a discontinuance has been since entered as to Amory S. Houghton. The injunction desired was against the sale of a certain tract of land situated in Cambridge, in this state, which had been advertised by David McClure, under a power to sell inserted in a mortgage of the premises. The bill averred, that one Dallinger was the owner of these premises and conveyed the same to Adam Hoit. That Hoit executed a mortgage of them to McClure on the 14th of May, 1846, to secure an alleged debt of $3,000. That subsequently, on the same day, Hoit conveyed the equity of redemption in the premises to the plaintiff [Samuel Platt] for the sum of $10,000, reciting that they were subject to two mortgages, one just described for $3,000, and one executed April 1, 1844, to W. Richardson, for $2,500. That the plaintiff supposed they were mortgages in the usual form, and that the premises could not be foreclosed if the money was paid at any time within three years; whereas, in fact, a power to sell after one year was inserted in the last of them; and, on the 20th May, 1847, notice of sale within 30 days had been advertised by the respondent. The bill then averred, that the interest in the premises when the mortgage was executed was in Dallinger; and that the deeds to Hoit, as well as to McClure, were fraudulent and made to defraud Dallinger's creditors, as D. soon after petitioned for the benefit of the insolvent law. That the sale to the plaintiff being first contracted by D., and known to Hoit and McClure, was valid, and to be preferred to the mortgage. That if the mortgage was valid, the plaintiff purchased under an impression it was in the usual form, without any power to sell in one year or to foreclose in less than three years. And the bill further prayed that the mortgage be adjudged void for fraud, and be surrendered, or the sale suspended for three years, and an account taken of the sum really due to be paid by the plaintiff in order to redeem the premises after that time. The plaintiff was a citizen of Pennsylvania, and alleged that he was likely to be much injured by an early sale of the premises at this time. There was another averment in the bill, of a mistake in the description of the premises, and against which relief was asked. Before the 30 days named in the advertisement of sale of the premises expired,—on the 23d of June, 1847,—the respondent filed his answer. The answer denied that any mistake existed in the description of the premises in the deed to the plaintiff, which materially affected the title or quantity of land, and averred the description to be the same as in the mortgage to the defendant. It next averred, that no representations had been made or authorized or known by the defendant as to the form of the mortgages. That Dallinger was owner of the land, subject to claims by one Rich-

ardson, for $2,500, and the $3,000 advanced by McClure, and sold the equity of redemption to the plaintiff, but that Dallinger did none of these acts with a view to conceal his estate or defraud his creditors. It further averred, that the plaintiff paid for the equity of redemption in Pennsylvania copper stock, and was not misled, nor was any mistake or fraud committed to injure him in the mortgages, and that the sale could now be made advantageously for him, the prices of land being high.

The case came on for hearing on the bill and answer, without any testimony, and for a temporary injunction till the pleadings were closed and evidence obtained and filed.

C. M. Ellis, for complainant.

G. Minot and B. F. Jacobs, for defendant.

WOODBURY, Circuit Justice. Though the plaintiff has an opportunity to give notice of his claim at the sale, it would be no bar to the sale if the defendants choose to proceed and could find bidders. Eden, Inj. 291. The result then would be new and further litigation with the purchaser, and hence that is to be avoided by a preventive relief, if a proper case is made out. 16 Ves. 267. An injunction temporary is sometimes proper, though the answer sets up title in the defendant and denies mistake or fraud. Eden, Inj. 118; Orr v. Littlefield [Case No. 10,590]. Thus, if the mischief in proceeding and disallowing the injunction is otherwise irremediable or incurable. 1 Glyn & J. 122; 4 Dow. 440. Such seems to be the sale in this case, and the expected delay in raising the money, beside the advantages in the meantime anticipated from the rise of the property in value. It may be replied to this in the present case, that the complainant could borrow the money and bid at the sale the full value, and that the excess over the mortgages would belong to him as owner of the equity. But the complainant belongs to a distant state, has not been able to visit there and obtain the money since the advertisement issued, and feels obliged to seek relief by longer delay, in a different mode. It seems to me, that on the bill and answer alone, he has made out no case for a permanent injunction. No defect is shown in the notice to sell, which may justify such an injunction against that sale. Drew. Inj. 342; 6 Madd. 10.

No fraud is admitted or to be fairly inferred, though some slight presumptions exist of unfairness in Dallinger in keeping his estate in others' names to some extent. But that is not shown to have been co-operated in by McClure, or to have affected the plaintiff as a creditor so that he can except to it. 2 Johns. 204; Poor v. Carleton [Case No. 11,272]. Nor is ground sufficient shown even for a temporary injunction,—beyond the peculiarity of the case,—showing that his damage may be great and without remedy, unless he is now indulged with time sufficient to return home and obtain the money to buy in the premises at the sale, if postponed. He seems to lay the foundation for that in equity, in the fact of the large nominal consideration he is admitted by the answer to have paid, in the further admitted fact that he was not informed of the peculiar form of this mortgage, giving the respondent a power to sell, and hence, undoubtedly, purchased under a mistake as to its existence. This he testifies to in express terms, and it is not denied on the other side (though all design to cause a mistake is repelled), in another fact, not noticed at first by myself, that the mortgage containing this power was not recorded, so that he could see its peculiar form when he bought the equity, and in the consequent fact that no special negligence existed in him or his attorney (who was left to close up the business), in not seeing its peculiar form, and in the further fact, well known, that such powers are not customary in many sections of the country, though somewhat usual elsewhere; and, finally, in the fact that their legality has been denied in some places (4 Kent, Comm. 146, 148, note), and questioned in others, though not for all purposes and at all times void. 1 Pow., Mortg. 9, 10; Comyn, 603; 3 Pick. 483; 2 Metc. [Mass.] 29. Its operation seems equitable only where the land is worth but little more than the debt, and interest has not been punctually paid.

It is to be further considered, that this relief may enable him to avoid loss, and have some opportunity to prove fraud, if it existed, so that he can avail himself of it; and the court can prevent the delay from being injurious to the respondent, by requiring, as it has, a bond to be filed to secure the payment of the costs, and another bond to indemnify the defendant for any injury by delay in the depreciation of the property. See, on this practice, Hawes v. James, 1 Wils. Ch. 2; Drew. Inj. 339. As the money market is not straitened at this time, no other injury can happen to the respondent by a short delay. He is conceded to be a man of property; and if obliged, in the meantime, to borrow, could doubtless procure the amount at legal rates and without sacrifices. It is true that mortgagers and their grantees are bound in law to make payment at the day the debt falls due. But, it is equally true, that now not only equity permits a longer time on paying interest, but the law does it under express statutes in probably every state in the Union. It is also true, that the injury by this mistake or fraud, if either were perfected, would be only the trouble of raising the money to redeem the mortgages now instead of three years hence. But that may be very considerable to some men and very little to others; and the plaintiff being a stranger here, and not shown to possess much property, it will probably be so great to him as to justify the allowance of a short

time, on the terms and grounds before indicated, to visit his home and procure the money. Let the temporary injunction then issue till the adjourned session of this term, in September next.

Case No. 11,218a.

PLATT v. MATTHEWS.

[13 Reporter, 581.] [1]

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

LIS PENDENS—RIGHT TO FILE—LIENS.

The right to file a lis pendens is statutory and cannot be impaired by the court.

Plaintiff filed in the office of the clerk of the city and county of New York a lis pendens upon certain property held by defendant. Defendant moved for an order that the plaintiff release the property to the extent of enabling the defendant to make a mortgage upon it.

W. A. Abbott and E. H. Moreau, for the motion.

F. N. Bangs, contra.

WALLACE, Circuit Justice. The right to file a lis pendens is a statutory right over which a court of equity has no more control than has a court of law. This court cannot impair that right of the complainant by subordinating the lis pendens which he has filed to the liens which the defendant wishes to create upon the property affected by it, even though the court should be of the opinion that the plaintiff's claim of title to the property will ultimately prevail. As an assignee in bankruptcy is an officer of the court which appointed him, it would seem that the district court in the exercise of its control over the proceedings of its officers is competent to direct the complainant to enter into such stipulations as may be necessary to preserve the interests of all concerned in the property in which he claims an interest. Motion denied.

[For hearing upon demurrer to bill in principal cause, see 10 Fed. 280.]

Case No. 11,219.

PLATT v. PRESTON et al.

[19 N. B. R. 241.] [1]

District Court, S. D. New York. Feb. 6, 1879.

BANKRUPTCY—ASSIGNMENT WITHOUT PREFERENCES—PREFERENCE—MORTGAGE—INJUNCTION—RECEIVER—MULTIFARIOUSNESS OF BILL.

1. A general assignment for the benefit of creditors without preferences is necessarily a fraud under the bankrupt law [of 1867 (14 Stat. 517)].

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

2. The bankrupt, who was a brewer, in March, 1878, gave to one P. a chattel mortgage for thirty thousand dollars on his machinery and other personal property, to secure payment of an amount then due, and also for future consignments of malt. This mortgage was not filed, and on the 14th of August was assigned by P. to one W., who gave therefor his promissory notes for thirty thousand dollars. W. had not sufficient means to pay said notes, unless the mortgaged property proved to be nearly worth the amount he gave for it. At the time of this assignment the bankrupt was insolvent. W. filed the mortgage on the 15th of August, foreclosed it, and, at the sale on the 20th, purchased the property for thirteen thousand dollars. On the same day the bankrupt leased the brewery for an alleged adequate rent to W., who took possession, and carried on the business in the name of the bankrupt's son. On the same day also the bankrupt made a general assignment to one D., his bookkeeper, and a person of no pecuniary means, who never gave the bond required by law. On the 31st of August a petition was filed by creditors, on which the bankrupt was adjudicated. On a motion for an injunction and a receiver, made in a suit brought by the assignee to recover the property, *held*, that the motion should be granted; that the bill was not multifarious, the acts of all the defendants being charged to have been done with a common purpose, and the object of the bill being single, viz. to recover the estate and clear it of the apparent encumbrances created by the several instruments sought to be set aside.

[Cited in Van Kleeck v. Miller, Case No. 16,860.]

3. The assignment and lease were clearly indicative of actual fraud on the creditors.

4. While the mortgage was not a fraudulent preference under the bankrupt law, by reason of its subsequent filing, or of its being kept secret to induce credit, yet, under the laws of New York, it was void as to creditors, and their rights as to the property covered by it passed to the assignee, and can be enforced by him.

[Cited in Re Oliver, Case No. 10,492; Wait v. Bull's Head Bank, Id. 17,043; Wehl v. Wald, 3 Fed. 93; Re Kraft, 4 Fed. 524.]

[This was a bill in equity brought by Platt assignee in bankruptcy of Newman against William J. Preston, Montz Weinfeld and Anthony J. Diekelman to set aside as fraudulent against the creditors of the bankrupt, a chattel mortgage given to the defendant Preston, a lease to the defendant Weinfeld, and a general assignment made to the defendant Diekelman, all of which were alleged to have been executed in pursuance of a common fraudulent purpose, and as parts of a single scheme to defraud, hinder, and delay creditors.]

A. Blumensteil, for complainant.

B. F. Tracy, for defendant Preston.

Van Alstine & Ross, for defendant Diekelman.

F. W. Angel, for defendant Weinfeld.

CHOATE, District Judge. This is a motion for an injunction and receiver pendente lite. The suit is in equity by the assignee in bankruptcy of one Newman, to recover the property of the bankrupt, alleged to have been transferred in fraud of creditors. The bankrupt was a brewer, owning and carrying on a brewery. The defendant Preston is a maltster, and in July, 1877, upon the recommendation of the defendant Weinfeld, Preston began to supply the bankrupt, Newman,

[1] [Reprinted by permission.]

with malt, upon a credit of four months, and he continued so to trade with him till March, 1878. In March, 1878, the bankrupt desired a larger credit, running up to thirty thousand dollars or more, and he gave Preston a chattel mortgage on the machinery and other personal property connected with his brewery, to secure the amount already due, and such further amounts as should become due in that business, and, as a part of the same agreement, Preston was to consign to the bankrupt malt to be manufactured into beer by the bankrupt, at his own cost and expense, for Preston's account, to be sold by the bankrupt, and the proceeds paid to Preston to the extent of an indebtedness which might exist for the malt so consigned. The chattel mortgage secured the performance of this agreement as well as the moneys already due for malt. The brewery and all the property mortgaged remained in the possession of the bankrupt, and the chattel mortgage was not filed as required by the statute of New York. By the 1st of August, the indebtedness of the bankrupt to Preston had increased to about thirty-two thousand dollars. The bankrupt had become slow in meeting the payments due under the agreement, and on the 14th of August Preston assigned his mortgage and agreement, and the debt secured by it to the defendant Weinfeld, taking, in consideration therefor, Weinfeld's promissory notes for thirty thousand dollars, without other security. Weinfeld was a merchandise broker, having some means, but not enough to meet these notes, which were made payable within a few months, unless the mortgaged property proved to be very nearly worth what he gave for it. Weinfeld swears that as soon as he bought the mortgage, he went and examined the bankrupt's premises, and that, in consequence of finding in the brewery only three thousand four hundred barrels of beer, whereas the bankrupt had shortly before represented to him that there were six thousand barrels, he determined to foreclose immediately. Accordingly, he filed the mortgage on the 15th of August, and went through the process of foreclosing it according to the laws of New York, advertising the sale in one obscure paper called the "Daily News." The sale was on August 20th, and Weinfeld became the purchaser for about thirteen thousand dollars, and immediately after took possession, and since that time has carried on the business under the name of the bankrupt's son, paying over to Preston the proceeds of the business in payment of his notes. On the same day, August 20th, the bankrupt made a voluntary assignment of all his property, for the benefit of his creditors, to the defendant Diekelman, his bookkeeper, a person of no pecuniary responsibility, and who has never given bonds or otherwise complied with the statutes of New York in respect to such assignments. The assignment included the books of the bankrupt. On or about the same day, the 20th of August, the bankrupt executed a lease of the brewery to Weinfeld for what is alleged to be an inadequate rent. From the 14th of August Newman was insolvent, and a petition was filed by his creditors, August 31st, on which he has been adjudicated a bankrupt. The bill charges a combination and fraudulent purpose on the part of Preston, Weinfeld, and Diekelman, by means of the secret mortgage, the general assignment and the lease, to defraud the creditors of the bankrupt, and to defeat the operation of the bankrupt law, and to secure a preference to Preston, and it seeks to set aside the mortgage, the assignment, and the lease.

It is objected by the defendants that the bill is multifarious. This is clearly not so. Although the several defendants are charged with acts of fraud affecting different parts of the estate of the bankrupt, yet their acts are charged to have been done with a common purpose, and the object of the bill is simply to recover the estate, and clear it of the apparent encumbrances and titles created upon it by the several instruments sought to be avoided. The bill is sustained by the well-considered cases of Boyd v. Hoyt, 5 Paige, 65, and Fellows v. Fellows, 4 Cow. 682.

As to the general assignment, it is insisted that it is not per se a fraud upon the bankrupt law, but void if actual intent to defraud or to defeat the law shall be shown. This may still be regarded as being an open question in the supreme court of the United States. Mayer v. Hellman, 91 U. S. 496. But the great weight of authority at present is, that a general assignment for the benefit of creditors without preferences is necessarily a fraud under the bankrupt law, defeating the operation of the law, because it provides for the administration of the estate in a different way from that provided by the bankrupt law, and by an assignee selected by the bankrupt himself. Globe Ins. Co. v. Cleveland Ins. Co. [Case No. 5,486]; Macdonald v. Moore [Id. 8,763]; In re Beisenthal [Id. 1,236]. The complainant, therefore, is entitled to a receiver of the property that passed by the assignment. The circumstances attending the making of the general assignment, and the contemporary lease, were too clearly indicative of actual fraud upon creditors to be overborne by the denials of Weinfeld and Diekelman, and therefore the motion is granted as to the general assignment and the lease.

The real question in the case is whether, on the facts shown, the complainant is entitled to an injunction and receiver in respect to the property covered by the chattel mortgage. It is claimed on the part of the complainant, that he is entitled to the relief asked on three grounds: first, because the chattel mortgage is to be considered as having been given at the date of its filing, and that the giving of it then would have been, and, therefore, the filing of it was, a fraudulent preference, which the assignee in bankruptcy can set aside; and secondly, because the evidence

warrants the conclusion that the mortgage was kept secret by Preston, with a fraudulent intent toward the creditors of Newman, and to induce a false credit whereby he might continue along in business, and so pay Preston's debt; and thirdly, because, as to creditors, the statute of New York makes an unfiled chattel mortgage, where the mortgagor retains possession, void; and that creditors whose debts exist prior to the filing or taking possession, have such an interest in or claim to the property mortgaged, that the assignee in bankruptcy, though his title accrues subsequently to the filing or the taking possession, may recover the property as property transferred in fraud of creditors.

As to the first and second of these claims they are, I think, conclusively disposed of by the decision of the supreme court of the United States in the recent case of Sawyer v. Turpin, 91 U. S. 114. In that case it was held that a chattel mortgage, within the period when it might have been held an unlawful preference, and given and received with knowledge of the debtor's insolvency, was not a preference within the prohibition of the bankrupt law, although it was given in exchange for an earlier mortgage which was never recorded, and which, by the law of the state, was "not valid against any person other than the parties thereto." It was held that each earlier unrecorded mortgage being valid as between the parties was a sufficient consideration for the new mortgage, and that the transaction was an exchange for value, and not a preference for a pre-existing debt, and that it was not in conflict with provisions of the bankrupt law which avoids preferences, "the purpose of which is to secure a ratable distribution of the property of a bankrupt, owned by him at the time of his becoming bankrupt, and undiminished by any fraudulent preferences given within four months prior thereto." And it was further said by the court, that it would make no difference in the result that the mortgage had been purposely kept secret in order to induce false credit to the bankrupt, because "the bankrupt act was not intended to prevent false credits." Its purpose is ratable distribution. The neglect of Preston therefore, or even his intended failure to file his chattel mortgage down to a time when he may have known of Newman's insolvency, cannot be held to make the filing of it the giving of a new security, or to make it void in his hands as against the assignee in bankruptcy, by reason of such failure to file it being a fraud upon creditors, which it was within the purview and meaning of the bankrupt law to recognize as a ground of recovery of the property as fraudulently transferred, or as a preference. The rule thus declared in Sawyer v. Turpin [supra] was followed by the district court for the Eastern district of Michigan, in the case of In re Barman [Case No. 999], where it was held that the failure to file a chattel mortgage until within four months before the bankruptcy, and until after knowledge of the insolvency of the mortgagor did not make it a fraudulent preference.

It remains to consider whether, independently of the provisions of the bankrupt law avoiding fraudulent preferences, any right or interest vested in the assignee, in the property covered by this mortgage, which he can enforce against the mortgagee for the benefit of the creditors of the mortgagor. It is to be observed that the case of Sawyer v. Turpin [supra] arose under the law of Massachusetts, whose statute provides that "unless a mortgage is so recorded, or the property mortgaged is delivered to, and retained by the mortgagor, it shall not be valid against any person other than the parties thereto." And in the construction given to this statute by the highest court in that state, it had been held that notwithstanding the declared invalidity of the mortgage as against creditors, yet that the mortgagee could file it, or could take possession at any time, and thereupon his title became perfect as against any creditor of the mortgagor, unless such creditor had acquired a specific lien or title to the property by attachment or execution prior to the filing or the taking of possession, and that under the state insolvent law the assignee could not recover the property for the benefit of the creditors, unless his title accrued before the filing, or the taking possession. Mitchell v. Black, 6 Gray, 100.

The question in the present case is whether, under the statute of New York, creditors have a different, and a larger interest, one that they can enforce, or that can be enforced by their trustee, although they acquire no specific lien prior to the filing, or the taking possession by the mortgagor. The statute of New York declares: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged shall be absolutely void as against creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed, etc." In the construction of this statute it has been expressly held by the court of appeals, that although a creditor is not in a position to raise the question of the validity of the chattel mortgage with the mortgagee until he has received judgment and takes out execution on his debt, yet, that having done so, his right relates back to the time of the contracting of the debt, and if at that time, or while the debt is in existence, the neglect to file the mortgage exists, he has a preference over the mortgagee in having the property applied to payment of his debt, even though the mortgage was filed before he obtained judgment; that this interest or right of the creditor is one that attaches to the debt, and accompanies it when transferred to another. And

further, it was held that such right attaches to all the debts of the debtor existing during such default, and not merely to those contracted during the default, and the lien of the execution levied on the mortgaged property, though issued on a judgment recovered after the filing of the mortgage, was held superior to that of the mortgagee. Thompson v. Van Vechten, 27 N. Y. 568.

"It is argued," says the court, "that this embraces only creditors who have obtained judgments and executions during the time when the omission to file existed. If this were so, the act would not in many cases accomplish any beneficial purpose. One proposing to part with money or property to another under a contract to be repaid at a future time, could obtain no information for his guidance by a search at the proper office. But it was the apparent, and I think the real office of the act to prevent the setting up of secret mortgages against persons who might deal with the mortgagor on the faith that his property was not thus encumbered." And from the peculiar language of the act, the court goes on to reason and decide that all the creditors of the mortgagor who were such during the existence of the default were intended to be included within its benefits. The interest then which a creditor of the mortgagor has in property transferred by an unfiled chattel mortgage in the state of New York, is quite different from that which, under the laws of Massachusetts, such a creditor has in such property so transferred in that state, and which the court had to deal with in Sawyer v. Turpin (ut supra). In that case the interest was a mere possibility of making the property subject to a lien to be perfected, and to attach to the property before the recording or taking possession—a possibility of an interest which was extinguished by a filing or taking possession before such lien should attach or become perfected. In New York this creditor's interest is not so extinguished, but inheres in the debt, and may be afterwards perfected and made to attach by judgment and execution subsequently obtained and issued. The case of Sawyer v. Turpin, therefore, while it is conclusive that the bankrupt law does not of its own force make such subsequent filing a fraudulent preference, and does not by its own force avoid such a secret mortgage in favor of the creditors, on the ground that it created or induced a false credit, yet it is not conclusive that this interest of creditors in New York in the property covered by the mortgage may not pass to and be enforced by the assignee in bankruptcy for the benefit of creditors. This depends on the further question whether the assignment in bankruptcy is operative to vest this interest or power to sue in the assignee. That the property so held under a secret mortgage is in New York held to be, and aptly described as property transferred in fraud of creditors, is shown as well by the reasons given in the case of Thompson v. Van Vechten for the decision above referred to, as by the terms of the statute of New York avoiding conveyances as to creditors for failure to file or record the same. By the Revised Statutes (section 5046) it is provided that all property conveyed by the bankrupt in fraud of his creditors shall be at once vested in the assignee by force of the assignment. I cannot doubt that this includes property in which, by the local law, the creditors have, at the time of the bankruptcy, an existing interest as creditors of the bankrupt, or a right to have it applied to their debts as property declared by the laws of the state which govern their rights in it to have been conveyed in fraud of them, although the fraud be not one which is recognized and declared to be such by those provisions of the bankrupt law which invalidate conveyances as fraudulent against creditors.

The evident design of the statute is to secure the distribution among the creditors of all the property to which they are entitled as creditors of the bankrupt, and it should have a fair and beneficial construction to effect this purpose. I see no reason to believe that the bankrupt law was intended to take away from creditors any substantial right or interest in their debtor's property, which by the local law they have. Yet to hold that such an interest does not pass to an assignee in bankruptcy, is virtually to take such right or interest from the creditors and give it to a mortgagor, who, by the local law, is not entitled to it. If the bankrupt should be discharged, the debts being gone, of course all benefit to the creditors from their interest in this property will be gone. If the discharge shall not be granted, then possibly the rights of the creditors may revive, and they may compete with each other in a race of diligence to recover this property and so obtain unequal shares in the distribution of the bankrupt's estate, in obvious violation of the spirit and purpose of the bankrupt law. It is, however, objected that this view is erroneous, because no creditor except after judgment can proceed to collect his debt out of the property so transferred, and that the assignee in bankruptcy does not stand in the place of a judgment creditor; that by the bankruptcy, which prevents judgments, the rights of creditors are virtually extinguished, and the case of In re Collins [Case No. 3,007], is cited in support of this position. In that case it was indeed decided that no interest would pass to the assignee for the reason that the creditors' interest has not become a specific lien for want of a judgment, but the doctrine of Thompson v. Van Vechten, that there is an inchoate but existing right or interest of the creditors in the property, is recognized as the law of New York. The court, however, seems not to have been referred to another statute of New York, passed in 1858, which provides that "any executor, administrator, assignee, or other trus-

tee of an estate, or the property of an individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm and treat as void all transfers in fraud of the rights of any creditor or others interested, and maintain all necessary actions for that purpose." This act cannot be overruled in considering what is the precise nature of the interest of creditors in property so transferred, and what are the requisites made essential by the local law for the enforcement of the rights of creditors therein. In a very recent case the court of appeals have given a construction to this statute, and have held that this statute was designed for the benefit of all creditors having the right to payment out of their debtor's property so transferred; that its benefits are not limited to judgment creditors whose lien is specific and complete; that it obviates the necessity of judgments on the debts, and places the assignee or trustee in the place of all the creditors having such rights, and enables him to recover the property for their benefit; and that an assignee in bankruptcy is within its terms and entitled, under its provisions, to sue in the state court; and the court very wisely remarks: "The policy of the bankrupt law is to secure an equal distribution of all the property of the bankrupt among his creditors, and this object would be defeated if a fraudulent assignor could set the bankrupt assignee at defiance and a fraudulent conveyance not be contested. Creditors could not well do it after a decree in bankruptcy. They would be practically remediless. The bankrupt court would be a place of refuge for every debtor who had fraudulently disposed of his property, and the bankrupt act a perfect shield for fraud. The assignee represents the creditor's rights without the technical obstructions to the enforcement of those rights by a creditor at large." Southard v. Pinckney, 5 Abb. N. C. 184.

It cannot be said, therefore, since the statute of 1838, and especially since its interpretation in the case last cited, however it may have been before, and as the law of New York was presented to the court in the case of In re Collins [supra], that the obtaining of a judgment is an essential ingredient in the interest of creditors in property so transferred, without which that interest becomes by the bankruptcy virtually extinct. The federal courts follow the rulings of the highest state court as to the interpretation of state statutes, and this decision is therefore conclusive as to the nature of this interest of creditors in property declared by the law of the state to be conveyed in fraud of creditors. And thus the technical difficulty, found by the court in the case of In re Collins to exist in the local law, has been effectually removed.

The views above expressed, as to the power of the assignee to sue, as the representative of the creditors to enforce their rights against property in which, by the local law, they have still an interest at the time of the bankruptcy, without the formalities of judgment or other proceedings by which creditors may obtain a perfect and specific lien which is prevented by the bankruptcy, are sustained by the following decisions among others: Barker v. Barker's Assignee [Case No. 986]; In re Leland [Id. 8,234]; In re Gurney [Id. 5,873]. The cases of Sawyer v. Turpin (ut supra) and Miller v. Jones [Case No. 9,576], are clearly distinguishable on the ground that it was shown or assumed that by the local law the interest of the creditors had become extinguished prior to the bankruptcy. They do not militate against the proposition here advanced that if that interest survives to the creditors at the time of the bankruptcy the assignee is vested with a title or a right to sue, which enables him to enforce their rights as their representative. The complainant may therefore, as representing the creditors of Newman, attack the chattel mortgage, and he is entitled to an injunction and receiver in respect to the property covered by it.

It has not been necessary to discuss at length the evidence of actual intent to defraud creditors in this case. The proofs would not justify a finding that the chattel mortgage was not, in its inception, made in good faith, otherwise than as it may have been intended to keep it secret as regards creditors, or that Newman was then insolvent. And if Preston had, as is claimed, a right to file his mortgage at any time, and thereby totally extinguish the rights of creditors, I do not perceive that his knowledge of Newman's insolvency at the time of his filing it could affect his rights, or that he might not, with knowledge of such insolvency, assign his right in the mortgage to a person having notice of such insolvency. There is, however, strong reason to conclude, notwithstanding the denials of the parties, that Preston, Weinfeld and Diekelman were, from the time of the sale of the mortgage, on the 14th of August, acting in concert with each other, and with the bankrupt, to obtain payment of Preston's debt and to prevent the property from being distributed among the creditors under the bankrupt law. The sale of the mortgage by Preston to Weinfeld was made under circumstances which show that there was some purpose for it beyond what appears on the face of the transaction or is admitted by the parties. It is not our experience of human nature that men give up a good security for so large an amount for the mere promises of a third party having no apparent means to perform such promises, nor that men suffer so great and so rapid ruin as seems to have overtaken Newman between the 14th and the 20th of August, without resistance or protest, unless they are consenting parties to it. The whole se-

ries of transactions was apparently for the purpose of making a better and more defensible title against the creditors of Newman.

Motion granted. Order to be settled upon notice.

[NOTE. Diekelman subsequently died and the cause was revived against his administrator. Upon the final hearing the bill was dismissed as to Preston and Weinfeld. The charge of fraud was not proved as against them. As to Diekelman's administrator, no order was entered, the case not being ready for hearing. 3 Fed. 394. From this decree the plaintiff took an appeal to the circuit court. It was there heard upon motion to dismiss. 8 Fed. 182.]

Case No. 11,220.

PLATT v. STEWART et al.

[13 Blatchf. 481.] [1]

Circuit Court, S. D. New York. Aug. 16, 1876.[2]

INSOLVENCY—PRIORITY OF CLAIMS — CONVEYANCE TO SECURE DEBTS—EXECUTION LIENS—VALIDITY AS AGAINST ASSIGNEE IN BANKRUPTCY—RECORDING CHATTEL MORTGAGE—STATEMENT OF INTEREST AND DESCRIPTION OF PROPERTY.

1. Evidence considered, as to whether a debtor was insolvent at the time he conveyed certain real estate to a creditor, to apply on a debt due to such creditor, and as to whether the creditor had reasonable cause, at the time, to believe that such insolvency existed.

2. L. owned the furniture in a hotel, upon which furniture he had given chattel mortgages to S., the owner of the hotel as security for the rent of the hotel. L. becoming insolvent, executions were levied on such furniture under judgments recovered after the giving of such mortgages. Subsequently, L. was adjudged a bankrupt, and his assignee in bankruptcy brought this suit against S. and the execution creditors, to set aside the mortgages and the judgments and to have awarded to him the proceeds of the furniture. The court set aside the mortgages, but awarded the proceeds of the furniture to the execution creditors.

3. Liens by execution upheld as valid, as against an assignee in bankruptcy of the debtor, where the judgments were for just debts, due and payable, and were obtained not only without the slightest aid or concurrence of the debtor, but generally in spite of his active and unjustifiable opposition.

4. Under the statute of New York in regard to the filing of chattel mortgages (Laws N. Y. 1833, p. 402, c. 279, § 2; Act April 29, 1833), where the mortgagors in a chattel mortgage resided in Westchester county, and not in the city of New York, and the mortgage was filed in the latter place, and not in the former: *Held*, that the mortgage was void as against creditors of the mortgagor, represented by his assignee in bankruptcy.

[Cited in Crampton v. Jerkowski, 2 Fed. 493.]

5. Under section 3 of the same act, in regard to the refiling of a copy of the mortgage, "together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof," a statement in regard to a mortgage given as security for rent to accrue on a lease of real estate, merely said: "I hereby certify that the lease within referred to still exists in full force, and the interests of the parties, and my interests, thereunder remain unchanged, except so far as the same have been altered by the payment of rent accrued:" *Held*, that such statement was insufficient.

6. The mortgage, a copy of which was refiled with such statement, described the property it covered by referring to a schedule annexed to it, and a copy of such schedule was refiled with the copy of the mortgage. The schedule described the property only as the goods and chattels described in a prior mortgage made by the mortgagors to the mortgagee, and in the schedule thereto attached, and filed in a certain office at a certain date, and all other goods and chattels in a certain building: *Held*, that, under section 3 of said act, such description of the property was not a sufficient statement of the property remaining subject to the mortgage at the time of such refiling.

7. The lessees having agreed by the lease to give to the lessor, as security for the accruing rent, a chattel mortgage, and to renew and extend it, from time to time, "as shall be necessary to effect that purpose," and that such mortgage "shall be a continuing lien and security for the payment of such rent," and the mortgages given being held void as against creditors: *Held*, that such agreement in the lease did not secure to the lessor, aside from a lien by a valid mortgage, any lien as against other creditors who were in a condition to contest his lien.

8. The mortgage being void as to creditors, no title to the mortgaged property passed to the mortgagee by reason of a failure to pay the rent, so as to cut off any right creditors would otherwise have to contest the mortgage.

9. *Held*, also, that this action was well brought by the assignee in bankruptcy, and could be maintained (1st), because, by section 35 of the bankruptcy act of March 2d, 1867 (14 Stat. 534), he is expressly empowered to bring an action to recover property fraudulently conveyed by the bankrupt; (2d), that, there being creditors who had liens on the personal property covered by the chattel mortgages, the assignee might maintain the action as representing them, although he denied the validity of their liens; and (3d), that, the assignee having an unquestioned standing in court as to a portion of the fund, it is proper that all the trust fund, and the conflicting claims to it before the court, and which must ultimately be decided by it, should be passed upon in this suit.

[This was a bill in equity by John H. Platt, assignee in bankruptcy of Simeon Leland & Co., against Alexander T. Stewart and others. For a hearing on the subject of compensation of sheriff, see Case No. 11,221.]

Dennis McMahon, for plaintiff.

Henry E. Davies, for Stewart.

Alexander H. Dana, for Miller & Conger.

John J. Thomasson, for Oechs & Co. and Batjer & Co.

HUNT, Circuit Justice. On the 24th of March, 1871, a petition in bankruptcy was presented by George F. Bellows, a creditor, praying for an adjudication of bankruptcy against Simeon Leland & Co., a firm composed of Simeon Leland, Charles Leland, and Warren Leland. On the 1st of April following, the adjudication was made as prayed for.

S. Leland & Co. had, for several years, been the keepers of the Metropolitan Hotel, in the

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

[2] [Reversed in 101 U. S. 731.]

city of New York, under a lease from Alexander T. Stewart, and used and owned in the said hotel a large amount of furniture and other property. At the time of the bankruptcy, they were holding under a lease to expire on the 1st of May, 1871, at an annual rent of $79,186, payable monthly on the first day of each month. The lease under which the Lelands carried on the hotel was dated April 30th, 1867, and contained the following provision: "And upon further condition, that the parties of the second part shall, simultaneous with the execution and delivery thereof, execute and deliver to the party of the first part a first mortgage and lien upon all the furniture and chattels of every kind now contained in said hotel, and used by the parties of the second part for hotel purposes, and which mortgage or lien shall be a security for the payment of the rent hereby reserved; and, on any default in the payment of such rent according to the terms of this instrument, the party of the first part may at once proceed to foreclose said mortgage or lien, and collect the amount of such rent from the sale of the property described or referred to in said mortgage or lien; and also upon the further condition, that the said parties of the second part shall, every year during the said term, and within thirty days prior to each 30th day of April therein, execute and deliver to the party of the first part a renewal of said mortgage or lien, and also an additional mortgage, which shall be a first lien, from the day of delivery thereof, upon all the additional furniture and chattels of every kind then contained in said hotel, and used by the parties of the second part for hotel purposes, and not covered by the said first mortgage, and, on any default in the payment of the rent hereby reserved, the party of the first part may proceed to foreclose such mortgages and collect the amount of such rent remaining unpaid, from the sale of the property in said mortgages described or referred to; and if, at any time during such term, the said parties of the second part shall fail or neglect to so execute and deliver to the party of the first part any such renewal, or additional mortgage or lien, then, and in such case, it is hereby expressly and mutually covenanted and agreed by and between the parties hereto, that the yearly rent reserved hereby shall thereafter be and become due and payable in advance on the first day of May in each remaining year of the term hereby demised, and the mortgage or mortgages held by the party of the first part at any time during the term hereby demised may be resorted to for the collection of the rent which shall at any time become due and be unpaid hereunder, whether payable in advance or otherwise, and, to that end, said mortgage or mortgages shall be a continuing lien and security for the payment of the rent hereby reserved." In performance of the covenants of this lease, on the 30th of April, 1867, the lessees executed to Mr. Stewart a chattel mortgage, covering all the furniture in said hotel, of which an inventory was annexed, to secure the payment of the rent reserved. The inventory purported to give, in detail, a statement of the furniture in every room in the house. This mortgage was filed on the 2d of September, 1867, in the office of the register of deeds of the city and county of New York. Other mortgages, or copies, were made and filed April 30th, 1868, and June 22d, 1869, to which it is not necessary particularly to refer. A chattel mortgage between the same parties, and for the same purpose, dated April 30th, 1869, acknowledged August 2d, 1869, was filed on the 4th of August, 1869. It is upon this mortgage, and its renewal, filed July 8th, 1870, that the questions respecting the validity of the mortgage security arise.

The chattel mortgage dated April 30th, 1869, purports to transfer "all the household and hotel furniture and chattels belonging to us, and all other goods and chattels mentioned in the schedule hereto annexed, and now in the building known as the Metropolitan Hotel, * * * to have and to hold," &c. The schedule referred to was as follows: "Schedule referred to in the within chattel mortgage—All the goods and chattels described in, and referred to in, a certain chattel mortgage, dated April 30th, 1867, made by us to said Stewart, and also in the schedule attached thereto, filed in the register's office of the city of New York, on or about September 2d, 1867, together with all other household or hotel furniture, goods or chattels, of every description, belonging to us, and now in or upon the building known as the Metropolitan Hotel, on Broadway, Prince and Crosby streets, in the city of New York." On the 8th of July, 1870, a copy of this mortgage, with the schedule attached, was filed in the office of the register of the city of New York, and upon such copy was endorsed the certificate following: "I hereby certify that the lease within referred to still exists in full force, and the interests of the parties, and my interests, thereunder remain unchanged, except so far as the same have been altered by the payment of rent accrued. Dated New York, July 8th, 1870. Alex. T. Stewart." On the 1st of July, 1870, the lessees failed to pay the rent due on that day, and, from that time until their bankruptcy, were in arrear, never thereafter paying the rent when due. On the 8th of July, 1870, the date of the last refiling, the amount in arrear was $32,994 15. At the time of executing these mortgages and the renewals, the mortgagors, and each of them, were residents of towns in the county of Westchester, New York, and neither of them was a resident of the city of New York. The question of the lien secured by the lease, and the questions arising upon the chattel mortgages, will be considered hereafter.

On the 24th of January, 1871, a deed of two houses and lots on Crosby and Jersey

streets, in the city of New York, executed by Charles Leland, was delivered to Mr. Stewart. There was then rent in arrear to the amount of $61,001 43. Houses, numbers 137 and 139 Prince street, were conveyed by Charles Leland to Mr. Stewart, by deed acknowledged on the 13th of February, 1871. The Thomas farm was conveyed to Mr. Stewart by Ellen Leland, by deed acknowledged on the 4th of February, 1871. The validity of these conveyances, and of the chattel mortgages to Mr. Stewart, is impeached by the assignee.

I will consider, first, the questions arising upon the conveyances of the real estate. The assignee insists that these pieces of property were conveyed by the bankrupts, or caused by them to be conveyed, to Mr. Stewart, within four months preceding their bankruptcy, by way of an unlawful preference to him on account of a large indebtedness for rent of the Metropolitan Hotel, and in fraud of the provisions of the bankrupt act. The conveyances were, confessedly, made within the four months specified. The title of the two houses and lots on Crosby and Jersey streets was in Charles Leland. The property was encumbered to $8,000, and was worth $30,000. Its net value was $22,000. This property was in fact owned by the firm, but was kept in the name of Charles, who was a single man. The purpose is a matter of some doubt. The Thomas farm, in Westchester county, stood in the name of Warren Leland's wife, but was, in fact, owned by him. This farm was of the value of $27,500, and was encumbered to $8,000, its net value being $19,500.

The questions to be determined are: (1) Were the Lelands in an insolvent condition when these conveyances were made? (2) Had Mr. Stewart, or his agent, Mr. Hilton, reasonable cause to believe them to be thus insolvent when the conveyances were taken?

On the first point, it is shown that the debts proven in bankruptcy against the firm of S. Leland & Co. amounted to $286,000, and the debts against Leland Brothers, (Warren and Charles,) to $181,166. The debts proved against Warren Leland, individually, amounted to $104,139, but the assignee states that he had not then determined whether they were valid claims. The assignee also testifies that he has received nothing from the estate of S. Leland & Co., not even enough to pay his expenses, and that, in his opinion, after paying prior liens and incumbrances, there will be nothing left for the payment of the general creditors of S. Leland & Co. So far as it appears, the value of the real estate conveyed to Mr. Stewart, and the proceeds of the sale of the furniture, hereafter to be considered, are the sole subjects of value that belonged to the estate, and these are the subjects of contention between conflicting incumbrancers. For the general creditor, there appears to be nothing to contend about.

The debt to Mr. Stewart for rent, as has been stated, was about $60,000 when the deeds were taken. This debt Mr. Stewart required to be paid, and he avers, in his answer, that he refused to treat for an extension of the lease of the hotel, (which would expire on the 1st of May, 1871), until this debt was paid in whole or in part. Warren Leland testifies that Mr. Stewart said he must be secured in the rent before he could talk about a new lease.

The testimony of Warren Leland indicates, that, for months previous to their bankruptcy, the firm had been engaged in a struggle to maintain itself. The struggle was manful and commendable. The question is, whether, in January and February, 1871, it had not become a desperate one. He says, that, as early as in the October previous, they had not money enough to pay their notes and checks, hardly enough to pay the running expenses of the hotel, which was constantly losing money; and that, when he came from Saratoga, in October, he found checks out which they could not meet, and checks and notes held over, which they could not get up. This, he says, continued to their bankruptcy. The firm had been frequently sued before this time, and had employed counsel to put in defences, for delay. One or two bankruptcy proceedings had been commenced against them, which they had disposed of by paying the debts. The record shows numerous judgments recorded against S. Leland & Co. Thus, $1,817, on two notes, one of them dated July 9th, 1870, one dated November 15th, 1870—suit commenced February 20th, 1871; also, $2,678 36, February 24th, 1871, on a note due December 1st, 1870, to which the delay of an answer had been interposed; also $801 01, February 7th, 1871, on a note due December 27th, 1870, summons served January 14th, 1871; also, a judgment, October, 1867, for $5,301 03, appealed, and judgment for costs on affirmance, and upon the original and the additional judgment executions were outstanding; a judgment, $1,089 15, March 14th, 1871, on a note dated July 9th, 1870, suit commenced January 4th, 1871, answer struck out as sham and frivolous; a judgment, $2,188 62, March 14th, 1871, answer struck out February 6th, 1871, as sham and frivolous; a judgment, $1,311 99, February 8th, 1871, answer struck out February 6th, 1871, as sham and frivolous; a judgment, November 12th, 1868, $676 94, for damages to a guest in loss of property, judgment affirmed by the court of appeals—executions issued upon both judgments before January 1st, 1871. Ten pages of the record are occupied in setting forth the record of suits and judgments, of which the above are specimens. In nearly all the cases the debts had become payable, and payment was neglected and refused, before January 23d, 1871. Mr. Leland's evidence shows that such refusal proceeded from inability to pay, and that they resorted to the usual expedient of

insolvent debtors, to wit, sham and frivolous defences, to procure delay. He shows, also, that numerous sheriffs' officers were quartered upon him, eating up his substance.

Evidence is given of the hope and expectation of the Lelands to sell their furniture, and an extension of their lease, to Mr. Risley, for $175,000. This expected sale was based upon a renewal of their lease for four years from May 1st, 1871. This renewal they never obtained, and, of course, it never became a proper subject of estimated value, as property. There was no reason to suppose that Mr. Risley would buy their furniture, unless he could also obtain an extended lease. If he had so desired, he could have accomplished it by attending the sale that was soon afterwards made. This furniture was estimated by one skilful man at $90,000, and by another at $47,000, and actually brought, at a sale expensively advertised and carefully conducted, the sum of $43,469 31. I think there can be no doubt, that, in January and February, 1871, the firm of S. Leland & Co. was irretrievably and hopelessly insolvent.

The next question is—Had Mr. Stewart, or his agent, Mr. Hilton, reasonable cause to believe that this insolvency existed, when the deeds in question were taken? The evidence is so voluminous that I do not undertake to state it, but content myself with a statement of results.

I cannot avoid the conclusion that Mr. Stewart and Mr. Hilton were more than willing to take this real estate in payment of the rent. It had accumulated to a very large amount. It was impossible for the Lelands to pay it except with this property. This real estate and the furniture mortgaged to Mr. Stewart constituted everything of value that they possessed. Their business was much depressed. They exhibited to Mr. Stewart and his agent a statement showing the falling off of their business to the extent of from $8,000 to $10,000 per month. The men who drank wine and indulged in extravagant expenditures, they said, did not now stop at the Metropolitan Hotel, but went further up town. To sell their furniture would be to end their business, and cut off all future payments. That these men were supposed to "live in palaces, and to drive four in hand," as Mr. Hilton states, would, under such circumstances, commend them to the favor of a prudent practical man like Mr. Stewart, is not to be credited. If this idea induced Mr. Hilton to omit all inquiry, and to believe them to be rich, it is to be observed, that Mr. Stewart nowhere confirms or approves this suggestion. His practical sagacity would scarcely permit it.

There were but two modes to be adopted by Mr. Stewart—First, to give indulgence, relying upon the security of his chattel mortgage; second, to obtain payment by means of the real estate. The result has shown, what any sagacious man well knows, that a chattel mortgage is the most precarious and uncertain of all securities for the payment of money. As a security upon property which wears out, which may suddenly disappear, and which is subject to more legal niceties than almost any other legal document, a chattel mortgage is seldom resorted to except in the absence of all other possibilities. I should be much surprised to learn that Mr. Stewart had ever, during his active business life, lent money on the security of a chattel mortgage, or received it for any purpose, when other security could be obtained. Leland testifies that Mr. Stewart stated to him that he did not consider the mortgage security as sufficient.

The manner in which this negotiation for the extension of the lease to the Lelands was conducted, is worthy of remark. A termination of the lease was fatal to the Lelands. They so understood it. The sale of the furniture could be well made with such extension, not at all without it. A threatening letter is written, requiring payment or that a lease will be made to other parties. This is done by Mr. Stewart's direction. A negotiation goes on in several interviews. Terms are discussed, varying from $52,000 per year to $70,000, as the rent, but nothing is decided. Mr. Stewart refuses to accede to any terms until the back rent is paid—in whole or in part, as he says—secured in the whole, as Warren Leland says. The inference from Mr. Stewart's testimony is, that this was not a preliminary condition, but, in his answer, he expressly so states, and Warren Leland testifies to the same purport. The only source from which such payment can be made or security given, is this real estate. The hope of the renewal was held out to the Lelands, until a conveyance was obtained of this property. The negotiation was then terminated with little ceremony, by the execution of a lease to Mr. Tweed. There is strong reason to think, both that Leland never would have conveyed this property except in the confidence that his lease would be renewed by Mr. Stewart, and that Mr. Stewart fully understood this expectation. It was the effort of a struggling debtor to obtain favor, and of a fearful creditor to obtain security.

Again, it may be asked, why did Mr. Stewart receive these conveyances? He testifies that he did not want the property, but he wanted the money for his rent. The Lelands, on the contrary, did want the New York property, as it was adjoining the hotel they occupied, and a convenient auxiliary to it. No property was ever before taken in payment of rent by Mr. Stewart from the Lelands. Why, then, did Mr. Stewart take this real estate? The alleged reason of saving expenses of search, brokerage and commission, if a sale should be made by Leland, and the money paid, is scarcely a good one.

If it was a purchase, a search would certainly be made by any prudent man, and it must be done through the means of a professional agent. No careful man would make a purchase for which he paid $43,000, except after an examination of title. The fact that no examination of title and no search was made, and that the party did not think the property worth the sum asked for it, goes strongly to show that the grantee was desirous to obtain the property on any terms, and was willing to take the risk of incumbrances. This is not an indication of a bona fide purchase.

Mr. Leland testifies that he told Mr. Hilton, at the interview at his house, that suits were being pressed against him, that Hilton asked if Fitch, the counsel, could keep them off, and Leland said that he could. This is denied by Mr. Hilton. The three Lelands agree in the general character of these statements.

Mr. Stewart and Mr. Hilton testify that they had no doubt of the responsibility of the Lelands at this time. They both knew, however, that the Lelands were largely in arrear for rent, and Mr. Stewart directed Mr. Hilton to write them officially in regard to it. Mr. Stewart states that he was anxious to collect the rent, and more than once directed Mr. Hilton to look after it. He states that he did not wish to make the purchase, but Mr. Hilton advised him to make it, and told him that he might as well accommodate them by making the purchase.

It requires some confidence to suppose that Mr. Stewart was willing to take, from a solvent debtor, property that he did not want, in payment of a good debt, and for the purpose of accommodating his debtor. Business men who act upon this principle seldom succeed in making large fortunes. It is difficult to suppose that Mr. Hilton gave this advice, or that Mr. Stewart acceded to it.

Mr. Stewart states that he made no personal inquiries as to the Lelands' responsibility, and had no personal knowledge of suits against them, and that he left everything to Mr. Hilton. Mr. Hilton testifies that he believed the Lelands to be in a "splendid" condition, and that he gave Mr. Stewart a "glowing account" of their affairs. The examination and the cross-examination of each of these witnesses is very protracted. Without impeachment of their veracity, it may be doubted whether their evidence is equal in weight to the direct testimony given, and to the circumstances of the case, to the contrary. This case was but one of the many large transactions in which those gentlemen were engaged, and of much less importance to them than to the Lelands. To the latter it was everything, and they may be expected to possess a more accurate recollection respecting it than others. In the present controversy they have no possible interest.

I am of the opinion that both Mr. Stewart and Mr. Hilton had the reasonable cause to believe the Lelands insolvent, required by law, and that Mr. Stewart is chargeable with such knowledge.

The questions upon the furniture in the Metropolitan Hotel, and the claims upon it, are next to be considered. The circumstances in regard to the chattel mortgages upon this property, given to Mr. Stewart, have been fully stated, and will be referred to as may be necessary. On the 24th of January and the 3d of February, 1871, Oechs & Co. had obtained judgments against S. Leland & Co. to the amount of $5,044 12, and issued executions thereon, which were levied upon this same hotel property. These judgments were obtained in spite of the strenuous opposition of the bankrupts. On the 17th of February and the 16th of March, 1871, Batjer & Co. obtained judgments against S. Leland & Co. for $3,035 90, and issued executions thereon, which were levied on this hotel furniture. These levies were made before the filing of the petition in bankruptcy. Miller & Conger also obtained six judgments against the same firm, upon five of which, amounting in the aggregate to $4,567 08, executions were issued and levied upon the hotel furniture, shortly before the petition in bankruptcy was filed. In March, 1871, to avoid the injury to result from the action of the conflicting claimants, the bankrupt court issued to the marshal a warrant directing him to take possession of the hotel furniture, to sell it at public auction, and to bring the proceeds into court, to be kept until the further order of the court. This was done, and the proceeds of such sale, being a net sum of $26,867 29, are now in court, and represent the subject of this controversy respecting the hotel furniture. Mr. Stewart claims the proceeds by virtue of his chattel mortgage, and the renewal thereof, and by virtue of the provisions of the lease, already set forth. Miller & Conger and the other judgment creditors claim the same by virtue of their execution levy upon the property, existing when it was taken from the sheriff's possession by order of the bankrupt court, upon its warrant to the marshal. The assignee claims that all the liens and claims above mentioned are invalid under the bankrupt act, and that each of them is superseded and overridden by the title of the assignee in bankruptcy.

(1.) As to the judgments and executions specified. I refer to them first, as their consideration will be brief. They were adjudged by the district court to be invalid. This judgment was founded upon a consideration of the case of Buchanan v. Smith, 16 Wall. [83 U. S.] 277. The construction generally given to that case, when this judgment was rendered, was much modified by the subsequent case of Wilson v. City Bank, 17 Wall. [84 U. S.] 473. If that case had been before the learned judge who decided the present one in the district court, I do not doubt that he would have

held, as I do, that these judgments are valid, and the executions valid liens upon the property seized. They were for just debts, due and payable, and the judgments were obtained not only without the slightest aid or concurrence of the debtors, but generally in spite of their active and unjustifiable opposition. See, also, Cook v. Tullis, 18 Wall. [85 U. S.] 332; Tiffany v. Boatman's Institution, Id. 376.

(2.) As to the chattel mortgages. Was the chattel mortgage of Mr. Stewart, and its renewal of July 8th, 1870, valid, so far as to give him a lien upon the hotel property in preference to an execution creditor or a bona fide purchaser? The statute of New York by which this subject is governed was passed April 29th, 1833, and is as follows (Laws N. Y. 1833, p. 402, c. 279):

"Section 1. Every mortgage, or conveyance intended to operate as a mortgage, of goods or chattels, hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of this act.

"Sec. 2. The instruments mentioned in the preceding section shall be filed in the several towns and cities of this state where the mortgagor therein, if a resident of this state, shall reside at the time of the execution thereof, and, if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument. * * * *

"Sec. 3. Every mortgage filed in pursuance of this act shall cease to be valid, as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register aforesaid, of the town or city where the mortgagor shall then reside."

It is objected, in the present case (1st) that these mortgages and renewals were all filed in the office of the register of the city and county of New York, and that none of them were filed in the towns of New Rochelle or Mount Vernon, in Westchester county, whereas the mortgagors were all residents of the state, and residents of the towns in Westchester county named, and none of them were residents of the city of New York; (2d) that the last two mortgages are defective in not having a sufficient specification of the property embraced, the reference to a schedule filed in 1867, and of property which was continually wearing out and being replaced, not being sufficient; (3d) that there is, in the renewal of July 8th, 1870, no sufficient statement either of the property remaining subject to the mortgage or of the interest of the mortgagee in it, that is, of the amount of his mortgage debt.

The first and the third of these objections I consider valid ones. As to the omission to file in the proper office, the case is quite plain. It is proved, beyond question, that the residence of the mortgagors was in Westchester county. The peremptory condition, therefore, of the statute, by which alone validity is given to the mortgage, is wanting. In its absence, the statute declares that the mortgage shall be absolutely void. This proof must be affirmatively made by the mortgagee, and, in a case where there was no evidence of the residence of the mortgagor, the mortgage was held to be void. Smith v. Jenks, 1 Denio, 580. If there be an erroneous recital, in the mortgage, of the residence of the parties, it does not relieve the case. It might operate as a waiver or an estoppel as to the mortgagor; but, the statute was enacted for the benefit of creditors, and no agreement of the debtor can estop them or control their rights. Chandler v. Bunn, Lalor's Supp. 167. The statute has imposed a rigid and unbending condition, to wit, a filing in the place where the mortgagor actually resides, as a preliminary to the validity of the mortgage. Whether this condition is wise or otherwise, whether convenient or difficult of performance, is not for the courts to say. The statute exacts it, and the courts must see that it is performed.

The schedule and the specification in the renewal of July 8th, 1870, are insufficient under the statute. It is required, that, upon such renewal, to continue the mortgage in force, there shall be filed a "true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof." This statement is intended to supply the place of a new mortgage. It might be difficult to obtain a new mortgage at the end of a year. There would be no obligation on the part of the mortgagor to execute it, and no necessary inducement to him to do so. A convenient substitute, and one within the control of the creditor, was given by the section we are considering, and this substitute should contain all the essentials of an original mortgage. It should show, especially, what was the property thus subjected, and what was the amount claimed to be an incumbrance upon it. The detailed schedule is an important part of the mortgage, essential to be presented to an inquiring creditor. This creditor is entitled to have it presented in the renewal equally as in the original. No one would contend that the requirement to refile "a copy" of the mortgage would be complied with by giving a skeleton of its contents and making further

reference to the original filed a year previously. The schedule is a part of the mortgage, and the rule is the same as to it.

Again, the specification on the refiling says: "I hereby certify that the lease within referred to still exists in full force, and the interests of the parties, and my interests, thereunder remain unchanged, except so far as the same have been altered by the payment of rent accrued." What information does this statement give to a creditor who should seek to ascertain the extent of Mr. Stewart's incumbrance? It simply informs him that the lease still exists. It does not inform him that there is $32,994 15 of rent due and unpaid, and which Mr. Stewart claims to be secured by the mortgage. It leaves him to infer that the rent has been paid promptly as it accrued. The latter would be the legitimate inference, while, in fact, the sum mentioned was in arrear. Ely v. Carnley, 19 N. Y. 496; Van Heusen v. Radcliff, 17 N. Y. 580. Grover, J., says, in the first case: "It is important to creditors to know the amount of liens as well as their existence. Hence, the act requires the filing of the instrument or of a true copy. A compliance with the act will give the creditor full information as to the property mortgaged, the amount of the debt or condition of the mortgage, and to what extent the property can be made available for the payment of his debt. When the paper fails to accomplish these purposes, it falls short of the requirement of the statute. * * * When a judgment creditor claims the property, in hostility to the mortgagee, the inquiry is—has the mortgagee complied with the statute?—if not, the statute makes his mortgage void. The cause of the omission is wholly immaterial, whether by accident or design."

I hold, therefore, that Mr. Stewart has no lien upon the proceeds of the sale of the hotel furniture, by virtue of his chattel mortgages.

(3.) As to the lien given by the lease. Much learning is found in the brief of the counsel for Mr. Stewart on this point. He strenuously insists that the lease contains in itself what amounts to a lien on the hotel furniture; and, again, that, if there has been a failure to perfect a lien, a court of equity will carry out the agreement of the parties, and give the lien agreed by them to be given.

The doctrine is certainly true, that, where parties have agreed to give a lien upon specific property, but have neglected it entirely, or have done it imperfectly, equity will, in many cases, carry out the agreement, and cause to be done what the parties agreed should be done, and what ought to be done. What is the agreement of the lease in regard to a lien or security for the rent? It is, in effect, that the Lelands will give to Mr. Stewart a chattel mortgage on their furniture for such security, and will renew and extend the same, from time to time, as shall be necessary to effect that purpose. There is no agreement that he shall have a lien except in this form. It is agreed to execute "a first mortgage and lien upon all the furniture," "which mortgage or lien shall be a security for the payment of the rent," and, "on any default in the payment of such rent according to the terms of this instrument," the party "may at once proceed to foreclose said mortgage or lien." It is then provided, that, within thirty days prior to its expiration, the party shall execute "a renewal of said mortgage or lien, and, also, an additional mortgage, which shall be a first lien" "upon all the additional furniture." If the party fails "to so execute and deliver" "any such renewal or additional mortgage or lien," the rent shall become payable in advance. "Said mortgage or mortgages shall be a continuing lien and security for the payment of the rent hereby reserved." The expressions "mortgage" and "lien" are manifestly synonymous. The one is a repetition of the other in a new form. The tenor of the article and the detail of manner show that the lien intended to be secured was by the means of a chattel mortgage, and that the lien derived from such an instrument should be at all times "kept up." Accordingly, the article concludes: "And, to that end, said mortgage or mortgages shall be a continuing lien and security for the payment of the rent hereby reserved."

As against his debtors, Mr. Stewart has an equity which could be enforced, to apply the property or its proceeds, which occupy the position of the property, to the payment of his debt. He has not the lien of a vendor, if such could here exist. He has not the equity of a seller and former owner of the property. In what respect can his equity be distinguished from that of any prior mortgagee of a personal chattel, whose mortgage or its renewal is defective? A manufacturer sells a coach from his shop for $1,000, and takes a chattel mortgage to secure the payment of the purchase price. His equity to have his money, and to have it from the property sold, may be conceded. But he places his security in a specific form of writing, as to which the statute declares that it shall be void unless certain conditions are complied with. If he fails to comply with them, his legal and his equitable security fail together. He has embodied his equity in the form of a legal document, and he must stand upon the security thus chosen. If his vendee gives another mortgage to a creditor, who complies with the statutory requirements, or if a creditor obtains judgment against him and levies his execution upon the coach referred to, no plea of a prior equity will avail the seller. His claim is postponed to that of the other creditor. It is not necessary to cite cases to sustain this position. In the view I take of this branch of the case, Mr. Stewart has not, and never had, a lien upon the hotel furniture or its proceeds, which would avail him against other creditors in a condition to contest it.

The considerations last mentioned furnish

an answer to the suggestion, that, by the non-payment of the rent according to the terms of the chattel mortgage, the mortgage became forfeited and the title to the property became absolute in Mr. Stewart. It is not necessary to examine the elaborate legal argument on this point, or to refer to the authorities. As against creditors and purchasers, Mr. Stewart had no mortgage. The statute condemns his security as "absolutely void." No language can be more explicit. No title by forfeiture can pass by or through an instrument which has not, and could never have had, a legal existence. Ely v. Carnley, 19 N. Y. 498. To hold that the title to personal property becomes absolute in the mortgagee upon failure to comply with the terms of the mortgage, in the sense that a subsequent purchaser or execution creditor cannot contest the first mortgage, would work an absolute nullification of the statute of 1833. By subjecting the property to the lien and claim of subsequent parties, the statute emphatically declares that the title is not absolute in the first mortgagee. Ely v. Carnley, supra.

The further question remains, of the right of the assignee to maintain this action. Mr. Stewart's counsel contends, that the assignee does not represent the creditors but the bankrupt only, and that, if his client's title is defective, the assignee cannot impeach it.

As to the right of the assignee to maintain an action to recover back the value of the real estate conveyed to Mr. Stewart by the Lelands, the case is provided for by the first clause in section thirty-five of the bankrupt act. It is there enacted, that, if any person, being insolvent, with a view to give a preference to a creditor, shall make any payment or conveyance of any part of his property, such creditor having reasonable cause to believe such person to be insolvent, and that such payment or conveyance "is made in fraud of the provisions of this act," "the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it." It has been shown already, that S. Leland & Co. were insolvent in January and February, 1871, in which months the deeds of the real estate were delivered to Mr. Stewart. Their insolvency was complete. It was hopeless and irretrievable, unless they could obtain from Mr. Stewart that to which they had no legal right, and which, in fact, they did not obtain—a four years' renewal of the lease of the Metropolitan Hotel. Knowing this to be their condition, a conveyance by them to Mr. Stewart, of $43,000 worth of real estate, in payment of a precedent debt, was, in law, a conveyance with intent to give him a preference over their other creditors. They gave to him in a measure which they knew they could not give to all. The case would have been very different if Mr. Stewart had paid money or advanced value at the time. Such a transaction by their debtor, in an honest effort to sustain himself, is not forbidden. See Cook v. Tullis and Tiffany v. Boatman's Institution, supra. It is no answer to this to say, that the Lelands expected to receive a renewal of their lease, and thus to retrieve their fortunes. Any other delusive expectation, as of receiving a legacy, or of drawing a prize in a lottery, or of making a fortunate speculation in stocks, would have furnished the same answer. In neither case would it be satisfactory. The law does not act upon such assumptions. Upon a view of their actual property and of their legal rights, they knew that it was impossible to continue their business or to pay their debts. They knew they paid to Mr. Stewart more than they could pay to others. They hoped, by giving to him such a preference, to obtain a favor and advantage in return. They knew, also, that it rested entirely in the caprice of Mr. Stewart, whether he would bestow or withhold that favor. This does not relieve them from the charge of intentionally giving one creditor a preference over others. Of the knowledge by Mr. Stewart and his agent, of the state of the affairs of the bankrupt, enough has been already said. Under such circumstances, the act provides that the assignee may recover back the money or property so paid, conveyed or transferred; and it is for that purpose the present suit is brought.

As to that part of the action which relates to the proceeds of the furniture, it is insisted by the appellant that the case of Gibson v. Warden, 14 Wall. [81 U. S.] 244, and the case of In re Collins [Case No. 3,007], are authorities against the right of the assignee. The fact that this property has been converted into money does not alter the rights of the parties to it. Whatever liens there were upon the property itself follow the proceeds, and are liens upon the proceeds, to the same extent that they were upon the property itself. Astor v. Miller, 2 Paige, 68; Sweet v. Jacocks, 6 Paige, 355; Gibson v. Warden, supra.

In Bank of Leavenworth v. Hunt, 11 Wall. [78 U. S.] 391, this action by the assignee to recover goods held under a similar mortgage, that is, one void as to creditors only, was sustained. Such was, also, the case in Allen v. Massey, 17 Wall. [84 U. S.] 351. In Re Leland [Case No. 8,234], Woodruff, circuit judge, held that the mortgage in such case was void as against the assignee in bankruptcy, and that he was entitled to recover the proceeds of the property, in the same manner as would creditors, had they obtained judgment. In two other cases, the same judge has held that the assignee did not represent creditors, so far as to enable him to sue persons against whom rights of action were given to creditors by statute, as for individual responsibilities. Bristol v. Sanford [Id. 1,893]; Dutcher v. Marine Bank [Id. 4,203].

It the present instance, there were exist-

ing, at the time this action was commenced, a large number of judgments and executions which had been levied upon the property in controversy. Several of these, to wit, those in favor of Miller & Conger and those in favor of Oechs and of Batjer, have been decided to be valid judgments and to give liens upon this property. Some others are, evidently, in the same condition. This brings the case within the rule laid down in the Case of Collins, supra, and would justify the action, although the assignee does not claim by virtue of those judgments and executions, but seeks to avoid them. They do exist, however, and are valid liens, and are by law represented by the assignee. I think they sustain the right of action of the assignee as against the fraudulent mortgages.

Again, the assignee has an unquestioned standing in court upon the point of the real estate conveyances. It is not unreasonable that all the points respecting the disposition of the trust funds, and of the conflicting claims of parties to the fund, brought before the court, and which must ultimately be decided by it, should now be passed upon. It is to the advantage of every one that that course should be taken.

My conclusions are: (1.) That the real estate conveyances to Mr. Stewart are void, and that he must make a reconveyance of the property to the assignee, and, in case of his inability to do so, pay the value thereof, which is proved to be the sums at which they were credited in account to S. Leland & Co. (2.) That the chattel mortgages of Mr. Stewart upon the hotel furniture are void. (3.) That the judgments and executions of Miller & Conger, and Oechs, and Batjer are valid, and were liens on the hotel furniture. (4.) That from the fund produced by the sale of the hotel furniture, there be distributed and paid in payment of the judgments of Miller & Conger, and Oechs, and Batjer, the sums due upon them respectively, according to their legal priorities. (5.) That the attorneys and counsel of the said judgment creditors, defendants, be paid their taxable costs only out of said fund. (6.) That the residue, if any, be paid to the assignee, for the purposes of the trust. I see no reason for requiring the payments to the judgment creditors to be made by the assignee, or that the fund in question should pass through his hands for that purpose. Let the same be made by the clerk in whose hands the funds now are. The attorney and counsel of the assignee is entitled to be paid his taxable costs of suit, and a reasonable allowance for counsel fees. Such costs and counsel fees are to be paid from the proceeds of the real estate, or from the residue of the furniture fund remaining after paying the execution liens, and are not to diminish the fund for the payment of such executions.

[On appeal to the supreme court, the decree of this court was reversed. 101 U. S. 731. See, also, Case No. 8,228.]

Case No. 11,221.

PLATT v. STEWART et al.

[11 N. B. R. 191.] [1]

District Court, S. D. New York. 1875.

BANKRUPTCY—SHERIFF'S FEES—PRIOR EXECUTIONS.

1. The sheriff is entitled to compensation for services rendered by him under executions issued against the bankrupt before the commencement of proceedings in bankruptcy, out of the proceeds of the personal estate; such compensation not to exceed the fees legally taxable under the laws of the state of New York.

2. No compensation can be allowed in respect to executions issued subsequent to the filing of the petition in bankruptcy.

[This was a proceeding by John H. Platt against Alexander T. Stewart and others.]

D. McMahon, for plaintiff.

J. S. Smith, for ex-sheriffs.

BLATCHFORD, District Judge. The referee reports that inasmuch as the decree declares that the three judgments recovered by the Merchants' National Bank of Lowell, and the executions issued thereon, are not liens upon the proceeds of the personal estate on deposit, he is precluded from allowing any compensation out of that fund to ex-Sheriff Kelly, for the services rendered by him under those executions. The referee was, in substance, directed by the decree to ascertain and report what would be a reasonable compensation to Mr. Kelly for his levy and services under such of those executions as were issued before the petition was filed, notwithstanding the declaration previously made in the decree, that the judgments and executions are not liens on such proceeds. This matter was considered by the court in framing the decree, and it was intended that Mr. Kelly should be compensated in like manner as if the decree had declared that the judgments and executions are liens on such proceeds. It is true that the amount of such compensation ought not to exceed, nor was it intended that it should exceed, the fees legally taxable under the laws of the state of New York, on the executions, in respect of the levy and services, when the levy was made and the services were rendered, and so legally taxable in respect of the property on which the levy was made, and in respect of which, under the levy, the services were rendered.

I concur in the conclusion of the referee, that no compensation is due to ex-Sheriff O'Brien out of the fund on deposit, in respect of the executions on the judgments recovered by the Bank of Dansville; and in his conclusion that ex-Sheriff Brennan can have no claim for compensation out of such fund, in respect of executions issued subsequent to the filing of the petition in bankruptcy. As to such of the seventeen executions issued to ex-Sheriff Brennan prior to March 27th, 1871, as were issued before the petition was filed, the referee reports that inasmuch as the de-

[1] [Reprinted by permission.]

cree declares that such executions and the judgments on which they were issued are not valid liens on the proceeds on deposit, he is precluded from allowing any compensation whatever to Mr. Brennan out of the fund for his services under those executions. The same observations apply to this matter as to the case of Mr. Kelly.

The case is referred back to the referee for a further report after further proceedings, in conformity with this decision.

[See Case No. 8,228.]

PLATT (UNITED STATES v.). See Case No. 16,054a.

Case No. 11,222.

PLATT v. UNITED STATES PATENT BUTTON, RIVET, NEEDLE & MACHINE MANUF'G CO.

[9 Blatchf. 342; 1 O. G. 524; 5 Fish. Pat. Cas. 265; Merw. Pat. Inv. 132.] [1]

Circuit Court, S. D. New York. Jan. 18, 1872.

PATENTS—VALIDITY—CONSTRUCTION OF CLAIM—ANTICIPATION—IMPROVED BUTTONS.

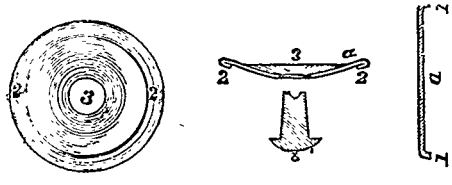
1. The letters patent granted to Clark M. Platt, July 10th, 1866, for an "improvement in buttons," are valid.

2. The claim of the patent, "the button, formed of a single piece of metal, with the edge turned over, and with one central hole, as a new article of manufacture, as specified," covers a button formed of a single thickness of metal, with the edge folded over upon the body of the metal, and with one central hole, capable of being used for a single rivet or eyelet, to fasten the button to the garment.

3. Such button is not anticipated by a button having a single piece of metal and the folded edge, but no central hole; or by a button in which the edge was not folded over upon the body of the single piece of metal; or by a button not made of metal; or by a button not made of a single piece of metal; or by a button made of a single piece of metal, with its edge folded over on the body of the metal, and with two, three or four holes, so as to be attached to a garment by sewing; or by a button made of more than one piece of metal, in which the edge of one of the pieces of metal is folded over upon the other parts which make up the thickness of the button, and not upon itself.

[In equity. Final hearing upon pleadings and proofs. Suit brought upon letters patent [No. 56,261] for an "improvement in buttons, granted to complainant [Clark M. Platt], July 10, 1866.

[a, plate; 2, 2, folded edge; 3, central hole.



[The nature of the invention is illustrated by the accompanying engraving, and an abstract of the specification, together with the claim of the patent, will be found in the opinion of the court.] [2]

Gilbert M. Plympton, for plaintiff.

Charles A. Durgin, for defendants.

BLATCHFORD, District Judge. This suit is brought on letters patent of the United States, granted to the plaintiff July 10th, 1866, for an "improvement in buttons." The specification says: "Buttons have heretofore been made with a hole in their centre, to receive a rivet that is passed through the garment. Said buttons have been made by uniting two thicknesses of metal at the edges, with a piece of paper between them. This mode of making is costly. Buttons have also been made of one piece of sheet metal, but the edge of the button formed by the thin sheet metal is sharp, and renders the button objectionable. My invention relates to a button which is a new article of manufacture, being made of one piece of metal, the edge of which is thickened by being folded over on itself, and the centre is perforated with one hole, for the reception of a rivet or eyelet passing through the garment and button, and riveted up to fasten the button to the garment." Then follows a description of the button, with references to the drawings. The edges of the disc or button blank are first turned back and then folded down on the button itself. The centre of the button is perforated for the reception of the rivet, the surface of the button is struck down, to increase its ornamental appearance, and the edges of the hole may be raised or pressed forward, so as to raise a burr, which will cause the metal of the button to sit tightly around the rivet. The button may, however, have a plain, central hole, adapted to a rivet, eyelet, or other fastening. The edge of the button may be turned forward instead of back, in either case making the edge of the button sufficiently thick and smooth for use, in consequence of the double thickness and fold at the edge. A conical hole or burr around the central hole is disclaimed. The claim is: "The button, formed of a singe piece of metal, with the edge turned over, and with one central hole, as a new article of manufacture, as specified."

There can be no doubt of the great utility of the button covered by the patent. The folding over of the edge of the single thickness of metal of which the button is made, upon the body of the metal, thickens the edge, and thus enables a light weight of metal to be used, while the edge of the button is strong and smooth. These features, with the central hole, make up the button. It has a light weight of metal, and is, therefore, cheap to make. It has but one piece of metal to be handled, and is therefore

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 342, and the statement is from 5 Fish. Pat. Cas. 265. Merw. Pat. Inv. 132, contains only a partial report.]

[2] [From 5 Fish. Pat. Cas. 265.]

cheap to make. The folded edge has the thickness and smoothness of the edge of a button made of two pieces of metal. The button can be attached without sewing and by a single rivet. The button sold by the defendants is identical with that of the patent.

The defendants have attacked the patent for want of novelty, but have wholly failed in such defence. It is not shown that any button made of a single piece of metal, with the edge folded over upon the metal in the body, and with a single central hole, existed before the invention of the plaintiff. This remark applies to the patents granted to Willoughby H. Reed, November 15th, 1864, and June 6th, 1865; to the application of Kosman Rose, of April 29th, 1858; to the application of John P. Jamison, of October 16th, 1860; to the patent granted to Festus Hayden, July 10th, 1840; to the patent granted to Henry S. Poole, August 11th, 1841; to the patent granted to P. Davey, November 29th, 1859; to the application of Samuel Cantrell, of February 22d, 1865; to the application of Samuel B. Fay, of August 13th, 1856; to the patent granted to Philander H. Benedict, March 14th, 1865; and to the patent granted to Edwin Smith, April 16th, 1861. Some of the prior buttons contain one or two of the three features of the plaintiff's button, but all of such features are not found combined in any one of the prior buttons. Those features are—the single thickness of metal—its edge folded over on its body—the central hole, capable of being used for a single rivet or eyelet, to fasten the button to the garment. Thus, the Rose button has the single piece of metal and the folded edge, but no central hole. In the Jamison button, the edge is not folded over upon the body of the single piece of metal, nor is it in the Reed button of 1864, or in the Hayden button, or in the Davey button, or in the Poole button. The Fay button is not made of metal. The Smith button is not made of a single piece of metal, nor is the Reed button of 1865. Nor is the plaintiff's button anticipated by a button made of a single piece of metal with its edge folded over on the body of the metal, and with two, or three, or four holes, so as to be attached to a garment by sewing; or by a button made of more than one piece of metal, in which the edge of one of the pieces of metal is folded over upon the other parts, which make up the thickness of the button, and not upon itself.

There must be a decree for the plaintiff, for a perpetual injunction and an account of profits, with costs.

PLATT, The JAMES. See Case No. 7,199.

PLATTE CITY (BRITTON v.). See Case No. 1,907.

PLATTSBURG (JUDSON v.). See Case No. 7,570.

Case No. 11,223.

PLAYER v. LIPPINCOTT et al.

[4 Dill. 124;[1] 5 Cent. Law J. 323; 25 Pittsb. Leg. J. 48.]

Circuit Court, E. D. Missouri. Sept. Term, 1877.[2]

BANKRUPT ACT—PREFERENCE—EXCHANGE OF SECURITIES.

The substitution and registry of a chattel mortgage, correcting a mistake in a prior unrecorded mortgage, is not an illegal preference, but simply an exchange of securities, and falls within the rule laid down in Sawyer v. Turpin, 91 U. S. 114.

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

The plaintiff [Preston Player] is the assignee in bankruptcy of Benjamin R. Lippincott, and brought this suit to set aside a chattel mortgage, dated November 15th, 1876, recorded November 18th of the same year, executed by the bankrupt to the defendants. On final hearing the bill was dismissed by the district court, and the assignee appeals. The facts are stated more at large, and the opinion of the district court is reported, in [Case No. 11,224], and in the subjoined note.

G. M. Stewart, for appellant, the assignee.
E. T. Allen, for appellees, the mortgagees.

DILLON, Circuit Judge. I find, from the proofs, that the mortgage of August 28th was actually delivered; that there was no agreement that it was not to be recorded or kept secret, and that there was no understanding that the mortgagor might sell the property mortgaged in the usual way. I further find that the mortgage was given to secure a bona fide debt, and that it was not made or taken in contravention of the bankrupt act. It contained a clerical error as to the amount of the note secured thereby, and for that reason the second mortgage on the same property was executed and acknowledged, November 15th, and recorded November 18th. The petition in bankruptcy was filed within two months after the execution and recording of the corrected and substituted mortgage, but more than four months after the execution of the first mortgage. No possession was taken under either mortgage.

The statute of Missouri (1 Wag. St. 281, § 8) is not essentially different, in the respect here involved, from the statute of Massachusetts; and I am of opinion that the district judge was clearly right in considering this case as governed by the judgment of the supreme court in Sawyer v. Turpin, 91 U. S. 114. I can perceive no solid grounds on which to distinguish them. The mortgagee's security, upon the facts in the case, dates from the execution of the original mortgage, which was more than four months before the commencement of the proceedings in bankruptcy. Affirmed.

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

[2] [Affirming Case No. 11,224.]

Case No. 11,224.

PLAYER v. LIPPINCOTT et al.

[4 Dill. 125, Note,[1] 16 N. B. R. 208; 5 Cent. Law J. 260.]

District Court, E. D. Missouri. Sept. 6, 1877.[2]

BANKRUPT LAW—PREFERENCE—EXCHANGE OF SECURITIES—CHATTEL MORTGAGE.

The substitution and record of a chattel mortgage correctly describing the note secured, for a prior unrecorded mortgage, which incorrectly stated such note, *held* not to be an illegal preference, but a simple exchange of securities, within the rule laid down in Sawyer v. Turpin, 91 U. S. 114.

[Cited in Re Oliver, Case No. 10,492.]

This was a bill in equity [by Preston Player against Lippincott & Co. and others] to set aside a chattel mortgage. The bill alleged the bankruptcy of B. R. Lippincott, by creditors' petition, filed January 9th, 1877; that Charles Lippincott and James Patterson, as co-partners under the style of Charles Lippincott & Co., and doing business in Philadelphia, were creditors of B. R. Lippincott (a brother of Charles), a manufacturer of soda water in St. Louis, in the sum of $14,480.92; that B. R. Lippincott executed a chattel mortgage to secure a note for said amount, to his brother's firm, on his stock and fixtures, extracts in syrup-room, etc., tools and stock in copper shop, boilers, machinery, and apparatus used by him in the manufacture and sale of soda water; that said note and mortgage were dated August 28, 1876; that the mortgagor and mortgagees agreed that said mortgage should not be placed on record, except in the event that B. R. Lippincott's creditors should press their claims against him; that, pursuant to such agreement, said mortgage was not placed of record until B. R. Lippincott's "insolvency was about to become notoriously public, namely, on the 18th day of November, 1876, when the same was filed and recorded;" that a part of the property mortgaged was stock in trade of the mortgagor, of which he "kept continually selling portions," and replenishing the same with new purchases, and that it was the agreement, intention, and purpose of the mortgagor and mortgagees that the mortgagor should remain in possession of the property mortgaged, carry on his usual business, and make sales of portions of all the property mortgaged, as the exigencies of his business might require; that the mortgagor did so remain in possession of said property and carry on his business until the bankruptcy. There were the usual allegations as to knowledge on the part of the defendants of the mortgagor's financial condition, and purpose to evade the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. The answer admitted the bankruptcy, the indebtedness of bankrupt to defendants as co-partners, in the amount alleged, the execution of the note and mortgage; but denied any agreement or understanding that the mortgage should not be placed of record except in case of the imminent insolvency of the mortgagor. The answer further denied any agreement or intention on the part of defendants, that the mortgagor should sell or dispose of, in the conduct of his business, any part of the mortgaged property, and denied that he had sold any part thereof. The mortgage contained the following stipulations: "The parties hereto agree that, until condition broken, said property may remain in the possession of Benjamin R. Lippincott, but after condition broken, the said Charles Lippincott & Co. may, at their pleasure, take and remove the same, and may enter into any building or premises of the said Benjamin R. Lippincott, for that purpose." The answer further denied any knowledge on the part of the defendants of the mortgagor's insolvent condition, either on the 28th of August or the 18th of November. The defendants, in explanation of the delay in recording the mortgage, averred that at the date of the execution of the note and mortgage, defendant Patterson was in St. Louis, on his annual visit to make a settlement with B. R. Lippincott, and took the mortgage with him to Philadelphia for the purpose of exhibiting the same to his partner, before having it placed of record; that on reaching Philadelphia, it was for the first time discovered by Charles Lippincott that, in copying the note into the mortgage, the word "four" had been written instead of "fourteen," in stating the amount of the note, though the amount of the debt had been otherwise correctly stated; that B. R. Lippincott was then daily expected in Philadelphia, to visit the centennial, and it was determined to hold the mortgage for correction until he should come; that B. R. Lippincott did not reach Philadelphia until early in November, and while he was there a new mortgage of the same date, and, with the exception of the error in copying the note, an exact copy of the first, was prepared, signed in Philadelphia by defendant's firm and B. R. Lippincott, and was taken by B. R. Lippincott to St. Louis for acknowledgment and record, and was acknowledged by him in St. Louis, November 15th, and recorded on the 18th.

Stewart & Hermann, for complainant, cited: Claflin v. Rosenberg, 42 Mo. 439; State v. King, 44 Mo. 242; Allen v. Massey [Case No. 231]; Bryson v. Penix, 18 Mo. 13; Balke v. Swift, 53 Mo. 86; Feurt v. Rowell, 62 Mo. 525; Harris v. Exchange Bank [Case No. 6,119]; Robinson v. Robards, 15 Mo. 459; Walter v. Wimer, 24 Mo. 63; Eaton v. Perry, 29 Mo. 96; Voorhis v. Langsdorf, 31 Mo. 451; State v. Tasker, Id. 445; Lodge v. Samuels, 50 Mo. 204.

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

[2] [Affirmed in Case No. 11,223.]

E. T. Allen and N. Oscar Gray, for defendants, cited: In re Wynne [Case No. 18,117]; Sawyer v. Turpin, 91 U. S. 114; Miller v. Jones [Case No. 9,576]; Field v. Baker [Id. 4,762]; Burnhisel v. Firman [22 Wall. (89 U. S.) 170]; Cragin v. Carmichael [Case No. 3,319]; National Bank of Fredericksburg v. Conway [Id. 10,037]; Hicks v. Williams, 17 Barb. 523; Thompson v. Van Vechten, 6 Bosw. 373.

TREAT, District Judge. The decision in the case of Sawyer v. Turpin, 91 U. S. 114, is conclusive on nearly every point in this case. The prior unrecorded mortgage for which the latter was substituted, would not be upheld if the rights of intervening mortgage creditors or vendees had arisen; but in the absence of such intervening rights, the last mortgage rests for its validity on the first. The facts connected with the two mortgages may be used to throw light on the bona fides of the parties. If the second is, as to date, to be referred to the first mortgage, for which it was substituted, then it was not made within two months of proceedings in bankruptcy. There is nothing on its face to make either mortgage void. Under the statutes of Missouri, it could have no effect as to the creditors until recorded. If any of the bankrupt's creditors had pursued the property between August and November 18th, their demands might have prevailed over the alleged rights of the mortgagees; but no such rights existed, or, if so, were asserted. The intimation of the supreme court of Missouri, that a mortgage should be recorded within a reasonable time, has reference to cases where intervening interests arise. There is nothing on the face of either mortgage, or in the evidence, showing that the mortgagor was to have the right to sell or consume the mortgaged property for his own benefit, or, in other words, that the conveyance was for his benefit, and, therefore, void. The bill is dismissed with costs. Bill dismissed.

[On appeal to the circuit court the decree of this court was affirmed. Case No. 11,223.]

PLEASANT HILL (POLLARD v.). See Case No. 11,253.

Case No. 11,225.

Ex parte PLEASANTS.

[4 Cranch, C. C. 314.] [1]

Circuit Court, District of Columbia. May Term, 1833.

WITNESS FROM ANOTHER STATE—ATTACHMENT.

A witness residing in Virginia cannot be compelled, by attachment, to attend the circuit court of the District of Columbia, in a criminal cause. By the opinion of Mr. Justice Brockenbrough.

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

Mr. Key, U. S. Atty., for the District of Columbia, moved the court (MORSELL, Circuit Judge, absent) for an attachment of contempt against John H. Pleasants, who resides in Richmond, in Virginia, for not obeying a summons to attend as a witness on behalf of the United States, before the grand jury of Alexandria county, in the District of Columbia, immediately.

Thomas Woodward, deputy-marshal of the District of Columbia, made affidavit that he served the annexed summons on J. H. Pleasants, in the city of Richmond, in Virginia. The summons was directed to "the marshal of Virginia," and says: "You are hereby commanded to summon John H. Pleasants to appear before the United States judges of the circuit court of the District of Columbia, for the county of Alexandria, at the courthouse in the town of Alexandria, to testify and the truth to say on the behalf of the United States, before the grand jury of the said county of Alexandria; and this he shall in no wise omit, under the penalty of $333.33, and have then there this writ," &c.

Mr. Key made an official statement, in writing and in substance, that Pleasants is editor of the Richmond Whig; that he has seen in the Whig a letter published from some person in Alexandria to some person in Richmond (and produced the paper, the Whig of 8th of May); that the grand jury have now before them for consideration a bill of indictment charging R. B. Randolph and sundry other persons as having conspired to commit an assault upon the president of the United States in the county of Alexandria, and that he expects the said Pleasants can prove, &c.

THE COURT (MORSELL, Circuit Judge, absent) refused to issue an attachment without a previous rule to show cause, which was granted, returnable on the 17th instant; provided a copy of the order, &c., be served on the said Pleasants on or before the 12th instant.

CRANCH, Chief Judge, however had doubts whether the subpœna was well served so as to bring the witness into contempt.

No cause having been shown, upon the return of the rule, an attachment was issued and served by the marshal of Virginia; but he was discharged by Mr. Justice BROCKENBROUGH, upon habeas corpus; who delivered the following opinion, as published in the Alexandria Gazette of the 26th of November, 1833.

Ex parte John H. Pleasants, on a writ of habeas corpus. The applicant is in the custody of the marshal for the Eastern district of Virginia; and has petitioned for, and obtained, a habeas corpus to relieve him from what he alleges to be an illegal detention.

The marshal has made a return to the writ, by which it appears that he arrested the petitioner under authority of an attachment issued from the circuit court of the District of Columbia, for the county of Alexandria, for a

contempt by him committed in not attending the said court as a witness, after being thereto legally summoned. The attachment itself, and the previous proceedings, together with an affidavit of the attorney of the District of Columbia, are annexed to the returns. By these, it appears that the grand jury of that county have before them a bill of indictment charging Robert B. Randolph and others with a conspiracy to commit an assault on the president of the United States, in the said county, and that, in the estimation of the said attorney, the said Pleasants may be a material witness in the said prosecution.

Many important subjects have been brought into view during the discussion; of which I shall notice such as I shall deem necessary to enable me to form a correct opinion on the case.

At the very threshold I am met with the objection, that this court cannot take cognizance of the case, because the arrest, of which the applicant complains, has been made by virtue of process of a court of the United States, who alone can judge of the legality of the arrest. This is a delicate question, and is attended with difficulty. When I look to the habeas corpus act, I find that its provisions are very general and comprehensive. It declares, that whenever a person detained in custody, (whether charged with a criminal offence or not,) shall apply for a writ of habeas corpus ad subjiciendum, and shall show by affidavit, or other evidence, probable cause to believe that he is detained in custody without lawful authority, it shall be the duty of the court to award the writ. And the court before whom the prisoner shall be brought, shall proceed to inquire into the cause of his imprisonment, and shall either discharge him, admit him to bail, or remand him into custody, as the law and evidence shall require. In every case in which there is a detention without lawful authority, the court may relieve the party detained. It would seem that if the commitment be made by a court having jurisdiction to commit, the court ought not to discharge, although the judgment of the committing court be erroneous. But if it be made by a court having no jurisdiction, then the discharge may be made.

Without going into the controverted question of commitments made under unconstitutional, and, therefore, void laws, there may be cases, in which, under constitutional and valid laws, a circuit court of the United States may exceed its commission. It may exercise powers which the law will not warrant. By such unwarranted jurisdiction, they may seriously encroach upon the personal liberty of men whom the state courts are bound to protect. Would not the judges, in such cases, neglect their duty if they failed to protect them?

In the present case, a foreign court. that is, a court sitting beyond the limits of Virginia, and alleged to have only a local jurisdiction, has sent its process beyond its own territory, and arrested an individual within the jurisdiction of this court.

I find it to be a general principle that the courts of one state or county cannot issue its process into another, without the consent of that other; but the court of Alexandria claims an exemption from that general principle, and undertakes to arrest a citizen within our jurisdiction. When that citizen claims the protection of our own laws, surely it becomes a proper subject of investigation here, whether that court is bound by the general principle, or comes within the exemption which is claimed.

I am of opinion that I ought to entertain jurisdiction in the case.

A great deal of ingenious and forcible argument has been used, to prove that the federal courts have no right to attach for a contempt of their process, or, indeed, to punish, by attachment, in any case.

I do not, however, agree with the counsel in many of the views he has presented on this subject. In our state courts there is no doubt of the existence of the power. We are in the daily habit of imposing fines, or attaching witnesses who refuse to obey the process of subpœna, and I do not see how courts of justice can perform the business before them, without the exercise of this or some equivalent powers.

My opinion is that the constitution does vest in congress the power of arming their courts with those powers which are necessary to enable them to discharge their duties; and in one case it imperatively requires that the courts should exercise them; for the sixth amendment declares, "that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor."

Before the establishment of the constitution, it was well known in every state of the Union what was the nature and character of the compulsory process by which the commands of the courts were enforced.

The process of attachment was a well-established process for that purpose; and when the constitution vested congress with the power of establishing courts, the seventeenth clause of the eighth section may fairly be understood as vesting them with power of authorizing those courts to issue attachments, or other process necessary to carry their orders into effect. But I have not yet seen any law of congress which authorizes the circuit courts of the United States, in any case, to issue attachments, to run into another district or state than that in which they are holding their courts. It was deemed necessary to give an express authority, by the act of 1793, to the courts, to issue subpœnas into another district or state. The act did not follow up this grant, by authorizing attachments to run into any other state, in case of disobedience of the process of subpœna.

The service of any kind of process from one state in another state, was, at that time, unusual, and if it was necessary that a law should be passed to sanction that practice, it is much more necessary that the more searching and more compulsory process of attachment should be authorized by law.

If this case, then, rested here, I am of opinion that I should be justified in discharging the prisoner, unless some act of congress can be shown, authorizing a circuit court of the United States to issue attachments into another state than that in which it is sitting. But the investigation which has taken place here, will probably justify, if it does not require, that I should examine the question, whether the circuit court of the District of Columbia has a right to issue process of subpœna beyond the territory of the District in a case arising under the municipal laws of the District.

The judiciary act of 1789, § 14 (1 Stat. 73), declares that the courts of the United States "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." The act of 1793, § 6 (1 Stat. 333), declares, "that subpœnas for witnesses who may be required to attend a court of the United States, in any district thereof, may run into any other district, provided, that, in civil cases, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same." These early acts were applicable to the circuit and district courts of the United States, which had been recently established. The district court of Columbia was established afterwards; and, on the 27th of February, 1801, the first act was passed "concerning the District of Columbia" (2 Stat. 103). The first section of that act declared, "that the laws of the state of Virginia, as they now exist, shall be, and continue in force in that part of the District of Columbia which was ceded by the said state to the United States; and that the laws of the state of Maryland, as they now exist, shall be, and continue in force in 'the other part of the District,'" &c. The second section of the act forms the District into two counties, and directs that a court shall be holden in each. The third section organizes the court. It declares, "that there shall be a court in each district," ("county,") "which shall be called the circuit court of the District of Columbia; and the said court, and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States." It is this latter clause, taken in connection with the sixth section of the act of 1793, which is supposed to confer on the circuit court of Alexandria, the power to issue its process of subpœna, in all cases which may be brought before it, into any other district; and I am now to inquire into the correctness of this opinion.

Let it be remembered, that the courts of the United States, established under the third article of the constitution, are vested with limited powers only. If a case does not arise under the constitution or laws of the United States, or treaties made under their authority; or if it does not affect ambassadors, other public ministers, or consuls; or if it is not one of maritime or admiralty jurisdiction; if it is not a controversy to which the United States are a party, or between two or more states; or between a state and citizens of another state; or between citizens of different states: or between citizens of the same state, claiming lands under grants of different states; or between a state and (or) citizens thereof, and foreign states, citizens, or subjects; if such be not the state of the cases, the federal courts have no jurisdiction. In that large class of cases arising out of the municipal laws of a state, the federal courts have no jurisdiction, the state courts, exclusive jurisdiction. In all cases of crimes committed against a state; in all cases of contract between citizens of the same state; in all cases of alienation, or descent of lands, in which citizens of the same state are concerned; in all cases of meum and tuum, whether in law or equity, between citizen and citizen; in short, in the every-day business of life, between members of the same sovereignty, the state courts alone have the jurisdiction. It is obvious, then, that, large as is the jurisdiction of the federal courts, that of the state courts is much more extensive.

When congress, by their act of 1793 (1 Stat. 333), authorized the process of subpœna to issue from one district to another, the effect was to authorize the circuit courts to send such process beyond the limits of the state in which they were located. But the state courts had no power to send out such extra-territorial process. This, then, was the state of things when the District of Columbia was organized. There were, in each state, two distinct sets of tribunals, emanating from, and belonging to, different political bodies. To the one set was confided the power of issuing process of subpœna out of their own bounds; to the other, it was denied. Thus, the circuit court of the United States, for the district of Virginia, sitting in Richmond, could send a subpœna for a witness, to Maryland; but the district court of Henrico, or the general court of Virginia, sitting in the same place, had no such power. The broad distinction between the subjects of jurisdiction in the two sets of judicial tribunals, was plainly in the view of congress when they undertook the task of providing or adopting a system of laws for the District of Columbia. As the two states had parted with all juris-

diction over the District, and the people contained therein, it became necessary to organize a court or courts for the District. They had the exclusive power of legislating for it. It was in their power to have two sets of courts, as in every other part of the United States; that is, one court to be vested with federal powers, another court with municipal powers. But the size of the territory, and the number of people did not require such a division of courts; and considerations of economy, probably, forbade the appointment of so many judges. They therefore decided on having only one court, which they denominated the circuit court for the District of Columbia. But still they kept up the distinction between federal judicial power, and municipal, or quasi state judicial power; although they conferred both kinds of power on the same court. Thus, in the first section they enacted that the laws of the state of Virginia should continue to be the law of one part of the District, and the laws of Maryland of the other. Previously thereto, the constitution and the laws of the United States had disrobed the states of Maryland and Virginia, as well as the other states, of all those powers which had been conferred on congress, and had disrobed the courts of those states of all those judicial powers which had been conferred exclusively on the federal tribunals. What laws of Virginia and Maryland were thus declared to be in force in the District of Columbia? They are the municipal laws of those states—the laws founded upon the reserved rights of those states. Amongst those laws of Virginia and Maryland which are thus continued in force in the District, I will ask whether there were any which authorized the process of the courts of the one to run into, and be exercised in the other? Very far from it. On the contrary, it was a fixed principle of those laws that the process of their courts should not issue beyond their territory. When the laws of Virginia and Maryland were adopted for the District, by this section, that principle was adopted with them, and consequently the process of the courts of this District, so far as it was required to carry into effect those laws, could not issue beyond the territory of the District.

I presume it will not be contended, that, as before the cession, process could run from Alexandria into the different counties of Virginia; so, after the cession, by the adoption of the Virginia laws, the process of Alexandria will still run into Virginia. It this should be said, it will be answered, that, by the cession, Alexandria and a part of Fairfax were cut off from Virginia so as to be no longer any part of her territory; and process, therefore, could no longer run from Virginia into that separated territory, nor vice versâ.

Amongst the laws of Virginia, thus adopted by congress, were the laws concerning assaults and conspiracies. These were common-law offences, and the punishment for them was plainly prescribed. In neither of these cases, nor in any other case, of either criminal or civil character, was there any law of Virginia (nor is there now,) by which a witness could be taken by process of a Virginia court, from any place beyond her territory, and brought to Virginia to testify. This may be a defect, but it is one which grows out of our political conditions, and can only be remedied, I presume, by the consent or agreement of the state. Such is the character of the laws of Virginia and Maryland which were adopted for the District of Columbia, by the first section of the act of February, 1801. Congress, in thus prescribing for the District a code of municipal laws, intended to act for them in the same character that the legislatures of the several states act towards the people of their several states. They had previously provided for them a set of federal laws, in common with the rest of the United States. For, as the District, in a different form, and under its former organization, as parts of two states, had always been, and still continued, a part of the United States, the laws, previously enacted by congress, growing out of the granted powers, were still applicable to them, and it was not thought necessary to reënact them specially for the District. Thus, the people of the District were immediately provided with two sets of laws, municipal and federal. It then became necessary to provide a court or courts, to carry into effect, within the District, as well the federal as the municipal laws. They created one court for the whole district, and vested it with "all the powers, by law, vested in the circuit courts of the United States." Section 3.

It has been argued that as the sixth section of the act of 1793, declared that subpœnas for witnesses who may be required to attend a court in any district, may run into any other district, so the circuit court for the District of Columbia, being vested with the same powers, may direct subpœnas to run, in all cases of which they have cognizance, from their district into any other district. But this, I apprehend, is a non sequitur. The power conferred by this third section, on the circuit court of Columbia, is the same with that conferred on the other circuit courts, and not greater. What, then, were the powers quoad hoc, conferred on the other circuit courts? To issue subpœnas into another district, in cases, before them, of which they had cognizance, that is, in federal, not municipal cases; of these latter they have no jurisdiction, and, therefore, cannot, in such cases, issue subpœnas into another district. But the circuit court of Columbia has the same powers with those of the other circuit courts; that is to say, they have the power, in federal cases, to issue subpœnas to another district; but in municipal cases, in cases arising under the laws of Virginia and Maryland, they have no such power. To allow

them the power in such cases, is not to give them merely all the powers belonging to the other circuit courts; but more than all; which cannot be allowed. They would have more powers on this subject than all the other courts, state and federal combined, if this were permitted. If, instead of blending all the judicial powers of the District, federal and municipal, in the same court, they had been separated as they are in every state in the Union, there would be no difficulty on this subject. If, after adopting the laws of Virginia and Maryland, in the first section, they had created a court to carry into effect the federal laws of the Union, and vested that court with all the powers abiding in the circuit courts of the United States, every one would see, that whilst to the latter the power in question was given, from the former it was withheld.

If to any one it seems strange that the courts of the same district should have a power, or not, according as the subject before them is of a federal or a municipal character, I can only say that a similar spectacle may be seen in every state in this Union. If a man be charged with robbing the mail in Henrico, and be brought before the circuit court of the United States sitting in Richmond, the judges of that court may send their process for the witnesses to any district, that is, any state in the Union. If the companion of that man be charged with robbing, on the highway, passengers in a private carriage, and be brought before the circuit court of Henrico for trial, the judge of that court cannot send process for witnesses to Alexandria, Baltimore, or any other place out of the state. It has been said, that the congress of the United States in legislating for the District of Columbia acts as the congress of the whole United States, and not as the legislature of that particular place. I cannot understand this doctrine. The laws of the United States, passed by virtue of the powers specified in the first fifteen clauses of the eighth section, apply to the people and territory of the ten miles square, in common with the rest of the people of the United States. But the 16th section gives to congress power to exercise exclusive legislation over that district. This power consists of two parts: (1st) the specific given power of federal legislation; and (2d) the residuum of legislative power which, in other cases, is reserved to the states. This residuum is, surely, as much local as is the legislative power of the states. Congress stands, to the District, in the same relation that the state legislatures do to the respective states. And as a state legislature can only legislate for its own state, and cannot enforce its laws beyond its own limits, so neither can congress, in legislating for the District, cause its district laws to be carried into effect in the states without their concurrence. The total legislation of the states is made up of federal legislation by congress, and of local legislation by the state legislatures. How can the legislation of the District consist of more parts? All that it can ask is, federal and local jurisdiction. If, in addition to these, you give it a local legislation which is to operate generally, not in that place only, but in all other places, you mar the beauty and symmetry of the whole federal system, and confer on congress a power of doing, indirectly, that which it cannot directly perform. Congress cannot pass municipal laws for the states: but if, in passing municipal laws for the District, they can affect or impair the municipal laws of the states, they do legislate for the states on those municipal subjects. In taking this view of the constitution, I should say that congress had no right to pass any law directing the process of the courts of Columbia to run into any of the states for the purpose of enforcing the merely municipal laws of the District, though these municipal laws be enacted or adopted by congress itself. I do not, however, think that they have, as to this matter, passed such a law; as I have already endeavored to prove.

Upon the whole, I am clearly of opinion, that the applicant is detained in custody without lawful authority, and that he must be forthwith discharged. See U. S. v. Williams [Case No. 16,712], in this court, at November term, 1833.

PLEASANTS (GOYON v.). See Case No. 5,647.

PLEASANTS (WOOD v.). See Case No. 17,961.

Case No. 11,226.

The PLEASANT VALLEY.

The SAMUEL ROTAN.

[7 Ben. 72.] [1]

District Court, S. D. New York. Jan., 1874.

COLLISION IN HUDSON RIVER — TUG AND TOW — LIGHTS — STEAM VESSELS CROSSING.

1. The tug S. R., a small tug about sixty feet long, was coming down the Hudson river, towing two canal-boats, one on each side of her, their bows projecting beyond her bow. Her pilot saw a steamboat, the P. V., coming up the river on his port hand, and, when about half a mile off, heading across the river towards him. He kept on his course till the P. V. was but a short distance from him, when she headed more across his bows. He then blew a whistle and rang the bells to stop and back his boat, but, before it could be done, the P. V. ran into the tow, striking the canal-boat which was on the port side of the tug, on her port side, and sinking her almost instantly, and also striking the other canal-boat so violent a blow that she also sank soon after. The owner of the two canal-boats filed a libel against the tug and the steamboat, charging that both vessels were in fault, the P. V. in that

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

she had no proper lookout, and did not see the tug and tow as soon as she should, and improperly changed her course, and did not stop and back in time; and the S. R. in that she did not stop and back in time, and did not give any signal to the P. V. till the vessels were close together. The answer of the tug alleged no fault in the canal-boats, but claimed that the P. V. alone was in fault, alleging against her the faults charged in the libel, and also that her pilot was incompetent. The answer of the steamboat alleged that the collision was due to fault in the tug and tow, in that they had no lights set, although it was then very dark, so dark that the pilot of the P. V. was unable to see the tow till it was near, and then, from seeing no lights, supposed it was a tow going from him, and could not discover that the tow was coming towards him, till the collision was inevitable, when he rang his bells to stop and back, which was all he could do. Neither steamboat, nor tug, nor canal-boats had any lights set, and as to the time of the collision and the darkness of the hour, which was not, however, far from sunset, there was a great conflict of evidence. *Held*, that, on the evidence, the pilot of the P. V. was not incompetent or inattentive.

2. On the evidence, when the collision took place, it was already so dark that the pilot of the P. V., looking down upon the water, was unable to see the tug and tow sooner than he did, and was misled, by the absence of the lights on the tug, into the supposition that they were going away from him instead of coming towards him.

3. The tug was in fault in not having lights set, as required by law, either on herself, or on either of the canal-boats.

4. The P. V. could take advantage of the fact of negligence on the part of the tug in not showing lights, as a defence on her own part, although such negligence was not set up in the libel.

5. The pilot of the tug was in fault in not sooner signalling the P. V., to give her notice of the presence of the tow by his whistle, in the absence of lights.

6. The change of course of the P. V. by starboarding, if made before her pilot was aware of the presence of the tow, was not such a change of course as is forbidden by the rules for avoiding collisions; and, if made after such discovery, was made in extremis, under the apprehension caused by the sudden near approach of the tug, for which the latter was liable, by reason of her having no lights and giving no signal.

7. The absence of a lookout on the P. V. outside of her pilot-house, was not a fault contributing to the collision.

8. Neither the thirteenth nor the fourteenth rules for avoiding collisions were applicable to the course of the P. V.

9. The tug was in fault in not having lights, in not sooner signalling the P. V., and in not sooner stopping and backing.

10. The libellants were entitled to a decree against the tug alone, and the libel against the P. V. must be dismissed.

In admiralty.

R. D. Benedict, for libellants.

C. Van Santvoord and W. J. Haskett, for the Pleasant Valley.

W. R. Beebe, for the Samuel Rotan.

BLATCHFORD, District Judge. The libellants, the Philadelphia and Reading Railroad Company, as owners of the canal-boats Samuel Lawrence and Charlotte Nesbit, bring suit against the steamboat Pleasant Valley and the steamtug Samuel Rotan, to recover for the damages sustained by the sinking of said canal-boats, by a collision which took place between them and the Pleasant Valley on the 12th of June, 1872, in the Hudson river, off the city of New York, the canal-boats being at the time in tow of the tug, the Lawrence lashed to her starboard side, and the Nesbit to her port side. The canal-boats were laden with cargoes of iron ore in bulk, and were on a trip from Piermont to Hoboken. The Pleasant Valley was on a trip from New York to Fort Lee. The bows of the canal-boats projected beyond the bow of the tug.

The libel alleges, that, when the tow had reached a point about opposite Fifty-Third street in the city of New York, the Pleasant Valley was observed coming up the river, well over on the New York side; that, shortly afterwards, she, improperly, and without warning, changed her course, and attempted to cross the course of the tug and her tow, and, in making such attempt, ran into the canal-boats, causing them to sink almost immediately, with their cargoes, and to become a total loss; that, though the approach of the Pleasant Valley in such a direction as to indicate danger of a collision, was seen by those in charge of the tug from the time when the Pleasant Valley was distant half a mile or more, yet no whistle or signal whatever was given to the Pleasant Valley by the pilot of the tug until the Pleasant Valley had approached within about 500 feet; that the collision happened in about the middle of the river; that it was daylight, and the tide was running ebb; that the canal-boats were plainly visible for a long distance; and that the collision was caused by the carelessness of those navigating the Pleasant Valley, in that she had no proper lookout performing his duties, that she improperly changed her course, and that she did not stop and back in time to avoid the collision, and by the carelessness of those navigating the tug, in that she had no proper lookout performing his duties, that she did not stop and back in time to prevent the collision, and that she failed to give any whistle or signal to the Pleasant Valley until the latter was within about 500 feet.

The answer of the tug alleges, that, at a little before sundown, and while it was broad daylight, the tug with her tow had reached a point about the middle of the river and above Fifty-Third street, the tide being ebb, when the Pleasant Valley left the foot of Thirty-Fourth street on the New York side; that her usual course would have carried her on the port side of, and far under the stern of, the tug and tow; that, as she neared the tug and tow, she had changed her course so as to run directly at the tug and tow; that, upon perceiving this, the pilot of the tug blew one whistle, to which no reply was made by the Pleasant Valley; that, after waiting a short time for a reply, and at the same time seeing

that the Pleasant Valley was drawing more directly across the bows of the tug and tow, the engine of the tug was promptly stopped and backed, but the Pleasant Valley kept on, only stopping her engine as she was about striking, and came in contact with the Nesbit on the starboard side of the Pleasant Valley, striking the stem of the Nesbit a violent blow as she was crossing, and carrying the tug and tow around to starboard, and, the Pleasant Valley being still on the swing to a course more directly across the river, the stem of the Lawrence came into contact with the starboard side of the Pleasant Valley, and the two canal-boats were so injured that they sank in deep water in a few minutes; that the pilot of the Pleasant Valley was a man of dissipated habits, unfit to be trusted as pilot, and was, at the time of the collision, more or less under the influence of liquor, and so much so, that, although it was broad daylight, he mistook the direction in which the tug and tow were going, and supposed he was attempting to cross the stern when he was in fact attempting to cross the bows; that the Pleasant Valley was without a lookout; that the collision was wholly the fault of those navigating the Pleasant Valley, in having at the wheel an incompetent and unfit person, in having no lookout, in not keeping to the right, in attempting to cross the bows of the tug and tow, in not stopping and backing in time, in not answering the signals of the tug, and in paying such little attention as not to see which way the tug, with her tow, was bound; and that, before the collision, having the tug, with her tow, upon her starboard hand, it was the duty of the Pleasant Valley, under the act of congress, to avoid the tug and her tow.

The answer of the Pleasant Valley alleges that the Pleasant Valley, from about off Thirty-Fourth street, was on a course up the river, heading for Bull's Ferry, gradually hauling across, and made no change from that course, until the discovery, on a close approach to her, within five hundred feet off or thereabouts, of the tug and her tow, right ahead and higher up the river, then first discernible from the Pleasant Valley, in the darkness ahead in the direction in which the Pleasant Valley was moving, and then only discernible in the darkness as a dark mass, without any lights, or shape of hull or sail, when, from an impression produced by the absence of such lights, that such mass, if moving, was moving up the river, the helm of the Pleasant Valley was put to starboard, to clear it, which was followed, after only a momentary necessary interval for observation by the immediate ringing of the bells on the Pleasant Valley, to slow, stop and back, in quick succession, and these bells were at once obeyed, and the way of the Pleasant Valley was stopped by the shore when the collision occurred, the stem of the canal-boat on the port side of the tug striking against the Pleasant Valley on her starboard bow aft her stem; that the canal-boats could not have been seen by any lookout on the Pleasant Valley sooner than they were seen by her pilot, or until they were too close for the Pleasant Valley to avoid a collision by proper vigilance or the use of ordinary and reasonable and due care and skill; that it was not daylight; that the collision was not caused by any fault of those navigating the Pleasant Valley, either in not having a proper lookout performing his duty, or through any improper change of course, or by reason of her not stopping and backing in time to avoid the collision, the same having been done as soon as any necessity therefor was discoverable, in the emergency produced by the fault of the tug and tow; that the collision was caused by the tug and the tow, they and each of them, in not exhibiting the usual and proper lights, or as required by the acts of congress in that behalf, and the ninth of the rules thereunder, of the supervising inspectors, of the Revision of June 10, 1871, or any lights, and by the neglect of the pilot of the tug, observing the approach of the Pleasant Valley, conspicuous to him by her whiteness, or other indications of her course and movement, under circumstances calculated to raise a doubt, and raising a doubt, as to the course and intention of the Pleasant Valley, in reference to passing the tug and tow, in not immediately signifying the same by giving several short and rapid blasts of the steam-whistle, and, upon the approach within half a mile, immediately slowing to a speed barely sufficient for steerage way, until the proper signals were given, answered and understood, or until the vessels should have passed each other, as required by rule 3 of the rules for the government of pilots in that behalf, and the exercise of proper seamanship, and by the tug's not having a proper lookout performing his duty, and not stopping and backing in time to prevent the collision, and not keeping well to the west of the middle of the river, according to the custom of river navigation; that the pilot of the Pleasant Valley started with her, on her voyage to her destination, from the foot of Spring street, at about or near 8 o'clock, which was about half an hour after sunset; that previously thereto, a violent storm prevailed, accompanied by rain and darkness, and, although the rain and wind had partially subsided, the weather was very cloudy, the night was dark, and the obscuration, greater in the direction in which the Pleasant Valley was moving, was such as to render the tug, flanked by the boats, and the boats, of a color not distinguishable from the surrounding atmosphere, without any lights, or any sail, or other indication of their presence as boats, until too close to enable the Pleasant Valley, by the exercise of proper vigilance, or ordinary and reasonable care, to do what might be necessary to avoid the collision; that, when the Pleasant Valley was heading her proper course to her desti-

nation, and her pilot discovered the tow as a dark object on the waters, as it presented no lights, he had every reason to believe that the vessel, if moving, was going up the river, and immediately, after only a momentary delay for observation, rang to stop and reverse, and the engineer obeyed the orders, and, at the time of the collision, the Pleasant Valley was dead, or nearly dead, in the water; and that the collision happened without any omission or fault chargeable to the Pleasant Valley, as contributing to, or conducing to produce, the collision.

This case presents, in the evidence, the usual feature which attends the trial of a libel by an injured tow against her tug and a third vessel, for a collision between such tow and such third vessel—a reduction of the trial to a contest between the tug and the third vessel, and to an attempt by each to throw the whole blame on the other. This case, too, presents a feature often attendant on the trial of collision cases—a tendency on the part of the witnesses for both sides to exaggerate in respect to points supposed to be vital and controlling. The exaggeration, in the present case, is as to the degree of remaining daylight or approaching darkness, at the time of the collision. The witnesses for the Pleasant Valley testify to great darkness; those on the other side to abundant daylight. Manifestly, both sets of witnesses exaggerate.

The answer of the tug and the answer of the Pleasant Valley substantially agree in one important particular, namely, that the pilot of the Pleasant Valley mistook the direction in which the tug and her tow were moving. The answer of the tug avers, that the pilot of the Pleasant Valley mistook the direction in which the tug and tow were going, and supposed he was attempting to cross the stern, when in fact he was attempting to cross the bows, and that, when the Pleasant Valley was not far off, she drew more directly across the bows of the tug and tow. The answer of the Pleasant Valley alleges that her pilot did not discover the tug and tow until they and the Pleasant Valley had approached within about five hundred feet of each other, and then saw them, in the darkness ahead, only as a dark mass, which produced the impression, that, if moving, it was moving up the river, because it had no lights, or shape of hull or sail, and that thereupon the helm of the Pleasant Valley was put to starboard, to clear it. These concurrent statements of the two answers, that the Pleasant Valley in fact mistook the direction in which the tug and tow were moving, and starboarded just before the collision, to pass under the supposed stern of the tug and tow, are supported by the evidence on both sides. It is true, that the answer of the tug attributes the mistake on the part of the pilot of the Pleasant Valley to his being, at the time, under the influence of liquor, so that, although it was broad daylight, he paid so little attention as not to see which way the tug and tow were bound. But the fact of the mistake and the movement it induced on the part of the Pleasant Valley are averred and established. On the supposition that the object seen from the Pleasant Valley was a vessel moving up the river, in the same direction that the Pleasant Valley was going, the starboarding by the Pleasant Valley, on the discovery of such object, was an intelligent movement, indicating that the pilot was in possession of his faculties, and was not under any disability. Nor is there any evidence that he was under the influence of liquor at the time. The evidence all points the other way. The pilot was dead at the time of the trial, but all the evidence we have in regard to his acts and conversation, at the wheel, in the pilot-house, just before the collision, indicate a man who knew what he has doing and was attentive to his duties. His conversation with Johnson, his sounding the gong twice to have the lights put up, his starboarding on seeing what he supposed was a vessel moving up the river, and his slowing, stopping and backing on discovering his mistake, are such indications. If, then, the mistake which the pilot of the Pleasant Valley made was not due to any blunting of his faculties by liquor, to what was it due?

The proposition urged, in this respect, against the Pleasant Valley is, that, although it was broad daylight, the pilot of the Pleasant Valley failed sooner to see the tug and tow. and failed, when he did discover them, to see at once that they were moving towards him, because he was inattentive to his duties. This involves, necessarily, the idea, that the pilot, in broad daylight, failed to see the tug and tow at all, although they were ahead of him, in the middle of a broad river, with no obstruction, and no other vessels in the vicinity, and plainly visible, until they arrived within a short distance of him, and that, when he discovered them, he failed, in broad daylight, to see that they were moving towards him, and not from him. The presumption is against such a state of facts. The conclusion drawn rests entirely on the premise that it was daylight, or, as the answer of the tug alleges, "broad daylight," or, in other words, that sufficient daylight remained for the pilot of the Pleasant Valley to have sooner seen the tug and tow, and to have seen, when he did discover them, that they were moving towards him, and not away from him, if he had been vigilant and attentive. There can be no doubt that the persons on the tug and the canal-boats saw the Pleasant Valley approaching when she was a long distance off. But the Pleasant Valley was a large side-wheel steamboat, painted white. She was conspicuous, and, seen from low canal-boats, and a low tug, she, doubtless, stood out in relief against the sky and what light there was in it. The tug was a small vessel, of 40 or 50 tons, and about 80 feet long. The canal-boats projected

ahead of her, on each side. They were of a dark color, and no visible part of the tug was lighter than a drab color. From the elevation of the pilot house of the Pleasant Valley, the background to the tug and tow was the water of the river. Under these circumstances, there is nothing improbable in the view, that those on the tug and the tow may have seen, with sufficient distinctness, the approach of the Pleasant Valley, while the pilot of the Pleasant Valley may not have been able, even by proper attention and vigilance, to see the tug and tow till he was close upon them, and, even then, not to discern, at first, which way they were moving. It depends on the degree of fading daylight or coming darkness. As to this, a most significant circumstance is the fact that the pilot of the Pleasant Valley twice signalled by the deck gong, from the pilot house, each time by a signal of two strokes, to have the vessel's lights put up. She had no lights set. The engineer heard the first signal and saw that it was not obeyed, and that no one went to put up the lights, and thinking, from the degree of darkness, that it was dangerous to run without lights, shut off the steam, of his own suggestion, to about one quarter speed, and then heard the second signal. At this time, on the weight of the evidence, it was about half an hour after sunset. It is not to be believed, that the pilot would have rung, and rung twice, for the lights to be put up, so that his vessel might be seen, if he had not been impressed with the conviction, resulting from the then actual use of his eyesight, that the daylight had so far receded, and the darkness had so far advanced, that he could not see, in the direction in which his vessel was moving, with sufficient distinctness to enable him properly to avoid a vessel without lights which might be approaching from that direction. The shutting off of the steam by the engineer is of kindred significance as to the absence of light and the presence of darkness. I am satisfied, on the evidence, that it was so dark, that the pilot of the Pleasant Valley failed sooner to see the tug and tow, because the tug did not have set any lights, and did not show any light, and that to the same cause is attributable the mistake the pilot made as to the direction in which the discovered object was moving. His own view of the necessity for lights, manifested by his call for them on his own vessel, naturally led him to expect that any vessel coming towards him from ahead would show a light, and to conclude that a vessel seen ahead, in that part of the river, and not showing a light, was moving away from him. From these considerations, it results, that the tug was in fault in not having set and burning the lights required by statute, whether as required by article 4 of the act of April 29, 1864 (13 Stat. 59), or by section 47 of the act of February 28, 1871 (16 Stat. 453, 454), and in not showing any light, either on herself or on either of the boats she was towing, and that such fault directly contributed to the collision.

The libel does not allege the absence of lights on the tug as a fault on the part of the tug. It specifies, as faults in the tug, only these, that she had no proper lookout performing his duties, that she did not stop and back in time to prevent the collision, and that she failed to give any whistle or signal to the Pleasant Valley until the latter was within about 500 feet. The theory of the libel is, that it was daylight, and that the canal-boats were plainly visible for a long distance. It states no facts which make out a necessity for lights on the tug. It claims that the canal-boats could have been seen if the Pleasant Valley had had a proper lookout performing his duties. Yet it claims, also, that the tug was in fault because she gave no whistle or signal to the Pleasant Valley until the latter was within about 500 feet, whereas she should have given such whistle or signal at a greater distance off, because she saw the Pleasant Valley half a mile or more off, approaching in such a direction as to indicate danger of collision. This must be regarded as being, in substance, an allegation, that the tug had reason, from the course of the Pleasant Valley, to suppose that the Pleasant Valley did not see the tug and her tow, and that, therefore, it was the duty of the tug to indicate her presence by whistling or otherwise signalling, and that her not doing so was a fault contributing to the collision.

Although the libel does not charge the absence of lights from the tug as a fault making the tug responsible to the libellants, yet the Pleasant Valley, in exoneration of the faults charged against herself by the libel, whether with a view to entire exoneration or to partial exoneration, has a right to show that the absence of lights from the tug was a cause, or the cause, of things charged by the libel as faults in the Pleasant Valley, namely, her alleged change of course and her alleged attempt to cross the course of the tug and tow. If, in showing this, she shows that such absence of lights from the tug contributed to the collision, that conclusion must, as against the tug, between her and the Pleasant Valley, be dealt with as a proper element in the case, inasmuch as the answer of the Pleasant Valley insists upon such absence of lights as a fault in the tug. Whether, if such absence of lights from the tug were the only fault in the tug that contributed to the collision, it could, when not alleged or insisted on in the libel, be allowed to operate to give a decree to the libellants against the tug, is an important question, and one not necessary to be here decided, inasmuch as there were other faults in the tug, contributing to the collision, which are alleged in the libel.

The allegations of the libel, that the tug saw, from the distance off of half a mile or more, the approach of the Pleasant Valley

in such a direction as to indicate danger of a collision, and that the tug gave no whistle or signal to the Pleasant Valley until the Pleasant Valley had approached within about 500 feet, and that the collision was due in part to carelessness on the part of the tug, in not stopping and backing in time to prevent the collision, and in not giving any whistle or signal to the Pleasant Valley until the latter was within about 500 feet, are borne out by the evidence. The pilot of the tug says, that, when he first saw the Pleasant Valley, she was about two miles off; that, from about off Forty-Second street she steered directly for the tug and tow; and that he gave no signal, but kept on until the Pleasant Valley was about 10 lengths or less off, when he gave one whistle, and then slowed, stopped and backed. Having no lights, and seeing the Pleasant Valley heading directly for the tug and tow, it was the duty of the tug to indicate her presence by whistles or other signals, as there was reasonable ground for the belief that the Pleasant Valley did not see the tug and tow, either from the darkness, or from inattention, and it was equally her duty to have stopped and backed sooner than she did. Confessedly, from about off Forty-Second street, the Pleasant Valley headed directly for the tug and tow, and did not change from that course, except to draw more across the course of the tug and tow, and the tug saw this, and saw that she and the Pleasant Valley were approaching each other so as to involve risk of collision. It was, therefore, under article 16 of the statutory rules (Act April 29, 1864; 13 Stat. 61), the duty of the tug to slacken her speed, and, if necessary, to stop and reverse. The latter necessity, as it turned out, existed, but the tug neglected such duty, until too late a period.

The failure of the tug to indicate her presence sooner by whistles or signals, was the neglect of such a precaution as is referred to in article 20 of the statutory rules. I do not characterize it as a failure to comply with rule 3 of the rules for the government of pilots, referred to in the answer of the Pleasant Valley. Nor must I be understood as characterizing the failure of the tug to show lights, either on herself or her tow, as a failure to comply with rule 9 of the rules of the supervising inspectors, of June 10, 1871, so far as those rules require anything different from, or in addition to, what is required, in respect to lights for steamtugs, by article 4 of the statutory rules, in the act of April 29, 1864.

Was the Pleasant Valley in fault? The libel alleges, as a fault in her, contributing to the collision, that she had no proper lookout, performing his duties. The fact that she had no lookout stationed at her bow is conceded. But the answer of the Pleasant Valley avers, that the canal-boats could not have been seen by any lookout on the Pleasant Valley sooner than they were seen by her pilot, or until they were too close for the Pleasant Valley to avoid a collision by proper vigilance, or the use of ordinary and reasonable and due care and skill. There was no one on the lookout, on the main deck, forward, on the Pleasant Valley, in the place where a lookout ought to have been stationed. The master and the deck hands were all of them aft, on the saloon deck, washing the deck. There was no one looking ahead but the pilot in the pilot house. He recognized the necessity for lights by twice sounding the gong for them, and this practical acknowledgment by him, that the darkness was such that he could not see, with distinctness, vessels which might not have lights, made it the more incumbent upon him to take care that he had a lookout stationed in the proper place for a lookout, to see if he might not be meeting, as it turned out he was meeting, a vessel without lights. Failing to have such a lookout, it is for the Pleasant Valley to show, that, if she had had such a lookout, the tug and tow would not have been seen by him sooner than they were seen by the pilot, and sufficiently sooner to have enabled the Pleasant Valley to avoid or mitigate the collision. It is difficult to prove a negative; but the views which have led me to the conclusion, that the absence of lights from the tug contributed to the collision, lead me also to the conclusion, that, with the conjoined speed with which the two vessels were approaching each other, no lookout at the bow of the Pleasant Valley would have seen the tug and tow so much, if any, sooner than the pilot saw them, or would, when he saw them, have seen that they were coming towards the Pleasant Valley, so much, if any, sooner than her pilot saw that, as to have made, with any reasonable promptness of action, any difference in the result. If the starboarding of the Pleasant Valley, on discovering the object ahead, was a mistake, and if porting would have been better, the error, induced directly by the want of lights on the tug, and committed in extremis, was not a culpable one, and must be held to be one for which the tug, and not the Pleasant Valley, was responsible.

The allegation, in the libel, that the Pleasant Valley was in fault, in improperly changing her course, so far as it relates to any change of heading by the Pleasant Valley before she discovered the tug and tow, relates to what cannot be called a change of course, because it was a change of heading made in ignorance of the presence of the tug and tow—an ignorance for which, as has been shown, the Pleasant Valley was not to blame. So far as such allegation relates to any change of course by the Pleasant Valley after she discovered the tug and tow, it was, as before remarked, a change in extremis, and not a culpable one.

The averment, in the libel, that the Pleasant Valley was in fault, in not stopping and backing in time to avoid the collision, is dis-

posed of by the observations already made. She stopped and backed as soon as she discovered danger of collision, and that the objects ahead were approaching vessels, and as soon as, under the circumstances, she was required to do so, and such discovery was made as soon as, with the want of lights on the tug, it could have been made.

The views already presented cover nearly all the allegations of fault made against the Pleasant Valley in the answer of the tug—the incompetency and unfitness of the pilot of the Pleasant Valley, her want of a lookout, her attempt to cross the bows of the tug and tow, her not stopping and backing in time, and her failing, through inattention, to see which way the tug and tow were bound.

The answer of the tug avers that the Pleasant Valley was in fault, in not keeping to the right. This is an invocation of the rule of porting, laid down in article 13, when two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision. I do not think this article has any application to the Pleasant Valley, under the circumstances of this case. She was under no obligation to port before she discovered the tug and tow, and her failure to port on or after such discovery was no fault. Nor did the fourteenth article apply to the Pleasant Valley, and require her, as having the tug and tow on her own starboard side, to keep out of their way. Nor was there any fault in the Pleasant Valley in not answering the whistle from the tug given, when such whistle was given, at a time when, from the evidence, a collision was inevitable.

The answer of the tug does not allege any fault on the part of the canal-boats. It is unnecessary to consider the allegation, in the answer of the Pleasant Valley, that the collision was caused by the canal-boats, in their not exhibiting the usual and proper lights, or to determine whether it was the duty of those owning or on board of the canal-boats, under the provisions of the forty-seventh section of the act of February 28, 1871 (16 Stat. 453, 454), or under the ninth of the rules of the supervising inspectors, of June 10, 1871, for the government of pilots, to exhibit or carry any lights, or to determine whether the provisions of the said ninth rule are regulations which the supervising inspectors were authorized to make by the twenty-third or the twenty-ninth section of the said act of February 28, 1871.

The libel as against the Pleasant Valley must be dismissed, with costs, and the libellants must have a decree against the tug, with costs, with a reference to ascertain the damages set forth in the libel.

PLEASONTON (NEW JERSEY STEAMBOAT CO. v.). See Case No. 10,166.

PLEASONTON (UNDERHILL v.). See Case No. 14,337.

Case No. 11,227.

In re PLIMPTON.

[4 Law Rep. 488.]

District Court, S. D. New York. Feb., 1842.

BANKRUPTCY—INFORMALITIES IN THE PETITION.

In bankruptcy.

BETTS, District Judge. In this case the objections are, that the petitioner did not set forth, to the best of his knowledge, a list of his creditors, with their places of residence and the amounts due to each. The parties must, however, point out the instances in which it has been omitted, and if they do the court will not pass it over. The second objection is, that the schedule annexed to the petition is defective in not showing the residences of all the petitioner's creditors. This objection rests under the same imperfection as the other, namely, that the particular omissions were not pointed out. Another objection is, that the petitioner does not set out an accurate inventory of his property and every portion of it. This is a question of fact, and if he has not set it out properly, it would be fatal to his application. The fourth objection is, that by the schedule it plainly appears the petitioner has an interest or ownership in certain furniture, which is not properly mentioned in the schedule. The schedule says, "other furniture in said house, which is mortgaged to a person in Massachusetts," and when thus designating this mortgaged furniture, he refers, in relation to it, to the clerk of the record office in Brooklyn, to show that the furniture is mortgaged for more than it is worth. As the petitioner thus sets forth the amount of part of his furniture, and sets forth that more of it is mortgaged, and to whom, I apprehend he complies with the act, as the assignee can be under no difficulty in relation to it, and can see what part of it is under incumbrance and what is not. It is not to be expected that papers of this sort will be positively certain as to every particular, but only reasonably certain, so that the creditors can fairly avail themselves of them. The fifth objection is, that the petitioner does not set forth in his schedule an assignment of certain property which he assigned to C. Sherwood, by an assignment of certain accounts or choses in action, etc., belonging to the petitioner. The schedule says, that those debts were "assigned to Sherwood as my assignee, to be divided amongst my creditors pro rata." This general reference to the assignment would not be sufficient, but when the party gives a copy of the assignment, it is to be considered part of the schedule, and I do not see any necessity for a list of the debts which are contained in that assignment. It may be a question between his assignee and the general assignee as to who shall have the property; but a list of the debts would throw no further light on the subject; and would be

merely putting into the hands of the assignee a paper of no use to him. These objections were overruled, and the matters of fact sent before a commissioner.

Case No. 11,228.

Ex parte PLITT et al.

[2 Wall. Jr. 453.] [1]

Circuit Court, E. D. Pennsylvania. Dec. 1, 1853.

CLERK'S COMMISSIONS—COSTS—COUNSEL AND CONTINGENT FEES.

1. A clerk of the circuit courts of the United States is not, under Act Feb. 26, 1853 [10 Stat. 161], relating to clerks' fees, nor otherwise, entitled to commissions for "receiving, keeping, and paying out money," unless the fund has actually passed into the court, or through the clerk's official hand, or has been agreed to be considered as having done so. The fact that the money is subject to the decree of the court, it not being in the court's registry, is not enough to give the clerk a right to commissions.

[Cited in Leech v. Kay, 4 Fed. 73; Fagan v. Cullen, 28 Fed. 843; Thomas v. Chicago & C. S. Ry. Co., 37 Fed. 550; Easton v. Houston H. T. C. Ry. Co., 44 Fed. 721.]

2. A fund in the hands of an intestate's administrator, upon which a decree of this court has acted, or is acting, is liable to three classes of charge: 1st. The necessary expenses of ascertaining it, and reducing it into possession. 2d. A reasonable compensation for its safe keeping, and the supervision of its interests. 3d. The expenses of ascertaining the proper distributees, and making distribution among them. Accordingly, under the 1st head the court allowed a party who had claimed as next of kin (though unsuccessfully as to any part) a whole fund in an administrator's hands, the actual expenses of a foreign commission obtained by him under implied authority of the administrator, a stakeholder, to show that certain funds abroad were assets of the estate, and so increase it. And also allowed him a sum for his expenses and trouble successfully exercised in the same implied way in obtaining indemnity from the estate of a former administrator, who had committed a devastavit and died. But would allow no part of the expenses, nor any compensation for long, wearisome, and great trouble, to which he had been put in that part of his efforts which were made in his own behalf alone; and which, unlike the former ones, had not in their result enured as above mentioned to the benefit of the opposing claimants, who had been now recently and finally decreed entitled to the whole fund. Under the 3d head the court allowed another unsuccessful party claimant of the whole fund, the actual costs and expenses to which he had been put in showing the relationship of all parties to the intestate, thereby enabling the court to give what it deemed a proper direction to the fund; although this party's object in showing this relationship had been to show a state of facts which, as he supposed, and in argument contended, gave him a right to the whole fund. But the court allowed him nothing more; and, as on the former case, would allow no part of the expenses, nor any compensation for long, wearisome, and great trouble to which he had been put, in that part of his efforts which were made in his own behalf alone; and which, unlike the former ones, had not in their result enured as above mentioned to the benefit of the opposing claimants, who had been now recently and finally decreed entitled to the whole fund. Under this 3d head the court allowed the counsellor of a special class of claimants who, by consent of another class, having, up to a certain point but no further, an interest common with this special class, and by order of court, had rendered great professional service to the whole class, before the point where the interests of the two classes diverged, a counsel fee of $6000, or three-fourths of 1 per cent. upon a fund distributable. The court considering that there was no doubt of its power where a fund is within its control, to take care of the rights of the solicitors who have claims against it, whether for their costs technically speaking, or their reasonable counsel fees; and regarding such persons in no other light than as meritorious assignees of a part interest.

[Cited in Ex parte Jaffray, Case No. 7,170; Re O'Hara, Id. 10,465; Re New York Mail Steam-Ship Co., Id. 10,208; Trustees v. Greenough, 105 U. S. 535.]

[Cited in Stewart v. Flowers, 44 Miss. 513.]

3. The court makes some extra-judicial remarks, in reply to argument at the bar, upon what are called contingent fees, or fees stipulated beforehand to be paid on the successful result of the litigation. It speaks of the practice of making such stipulations as not to be generally commended, exposing honourable men to misapprehension and illiberal remark, and giving the apparent sanction of their example to conduct which they would be among the foremost to reprehend. And though the court remarked that such contracts might sometimes be necessary, in a community such as that of Pennsylvania had been, and perhaps as it is yet; and that where they have been made in abundant good faith, uberrima fide, without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence of any sort or degree; and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by "all good fidelity to the client;" the court would hold them valid; yet they remarked further that it was almost unnecessary to say, that such contracts, as they could scarcely be excepted from the general rule, which denounces as suspicious the dealings of fiduciaries with those under their protection, must undergo the most exact and jealous scrutiny before they can expect the judicial ratification.

4. A case before the court being an exceptional and very peculiar case, where there was a large fund left by a bachelor, with doubtful domicil and of uncertain sanity, without any near relatives, but vast numbers of remote ones, to his "heir-at-law or lawful heir," where the claimants were very numerous, poor, scattered about the world, having fractional interests, and quite unable to pay counsel for maintaining what after a quarter of a century's hard litigation, and without any compromise, was decided to be their just rights; and where the court knew the whole extent of the counsel's labours, and knew also the rate of commission, and the whole extent of the gross sum received by them; such a case was regarded by the court as illustrating very fairly the occasional policy of such contracts. And in the case of a fund of $800,000 or thereabouts, the court did not consider as unconscionable a stipulation for a contingent compensation of 7½ per cent.; it being by the terms of the contract divisible between three counsel, the suit having been pending for 25 years; having required an enormous mass of testimony from England as well as here; having been argued three or four times in this court, and as many times before the supreme court at Washington; and having been finally adjudged there only by an equally divided court.

[Cited in Re O'Hara, Case No. 10,465.]

Two cases in previous parts of these Reports (White v. Brown [Case No. 17,538], and Aspden's Estate [Id. 589]) give an account of

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

Mathias Aspden and his estate. This man was a bachelor of selfish, secluded, and ridiculous habits, and indeed of rather doubtful sanity, who, born in Pennsylvania prior to the Revolution, left the country on that event, and after an unsettled and strange life, died in London, in 1824, leaving a large personal estate to his "heir-at-law," or "lawful heir." A variety of circumstances connected with a very doubtful place of domicil, and with questions of fact and of law, made it quite a difficult matter to decide who, under these terms, was to take the estate. One John Aspden, of Lancashire, England, claimed it in 1828, and after a long and able argument on the whole law and merits, before this court, when the late Justices Baldwin and Hopkinson sat here, the court "had no hesitation in expressing its most decided opinion that he was entitled to the whole estate by the fixed rules of law:" and to him accordingly the whole estate was decreed to go. From this decree the case was taken to the supreme court of the United States, where, in January, 1835, without any opinion on the general law or merits, the decree was reversed, and the case remanded for further proceedings, because there was no allegation in the pleadings as to the place of the testator's domicil; a matter which, when the case was below, the counsel on both sides and the court, had considered as either sufficiently alleged or of no importance. Harrison v. Nixon, 9 Pet. [34 U. S.] 483, and [Poole v. Nixon] Id. Append. 770. In the meantime another John Aspden, to wit, John Aspden, of London, had appeared, claiming to be the true heir. Both these parties claimed the estate against one another, and they both claimed it against a large number of persons, heirs by the Pennsylvania statute law. These heirs, too, being divided into two classes, some coming ex parte paterna and others ex parte materna, at a later stage of the case claimed against one another, as until they had disposed of these persons they did jointly against the heirs real and pretended at common law. The claim of the heirs ex parte paterna was to all the estate, while the heirs ex parte materna claimed to share it with them in the rates of 32 parts to 3. With a few exceptions nearly all these half-blood parties were poor, common and rather ignorant people, including old women and children. They were scattered over the whole country; most of them were unknown to each other prior to this suit, and after they became acquainted by it, were bound together by nothing in common, but the cohesive power of one interest. New claimants, too, were constantly turning up, having been fished out by somebody who had proved to their satisfaction a relationship with Aspden. But even this bond of a common interest in a large pile of money, pressed unequally upon these parties. A few took a very active part. Others took an inert part: some would take no part at all.

In the earlier history of the case the late Mr. B. Tilghman and Mr. Newbold were the principal counsel of these last mentioned—the half-blood or statutory heirs. But there was a host of other counsel of all grades of character and importance, or of no character and no importance, hanging on the skirts of the case, and representing some small interest in it just sufficient to warrant an appearance in the court room. Some parties had no counsel; and some counsel, if they had any parties, took very little pains to represent them. All the counsel, of course, could not argue the case at Washington; and after an appeal there in 1833, Mr. B. Tilghman and Mr. Newbold were designated at a meeting of several principal and some inferior counsel, to take care of the case at Washington; it being understood that a third counsel, who practised habitually in the supreme court there, should be taken into it, in that city. A commission of 7½ per cent. contingent on the amount to be recovered, was—the witness could not say, agreed on—but was "named" as a compensation to these three counsel, who it was understood "would be rendering a general benefit" to both sides of the half-blood. And Mr. Newbold, before going to Washington did obtain agreements in writing from some of the parties in this form, st.: "We do hereby agree, each for himself, to pay J. L. Newbold seven and a half per centum, on the amount that shall be recovered for us out of the estate of Mathias Aspden, deceased, when the same shall be received, for prosecuting our claims upon said estate before the supreme court of the United States, in the case of Packer v. Nixon, now pending before said court, and do hereby constitute him our attorney for said purpose." Mr. Newbold did not expect to claim for himself this amount, but expected that all interested would sign similar papers, and that the amount would be divided into three equal parts, 2½ to Mr. Tilghman, 2½ to himself, and 2½ to the third counsel at Washington. Messrs. Newbold and Tilghman now proceeded to Washington, where they called on the Honourable Daniel Webster, Esquire, at his residence on the morning that the case was to be argued, and a short time only before the court met: and begged his professional assistance in the case. They told him what had been agreed upon. And speaking of professional compensation, Mr. Webster asked whether they could not get something as they went along—"Enough, at least," as he pleasantly asked, "enough, at least, gentlemen, to nib the pen?" Mr. Newbold told him that it was out of the question to expect any money now from the parties, most of whom were too poor, and others too doubtful of success to risk any money in fees. Mr. Webster assenting, as one witness "understood," to these terms, went with the counsel to the supreme court where the case was almost immediately called, Mr. Newbold stating it, and Mr. Webster taking notes. On

the second day's argument, one of the judges in an obiter way apparently, asked counsel if there was any averment of domicil in the pleadings, to which Mr. Newbold replied negatively. The matter was not further alluded to by the court. But after the adjournment on that day, Mr. Webster remarked to his colleagues that he thought there was "much significance" in that question which the court had asked about the averment of domicil: and after the consultation with them that evening, he himself moved the court on the following morning to suspend the argument and send the case back to amend the pleadings. A day was fixed to argue this point and it was argued by Mr. Webster's colleagues, though not by him; he being engaged elsewhere: and after argument on the other side, and a warm opinion of dissent from Justice Baldwin, the court did reverse the decree and send it back as Mr. Webster had moved. The report of the case as given by the supreme court reporter, does not refer to the matter as having been suggested at all by the court; stating simply ([Harrison v. Nixon] 9 Pet. [34 U. S.] 494) that: "At a subsequent day of the term, when the cause came on for argument upon the merits, a question was presented by Mr. Webster, who, with Mr. Tilghman and Mr. Newbold, was the counsel for the appellants; whether the bill taken by itself, or in connexion with the answer, contained sufficient matter upon which the court could proceed, and finally dispose of the cause. It was submitted, that the bill contains no averment of the actual domicil of the testator, at the time he made his will, or at any intermediate period, before, or at his death. The court directed this question to be argued, before the argument should proceed on the merits." As soon as the court ordered the argument on his motion, Mr. Webster said to his colleagues: "I will take no part in this. You, gentlemen, will." "He seemed," said the testimony, "to think that there could be no doubt about the result. He thought the court would send the case back for want of that averment." His colleagues made no objection when he said that he would take no part in the argument of the motion. There was no evidence that he was ever afterwards applied to, or took any part in the cause. And as he had been expected to act only at Washington, the question which—after the 1st argument there and the 2nd one hereafter mentioned—arose between the two classes of half-blood, for both of whom he had been engaged, was suggested as a reason why he might not have felt at liberty to do so. It was a reason why other counsel similarly situated did not. There was no evidence that Mr. Webster had ever made any stipulations of any kind, with any body, about his fees and it was certain that he never either asked or received any thing. The case, as is hereafter stated, was decided in this court in favour of the parties for whom he had acted some months before his death in the fall of 1852; and a difficulty in the supreme court which prevented at least any reversal of that decree was known in the spring of 1852; a considerable time before it also. He had neither made any record of his own about his fee, nor preserved any from other counsel; though Mr. Newbold had many for himself and his colleague, Mr. Read. Neither Mr. Webster's family, nor his testamentary executor had ever had from him the least intimation of his claim of any fee in the case. The executor derived his first knowledge of the possibility of right from a friend of Mr. Webster's to whom Mr. Josiah Randall, who had been engaged on the other side, had communicated it; and in consequence of this information, apparently, the matter was now presented. The executor of Mr. Webster here represented by Mr. Randall did not ask to have the matter rested on any agreement for contingent compensation; but that the court "would order such an allowance to be made in compensation for Mr. Webster's services as should seem fair and equitable." It appeared that although Mr. Webster had never preferred any claim of any sort on any fund, yet in discussion among counsel, Mr. Newbold, who had received his fees based on the contingent arrangement, had said that as Mr. Webster had been spoken to, and was an eminent man, he ought to receive a complimentary fee; and that if no one else would pay it he, Mr. Newbold, would pay $1000 out of his own fee. So far as concerns the claim preferred in behalf of Mr. Webster.

After this reversal at Washington already spoken of, for want of an averment of domicil, and the remission for further proceedings, the case, of course, came back here. But in the mean time the former justices, Baldwin and Hopkinson, had departed this life, and new judges, st. the present judges Grier and Kane were now upon the bench. The whole matter came of course before them. The first thing which they did was to order an issue for trial by a jury to settle the place of Aspden's domicil: and that the parties "should respectively designate three counsel on each side by whom the said trial should be opened and argued." At this stage of the case the interest of the half-blood or statutory heirs—whether coming paternally or from the mother's side—was still a common one. They were both seeking to establish a Pennsylvania domicil, and so weaken the case of all persons who might be heir by the common law of England, and who were seeking to establish an English domicil, and so give to the "heir at law" the whole estate by making the term "heir at law," synonymous with "heir by the common law of England."

In pursuance of the order a little above mentioned, Mr. B. Tilghman, Mr. Read, and Mr. H. D. Gilpin, were designated by the Pennsylvania statutory heirs as the counsel by whom this question of domicil should be

"opened and argued" on their behalf. The opening fell to Mr. Gilpin. The evidence of domicil—some exhibition of which the reader will get by reference to the case of White v. Brown, already reported—was entirely documentary. It was enormously voluminous, extremely detailed, uncommonly discrepant: and from the absurdity of the principal character in it, old Aspden—a mere zany—positively disgusting to any study of intelligence. To this huge pile of record evidence, Mr. Gilpin had given a most attentive and pains-taking study. He had diligently hunted up from its extent and from its corners, everything which could bear upon the case; and picking it out from the disorderly congeries of an immense paper book, had put it all together in a neat, arranged, and lucid narrative. The result of the whole was, that he presented his own case in its best aspect, and presented the opposite case with all the strength in which it was possible to present it, and yet keep it throughout, strictly subordinate to his own. The opening occupied several days, and was very full. Admitted principles of law were brought in to bear on the case as thus presented, and the jury, understanding what they did understand, thought they understood every thing; and pretty much decided the case, when they had heard it stated by one side. Having been a good deal exhausted with the exercise of a long continued attention, they would hardly attend again to the supplemental kind of opening which Mr. Gilpin had made necessary for the other side; nor to the attempt of that side to show that this opening, which appeared to present a genuine and entire case, was in truth the effect of skilful collocations, of selected points of view, and of illusive casts of light; and that the pieces of the puzzle which—arranged by the adjustment of painful ingenuity—produced a figure of one aspect, could, by another process of less pains, and as much truth, be as well arranged to present a figure exactly the reverse. This opening gained, or was very instrumental in gaining, the verdict of a Pennsylvania domicil; and that domicil in truth gained the whole cause; for the domicil being settled to be in Pennsylvania, the new judges decreed exactly opposite to the former ones, and that the estate should not go to the heir by the common law of England, whether he were John Aspden, of London, or John Aspden, of Lancashire, but should go to the heir (which they held to be a nomen collectivum) by the statute law of Pennsylvania; the heirs of the half-blood already mentioned. Then sprung up, unexpectedly, a second and new question between this class of heirs; that division of them which came ex parte paterna, claiming, on certain grounds, the whole of the estate, to which, in an earlier stage of the case, and before the point was supposed to be one which would arise, the court had strongly intimated they were entitled; and the heirs ex parte paterna claiming to share $^{32}/_{35}$ of it with them. Mr. Gilpin, who had been originally retained by the maternal heirs alone, now fell back to his original and more defined position, and maintained, both in this court and at Washington, with great labour of argument, against Mr. Read, who, having been retained by the maternal heirs alone, sided now with them—the claim of the paternal heirs to the whole $^{35}/_{35}$. But, as the result proved, that claim was not allowed either there or here; those heirs having got but $^{3}/_{35}$.

From the decree of the circuit court here, which first made this decree, an appeal was taken to Washington. The case was there elaborately argued in May, 1852, by Mr. J. Randall, in behalf of one Jackson, M. D., who had been appointed in this country administrator de bonis non of John Aspden, of Lancashire, one of the persons who had claimed to represent the heir by the common law of England; and the court suspending its opinion in an unusual way, "it reached the counsel of Dr. Jackson, that the court were embarrassed by the suggestion, that there was a material point that had not been taken by any of the counsel in the argument of the cause." The recollection of Mr. Randall, who was one of Dr. Jackson's counsel, and was here his witness,[2] was, "that this fact was stated by one or more of the letter writers from Washington, in the public newspapers." He was likewise informed that Mr. Reverdy Johnson and Mr. Berrien had both made the same statement, with the remark, that it was extraordinary that so many Philadelphia lawyers had been arguing a cause, and had neglected to touch upon the real point of the case. Mr. Randall "examined the various aspects of the case with as much sagacity as he could, and came to the conclusion that the point omitted was, that after the death of Mr. Nixon there was no legal representative of Mathias Aspden recognised by the laws of England, and that it would be very important that Dr. Jackson should obtain letters of administration in London, and be substituted in the place that Mr. Nixon occupied at the time of his death." He "consulted with Mr. Hirst, who had been counsel in a collateral question in the argument," and Mr. Hirst agreed in this opinion of Mr. Randall's. Mr. Randall had taken "a great deal of pains to ascertain whether these surmises were correct or not," though, of course, he "had no correspondence or communication with any one of the judges on the subject," but he "left this country under a firm belief that the information was correct;" though he was never able afterwards to find it so.

[2] No objection was taken under the rule 4 of this court, relating to attorney and counsel, which says, "No attorney shall be accepted as security for costs, nor as bail of any kind, nor to testify in favour of his client, except as to matters which are provable by the affidavit of a party."

Dr. Jackson, who was a medical professor in a university at Philadelphia, very reluctantly acceded to this proposition of going abroad; spoke of the injury which would be done to his profession by his absence, and said that nothing but an imperative sense of duty would induce him. Mr. Randall urged him to go, and promised to accompany him, which he did. They sailed on the 15th of June, 1852, and returned some time in October. "After Dr. Jackson arrived in London, he was put," said Mr. Randall, "to much inconvenience; compelled to remain a longer time than we expected; and I think more than a month after myself. I left him behind. The solicitor selected required him to be in London on the 8th of October, and he sailed some days after that, I think on the 13th. His request was finally refused; at least he never did receive letters. The course of medical lectures, of which he was professor, had commenced before he returned, to the detriment of himself and of the university, as was alleged by his brother professors." After Dr. Jackson arrived in London, in the end of June, being told that nothing could be done until September or October, he made a continental tour to Havre, Paris, Brussels, Aix la Chapelle, Cologne, Wiesbaden, Frankfort, Baden Baden, Strasburgh to Paris, Boulogne, &c., to London; the expenses at which places, on the continent, Mr. Randall testified was about half the expense of remaining in London; that place, so far as he knew, being the dearest, and Baden Baden, where Dr. Jackson remained two days, the cheapest. The whole expenses of his journey abroad, were $1697.70. Dr. Jackson had previously to setting out to get these letters of administration in London, been appointed by the orphans' court at Philadelphia administrator de bonis non of John Aspden, of Lancashire, already mentioned, and had given bond with sureties in the large sum of $670,000; and "from the time of his appointment zealously and laboriously attended to its duties." Consultations with counsel were frequent, and Dr. Jackson put aside all professional and other avocations to attend to these meetings. He attended upon the counsel when the argument was prepared, and he also, at the request of his counsel, attended at Washington at the argument before the supreme court, in May, 1852. The counsel on all sides who attended Washington at that time, had by consent of each other obtained an order of court to take out of the fund a certain sum for their expenses in attending that argument. No provision was made for Dr. Jackson, who, Mr. Randall testified, "had received nothing from any source to reimburse himself the sums he had expended, nor any compensation for the services he had rendered," whatever they were. There was no doubt that Dr. Jackson had devoted a great deal of time to following up the case; and had made himself master of all that it became him to know.

The case having been argued a second time at Washington, in December, 1852, by Mr. Read and others, including Mr. Gilpin, on appeal from the decree above mentioned of the new judges, that decree, by an equally divided court, (see Brown v. Aspden, 14 How. [55 U. S.] 25; and Aspden's Estate [Case No. 589]) was affirmed; and the fund amounting to near $800,000, was now to be distributed. It had never been "paid into court," nor agreed to be considered as paid into court, though under orders of the court the administrator had frequently paid expenses incident to the suit. After the death of old Aspden's surviving executor, who had devastated part of it, it passed to an administrator de bonis non, the defendant in the original case, who still held it, and had been paid for holding it, by an allowance in the orphans' court of the state where he had settled his administration account. Submitting himself constantly to the orders of this court, he had frequently paid out certain comparatively small sums under those orders certified by the clerk; these being for expenses of printing, &c., &c., and for payment by consent of certain principal counsel on both sides, to them both for their expenses in being at Washington to argue the case there. For convenience, apparently, these sums had sometimes passed through the clerk's hands.

An act of congress, passed on the 26th of February, 1853, under the head of "Clerks' Fees," provides that there shall be allowed to the clerk of the circuit court "for receiving, keeping and paying out money in pursuance of the requirements of any statute or order of court, one per cent. on the amount so received, kept, and paid." A former fee bill was to a similar but not more favourable effect.

The two Aspdens (against both of whom, irrespective of the question which was between themselves, of true heirship at the common law, the case had been decided) had expended a good deal of money and had had a great deal of trouble about the case. From 1826, when John of London first made his claim, till May, 1852, soon after which time it was decided against him, that John had expended $7226.10 for travelling and lodging expenses, counsel and clerk fees, printers' bills, and very moderate allowance to himself for trouble and loss of time through this term. A small part of his expenses, $1750, but a good deal of his trouble had been caused by a breach of trust in the sole surviving executor of old Aspden, the testator, and by exertions to obtain a lien in one of the state courts at Philadelphia against the executor's estate; which lien he did obtain, thereby saving a loss of many thousand dollars to old Aspden's estate. Another item of his expenses was the cost of a commission, $92.50, at an early date; the effect of which

was to prove the testator's personal property in England. John of Lancashire had expended $2502.85, generally on accounts similar to those of John of London's, except in regard to services against the defaulting executor, and in regard to proving the testator's property. John of Lancashire had laid out no money on these accounts, but he had laid out about $1197.42, for costs and expenses connected with commissions abroad, which showed the whole relationship of the respective claimants, of all sides, in the case, to old Aspden, the common testator. He had never made to himself any allowance for time or trouble.

The bulk, thirty-two thirty-fifths, of this large fund was paid over to the counsel of the largest representatives of the half blood, Mr. Read, Mr. Newbold, and Mr. B. Tilghman, who retained among themselves, and independently of any reference to Mr. Webster, the 7½ p. c. originally named; but a portion, about $60,000, of the distributable fund, was reserved for further order; and several claims, the subject of this case, were now made upon it.

1st. George Plitt, Esquire, clerk of this court, represented by Mr. R. P. Kane, for the payment to him out of the fund, of 1 p. c. upon the whole distributable fund.

2d. John Aspden, of London, represented by Mr. M'Laughlin, for a bill of $7226.10, for his expenses and trouble as just above stated.

3rd. John Aspden, of Lancashire, represented by Mr. Markland, a bill of $2502.85, with interest, for his expenses, as also above stated.

4th. Dr. Jackson, represented by Mr. Randall, a claim of quantum meruit, "for care and trouble as administrator of John Aspden, of Lancashire, heir at common law of testator, and for his costs and charges in the performance of the duties of that office," of which claim his bill for $1697.70, the expenses of his European tour, was one item.

5th. The testamentary executor of the late Honorable Daniel Webster, Esquire, represented by Mr. Randall, for "such an allowance, in compensation for his services, as should seem fair and equitable."

6th. H. D. Gilpin, Esquire, represented by Mr. G. M. Dallas, for three-fourths of 1 per cent., or about $6000, "for services rendered by him on behalf of all the next of kin, under an order of the court, and with the consent of all representing the said next of kin."

Against these Claims. 1st. The clerk's. The money was never paid into court. And though the administrator has paid out parts of it, under orders of the court, which orders may have been certified by the clerk, it has been no otherwise "in court," than that it has been in contest and waiting a final decree; nor does the decree operate upon it, further than a decree would operate on a piece of land for a conveyance, of which a bill had been filed in equity. No one would say that this land was "in court." The clerk has never either "received, kept or paid" out this money. This has been done by the administrator, and the administrator has been paid for it. One decimation of the fund is enough.

2nd and 3rd. The claim of the two Aspdens may be disposed of together. They claimed an enormous fund. The game was well worth the contest. They pursued it, and with fair grounds of hope. But it has eluded them. It has been finally determined that they had no right whatever to the money which they claimed; that the property belonged entirely to other persons. Why shall these other persons be made to pay a large sum for having been disturbed and delayed for a quarter of a century in the enjoyment of their own property? property now decided to have been always and rightly theirs, and to have been by these present applicants, the Aspdens, all the while unlawfully withheld from them? The Aspdens have paid for a chance. They purchased a lottery ticket and drew a blank. What right have they to call on him who drew a prize, to make good the cost of their ticket?

4th. Dr. Jackson's claim stands much on the same foot. The fact that he was a medical professor, whose professional receipts have been greatly injured by his absence in Europe, was a sufficient reason why he should not have applied for this administration at all. From the nature of his professional duties, he was certain to be unable to attend to it without injury to them. The supposition under which he went abroad, had no foundation in fact at all; and none even in imagination, beyond impertinent and loose rumours about private opinions of the supreme court, which it was nobody's right to know. He, too, embarked in a lottery; and has no right to complain that he has been paying for tickets that drew no prize.

5th. The case of Mr. Webster was never thought of by him, or by his executors; and comes into court only because it has been invited. If he ever meant, at any time, to make a claim, it is clear that he himself abandoned it. While everybody else was keeping records and making charges, he kept no record and made no charges. The main controversy about Aspden's estate was disposed of in his life time, but a claim was never mentioned by Mr. Webster, nor heard of by those nearest and dearest to him. His son, his executors knew nothing of it; though these last, when told of it, could, of course, do no less than make it known. Under these circumstances, it is not just to his memory—a memory ever dear to his friends and to this country—to present a demand so unlike any ever presented by himself.

6th. Mr. Gilpin had his special clients ex parte paterna, who paid him. What he did, enured, it is true, to the benefit of the claimants ex parte materna; but that was no merit of his. It has so enured, beyond his expectations and contrary to his design. Mr. Gilpin battled with the heir-at-law, because he himself claimed the whole fund for his

own special clients. And after he had secured it from that heir to the heirs general on both sides, as he had to do before he claimed it for his own clients, instead of taking his proper share of $^{3}/_{35}$, he sought to take it all. He abandoned the common field when he had vanquished an enemy, who, though common, was proper also; and who was fought, not because he was common, but because he was proper. Having turned all his arms against his allies, he now from them asks remuneration. Remuneration for what? For this only, that in spite of his ablest and earnest efforts to take these $^{33}/_{35}$ from them, they have been strong enough to keep them to themselves. And here, too, was a chance. The claimants ex parte paterna were few. The whole of $^{35}/_{35}$ of such a fund, was indeed a splendid prize. It was worth the winning, and worth the contest. The contest has been fought, but the prize has not been won. After a long, hard and honourable contest, others are in possession of it, and in possession rightful. It is theirs, and as is now decided, always has been theirs. In such a case resignation is becoming: and afterthoughts should have no place.

Mr. M'Call, who was with several others, counsel in opposing these claims, briefly but very ably, and with much dignity, argued in addition, 1st. That the taking of contingent fees, however reasonable it might appear in any particular case, was in its general effects so liable to abuse and so injurious to the character of the profession, that it ought not to receive the deliberate sanction of the court, which was now for the first time in Pennsylvania invoked; and 2d. That the agreements for compensation in the case at bar were matters entirely between counsel and client, not amounting to assignments of the fund, nor giving any lien on it: and therefore the court had no jurisdiction to award their payment out of the fund.

In Favour of the Claims. The clerk has in some instances actually distributed the fund which was paid into his hands, though not perhaps technically into court. No doubt, in those cases, he might have obtained a formal order of payment into court. The claim of such officers to their commission should not be held down to technical observance, or they will be tempted to resort to forms and to delay (the result of them), to secure the commission meant to be allowed to substance.

2nd and 3rd. The claim of the two Aspdens is more tenable. Here is an enormous fund in chancery, left by a fool—a zany—under peculiar facts and a will of most difficult interpretation. The claimants are scattered over the earth and seas. They are most of them poor. The rightful claimant is perhaps the poorest of all, and wholly unable to show his right. Will the court give the fund to any claimant able to make a prima facie case? Or will it make some effort to ascertain the rightful party? It wishes to inform itself; and unless the cost of information is paid by the fund, it will be paid by nobody, and the court will not be rightly informed at all. Such a fractional part of the fund is most properly employed in giving the residue a legal and moral direction. A fund is constantly so used in the payment of auditors, advertisements, masters, jurors, &c.

4th. Dr. Jackson acted by the advice and more than the advice of counsel all through. He was urged, importuned to acquire the administration in London, and went abroad animated by nothing but an imperative sense of duty, and in the performance of an act urged upon him by his counsel. He had no sinister design. He asks nothing but remuneration for actual disbursements.

5th. The claim of Mr. Webster's executors is eminently fair. Mr. Webster gained this whole case for these parties who now refuse a cent to his estate. His wonderful mind in an instant saw the immense meaning which lay in a casual inquiry of one of the judges, if indeed it was an inquiry of any judge; for the reporter states that the point of domicil was first raised by Mr. Webster himself. Whether or not, he took it up and followed it out. Some of the ablest counsel of Philadelphia had gone through the case before Judge Baldwin, without once raising that point. Yet who denies that this is the point on which the whole case has finally turned? Mr. Webster did not argue the case at Washington. And why? No doubt, in making his motion, in a few words, in one or two simple propositions—words and propositions which no man could have proposed but himself—he came like a sledge-hammer upon what, beneath his stroke, was first destined to give way. While other men were in doubt, he saw in one instant the inclination of the court, and he saw that inclination was decision. "He seemed," says the testimony, "to think there could be no doubt about the result," and therefore, he said, "I will take no part in this: you, gentlemen, will." He had done the work, and he left others, either on his own side or on the opposite, to undo it, if they could. He could sleep "in spite of thunder." Admit that, as an honourable barrister, he never made a contract about his fees; that he took no writings, enforced no signatures, nor presented any claim. Is that an argument here before an honourable court, the guardians of its officers and of its suitors both alike, and now having distribution of the fund and awarding it to all entitled? It is the highest tribute to Mr. Webster's purity and honour, the proudest testimony to his professional and personal character—his character as a barrister and a gentleman—that he did make no entries; that he did leave no records; did never present any claim for professional services; and that he never dreamt of looking at such matters in the spirit of an attorney or a broker. The application now brought forward in behalf of his executors does not profess to rest upon contract. Contract for contingent

compensation is repudiated. Mr. Webster's testamentary executor asks "for such an allowance, in compensation for his services, as should seem fair and equitable." Can the fees of counsel ever rest on purer, more honourable grounds?

6th. Mr. Gilpin's labour was immense. By the mere force of orderly and lucid statement, he gained a point before the jury which was referred to the jury alone. As a matter of fact, the heirs ex parte maternâ have gained vast benefit from his labours. All the counsel could not argue the point. Mr. Gilpin was appointed to argue it for all parties. He did argue it, and argued it successfully. He was entitled to compensation then, if it could have been foreseen that the statute heirs would finally gain the case away from the heir at common law. Up to a certain point the interest of the heirs ex parte paterna and those ex parte materna was common. Each class of heirs understood that; and each was willing to pay for a service in fact, no matter with what ulterior motive rendered. Each, after a certain point, was willing to trust to its own ability against each other. Both, before that point, were afraid of a common enemy.

It will not do in this country yet to argue against contingent compensations. In the interior country, especially, our people are poor. Our counsel anywhere, are not much richer. Certainly, the court must keep a close eye upon its officers, and upon the least intimation of rapacity must probe the matter to its origin. It would of course set aside any unconscionable contract.[3] This case is free from imputation. Though for a quarter of a century there has been a huge fund, a mere prize for contest, no compromise has ever been made, except in one instance, where, under an order of court, the expenses of counsel at Washington, on all sides, were allowed. The money has never gone into counsel's hands at all, nor by any consent among them. The bulk of the fund remains as it was. The case has been one of a long, hard, honest fight; "a regular pounding-match;" and the whole fund, after twenty-five years of fruitless and uncompensated toil to the counsel of the other side, now goes into the hands of the statute heirs. The application is made to the court. The whole case is familiar to it. The extent, merits, and result of Mr. Gilpin's services are known to all, and especially known to the court.

We need not speak at all of contracts for contingent fees generally. Our remarks would be extraneous to Mr. Gilpin's case. His claim is upon a professional quantum meruit "for services rendered by him on behalf of all the next of kin, under an order of the court and with the consent of all representing the said next of kin." He could not have declined to render these services without having committed a contempt of the court. The court will see that his successful toil is liberally recompensed.

KANE, District Judge. The estate which has been the subject of litigation, remains in the hands of the administrator. There has been no order that the fund, or the residue of it, should be paid into court. It is therefore, as it has been, a fund subject to our decree, but not in our registry; within the judicial control, but over which that control is yet to be exercised. It is not moneys "deposited" in court, or moneys "received, kept, and to be paid out" by the clerk. That officer has, therefore, no claim upon it, under either the former or the present fee bill, of the sort which has been contended for, except so far as he may appear, upon future taxation, to have disbursed any portions of it under the occasional orders of the court.

Over and above the fees of office, this fund is subject to three classes of charge:

1st. The necessary expenses of ascertaining it, and reducing it into possession.

2nd. A reasonable compensation for its safe keeping, and the supervision of its interests.

3rd. The expenses of ascertaining the proper distributees, and making distribution among them.

All of these would be included by the practice of the English chancery, in the general designation of expenses, or of costs taxable between solicitor and client; and as such, would in a case like this be allowed against the fund. See the orders in Stanton v. Hatfield, 1 Keen, 358, and in Gaunt v. Taylor, 2 Hare, 413, and the opinion of the Vice-Chancellor in Thompson v. Cooper, 2 Colly. 90.

In the first of these classes, we are disposed to include certain costs and expenses, which were paid by John Aspden, of London, for a commission to England, and in the early proceedings in the state court at Philadelphia against the executor; and we add to these the sum of one thousand dollars, as a compensation for his vigilant and effective service in securing a very large amount of money to the estate, and in lieu of all expenses incurred by him in and about the same.

[3] Mr. Justice Grier, who was present at the argument, though not at the delivery of the court's opinion, here observed that these contingent fees were "very delicate affairs." They were not allowed at all in England, and had given rise in our country to great abuse in some instances. Still, perhaps, they would have to be tolerated awhile longer, especially in the country. This much he would say, that if the action of the court were needed, it would disregard such a contract, and allow counsel what, under the circumstances, the court deemed fair. On the other hand, he wished to be also understood, that the court would take care of counsel who, in this country, often suffered from the stinginess of clients. If a client would not pay his counsel properly, and the court could in any way get hold of the funds, it would order an allowance tc him. And the court would not suffer clients to receive money themselves, or to compromise a case "outside and over the counsel's heads," without first making proper compensation for their service and capacity.

The administrator de bonis non is the only person before us whose claim would have a place in the second class. He has, however, been satisfied for his expenses, care and trouble, by an allowance in the orphans' court, where he has settled his administration account.

Among the expenses of ascertaining the proper distributees of this fund, or, more properly speaking, as among the costs to be taxed under the decree, we allow the several charges incurred by John Aspden, of Lancashire, in and about the execution of commissions to examine witnesses abroad.

The claim of Dr. Jackson seems to us plainly outside of all the classes we have indicated. His action did not contribute to the increase of the fund, or aid the court in determining the mode of its distribution. He was the administrator in this country of one of the suitors for the estate, and he sought unsuccessfully to become administrator in England also. He failed to obtain a decree in favour of the interests which he represented; and we do not see that he has any other rights against the fund than the other parties who shared his failure.

The claims for professional services rendered in this cause by Mr. Webster and Mr. Gilpin, refer themselves to the third class of which we have spoken. We have no doubt of the power of the court, where a fund is within its control, as in the case before us, to take care of the rights of the solicitors who have claims against it, whether for their costs, technically speaking, or their reasonable counsel fees. We can regard them in no other light than as meritorious assignees of a part interest; and they are so regarded in the English chancery. White v. Pearce, 7 Hare, 278. The principle and the rule are fully established in that country by the cases which have been already cited; and these are sustained in the United States by the New York adjudications, both at common law and in equity (Pinder v. Morris, 3 Caines, 165; Bradt v. Koon, 4 Cow. 416; Talcott v. Bronson, 4 Paige, 501); and they are recognised by the supreme court of Pennsylvania (Balsbaugh v. Frazer, 7 Har. [19 Pa. St.] 98).

Whether it was originally wise to invest the due compensation of counsel with the incidents of a legal demand, and whether the dignity, and with it the usefulness of the profession, might not have been better secured by leaving its members to a merely honourary recourse, has divided the opinions of intelligent and honest thinkers. But the question is now, and has long been a merely speculative one in Pennsylvania; and our courts have either to remodel the law, or to enforce it as it stands, by admitting the lawyer to sue for his quantum meruit.

So, too, of the practice, which has obtained to a considerable extent, of stipulating beforehand for professional fees, contingent on the result of the litigation. It is not a practice to be generally commended, exposing honourable men not unfrequently to misapprehension and illiberal remark, and giving the apparent sanction of their example to conduct, which they would be among the foremost to reprehend. Such contracts may sometimes be necessary in a community such as that of Pennsylvania has been, and perhaps as it is yet; and where they have been made in abundant good faith—uberrima fide—without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence of any sort or degree; and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by "all good fidelity to the client;" the court will hold such contracts to be valid. But it is unnecessary to say, that such contracts, as they can scarcely be excepted from the general rule, which denounces as suspicious the dealings of fiduciaries with those under their protection, must undergo the most exact and jealous scrutiny before they can expect the judicial ratification.

These general observations have been invited by some portions of the argument; they have no purposed application to anything presented by the facts before us. Indeed, the case may be regarded as illustrating very fairly the occasional policy of these contracts. But a small proportion of those, whose rights in the Aspden estate have been finally affirmed by the courts, were in circumstances to support the long and costly litigation which those rights have undergone; and the compensation which they engaged to pay in case of success, though large in the aggregate, was altogether moderate, because contingent on the result. The gentlemen who have devoted, for so many years, and through so many discouragements, their talents, mature learning, and untiring energy, to the prosecution of this case through all its chances, have confessedly earned all that they have received.

Included in the per centage which was payable to them, was the agreed compensation for the services of Mr. Webster. But he was not directly a party to the agreement by which the clients bound themselves to the payment. His agreement was with the original counsel, and they were to pay him out of the fee they were themselves to receive. Whether his compensation was to be measured by one standard or another, whether it was specific or contingent as to amount, to be modified by reference to the extent and character of his services, or to be dependent solely on the amount recovered, we are relieved from inquiring. The clients have complied with the terms of their engagement; and the per centage which they engaged for, and to which Mr. Webster looked, has been paid out of the fund with the consent of all parties, to the gentlemen who were entitled, in the first instance, at least, to receive it.

In this the claim of Mr. Webster's execu-

tors differs from that which has been presented by Mr. Gilpin. The parties who were before us asserting title as the next of kin, were themselves divided in interest and right, and were represented by different and numerous counsel. In the progress of the cause, after it had come back to us from the supreme court, we directed a feigned issue to be tried at law between the asserted heir-at-law on the one side, and all those who claimed to be the next of kin, as a single class, on the other. It became necessary, of course, that a limited number of counsel should be elected to represent the two great parties to this issue, and an order of court was made to that effect. Mr. Gilpin, who had been before retained by one of the parties, having in one aspect a minor interest, and in another an interest adverse to the rest, was chosen at a meeting of all the counsel, as one of the persons to try the cause for the next of kin. The selection was ratified by the court. The effort of Mr. Gilpin in opening the case, evinced the highest degree of professional ability and research: it is scarcely too much to say that it gained the cause.

The gentlemen who were associated with him on the law side of the court, having been originally retained by parties who were ultimately successful in the secondary contest in equity, have been compensated for their services. With Mr. Gilpin the case is different. Those whom he immediately represented, though victorious in the feigned issue like the rest of the next of kin, were defeated in the contest which followed, and have recovered a comparatively trifling amount. He has not felt himself authorized, under the circumstances, to accept compensation from his original clients alone, for the services which he rendered to them in common with all the rest, under the order of the court and the appointment of their counsel.

The parties, against whom his claim would be sustained at law, as for services rendered at their "instance," or at least with their "consent" (Balsbaugh v. Frazer, 7 Har. [19 Pa. St.] 95) are numerous and scattered. Some of them have appeared before us by their counsel, to recognize the fitness and justice of the demand asserted for Mr. Gilpin: others, admitting its propriety in general terms, have questioned the manner in which it should be assessed among the several parties: others, again, are unrepresented, or decline consenting to its payment from the fund. Now, it is the familiar rule of courts of equity, where a suit has been instituted and carried on for the benefit of many, that all who come in to avail themselves of the decree shall bear their just proportion of the charges. Thompson v. Cooper, 2 Colly. 90, which was a creditor's suit against an administration; Rogers v. Ross, 4 Johns. Ch. 608, which was a controversy like the present, growing out of the ambiguous language of a will: and Mason v. Codwise, 6 Johns. Ch. 297, 301, where Chancellor Kent, by the terms of his decretal order, declared that he who comes in under the general decree, "is admitted upon the condition of being contributory to the plaintiff for his proportion of the expense of the suit."

It appears to the court, that if any case can occur, in which this rule should be enforced by holding the fund liable for the remuneration of the solicitor, it is this: where a gentleman has been chosen, by the concurrence of all the parties in interest before this court, to render service for them all; that service to be rendered in a trial at law directed by this court, and by counsel, who, by the further order of this court, were to be specially assigned for its performance;—where the service has been rendered so ably, and with such important results to all;—and where, from the number, position, and relations of the parties, it has been from the first, and yet is impossible that they should unite in tendering to him a just honorary recompense. And it appears to us also, that where, from the character of the controversy, seven and a half per cent. has been esteemed by the parties themselves a fair compensation to the rest of the counsel who succeeded, the charge of three-quarters of one per cent. should not be deemed a more than adequate return for the successful labours of Mr. Gilpin. Decree accordingly.

Case No. 11,229.

The PLOUGHBOY.

[1 Brown, Adm. 48.] [1]

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

REVENUE LAWS—RECEIVING GOODS UNLADEN WITHOUT PERMIT.

1. Under section 28 of the act of 1799 [1 Stat. 648], the reception by one vessel of goods unladen from another without a permit, subjects the receiving vessel to forfeiture irrespective of a fraudulent intent on the part of her officers.

2. The fact, that efforts were made to find an officer, which were unsuccessful on account of the lateness of the hour, and that the master was impatient to proceed, furnish no legal excuse.

Information under section 28 of the act of 1799, for receiving a quantity of Canadian liquors from the bark Fame, while lying moored at Port Huron, without a permit from an officer of the customs. [There was a decree of condemnation, under section 1, Act March, 1821. Case No. 4,633.]

Joseph Miller, Dist. Atty., for the United States.

Levi Bishop, for claimant.

WILKINS, District Judge. The charge embraced in the first and second counts of the information is clearly established by the proofs. It is in substance that after the ar-

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

rival of the Fame at Port Huron, the goods were unladened from her without license, and were put on board and received into the Ploughboy, Port Huron not being the proper place for the discharge of the cargo of the Fame.

Section 28 of the act of 1799, must be construed in connection with the preceding section, and consequently inhibits under penalty of the forfeiture of the vessel, the reception of the cargo by and into any other ship before reaching her port of destination. Port Huron was not such port. The cargo was transferred from one vessel to the other at midnight, without authority or permit.

By the written admission on file, it appears the bark Fame left the port of Amherstburg, Canada, with a cargo of whisky, brandy and gin, of Canadian manufacture, bound as appears by her manifest for the port of Detroit. The manifest or "report outwards" duly authenticated by the British collector, simply shows the fact that the bark Fame with her cargo left for Detroit on the day mentioned. She passed Detroit without reporting, pursuing her course up the river to Port Huron, and there moored at the dock and waited for the Ploughboy. On her arrival, the cargo of the Fame was transhipped and received on board the Ploughboy, and by her taken to and discharged at Port Sarnia in Canada, nearly opposite Port Huron. The Ploughboy was a British vessel running between Detroit and Goderich in Canada, occasionally stopping at Port Huron and Sarnia. The owner of the liquors was also the owner of the Ploughboy, and kept liquors for sale both at Goderich and Sarnia, and I have no doubt from the testimony, that the liquors were intended to be consigned to the Canadian ports, and were not designed for the United States. But such intention was not expressed in the manifest—an omission resulting from the obvious design of the consignee to have them transhipped to his own vessel, which was expected to meet the Fame on the British side of the channel. It was admitted that the Fame delivered no manifest at Detroit, her port of destination, and it is in proof, that after her seizure at Port Huron it was, by the deputy collector there, transmitted by mail to the collector at Detroit. The letter of the law then was clearly violated by the Ploughboy, there being no permit to unlade the Fame and receive her cargo, from any officer of the customs, and the language of the statute is so positive that notwithstanding the apparent lack of a fraudulent intent, I must reluctantly direct a decree of condemnation. The law prohibits the reception of goods by one vessel from another, before reaching the port of destination, without a permit or license. The officers of the Ploughboy knew the necessity of a permit, and endeavored to find a custom-house officer, but were unable to do so on account of the lateness of the hour. The statute declares that the cargo of no such vessel shall be unladened or received into any other ship for any purpose whatever, without the specified authority. This excludes the defense of innocence of intention. The impatience of her officers to proceed on their way, cannot be embraced by judicial construction in the exception of the statute as to accident or necessity. If no officer could be found at that late hour, it was the duty of the master to wait until morning. The evidence of an understanding with the former collector cannot be recognized by the court as modifying the statute, although it certainly is an excuse addressing itself to the clemency of the government for a remission of the forfeiture. The evident consignment of the cargo to Sarnia—the design to tranship for that purpose, the supposed arrangement with a former collector as to arrivals and departures at Port Huron, the arrival of the Ploughboy in the night time on her trip to Goderich—the search for the officer at midnight, in order to procure a permit, tend strongly to acquit the master of any intent to violate the law, but furnish no legal basis for an acquittal under the provisions of the statute. Decree of condemnation.

The forfeiture decreed in this case, was afterwards remitted upon payment of a fine of $200 and costs.

Case No. 11,230.

The PLOUGHBOY.

[1 Gall. 41.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

FORFEITURE—PURCHASE OF FORFEITED GOODS WITHOUT NOTICE.

A purchase of goods which have become forfeited to the United States, will not purge the forfeiture, when the purchase has been made under a full knowledge of the facts; or of such facts as were sufficient to put the party on inquiry.

[Cited in The Florenzo, Case No. 4,886; Jones v. Van Zandt, Id. 7,502; Jones v. Van Zandt, 5 How. (46 U. S.) 225; Carr v. Hilton, Case No. 2,437; Nine Hundred and Seventy-Nine Boxes of Sugar, Id. 10,271.]

[Cited in Great Falls Bank v. Farmington, 41 N. H. 42.]

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

The brigantine Ploughboy was seized and libelled, for proceeding to a foreign port, to wit, the Havanna, contrary to the third section of the act of 9th January, 1808 [2 Stat. 453] c. 8. The cause was submitted upon the facts stated in the decree of the district court, and the accompanying papers; and it was admitted, that the Ploughboy proceeded from Boston to Havanna, and there landed her cargo, and returned from thence to Boston with another cargo. On her return to Boston, which was on the morning of the 29th of December, 1808, she was immediate-

[1] [Reported by John Gallison, Esq.]

ly, and before seizure, sold to the claimant, who had full knowledge at the time that the brigantine had proceeded to the Havanna, and returned directly from that port.

G. Blake, for the United States.
C. Jackson, for claimant.

STORY, Circuit Justice (after reciting the facts). I am satisfied, that the voyage to the Havanna was illegal, and that the pretences assumed as a ground of defence of it, are merely colorable or wholly inadequate in point of law. The vessel was undoubtedly therefore subjected to forfeiture. But it is contended (and indeed this seems principally relied on by the counsel for the claimant) that, admitting the forfeiture to have been incurred, yet before seizure the claimant became a bona fide purchaser without notice of this defect of title, and ought not to be affected by it. Admitting the law to be, that a forfeiture of goods is purged by a subsequent bona fide sale without notice, can it with any propriety be applied to the present case? It is a general rule, that whatever is sufficient to put the party upon inquiry, is good notice. 2 Fonbl. bk. 2, c. 6, § 3; 1 Atk. 490; Amb. 313. Now it would be difficult for the claimant to contend that, when he had notice of the facts, as to the voyage, he must not also have had notice of the legal consequences flowing from those facts. Supposing the present sale a real one for a valuable consideration, there was certainly a want of due caution and deliberation in the purchase. The claimant was guilty of what the law esteems as crassa negligentia. This claim must therefore be rejected in favor of a prior right by forfeiture.

The libel is certainly very inaccurately worded; but on the whole the substantial merits are stated, and the decree of the district court is affirmed. See The Mars [Case No. 9,106].

PLUM (PILES v.). See Case No. 7,378.

Case No. 11,231.

In re PLUMB.

[9 Ben. 279; 17 N. B. R. 76; 6 N. Y. Wkly. Dig. 70.] [1]

District Court, S. D. New York. Jan. 5, 1878.

PARTNERSHIP ADJUDICATION—DISCHARGE OF INDIVIDUALS.

1. Where an individual member of a copartnership is adjudged a bankrupt, without any adjudication against the copartnership, or against the other partners in the copartnership, inasmuch as the assignee of the individual cannot administer the estate of the copartnership, or call third persons to an account for partnership property, the estate of the firm is not in the bankruptcy court in any such wise as to make a discharge of the individual operative in respect to the debts of the firm, provided there are assets of the firm when the bankruptcy proceedings are instituted.

2. Adjudication of the members of a firm, by adjudication of one member of it in one proceeding, and of the remaining members of it in a separate proceeding, with such effect as to bring the firm into bankruptcy, is a thing not contemplated by the statute (section 36 of the act of March 2d, 1867, now section 5121 of the Revised Statutes), nor by general orders Nos. 16 and 18. The adjudication must be made in one proceeding and on one petition, and the two petitions cannot be consolidated. Therefore, the individual member cannot, in his proceeding, be discharged from the debts he owes as a member of the copartnership, and he must, in a given proceeding, be discharged from all his debts or from none.

[Cited in Re White, Case No. 17,533; Re Henry, Id. 6,370.]

[In the matter of James N. Plumb, a bankrupt.]

J. K. Hayward, for bankrupt.
G. A. Seixas, for opposing creditors.

BLATCHFORD, District Judge. On the 29th of February, 1868, at ten o'clock a. m., James N. Plumb filed in this court his petition in voluntary bankruptcy. Annexed to it are a schedule of his debts and an inventory of his estate. The schedule of his debts contains a list headed: "Liabilities of the late firm of J. M. & J. N. Plumb & Co., assumed by the firm of J. M. Plumb & Co.," being Schedule A, No. 3, and unsecured claims, and not liabilities on notes or bills discounted, and thirty-five in number. The schedule of his debts contains also a list (schedule A, No. 4) of liabilities on notes or bills discounted, being fifty-six notes, all of which are stated in said schedule to have been "contracted as copartners by J. M. & J. N. Plumb & Co., and assumed by J. M. Plumb & Co." The same Schedule A, No. 4, contains a list of fifteen other notes, which are stated in said schedule to have been "endorsed by J. M. & J. N. Plumb & Co., and assumed by J. M. Plumb & Co." The makers of the notes are other persons. Said Schedule A, No. 4, also says: "All the above contracted as copartner in firm of J. M. & J. N. Plumb & Co., by endorsement of said paper, composed of James M. Plumb, this petitioner (James N. Plumb), Leonard D. Atwater, and Andrew M. Fanning." The inventory of assets, Schedule B, No. 3, annexed to said petition, contains a list of thirty-eight debts, the list being headed: "Due the late firm of J. M. & J. N. Plumb & Co., and transferred to the firm of J. M. Plumb & Co.—A. Debts due petitioner in open account, that is, due said J. M. & J. N. Plumb & Co., and applicable to payment of debts of that firm."

On the 29th of February, 1868, at 10:18 o'clock a. m., James M. Plumb, Leonard D. Atwater, and Andrew M. Fanning filed in this court their petition in voluntary bankruptcy. Their petition describes them as "partners in trade composing the firm of J.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 6 N. Y. Wkly. Dig. 70, contains only a partial report.]

M. Plumb & Co.," and states that the said petitioners, as such partners in trade in said firm of J. M. Plumb & Co., and as members of the firm of J. M. & J. N. Plumb & Co., composed of your petitioners and of one J. Neale Plumb, of the said city," &c., "have carried on business," &c.; "that the members of said copartnership J. M. Plumb & Co. severally, and the said firm, owe debts," &c., "and are, and said firm of J. N. Plumb & Co. are, unable to pay all their debts in full," &c. The schedule of their copartnership debts contains a list headed: "Liabilities of the late firm of J. M. & J. N. Plumb & Co., assumed by the firm of J. M. Plumb & Co.," being a part of Schedule A, No. 3, and unsecured claims, and not liabilities on notes or bills discounted, and thirty-five in number, and being the same debts and similarly described as the debts, thirty-five in number, above mentioned as set forth in Schedule A, No. 3, to the petition of James N. Plumb. The schedule of their copartnership debts contains also a list (Schedule A, No. 4) of liabilities of J. M. Plumb & Co. on notes or bills discounted, being fifty-six notes, all of which are stated in said schedule to have been "contracted as copartners by J. M. & J. N. Plumb & Co., and assumed by J. M. Plumb & Co.," and being the same notes and similarly described as the notes, fifty-six in number, above mentioned as set forth in Schedule A, No. 4, to the petition of James N. Plumb. The same Schedule A, No. 4, to the petition of James M. Plumb & Co., contains a list of fifteen other notes, which are stated in said schedule to have been "endorsed by J. M. & J. N. Plumb & Co., and assumed by J. M. Plumb & Co.," and to have been "contracted as copartners by J. M. & J. N. Plumb & Co." The makers of the notes are other persons, and the fifteen notes are the same notes, and similarly described, as the notes, fifteen in number, above mentioned as set forth in Schedule A, No. 4, to the petition of James N. Plumb. The inventory of assets, Schedule B, No. 3, annexed to the petition of James M. Plumb & Co., contains a list of thirty-eight debts, which is headed: "Due the late firm of J. M. & J. N. Plumb & Co., and transferred to the firm of J. M. Plumb & Co.—A. Debts due petitioner in open account," and being the same debts, and similarly described, as the debts, thirty-eight in number, above mentioned as set forth in Schedule B, No. 3, to the petition of James N. Plumb.

James N. Plumb and J. Neale Plumb are one and the same person. The ground of jurisdiction set forth in the petition of James N. Plumb is residence in this district for the necessary time. The ground of jurisdiction set forth in the petition of James M. Plumb, Atwater and Fanning is the carrying on of business by them in this district for the necessary time. The two petitions were referred to the same register. The adjudication of bankruptcy as to James N. Plumb, under his petition, was made on the 16th of March, 1868, and on the same day an adjudication of bankruptcy as to the other three jointly, and three separate adjudications of bankruptcy as to each of them separately, were made under their petition. Under each petition a warrant was issued on the 16th of March, 1868, returnable on the 30th of April, 1868. On the 30th of April, 1868, Charles G. Judson was elected assignee in each case. He accepted each trust on that day, and each election was approved by the judge on the 1st of May, 1868, and on the same day an assignment in each case was executed by the register to the assignee.

James N. Plumb now applies for a discharge from his debts, and it is objected that the court cannot grant him a discharge, because his petition discloses debts owed by the firm of J. M. & J. N. Plumb & Co., and assets belonging to said firm, and that he was a member of said firm, and that he did not make the other three copartners in that firm parties to the petition which he filed; that all the debts from which he seeks a discharge were contracted by him as a member of the firm of J. M. & J. N. Plumb & Co.; that the four should have joined in, or been brought in under, one petition; and that, as the matter stands, this court acquired no jurisdiction over the assets owned by the four jointly, as members of the firm of J. M. & J. N. Plumb & Co., and no jurisdiction to discharge James N. Plumb from any of the debts owed by him as a member of that firm.

The firm of J. M. & J. N. Plumb & Co., composed of James M. Plumb, James N. Plumb, Fanning, and Atwater, was formed December 30th, 1865. It was dissolved December 30th, 1867, and James M. Plumb and Fanning and Atwater then formed a new firm, composed of themselves alone, under the name of J. M. Plumb & Co. The new firm failed on the 14th of February, 1868. On the dissolution of the old firm, the new firm, with the consent of James N. Plumb, took possession and charge of all the assets of the old firm, and proceeded to turn them into money and to pay therewith the debts of the old firm, and did so, to some extent, leaving remaining, at the time the petitions in bankruptcy were filed, the assets and debts set forth in the schedules to the petitions. There was no formal or other transfer by James N. Plumb to the other three, of his interest in the assets, but they acted on their own behalf, and as his agent, in converting into money assets owned by the firm jointly, and in paying therewith debts owed by the firm jointly.

I recently had occasion to examine this question in Crompton v. Conkling [Case No. 3,407], and held, that where an individual member of a copartnership is adjudged a bankrupt, without any adjudication against the copartnership or against the other partners in the copartnership, inasmuch as the as-

signee of the individual cannot administer the estate of the copartnership, or call third persons to an account for partnership property, the estate of the firm is not in the bankruptcy court in any such wise as to make a discharge of the individual operative in respect to the debts of the firm, provided there are assets of the firm when the bankruptcy proceedings are instituted. In addition to the cases referred to in the decision in Crompton v. Conkling, it was held by the district court for New Jersey, in Re Marks [Id. 9,094], May 29th, 1877, that where there are no partnership assets to be collected and paid out, one member of a partnership may, upon his individual petition, be discharged from all his debts, partnership and private; but that if there are assets of a partnership to be collected, the firm must be adjudicated bankrupts, and an assignee be appointed to collect and distribute the same, before any individual members of the firm can be discharged.

It is entirely clear that there were assets of the firm of J. M. & J. N. Plumb & Co., when that firm was dissolved. The assets set forth in the two petitions as having been assets of that firm continued to be assets of that firm, and the property of the four persons who had composed that firm, at the time the two petitions were filed. There never was any transfer of the interest of James N. Plumb in those assets to his copartners. Although the petitions state that the assets named in them were transferred to the firm of J. M. Plumb & Co., yet the testimony shows that this was not the fact. The assignee of James N. Plumb, could not, by virtue of the assignment to him in this proceeding, administer those assets of the firm of J. M. & J. N. Plumb & Co.

It is urged that the firm of J. M. & J. N. Plumb & Co. was and is in bankruptcy, because all four of its members were adjudicated bankrupts—one under one petition, and the other three under a distinct petition; that each petition sets forth the assets and liabilities of that firm; and that that firm, and its members, and its estate are as much in bankruptcy as it is possible for them to be, if both of the petitions are taken into consideration. But the difficulty is that it is impossible to take both petitions into consideration. It so happened that the same person was made assignee under both petitions. But that was accidental. The copartners of James N. Plumb were not brought into court under his petition, nor did they come into court voluntarily under his petition. If they had resided in another district they might as well have filed their petition in that district. The assignee of James N. Plumb in this proceeding acquired no title to the assets of the firm of J. M. & J. N. Plumb & Co., although the other three members of that firm became bankrupts in another proceeding. Nor did the assignee of the other three, in their proceeding, acquire title to those assets, although James N. Plumb filed his petition in a separate proceeding. Adjudication of the members of a firm, by adjudication of one member of it in one proceeding and of the other members of it in a separate proceeding, with such effect as to bring the firm into bankruptcy, is a thing not contemplated by the statute (section 36 of the act of March 2d, 1867, now section 5121 of the Revised Statutes), nor by general orders Nos. 16 and 18. The clear intention is, that the adjudication of the bankruptcy of the "copartnership," as general orders Nos. 16 and 18 express it, shall be made in one proceeding and on one petition. No provision is made anywhere for a consolidation of two such petitions as those now under consideration. This is not a case of two petitions for the adjudication of the bankruptcy of the same copartnership, in the language of general order No. 16, for, the petition of James N. Plumb prays only for his own adjudication, and the petition of the other three prays only that they three may be adjudged bankrupts.

I am, therefore, of opinion, that his court has not acquired, either by the petition of James N. Plumb, or by the petition of the other three, or both, such jurisdiction of the estate of the copartnership of J. M. & J. N. Plumb & Co., that it can discharge James N. Plumb from the debts he owes as a member of that copartnership. He owes no other debts. Moreover, he must, in a given proceeding, be discharged from all his debts or from none. A discharge is refused.

PLUMER (UNITED STATES v.). See Cases Nos. 16,055 and 16,056.

Case No. 11,232.

PLUMMER v. CONNECTICUT MUT. LIFE INS. CO.

[1 Holmes, 267.] [1]

Circuit Court, D. Maine. Oct., 1873.

EQUITY — REMEDY AT LAW — MULTIPLICITY OF ACTIONS.

A bill in equity is not demurrable on the ground of a plain, adequate, and complete remedy at law, when it appears that the remedy at law can only be prosecuted by means of a large number of actions, involving many questions of values and accounts which it would be practically impossible for a jury to settle.

Bill in equity [by Patience C. B. Plummer against the Connecticut Mutual Life Insurance Company] to obtain a settlement of accounts, and for an injunction to restrain the prosecution of certain actions at law by the defendant corporation. The defendant demurred to the bill, upon the ground that the complainant had a plain, adequate, and complete remedy at law. [For an action at law between the same parties, see Case No. 3,106.]

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

E. F. Hodges, for complainant.
J. S. Rowe, for defendant.

SHEPLEY, Circuit Judge. The bill in equity in this case is instituted by the complainant, as surviving partner of the firm of B. Plummer & Sons, composed at the decease, in March, 1871, of Watson E. Plummer, of the said Watson E. and the complainant. Complainant is the widow of Benjamin Plummer, deceased, who for many years prior to his death had been an agent for insurance companies, and from 1859 to the time of his decease, in April, 1867, was acting exclusively as agent of the defendant company. The bill alleges an arrangement entered into in February, 1859, between the insurance company and Benjamin Plummer, by which he agreed to act as exclusive agent of the company in the eastern part of the state of Maine, to solicit parties to effect insurances in said company, and to perform other services for the company. In consideration thereof, the company agreed to pay him, or permit him to retain, ten per cent of all moneys paid for the first year's premiums, and five per cent upon all subsequent premiums, on all policies issued by the company to any persons taking the same through the influence or solicitations of the said Benjamin. The bill alleges that, upon the faith of this agreement, Benjamin Plummer incurred very great expenses in advertising, in the establishing suitable offices, the employment of clerks, and in travelling and other expenses necessary to develop and increase the business of the company. That he thereby so far increased the business of the company, that, while the company for the year prior to the time of his assuming the exclusive agency had received for premiums in the territory embraced within his agency not over $2,000, it received in the year ending February 1, 1871, from the same territory, over $250,000. On the 1st of November, 1861, the company constituted him the general agent of the company for Maine and the adjacent British provinces, with authority to appoint sub-agents subject to his control and direction, with the right to retain fifteen per cent of all moneys paid for first-year premiums on policies subsequently procured by his exertions, and seven and one-half per cent on all renewal premiums on policies procured by him, whether issued before or after November 1, 1861.

In July, 1863, Benjamin Plummer formed a copartnership with his sons, Oliver B., and Watson E., Plummer, and the business was then conducted under the name of B. Plummer & Sons; and the company accepted the firm as their agents in the place of Plummer alone, and settled its accounts with them on the basis of the agreements with Benjamin. On the 1st of February, 1867, the company entered into a new arrangement with B. Plummer & Sons, agreeing to give them twenty-five per cent of all first-year premiums, and six per cent of all renewal premiums, on policies procured by them subsequently to that date.

On the second day of April, 1867, Benjamin Plummer deceased, and the business was conducted by the surviving partners, with the acquiescence of the defendant company, until the 10th day of July, 1867, when the complainant became a member of the firm with her two sons, continuing to carry on the business in the name of B. Plummer & Sons, with the knowledge and consent of the company. On the 1st of June, 1869, O. B. Plummer, one of the partners, retired, assigning his interest to the remaining partners, who continued the business as before, with like knowledge and acquiescence of the company. On the 1st day of February, 1870, another modification of the contract was made, by the terms of which the firm was thereafter to receive twenty-five per cent of first-year premiums, ten per cent of renewal premiums on the four next succeeding years, and two per cent on premiums for subsequent years.

In March, 1870, W. E. Plummer deceased, leaving the complainant the sole survivor of the firm, who continued to conduct the agency until the power was revoked by the company. The bill further alleges that it was a consideration of the efforts and expenditures of the said Plummers in securing an enlarged constituency of said company, and that it was distinctly stipulated in all the agreements that they were entitled to receive the stipulated percentage as long as any payments should continue to be made on the policies procured by them; and they were ready to perform the duties of the agency as stipulated; and that their rights were the same by agreement, so far as related to the percentage on the policies procured by them, whether the agency was revoked, or in the event of the death of the agent or agents; that, after the death of Watson E. Plummer, in March, 1871, the complainant had made arrangements to continue, and did continue, the agency and business with competent and skilful assistants, as it had theretofore been done; but that in May, 1871, the company revoked the agency, and all power to collect premiums, or percentages on premiums, and refused to allow or pay her anything for the value of the percentages on the future premiums, or in any way to recognize any rights or interests of the complainant therein, or in any premiums whatever paid after the date of the revocation of the agency on policies which had been procured by said Plummer or said firm. When the agency was revoked, policies were in force issued prior to 1861; subsequent to 1861 and prior to 1867; subsequent to 1867 and prior to February 1, 1870; and subsequent to the last date.

The amount of the business created by said Benjamin Plummer and said firm is averred to have been so large that the company had received several millions of dollars from it,

and at the time of the revocation of the agency was receiving a quarter of a million dollars annually, as premiums on policies secured by them. These policies are averred to be in the hands of the defendant, in the usual form of life insurance policies, with conditions so varied and numerous that it would be impossible to set them out; and the bill prays for discovery and production of the policies, that an account may be taken of the complainant's interest therein.

In October, 1869, the firm of B. Plummer & Sons executed a bond to the company, with J. H. Bowler and others as sureties, in the penal sum of $10,000, conditioned for the due performance of their duty as agents, and the payment to the company of all sums collected by them for the company. An action has been commenced by the company on this bond, and is now pending in this court against the said Bowler alone, as surety on the bond. Another action has been commenced, and is now pending in this court, against the complainant, claiming to recover the sum of $50,000, moneys alleged to have been collected by her during the months of March, April, and May, 1871. The complainant alleges that the company in equity has no claim against her, or said Bowler, but in equity is indebted to her in a sum exceeding $100,000. In order to save a multiplicity of actions, and to obtain a just application of the indebtedness of the company to the complainant, in liquidation and cancellation of bond, and to relieve the surety, whom the complainant is in law bound to protect, the bill prays for an account of the value of her interest in the existing policies, and of the policies themselves, and that the company be decreed to pay her the value of such interest, after deducting all sums belonging to the company in her hands, and for an injunction against the prosecution of the suits at law until the rights of the parties are determined, and the value of her interest ascertained, under the rules of commutation recognized in the business of life insurance.

To this bill the company demurs; and, in support of the demurrer, it is claimed that the complainant has a plain and adequate remedy at law, and that there is no need of a court of equity to compel a discovery, as the complainant could compel the agents of the company to produce, in a suit at law, all the evidence required or material.

Where there exists a remedy at law, parties are not remitted by a court of equity to their action at law, unless the relief at law is as adequate, complete, and effectual as in a court of equity. May v. Le Claire, 11 Wall. [78 U. S.] 217.

While the statute declares that there shall be no remedy in equity where there is a plain, adequate, and complete remedy at law, the supreme court of the United States have decided that, to oust the jurisdiction in equity, the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity. Boyce's Ex'rs v. Grundy, 3 Pet. [27 U. S.] 210; Wylie v. Coxe, 15 How. [56 U. S.] 415; Garrison v. Memphis Ins. Co., 19 How. [60 U. S.] 312; Brown v. Pacific Mail Steamship Co. [Case No. 2,025].

So the equity jurisdiction will be entertained where there is an adequate remedy at law, if the peculiar machinery of a court of equity, as a discovery or an injunction, be necessary to do complete justice between the parties. Gass v. Stinson [Case No. 5,260].

According to the averments of the bill, which, for the purposes of this hearing, are admitted by the demurrer, a claim exists against the company for the value of the percentages in money upon all future accruing premiums on policies procured through the instrumentality of Benjamin Plummer, or of the complainant, or any of the firms in which they had been partners, as the commuted value of such prospective percentages at the time of the dissolution of the agency by death, or the act of the company, could be ascertained under the recognized rules of such commutation as administered and applied in the business of life insurance companies. But this remedy could only be enforced at law in a multiplicity of suits. A portion of the sum must be recovered in a suit in her own name as surviving partner; another portion, in her own name individually, for the percentage on policies procured by her after the dissolution of the firm by the death of Watson E. Plummer. Another suit would be requisite, in which the executor of Benjamin Plummer would be a party; and still another, in which the name of Oliver B. Plummer must be joined in an action at law, to reach the case of the percentage to be paid on policies issued before he retired, although he has no interest now in those percentages. And in these various suits, covering the percentages on over two thousand policies, the questions would have to be determined as affected by the four different classes of percentages, varied according to the varied dates of the policies and the different dates of the premiums; so that it would be practically impossible for a jury to make the requisite computations, or even, within any limits of time during which a jury could be kept in deliberation, to verify the computations and results of the most skilful experts in the science of the computation of such values, who alone could make the requisite computations and apportion the amounts properly in the respective suits. And during the pendency of these actions at law, and after their determination, the aid of a court of equity would be almost necessarily invoked to protect the rights of the sureties to the bond, by making the equitable appropriation of the amounts, if any, found to be due to the complainant in such manner as to protect the rights of the surety. The

demurrer, therefore, must be overruled, and the provisional injunction will issue to restrain the defendant from taking out executions in the suits at law until the final determination of the suit in equity, or until the further order of this court. Injunction ordered.

PLUMMER (CONNECTICUT MUT. LIFE INS. CO. v.). See Case No. 3,106.

PLUMMER (GILPIN v.). See Case No. 5,451.

Case No. 11,233.

PLUMMER v. WEBB.

[4 Mason, 380.] [1]

Circuit Court, D. Maine. May Term, 1827.

ADMIRALTY—SUIT FOR ABDUCTION OF MINOR SON —VALUE OF SERVICES —MARITIME CHARACTER OF CONTRACT.

1. A father may maintain a suit in the admiralty for a tortious abduction or seduction of his minor son on a voyage on the high seas, in the nature of an action per quod servitium amisit, for it is a continuing tort.

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 486; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 434; The Yankee v. Gallagher, Case No. 18,124; Cutting v. Seabury, Id. 3,521; Hough v. Western Transp. Co., 3 Wall. (70 U. S.) 34; The Florence, Case No. 4,880; The Charles Morgan, Id. 2,618; The Garland, 5 Fed. 926.]

[Cited in Magee v. Holland, 27 N. J. Law, 95.]

2. A father is entitled to the services of his minor children. And he may sue in the admiralty for wages earned by such children by maritime services.

[Cited in The Etna, Case No. 4,542; The Hattie Low, 14 Fed. 880; The Modoc, 20 Fed. 399.]

[Cited in Guion v. Guion, 16 Mo. 50; Halliday v. Miller, 29 W. Va. 431, 1 S. E. 827.]

3. A contract of a special nature is not cognizable in the admiralty merely because the consideration of the contract is maritime service. The whole contract must, in its essence, be maritime, or for compensation for maritime services.

[Cited in Waterbury v. Myrick, Case No. 17,253; The Perseverance, Id. 11,017; U. S. v. New Bedford Bridge, Id. 15,867; Leland v. The Medora, Id. 8,237; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 421; Gloucester Ins. Co. v. Younger, Case No. 5,487; Grant v. Poillon, 20 How. (61 U. S.) 168; The G. H. Starbuck, Case No. 5,378; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 142; Diefenthal v. Hamburg-Amerikanische P. Actien-Gesellschaft, 46 Fed. 399.]

[Cited in Case v. Woolley, 6 Dana, 21.]

Libel in the admiralty in personam. The allegations in the libel stated, that the infant son of the plaintiff [Moses Plummer] was shipped, with the consent of the plaintiff, on board of a vessel of which the defendant [Michael Webb] was master, on a certain voyage described in the libel, and proceeded to give an historical detail of certain gross misconduct, ill usage, and cruel treatment, on the part of the master, towards the son of the plaintiff; that his health was impaired thereby; and that he was improperly carried away on a second unauthorized voyage, beyond the scope of the original shipping articles, during which he died. Many aggravations were alleged in the libel as grievances, and damages were prayed accordingly. The district court, upon the hearing of the cause, dismissed the libel upon the merits. [Case No. 11,234.] Upon the appeal to the circuit court, an objection was taken to the jurisdiction of the district court as a court of admiralty to entertain the suit. [Case unreported.] It was also suggested by the court, that the allegations in the libel savoured of felony, and seemed to charge the defendant with an offence of a very heinous nature. By the leave of the court the libel was amended in this particular, and came on to be heard upon the question of jurisdiction.

Messrs Daveis and Greenleaf, for libellant.
Mr. Orr, for respondent.

STORY, Circuit Justice. When this case was formerly before this court a doubt was suggested on my part, whether the case, as laid, did not assume the character of a criminal and felonious offence; and if this objection was overcome, whether it was a case within the admiralty jurisdiction. In consequence of this suggestion the original libel was amended, with a view to get rid of the objection as to the criminal nature of the complaint; and at the last term of the court, the question, as to the admiralty jurisdiction, was, at my instance, fully argued by counsel. Some of the sources of my doubt were entirely removed at the argument; and so far as any one yet remains, it arises rather from the particular frame of the libel, than the case as argued at the bar.

The suit is brought by the libellant for damages occasioned by the loss of the services of his infant son through the misconduct of the respondent, the master of the brig Romulus, on board of which vessel the son was, with the consent of his father, shipped for a foreign voyage. The case has been argued merely on the allegations contained in the libel; and of course nothing of its real merits is to be understood as in controversy in this stage of the proceedings. There are two distinct allegations, or as they are phrased at the common law, two distinct counts in the libel. The first asserts, that the libellant entered into an agreement, that his son, who was under 14 years of age, and to whose services he was entitled, should go "on a voyage to sea within the jurisdiction of the court, on board the Romulus, of which the respondent was master, to Europe and home, for good, careful, tender, and paternal usage, suitable to his years and station, and for his improvement, according to his ability and

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

capacity, in order to render his services more useful and valuable to the libellant," and that the respondent assented to the agreement on his part. It then asserts, that the son went on the voyage accordingly, and proceeded from Portland to Savannah, thence to Liverpool, and from Liverpool to New Orleans; and that, during all this period, the son did duty on board, and rendered such services as he was able; that during this voyage the respondent suffered the son to be beaten in an excessive and improper manner, by the mate of the brig, on divers occasions, and put him in the mate's watch, and knowingly exposed him to inhuman treatment and abuse; that, after the arrival of the brig at New Orleans, the crew were discharged, and the son, finding that the brig was not to return to Portland, but to go on another voyage, solicited permission to return home, which the respondent, from improper motives, refused, and compelled him to remain on board, and to pursue the new voyage; that the vessel sailed on that voyage for Europe; and that the son, by reason of this ill usage, was much debilitated, and finally, in the course of the passage, sickened and died; whereby all his services were lost to the libellant.

The second count sets forth a like agreement, with the additional fact, that the son was to serve without wages. It then proceeds to state, in substance, the same facts and acts of misconduct and ill usage, as in the first count, and the carrying away of the son on the second voyage, without authority, and his sickness and death; and that "thereby the libellant wholly lost the service, comfort, and society, of the son, after said conversion, and evermore."

There is no doubt of the right of a father to the services of his children during their minority. It results at once from the parental duty and obligation to maintain them, and from the deep interest, moral, religious, and social, which the parental relation necessarily involves in the comfort, happiness, and preservation of offspring. It is accordingly laid down in our text-books, that a father is entitled to the advantages and profits accruing from the personal labour of his children, while they live with and are maintained by him. 1 Hoodeson, Seel. 451, 452; 1 Bl. Comm. 452, 453. And if they are, by force or fraud, by abduction or seduction, withdrawn from his power or protection, so that he loses the comfort of their society, or their services, he is entitled by the common law, upon the plainest principles of justice, to an action of damages for the tort, per quod servitium amisit. The authorities are clear to this purpose, and go even to the extent, that the tort may be waived, and an action, as ex contractu, maintained for the child's services. See Selw. N. P. tit. "Master and Servant," I, IV: Hambly v. Trott, Cowp. 375; Lightly v. Clouston, 1 Taunt. 112; Foster v. Stewart, 3 Maule & S. 191; 5 East, 39, note; James v. Le Roy, 6 Johns. 274; Hill v. Allen, 1 Ves. Sr. 83; Winsmore v. Greenbank, Will. 577. In respect to the right of a father to sue in the admiralty for the wages of his minor son, or for a master to sue for the wages of his apprentice, for services on a maritime voyage, there cannot, I presume, be the least reason for judicial doubt; at least, if there be, it is not entertained by this court. The case of Emerson v. Howland [Case No. 4,441] is directly in point, and binds my judgment.

The real difficulty in sustaining the jurisdiction, in the present case, stands wholly free from these considerations. Supposing the present libel to be for a tort, in the nature of an action for damages for an abduction or seduction, per quod servitium amisit, the only question would be, whether it was a tort arising upon the high seas. The most strenuous opponents of the admiralty, those, whose zeal in favor of the exclusive pretensions of the courts of common law, does not hesitate to adopt any doctrine on this subject, however extravagant, which is countenanced by a single authority or dictum, have been compelled to yield, that the admiralty has jurisdiction over torts committed on the high seas. Lord Coke has, in the most positive form, asserted it in his 4th Institute, 134, in behalf of the common law judges. "We acknowledge (says he), that of contracts, pleas, and querels, made upon the sea, or any part thereof, which is not within any county (from whence no trial can be had by twelve men), the admiral hath, and ought to have, jurisdiction. And no precedent can be showed, that any prohibition hath been granted for any contract, plea, or querele, concerning any marine cause, made or done upon the sea, taking that only to be the sea, wherein the admiral hath jurisdiction, which is before by law described to be out of any county." And this language conforms to the interpretation of the statutes of 13 Rich. II. c. 5, and 15 Rich. II. c. 3, for which the common law courts have contended, with so much resolution and success in other times. Mr. Justice Blackstone also, in his Commentaries (volume 3), 68, 107, admits the jurisdiction of the admiralty over maritime injuries, in the most ample terms. See Martins v. Ballard [Case No. 9,175].

Looking at the libel under this aspect, the only part of it, which lays any foundation for the jurisdiction of the court, is the seduction or abduction of the son on the second voyage from New Orleans to Europe; for as to the first voyage from Portland, there is no pretence of any unlawful retainer. The only objection, which can fairly be made to the jurisdiction, under these circumstances, is, that the unlawful act had its origin in port, and may be redressed at the common law. But in respect to maritime torts, with the exception of cases of prize, the courts of common law have constantly claimed a right of concurrent jurisdiction, and the exercise of

it has never been supposed to oust the admiralty of its authority to entertain suits of the like nature. Here, it is true, the tortious act, or cause of damage, might be properly deemed to arise in port; but it was a continuing act and cause of damage during the whole voyage. It was, in no just sense, a complete and perfected wrong, until the departure of the vessel from port; and it travelled along with the parties as a continuing injury through the whole voyage, and terminated only with the death of the son at sea. In Com. Dig. "Admiralty," F 5, it is laid down, that if the libel be founded upon one single continued act, which was principally upon the sea, though part was upon land, a prohibition will not go. And for this he cites 1 Roll. Abr. 533, line 13, where it is said, if a man take a thing upon the sea, and bring it to land, the suit for that may be in the admiral court, for it is a continued act. This is now common learning; for no suits are more frequent in the admiralty, than those for restitution for marine trespasses to property. The present case appears to me to fall precisely within the principle stated by Comyns. I think it, however, unnecessary to go into an examination of the doctrine at large, because the reasoning which supports it has been fully considered in the opinion of the district judge, in the case of Steele v. Thacher [Case No. 13,348], at December term, 1825, with a copy of which I have been favored. I take this opportunity of expressing my entire concurrence with the learned exposition given by him, on that occasion, of this branch of the admiralty jurisdiction.

The real difficulty which I have felt, in regard to the jurisdiction of the court, arises from another aspect of the case, as founded in contract. The libel, so far as it seeks damages for the misconduct of the master on the first voyage (in which there was a lawful retainer), seems to proceed upon a breach of the contract set forth in the first count. The contract is not set forth as mere inducements to the tortious conduct, but it is laid as the very gist of the suit. The gravamen is the breach of the terms of the contract, and the violation of duty which flowed from its obligations. It does not, indeed, seek a compensation for services, in the nature of wages; for no such compensation was within the scope of the contract. But it does seek compensation for positive or permissive violations of the agreement "for good, careful, tender, and parental usage." Now, my doubt is, whether a special contract, like that articulated in the libel, is of such a nature as properly falls within the admiralty jurisdiction. My opinion, upon the most careful examination which I have been able to give the subject, has hitherto been, that of right the admiralty possessed jurisdiction over all maritime contracts. In arriving at this conclusion it has been necessary to examine the decisions of the courts of common law, with critical care, and to compare them with each other, as well as with general principles. If, indeed, every decision, made by a court of common law, and every dictum of an English judge, on the subject of this jurisdiction, is to be deemed to be an absolute authority, infallible and irreversible, and conclusive upon the conscience of every American court, the course is very easy to establish what are the actual, though arbitrary limits prescribed to the admiralty. But if the subject is to be investigated upon principle; if opinions, held by these who were not only jealous of, but hostile to, the fair exercise of the jurisdiction, are to be sifted; if decisions, hastily made upon applications for prohibitions, during the vehement struggles of those rival courts, or, as one may say, flagrante bello, are to be calmly and deliberately considered; if adjudications, made at one period, are to be weighed with conflicting adjudications, made at another period; if the reasoning of cases is to be brought under discussion, and thus, non numerantur, sed penderantur; if, above all, the voice of those enlightened and learned judges, who have adorned the admiralty in different ages, and whose knowledge and experience are not cast into shade by a comparison with the ablest of their contemporaries, may not be stifled without a hearing; it will not be found quite so facile a task, as is sometimes rashly imagined, to convict the admiralty of gross usurpations, or to sustain the courts of common law in all their irregular and fluctuating restrictions upon that jurisdiction. Nor can there be any just cause of alarm to any considerate mind in the exercise of jurisdiction over maritime contracts. Courts of admiralty act within the sphere of their jurisdiction, as courts of equity, and administer justice ex æquo et bono. No objection lies against them, which does not equally lie against courts of equity. There is no real danger, in either case, to private or personal rights, unless the administration of substantial equity between the parties is to be deemed injustice. Of all contracts none require so liberal an interpretation, so enlarged a good faith, and so comprehensive an equity, as maritime contracts. And it is one of the highest excellencies of the common law courts, that, since maritime contracts have come familiarly under their cognizance in modern times, they have endeavored to give them an expansive equity, and to disentangle them from the niceties of the old technical law. No man could wish to see those courts deprived of any portion of this jurisdiction, which is now exercised by them with such beneficial and important influences upon society. But it is a very different question, whether another court is to be deprived of an ancient concurrent jurisdiction, always claimed by it as a matter of right, and always exercised by it, until borne down by a torrent of prohibitions. My opinion, as to the matter of right, remains unaltered. Whenever it shall be established,

in a higher tribunal, that a different rule ought to prevail; that the admiralty jurisdiction in America ought to be measured, not by the powers of the colonial vice admiralty courts, nor by the doctrines of admiralty judges, but by the decisions of the courts of common law upon prohibitions to the high court of admiralty in England; I shall cheerfully bow to the judgment, and submissively obey the mandate. Whatever may be my own private judgment on these matters, there ought to be no wish to contend for the exercise of powers, which involve irksome and laborious duties, and, least of all, to covet a jurisdiction which is so ably administered elsewhere. I may not be convinced, that there ought to be a surrender of the right, because its free exercise has been interrupted in other times, or a conjectured public policy requires its abandonment; but I shall resign myself to a perfect acquiescence in any judicial result which other minds may dictate.

To return, however, to the point more immediately under consideration, the difficulty is in affirming this contract to be solely and exclusively a maritime contract. It seems rather to be a temporary apprenticeship for the voyage, and not otherwise a maritime contract, than that the sea was, by implication, to be the principal scene for its performance. So far as the services of the boy are concerned, these services are principally maritime; but they constitute, not the ground of the present claim, but the consideration for the stipulations of the master for paternal and proper usage. If this case had been upon common indentures of apprenticeship, though for the purpose of learning the mystery of a mariner, I should have had great doubt, whether the apprentice could sue for a breach of the stipulated duties by the master in the admiralty. I cannot say, that the whole contract is here of a maritime nature. There is mixed up in it obligations ex contractu not necessarily maritime; and so far the contract is of a special nature. In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction, that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime. If the doctrine of the courts of common law, which denies the admiralty jurisdiction over mariners' contracts, where there is a special agreement, had been confined to cases, where the consideration for such maritime services was not money, but of a peculiar nature, not capable of adjustment in pecunia numerata, or resting in special executory stipulations, there would have been little objection to it. See Howe v. Napier, 4 Burrows, 1944; De Lovio v. Boit [Case No. 3,776]; Harden v. Gordon [Id. 6,047]. If a contract were to convey a farm or a house, or to build a mill, or to furnish manufacturing machines, or to weave cloth, in consideration of marine services, it would hardly be contended, that a court of admiralty had authority to enforce these special stipulations. In such a mixed contract the whole would most appropriately belong to a court of common law. After considerable reflection on the subject, I have not been able to persuade myself, that a contract "for good, careful, kind, tender, and parental usage," in consideration of marine services, upon a special retainer without wages, is properly cognizable in an admiralty forum. I have no desire to strain the jurisdiction, so as to reach cases of an ambiguous character. Let them be left to the common forum of the litigant parties. See L'Arina v. Manwaring [Id. 8,089].

Upon the whole, as at present advised, I incline to the belief, that the case, so far as it stands upon the first voyage, cannot be supported in this court, and that it ought to be dismissed, without prejudice to any suit in a common law tribunal. What would be the case upon a suit for ill usage by the minor himself, if living, it is unnecessary to consider, as no such case is before the court for judgment, and sufficient unto the day is the evil thereof.

Case No. 11,234.

PLUMMER v. WEBB et al.

[1 Ware (75), 69.] [1]

District Court, D. Maine. June Term, 1825.

ADMIRALTY—ASSAULT ON MINOR CHILD—LIBEL BY FATHER — DEATH OF CHILD — MERGER OF PRIVATE WRONG IN A FELONY.

1. The ancient doctrine of the common law, founded on the principles of the feudal system, that a private wrong is merged in a felony, is not applicable to the civil policy of this country, and has not been adopted in this state.

[Cited in The Harrisburg, 119 U. S. 205, 7 Sup. Ct. 142.]

[Cited in Rogers v. Huie, 1 Cal. 435.]

2. A libel may be maintained by the father, in the admiralty, for the consequential damages resulting from an assault and battery of his minor child on the high seas. But to support the action he must show either actual damage, or that which is held to be such by intendment of law, and the action may be maintained after the death of the child, though the death was occasioned by the severity of the battery.

[Cited in Sullivan v. Union Pac. R. Co., Case No. 13,599; Waring v. Clarke, 5 How. (46 U. S.) 486; Mendell v. The Martin White, Case No. 9,419; The Charles Morgan, Id. 2,618; The Garland, 5 Fed. 926; The E. B. Ward, 17 Fed. 458; The Manhasset, 18 Fed. 924; The Columbia, 27 Fed. 720; The Harrisburg, 119 U. S. 205, 7 Sup. Ct. 142.]

3. An action for the personal injury of a minor must be in the name of the child, and the damages recovered will be for the use and benefit of the child, and not of the parent.

This was a libel filed by Moses Plummer against the respondents, the master and first and second mates of the brig Romulus, for various assaults and batteries alleged to have been made on John S. Plummer, the

[1] [Reported by Hon. Ashur Ware, District Judge.]

minor son of the libellant. It was proved at the hearing that Michael Webb, the master, received the son on board the vessel at the father's request; that he was to serve without wages, and perform such services as were proper for a boy of his age, being twelve or thirteen years old, and that in consideration of his services the master should instruct him in the duties of a seaman. It was the understanding at the time, that the vessel should perform a double voyage before her return to this port, that is, should make two voyages to Europe, and that the boy was to remain with the vessel until her return to this place. On his return here, the owners might pay him such wages as his services were thought to be worth, but they were not bound to pay any. One voyage was performed to Liverpool and back, by the way of Savannah, to New Orleans, where the brig lay a considerable time waiting for freight. Soon after leaving New Orleans, on her second voyage to Liverpool, the boy sickened and died, in consequence of the beating and ill usage he had received. The libel charges several batteries during this period, and several are proved against the first mate, but no evidence was offered implicating the second mate, nor was any instance of beating brought home directly to the master. It was contended for the libellant that the evidence disclosed such a criminal negligence and inattention on the part of the master in suffering a boy of his tender age, who was placed in a peculiar manner under his protection, to be repeatedly beaten by his first officer, that for this negligence he ought to be held as a joint trespasser; that it is the duty of the master, in all cases, to protect the men under his command from the abuse of his subordinate officers, and that this obligation in the present case was enhanced by the peculiar circumstances of trust and confidence under which the boy was placed in his charge.

C. S. Daveis, for libellant.
Fessenden & Deblois, for respondents.

WARE, District Judge. Several questions of law have been raised and discussed at the bar, which require to be disposed of before we can arrive at the merits of the case, as disclosed in the evidence. They have been urged as a bar to the libellant's right to recover against either of the respondents, under any state of facts which can exist.

It is contended, in the first place, that the father cannot maintain an action, because the tort, as alleged in the libel, amounts to a felony, and that the private wrong is merged in the public crime; and in the second, that if any right of action ever existed, it is extinguished by the death of the son before the commencement of the suit. The case of Higgins v. Butcher, Yel. 90, is relied upon as an authority at common law, directly in point. That was an action brought by the husband for the battery of his wife. The battery was the cause of her death, and the action was brought after her decease. It was ruled that an action for a personal tort, done to the wife, did not lie for the husband alone, but the wife must join; and the damages being recoverable for the benefit of the wife, the right of action died with her, and did not survive for the husband. It is further added, that if a man beat the servant of another so that he die of the extremity of the beating, no action will lie for the master, because the private wrong is swallowed up and lost in the public offence.

The doctrine here stated, of the merger of the private wrong and civil remedy in a public crime, was an ancient principle of the common law, and seems to result as a natural and logical consequence flowing from the fundamental principles of the feudal system. Under that system, all property, or at least all landed property, was assumed to belong to the sovereign and superior lord. The grants which were made to private persons did not convey the absolute property, but only a usufructuary interest, and this was granted upon condition. If the conditions were not performed, this interest was forfeited, and the land reverted to the grantor, in whom the ultimate proprietary right had continued to reside. Wright, Ten. c. 1. One of the conditions implied in every feudal grant was that the tenant should not commit felony. The commission of a felony was therefore a forfeiture of the whole of the feudatory's interest in the grant. 2 Bl. Comm. 153. The common law extended this forfeiture to his goods and chattels, as well as his lands. There would therefore be no remedy which could reach the real estate of the wrongdoer, because all the interest which he had in that, ceased from the moment that the offence was committed, and reverted to the donor. And as to his personal estate, a species of property of little consideration in the early ages of the common law, the title which the crown acquired by forfeiture took precedence of any claim which a private person might have to damages to be recovered against the party. The forfeiture extending to the whole property of the felon, and the crime being capital and punished by death, nothing remained to satisfy a private demand, and no person against whom the action could be brought. The private action was therefore necessarily gone, or as it is usually expressed, the private wrong was merged in the felony. But these principles have never been adopted in this state. There is with us no forfeiture of goods resulting from felony, nor are all felonies punished by death. In this state, therefore, an action may be maintained for the private wrong, although the act which is the foundation of the suit amounts to a felony. Boardman v. Gore, 15 Mass. 331. This doctrine of the merger of the civil remedy in the public crime, which is a natural

and logical consequence of the fundamental and organic principles of feudal society, is entirely in opposition to the system of civil polity established in this country. And modern decisions in England have overruled the old cases on this point. The case of Crosby v. Leng, 12 East, 409, shows that an action may be maintained for a wrong amounting to a felony after the party has been convicted or acquitted of the public offence, provided the acquittal is not obtained by collusion. As to the other point ruled in the case cited, if the meaning be that the husband cannot recover damages for the mere personal wrong to his wife, it may be true; but if the meaning be that an action will not lie in his name alone for consequential damages, as for the loss of her services and society, and the expenses of her cure, however the law may have been formerly, I understand the contrary to be now well established. 3 Bl. Comm. 140; Chit. Pl. 61; Com. Dig. "Baron and Feme," W; Cro. Jac. 538.

But whatever may be thought of the law of that case, its application to the case at bar is not admitted. It is not questioned that an action does lie for the parent for a battery of his child. It is, however, contended that it does not lie after the death of the child which is the subject of the tort.

The private injury resulting from an assault and battery may be regarded under a twofold aspect. First, the direct and immediate personal injury, the bodily pain and suffering occasioned by the beating, and the mental anguish and humiliation resulting from the disgrace of being beaten. Secondly, the collateral or consequential injury, the loss of labor and service, and the expenses of cure which may be occasioned by the severity of the battery. The first wrong necessarily spends itself on the individual who is the subject of the battery, and as he is the only sufferer, upon the first principles of natural justice he only is entitled to the amends. For this damage, the husband cannot sue alone, because it is naturally due to his wife. But as, by the principles of the common law, the wife is not permitted to sue in her own name alone, she shall be joined in the action by her husband, or, to speak more correctly, the husband shall join in her action, because it is prosecuted for her benefit, and the damages survive to her use if the husband die before they are recovered. Com. Dig. "Baron and Feme," V; Russel v. Corne, 1 Salk. 119, 2 Ld. Raym. 1031; 1 Chit. Pl. 61. The second falls on the person who is entitled to the labor and service of the person who is the subject of the battery, and who is bound for the expenses of his cure. For this loss, the law gives him an action for damages. The death of the child or servant through whom the injury is done, before the commencement of the suit, if it is a consequence of the battery, aggravates the injury; if the death is occasioned by other causes, it leaves it as it stood before. It neither enhances or diminishes the loss. It is not easily perceived upon what principles of natural right the remedy should be taken from a party by an event which he could not control, and which leaves his rights unimpaired and his wrong unredressed. The case of Winsmore v. Greenbank, Bull. N. P. 78, is an authority to show that the death of the person through whom the injury was done, before the commencement of the suit, is not a bar to the action.

But if the parent's right of action is not extinguished by the death of the child before the commencement of the suit, it is material to inquire what damages he can recover in an action in his own name, or what damages he is entitled to in his own right. The natural and obvious answer to the inquiry is, that he can recover such damages as he has sustained in consequence of the wrong. And it is upon this ground that the law places the action. Its foundation is the loss of service, and it is so stated in all the authorities. But it seems to have been assumed at the argument that, although this is the ground of the action, or the material circumstance which enables the court to render a judgment for damages, yet that the court, having a legal ground for sustaining the judgment, may proceed to award damages beyond the loss of service and for causes which would not of themselves support an action in the parent's name. The action was likened to an action of trespass by the parent for the seduction of his daughter. This also has its foundation in the loss of service, and will not lie without a per quod servitium amisit. But in point of fact, the service, in the estimate of damages, is merely nominal. If the child is a minor, it is assumed as a presumption of law that she is a servant. No service need be proved, nor is it necessary, to support the action, that she should be an inmate of her father's family. Martin v. Payne, 9 Johns. 387. And if she be over twenty-one and lives in her father's family, the slightest acts of service are sufficient to support the heaviest damages. Reeve, Dom. Rel. 291, 292. The allegation of loss of service is necessary to let in the action, but the substance of the wrongs for which damages are awarded is the disgrace, and humiliation, and wounded feelings of the family; wrongs for which the law gives no remedy, unless they are tacked to a nominal or fictitious menial service. The law, in this case, allows a deviation from strict logical principles, in the interest of good morals; for in cases of seduction, unless the parent could recover damages no recovery could be had, and the heartless depravity of the cold-blooded destroyer of the peace of families would escape unpunished. The suit of the child is answered by the maxim, "Volenti non fit injuria." She is particeps criminis, and the law will allow her no action, the foundation of which is laid in her own turpitude. But in the case of an assault and battery, the law is different.

The parent and child may each have their distinct action for their separate wrongs. The loss of service falls on the parent, who is entitled to the labor of his child, and for this the law gives him a remedy by an action. But the wrong which is merely personal, the pain and anguish of body and mind, are the injuries of the child, which he only can feel, and for which he is entitled to his separate action, and the damages are recovered for his benefit. The damages of the parent or master, and of the child or servant, are in their nature several and distinct, and a recovery by one is no bar to an action by the other. Reeve, Dom. Rel. 376; Gray v. Jefferies, Cro. Eliz. 55.

Can the parent, then, upon the facts of this case, maintain an action for the loss of the services of his child? The child was not living in his father's family. He was placed by the parent in the custody of one of the respondents as a servant, who, by the parent's agreement, at the time of the several assaults complained of, was entitled to his services, so that if there was any loss of service, it did not, in this case, fall on the parent, but upon the master, who for the time had succeeded to his rights in this respect. Had the battery been committed on the boy by any other person than one of the ship's crew, by which he should have been rendered incapable of doing duty during the period included in the agreement, no doubt can be entertained that the master could have recovered damages for the injury. The rights of the master in this respect are as well established as those of the parent. But if the master could have maintained an action, this would necessarily have excluded the action of the father for the same cause. Considering the suit as an action for the loss of service,—and on no other ground can it be maintained,—my opinion is that it cannot be sustained.

As against Mr. Merritt, the second mate, it is dismissed with costs. There is no part of the evidence which attaches any blame to him. With respect to the master and first mate, it is dismissed without costs. There can be no doubt upon the evidence, that the boy was unreasonably beaten, and if he were alive to prosecute the suit for his own wrongs it would be a clear case for damages. There is indeed no direct proof that he was beaten by the master. But it was the master's duty to protect him from the violence of his subordinate officers. I do not admit the correctness of the argument of the counsel for the respondents, that the master in this form of action, is not liable for non-feasance. It is his duty to interpose his authority for the protection of all his men from the intemperate violence of his inferior officers, and if he suffers them to be ill-treated he ought to be held as a joint trespasser. He is intrusted by the law with the supreme power on board of his ship, and what is done by his permission must be considered as done by his authority. In the present case, the obligation to protect this boy was particularly strong, because he was placed in his care under peculiar circumstances.

[The circuit court on appeal held that the case was not wholly within the jurisdiction of the admiralty, and so remitted the parties to their action at common law. Case No. 11,233.]

PLUMSEL (HOLTZMAN v.). See Case No. 6,650.

PLUMSELL (McCLEAN v.). See Case No. 8,693.

PLUNKETT (WOLF v.). See Case No. 17,926.

PLUTO, The (FAGAN v.). See Case No. 4,605.

PLYMOUTH, The (FISHER v.). See Case No. 4,822.

PLYMOUTH, The (SCOTT v.). See Case No. 12,544.

Case No. 11,235.

The PLYMOUTH ROCK.

[7 Ben. 448.] [1]

District Court, E. D. Nw York. Sept., 1874.[2]

SUPPLIES—NECESSARIES—LIEN.

1. A steamboat, which made several trips a day from New York City to Sandy Hook, a voyage of about an hour and a quarter, kept a restaurant on board, at which food was supplied to such passengers as wished. The money received at the restaurant was received by the purser as part of the daily earnings of the boat. The crew of the boat were fed at the restaurant. Supplies for this restaurant were furnished to the boat at the city of New York, the boat being there a foreign vessel. The person who furnished the supplies filed a libel against the boat to recover their value. *Held*, that the supplies were necessary to the boat, and that the libellant had a lien upon her therefor.

[Cited in Harney v. The Sydney L. Wright, Case No. 6,082a; The New Champion, 17 Fed. 816.]

2. Articles, which form part of the natural and reasonable outfit of a vessel, for the business in which she is engaged, are necessaries.

In admiralty.

Beebe, Wilcox & Hobbs, for libellants.

Dudley Field, for claimant.

BENEDICT, District Judge. This is an action against a vessel, foreign to New York, to enforce a lien for provisions furnished the vessel in New York.

No question arises as to the fact that certain provisions mentioned in the libel were furnished to the vessel in New York, and used on board her in her ordinary employment. But it is contended that the provisions were not necessary to the vessel. The vessel was employed in carrying passengers between New York City and Sandy Hook. She had a regular route between those two

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

[2] [Affirmed in Case No. 11,237.]

points, and made several trips each day. Her passengers were supplied with such food as they might desire during any voyage, at a restaurant kept on the boat by the employés of the boat, the profits of which were received by the purser as part of the daily earnings of the boat. The crew of the vessel were also supplied with their food from this restaurant. The supplies in question were obtained for and were used in this restaurant. Upon these facts it is contended that any trip of the vessel could be made without any necessity for food on the part of the crew, and that the passengers could have survived a voyage of one hour and a quarter without provisions, and therefore it is said the articles in question are not necessaries. But, in order to bring an article within the description of necessaries for a vessel it need not appear that the voyage could not by any possibility be made without such article. It is sufficient, if the article form part of the natural and reasonable outfit of a vessel for the business in which she is engaged. In such a business as this vessel was engaged in, supplying to the passengers the food they might desire to have during the voyage was a part of her business; and it doubtless might be added, that it was necessary to the success of her voyages. Of course the food of her crew was necessary. I entertain no doubt therefore, as to the liability of a vessel for articles like those in question. A further point is made that credit was given to the owners, and not the vessel, but proofs fail to sustain this defence. There must accordingly be a decree in favor of the libellants.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 11,237.]

Case No. 11,236.

The PLYMOUTH ROCK.

[9 Ben. 79; [1] 23 Int. Rev. Rec. 129.]

District Court, E. D. New York. March 27, 1877.

MARITIME LIEN—PRESUMPTION OF CREDIT.

When the master of a foreign vessel has authority to contract upon the credit of his vessel for necessary repairs, the credit of the vessel is presumed to be an element in any contract he may make for such repairs. An apparent necessity for the credit of the vessel is presumed from the necessity for the repairs and the general authority of the master. This presumption is not repelled by proof that the owner of the vessel was in good credit at the time the repairs were ordered.

The New Jersey Southern Railroad owned several steamers, which in 1873 were plying between Long Branch and New York. The master of one, the Plymouth Rock, ordered canvas to be put over her decks, for which work the libellants [John W. Santbrink and others] charged the vessel upon their books, and renderd a bill therefor on board the vessel. They were referred to the office of the railroad company for payment, and there were asked to take the note of the railroad at 60 days. This they consented to do, if the man who furnished them the duck would take it in payment of his bill; and, getting his assent, they received the note and signed a printed form of bill-head and receipt made out by the railroad company, as against itself, covering the amount due them for this work, and some flags furnished to another steamboat of the company. The note was endorsed by the libellants and passed over to their dealer in canvas; but before its maturity the railroad company failed and went into the hands of a receiver and the note was never paid. Neither payment nor laches were set up in defence to this action, but solely that the work was done on the credit of the railroad company and not of the steamboat.

Beebe, Wilcox & Hobbs, for libellants.
Shearman & Sterling, for claimants.

BENEDICT, District Judge. This is an action to enforce a lien for certain repairs (putting canvas on decks) of a foreign vessel. The work was done in May, 1873, and its necessity to enable the vessel to transact her business is not denied.

The only defence set up in the answer, is that the work was performed solely upon the credit of the New Jersey Southern Railroad Company, and not upon the credit of the vessel.

[The evidence shows that the vessel was owned by the New Jersey Southern Railroad Company; that the work in question was ordered by the master of the vessel, whose authority to give the order has not been disputed. The order was for the vessel, and the amount was charged to the vessel in the books of the libellants. No other evidence of what occurred at the time of the contracting of the debt is given. Upon these facts alone it would hardly be contended that an exclusive personal credit to the owners had been shown.][2]

It has been proven, on the part of the defence, that the libellants who had rendered their bills on board the vessel, and had been referred to the office of the New Jersey Southern Railroad Company, as the place where they would get their pay, on appearing there were requested to take the note of the railroad company, at sixty days. This was not assented to by the libellants until they had learned whether the man from whom they had purchased the duck used by them in repairing the steamboat would be willing to accept the note from them. On application to the duck man he was found willing to take the note if endorsed by the

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[2] [From 23 Int. Rev. Rec. 129.]

libellants, whereupon the libellants accepted the note of the railroad company, payable at sixty days. This note included not only the bill for repairs to the Plymouth Rock, but also a small bill of $28 for flags furnished to the steamboat Jesse Hoyt, a vessel in the employ of the same railroad company.

At the time of giving the note the railroad company presented to the libellants, for signature, a receipt in full printed at the bottom of a bill made out by the railroad company and not by the libellants, which bill included both the bill in suit and the bill for the flags, the charges being distinguished in the body of the bill by placing opposite to each the name of the vessel to which it belonged. The heading of the bill was printed, and read, "The New Jersey Southern Railroad Company to Santbrink & Lathrop, Dr." Upon accepting the note the libellants signed the receipt, printed at the bottom of the bill, but added to the words, "Received in full of the above account," the further words, "by note payable sixty days from date." The note thus received was at once passed over to the duck-man, but was never paid, and is now tendered for cancellation by the libellants. The railroad company became insolvent and passed into the hands of a receiver within a month or two after giving the note.

These are all the circumstances proved that can have any bearing upon the issue raised by the answer, where neither payment nor laches is set up, but only that no lien for the repairs in question was ever created, because the work was done solely upon the credit of the New Jersey Southern Railroad Company and not upon the credit of the vessel; and they are not sufficient to sustain the defence.

The fact that after the work had been done the libellants were persuaded to postpone the day of payment for sixty days, provided the man from whom they had purchased their materials would give them a like extension, and that the note of the owner, payable in sixty days, was then taken, is very slight evidence to show that the terms of the original contract excluded the idea of a credit to the vessel; and any inference to that effect possible to be drawn from the form of the bill, made by the owner, which was receipted by the libellants, is repelled by the fact that the work was ordered for the vessel, that nothing whatever was then said about a personal credit, that the suggestion to take a note of the owners was first made when the libellants came to demand payment for work already done, and was then proposed as a matter of favor to the owners —not of right—and that the work was charged by the libellants, at the time, to the vessel and not to the owners, and the bill therefor presented on board the vessel.

The case contains testimony tending to show that the railroad company was in good credit at the time this work was done, but that fact, if it can be considered as proved in face of the admission that the stock of the company was selling at from twenty-five to thirty-five cents on the dollar, is not sufficient to raise the presumption of a personal credit, or to prevent the creation of a lien in a case like this. There is no evidence in this case that the master of the vessel who ordered the work had any funds at his command which he ought to have applied to procure these repairs, and no circumstances are shown casting upon the libellants the obligation of ascertaining that the master had no authority to contract for the repairs on the credit of the vessel; indeed, it has not been contended that the master had not such authority, but the ground taken is, that, as matter of fact, he did not contract upon the credit of the vessel. Where the master of a foreign vessel has authority to contract upon the credit of his vessel, and does contract for supplies necessary to the vessel, the presumption arises that the credit of the vessel is an element of the contract. An apparent necessity for the credit of the vessel is presumed from the necessity for the supplies and the general authority of the master. The Grape-Shot, 9 Wall. [76 U. S.] 138. This presumption is not repelled by proving that the owners of the vessel were in good credit at the time. In the case of The Guy, 9 How. [50 U. S.] 758, such proof was made, but the lien nevertheless upheld.

My conclusion, therefore, is that the debt in question was contracted upon the credit of the vessel, and consequently there must be a decision in favor of the libellants for the amount of their demand, with interest and costs.

Case No. 11,237.

The PLYMOUTH ROCK.

[13 Blatchf. 505.] [1]

Circuit Court, E. D. New York. Aug. 16, 1876.[2]

MARITIME LIENS—SUPPLIES—EFFECT OF OWNER'S RESIDENCE UPON CHARACTER OF VESSEL — ENROLLMENT—NECESSITY FOR THE SUPPLIES.

1. A new Jersey corporation owned a steamboat which was enrolled in the port of New York. She ran as a passenger boat between the city of New York and Long Branch, in New Jersey, making several trips a day each way. Supplies of food were furnished to her in New York, on her credit, such supplies not being absolutely necessary for the passengers or crew, but being useful and convenient. Some of the food was consumed by the employés of the vessel, but the larger part was dispensed at a restaurant on board, to passengers, who paid for what they ordered. *Held*, the enrollment of the vessel at New York did not make her a domestic vessel there, but she was a vessel in a foreign port, while in New York, because her owner did not reside at New York.

[Cited in The Rapid Transit, 11 Fed. 330; Chisholm v. The J. L. Pendergast, 32 Fed. 416; The Havana, 54 Fed. 202, 64 Fed. 496.]

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

[2] [Affirming Case No. 11,235.]

2. There was sufficient necessity for the supplies to furnish a basis for a lien on the vessel, and the fact that they were dispensed to passengers from a restaurant furnishes no ground for alleging that such necessity did not exist.

[Cited in Harney v. The Sydney L. Wright, Case No. 6,082a; Bovard v. The Mayflower, 39 Fed. 42.]

3. A lien on the vessel for such supplies was created.

[Followed in The Metropolis, Case No. 9,503; The Long Branch, Id. 8,484.]

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

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Dudley Field, for claimant.

HUNT, Circuit Justice. During the summer of the year 1873, the New Jersey Southern Railroad Company was the owner of the steamer Plymouth Rock. This vessel was run as a passenger boat between the city of New York and Long Branch, New Jersey, making several trips back and forth each day, and occupying an hour and a quarter in making a trip from dock to dock. The vessel was run by and in the interest of the said railroad company, which was an incorporation organized by and under the laws of the state of New Jersey, having its office and doing business in that state.

During the months of July, August and September, 1873, the libellant Fuller furnished to said vessel, and on its credit, at the city of New York, stores and supplies for food, consisting of butter, ham, and other articles of food, which were received and consumed on board the said steamer. The goods furnished were used partly in the support of the crew of said vessel and of the attendants thereon, and in part were dispensed from a restaurant on board said vessel, to the passengers thereon. Much the larger portion was used in the manner last mentioned. The sales from the restaurant were intended as sources of profit to the owners of the vessel, and the supplies were useful and convenient to the passengers and to the crew of said vessel. The trips were so short and the landings so frequent that such supplies were not absolutely necessary either to the passengers or the crew.

1. It is objected to the recovery, that the vessel was in her home port, and that there was, therefore, no lien for supplies furnished to her. The claimant insists that the character of the vessel, in this respect, is determined by her register and enrolment. Hence, there is produced a bill of sale from a former owner, containing a certificate of the enrolment of the vessel in the port of New York, and a new certificate of enrolment in that port, obtained by such new owner, the present claimant. Several authorities are produced upon either side, which I have duly considered. As I feel no hesitation in holding that the character of a vessel, as to its being a foreign or a domestic vessel, is determined by the place of residence of its owner, and not by the place of its enrolment, I do not deem it necessary to discuss the authorities. 1 Pars. Shipp. & Adm. p. 43, note; The Lulu, 10 Wall. [77 U. S.] 198, 199.

2. It is insisted, that these supplies were not necessary, and, hence, that there is no lien. "Necessity" is a relative term. By the uniform construction of the courts, much latitude is given in this respect. What is necessary for a packet ship to Liverpool or Havre, carrying passengers who pay the highest price and expect a table to be liberally supplied, may not be necessary for a vessel carrying coal or lumber, with crews working at low wages and accustomed to plain fare. But, in each case, no doubt, a lien may exist for the articles supplied. The Lulu, supra.

I do not see that the fact of the dispensation of the supplies from a restaurant, i. e. to individuals as called for, and to be paid for by such individuals, rather than that the passenger should be charged a passage price intended to include a charge for meals furnished, makes any difference. If a British steamer is about to sail for London with a crew of fifty men, and one hundred passengers, she must be provided with the means of feeding them. She must lay in the needed supplies in advance, ascertaining what will be needed. Whether she charges a passenger one hundred dollars and furnishes him a state room, and a seat at a general table well provided with food, or whether she charges him fifty dollars for his state room, and furnishes him meals to be paid for when and as he requires them, can be of no importance. No man can make the voyage without food, and, if it is supplied by the ship's company, the particular manner in which it is dispensed cannot be of importance. It certainly cannot be competent for the ship's owner to allege, that, for such reason, the articles purchased on its account are not necessary supplies.

3. It is strenuously urged, also, that the maritime lien for supplies furnished to a foreign vessel does not apply to a case like that before us, that of a ferry-boat between two points near at hand. If the rule does apply here, it must apply to the ferry-boats making their trips half-hourly between New York and Jersey City. These boats cross a space of perhaps a mile in width, and the boats are hourly at hand to respond to the liability imposed by the local law.

A lien is given for supplies furnished to a foreign vessel, which is denied in the case of a domestic vessel, for obvious reasons. In the latter case, the necessity for the lien does not exist, because the owner is understood to be present, and, by his personal credit and by giving liens himself on the vessel, he can procure everything to which his own credit or the value of his vessel properly entitles him. In the former case, the vessel is un-

derstood to be absent from her owner. She is a rover. She has reached a strange port, where her owner is unknown. Her voyage is unfinished, and, unless she can obtain supplies, she must lie where she is, a loss to every one. If her master has no funds in hand, the voyage must fail and his vessel must be a total loss, unless the vessel itself can furnish the means of extrication. These are the theories upon which the lien is given; and while, in practice, there have been modifications in many particulars, and while it is not intended to say that these are necessary conditions, they are, nevertheless, the foundation of the rule. The Grapeshot, 9 Wall. [76 U. S.] 136, 141; The Kalorama, 10 Wall. [77 U. S.] 212; The Lulu, Id. 197; The Lottawanna, 21 Wall. [88 U. S.] 558.

It is difficult to justify the application of this rule to a vessel that never goes to sea, and is never out of sight of her port of departure, and that is every hour of the day within the reach of the local process of the state in which the supplies are furnished. Were the question before me as an original one, I should be much inclined to take the view of the claimant, and to hold that the lien did not exist in a case like the present. It appears, however, that the decision under review is, in this respect, in accordance with the holdings of the courts of the Southern and Eastern districts of New York. The Neversink [Case No. 10,133]. Until the question shall be presented to a higher tribunal, it would not be becoming in me to hold otherwise, and I, therefore, overrule the objection under consideration. The furnishing of the supplies, and that they were upon the credit of the vessel, is reasonably established.

The judgment of the district court is affirmed.

PLYMTON (SLOAT v.). See Case No. 12,948.

PLYMTON (UNITED STATES v.). See Cases Nos. 16,057 and 16,058.

Case No. 11,238.

POAG v. The McDONALD.

CHAMBERLAIN v. SAME.

[25 Betts, D. C. MS. 75.]

District Court, S. D. New York. April, 1859.

ADMIRALTY—TORTS ON TIDE WATER WITHIN A STATE—DECISION OF APPELLATE COURT—OBITER DICTUM.

[1. An assertion of a rule of law by an appellate court, although obiter dictum, binds an inferior court.]

[2. The admiralty jurisdiction does not extend to matters of contract or tort arising in commerce on tide water wholly between ports in the same state.]

[Overruled in The Brooklyn, Case No. 1,938.]

[See note at end of The Ann Arbor, Id. 407.]

[These were libels by John Poag and others, and by Newell Chamberlain, owner of the canal boat S. K. Williams, against the steamboat General McDonald, for negligence in towing. Heard on objection to the jurisdiction.]

Platt, Girard & Buckley, for libelants.

Benedict, Burr & Benedict, for claimants.

BETTS, District Judge. An objection to the jurisdiction of the court over the cause of action was raised and argued by the counsel in both the above cases preliminarily to the hearing upon the merits. No exception had been raised in the answers or by other form of pleading to the competency of the court to take cognizance of the causes, but it was mutually conceded between the counsel that the point should be deemed in issue on this hearing, and be pronounced upon as if specially made by the pleadings.

The facts alleged in the libels which form the grounds of action are that Chamberlain was owner of the canal boat S. K. Williams, and Poag and others, including her owner, were common carriers by water, and had in their charge the lading and cargo of the boat, to be transported by them in that capacity, and that the boat and her lading received serious injury through the culpable negligence and fault of the claimants, their officers and crew; that the steamboat McDonald was a tugboat employed in that capacity on the Hudson river between Albany and New York, in towing vessels for hire. On the 26th of July, 1858, the S. K. Williams was taken in tow at Albany by the tug, to be towed to New York for the usual fare or compensation; and it is charged that in making the passage, the steamer, by her mismanagement or culpable negligence, caused the Williams to strike upon a rock in the river, by which a serious loss and injury were sustained by the tow and her cargo. The verity of these allegations is not brought under consideration. The claimants demanded the dismissal of the libels, for the reason that the law is now settled by recent judgments of the United States supreme court, that the federal courts cannot take cognizance of actions in tort, or upon contracts of affreightment, in relation to the transportation of goods, wares or merchandize between different ports in the same state, those subjects belonging exclusively to the jurisdiction of state tribunals. The reports published in the public papers of two causes decided by the supreme court at its last session give strong color to that position. Allen v. Newberry, 21 How. [62 U. S.] 241, and Maguire v. Card, Id. 248. It is not intended now to seek to discriminate the principle presented on the facts upon which the present actions rest from the doctrines declared by the supreme court in those decisions, because, if there may be found any diversity therein, it will rather be the purpose of this inquiry to ascertain and conform to the doctrines promulgated by the supreme court, although the ruling may comprehend grounds outside the limits of the matters then

directly in contestation before that court. The books by no means fail in precedents of cases in which courts establish rules of decision which are recognised and applied in after instances, in governing rights not brought directly under consideration by the allegata et probata, calling for the particular judgment rendered. The resolution of the special theorem propounded by the court at the time may be expanded into conclusions probably logically consequent thereto, but still depending for support upon assumptions in respect to open questions of law, and not upon the foundation of any actual adjudication made on the specific points by authorized tribunals. The English and American reports of all periods furnish illustrations of this suggestion. Such declarations of law outside of the subject-matter, particularly when proceeding from courts of final resort, carry an influence with them equivalent in effect to positive authorities. Whatever the rightful theory may be in relation to declarations and interpretation of rules of law made by the supreme court in relation to the jurisdiction of subordinate federal courts, I think the safe course with the inferior court will always be to accept the plain assertion of the supreme court as the highest evidence of the fact of jurisdiction, and to avoid all scrutiny into the justness of the conclusion, and much more into the consistency with its own antecedent action in that high tribunal in making it. If, then, it is found that the supreme court has asserted in those decisions, or either of them, that this court cannot take cognizance of actions for loss or damages to vessels or property incurred upon inland waters of any character, within a particular state, when engaged solely in internal trade, business or commerce, between the ports and places of the same state, because the subject is then one exclusively of municipal and local jurisdiction, I shall not entertain any inquiry whether prior rulings of the court have been made inconsistent with that doctrine; and more particularly I shall decline all consideration of the varying reasonings, if there be such, upon which the court, at the one time or the other, may have motived its decisions. I must regard the latest assertion of the law governing the point made by the court as the authoritative one.

What, then, do the latest decisions of the supreme court determine to be the limitation of admiralty jurisdiction in the United States courts with respect to transactions on waters wholly within the territorial boundaries of a particular state of the Union, or between ports and places of the same state? This inquiry I hold to be answered and governed by the rule declared for the time being, and irrespective of all prior usages or declarations by the same court. Allen v. Newberry, the first of the above-cited cases, directly asserts these doctrines: (1) That a court of admiralty has no jurisdiction over an undertaking for the carriage and transportation of goods on the lakes or inland waters of the United States from one port to another in the same state, although negligence and misfeasance in executing the undertaking be charged as a ground of action, and also although the vessel be on a voyage from one state to another; (2) that the court has no jurisdiction in admiralty over a suit upon a contract of affreightment, carriage or transportation of property between ports and places of the same state, but that such jurisdiction belongs to the courts of the state exclusively.

The case above quoted is said by the court subsequently (Maguire v. Card) to have occurred within waters upon which the jurisdiction of the court was regulated by the act of congress of February 26, 1845 (5 Stat. 726); yet that the court regarded the restriction of jurisdiction by that statute only as declaratory of the law, and that the restriction existed independently of the statute, which, it must be presumed, imports that the limitation applies to tide waters, arms of the sea, &c., as is the locus in quo in the present action, because no claim to an admiralty jurisdiction in any respect was exercised prior to that statute over lakes and navigable waters connecting them, unless the waters were subject to the ebb and flow of the tide. This last-cited case (Maguire v. Card, 21 How. [62 U. S.] 248), decided also in December term, 1858, established this doctrine in respect to the jurisdiction of admiralty courts over waters within the territorial limits of a particular state: That it does not extend to contracts of any description entered into with a vessel engaged in the business of navigation and trade in the purely internal commerce of a state between ports and places of the same state. The vessel in that case was not a domestic one, and was employed in navigation and trade upon the Sacramento river, which lies wholly within the state of California, but is subject to the ebb and flow of the tides, and was thus, according to the usual acceptation, an arm of the sea; still, though possessing that character, it is definitely pronounced by the supreme court that those waters are not within the admiralty and maritime jurisdiction of the court of admiralty in respect to matters relating purely to the internal commerce of that state. This destitution of jurisdiction seems to be absolute, and independent of the ownership of the vessel, whether foreign or American. The transaction in Maguire v. Card was upon tide waters, and in Allen v. Newberry upon waters brought within the admiralty jurisdiction by the act of congress of February, 26, 1845; but the judgment of the court appears to be unequivocal that the jurisdiction in both cases stands upon the same principle, and is derived from and dependent upon the power of congress to regulate commerce with foreign nations and among the several states and with the Indian Tribes, and cannot be exercised in respect to

purely internal navigation and trade or transportation carried on within the territorial limits of a particular state, whatever may be the cause of action or form of remedy.

The counsel for the libellants claim in these cases that the actions are substantially in tort, as the damage incurred was owing to the culpable management of the tug, and that the larger restriction of admiralty jurisdiction in local waters declared by those decisions of the supreme court should be limited to matters of contract, and not embrace those of tort. It must be observed that no such reserve or qualification of the doctrine is intimated by the court; and, further, that in Allen v. Newberry, 21 How. [62 U. S.] 244, the libel states as the gravamen of the suit that the goods were shipped on board the vessel (on Lake Michigan), to be delivered at Milwaukee, "and that the master, by reason of negligence and the unskilful navigation of the vessel and her unseaworthiness, lost them in the course of the voyage." The loss was proved to have been caused by jettison. Those allegations, and the proofs given under them, presented a case of malfeasance and loss by fault of the master of the vessel, so that it authorized at law an action of trespass, or a case against the owner for the injury and wrong, although the relationship between the parties in its incipiency sounded in contract. Alexander v. Greene, 3 Hill, 9, 7 Hill, 574; Wells v. Steam Nav. Co., 4 Seld. [8 N. Y.] 375, 2 Comst. [2 N. Y.] 204. The facts alleged in these libels before the court accordingly constitute a cause of action which might be prosecuted in trespass or case, at common law; and it is to be observed that the admiralty courts do not regard forms of action, or technicalities of any kind, in their procedures. Dupont v. Vance, 9 How. [60 U. S.] 162.

In admiralty the culpable propelling of the S. K. Williams upon a wharf, a rock, or other stationary object would be a tortious collision, equally as if the injury was inflicted by drawing her wrongfully against another moving object. The decision in Allen v. Newberry must therefore be accepted as determining that negligence or misconduct of the master of the steamer Fashion in respect to the property of the libellants, in its carriage or transportation, causing its loss thereby, did not entitle the libellants to maintain an action in the admiralty of contract or tort against the steamer, she being on waters not subject to the jurisdiction of the court, because she was employed in business of commerce and navigation between ports and places of the same state, and not between different states or territories; and in Maguire v. Card it was determined that the admiralty cannot take cognizance of any matter of contract or tort occurring upon the tide waters between ports or places in any particular state, and in relation to the purely internal commerce of the state, and which does not in any way affect trade or commerce with other states. This judgment of the supreme court withdraws from the provision of the constitution (article 3, subd. 2) the broad meaning imported in the grant of admiralty powers "to all cases of admiralty and maritime jurisdiction, and restricts its operation to matters pertaining to commerce with foreign nations, among the several states, and with the Indian tribes." Const. art. 1, § 8.

I think the language of the court in these judgments embraces every ground of action put forth in the libels in these two suits; and in submission to those opinions I shall decide, without respect to any anterior rulings of the supreme court upon kindred subjects, that this court cannot take cognizance of these suits, either upon the undertaking of the tug or the tort feasance of her master and crew. The libels must therefore be dismissed, with costs.

[NOTE. On appeal to the circuit court, the decree of this court was affirmed as far as it dismissed the libel for want of jurisdiction. Case No. 11,239. The question then arose as to what decree should be made by the circuit court in regard to costs. Id. 8,756.]

Case No. 11,239.

POAG v. The McDONALD.

[17 Leg. Int. 318.]

Circuit Court, S. D. New York. Aug. 29, 1860.

JURISDICTION OF FEDERAL COURTS — ADMIRALTY CASES—STATE WATERS.

[The federal courts have no jurisdiction of a suit in admiralty to recover damages resulting from negligent towage upon the Hudson river in the course of a voyage from Albany to New York; and it is immaterial whether the libel be founded upon contract or in tort, for the state governments have exclusive jurisdiction of their purely internal trade and commerce.]

[Cited in The Brooklyn, Case No. 1,938.]

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

[This was a libel by John Poag and others against the General McDonald for negligence in towing. From a decree of the district court dismissing the libel (Case No. 11,238), libelants appeal.]

Platt, Gerard & Buckley, for appellant.

Benedict, Burr & Benedict, for appellees.

NELSON, Circuit Justice. This is a libel filed in the court below to recover damages to a canal boat while in tow of the McDonald, on the North river, from Albany to the city of New York. The steamboat was engaged in the business of towing between these two places. The canal boat was wrecked at Vanwie's Point, some six miles below Albany, through an alleged fault of the tug. The court dismissed the libel for want of jurisdiction. [Case No. 11,238.]

It is conceded that if the libel is to be regarded as founded in contract, it must fall within the case of Allen v. Newbury, 21 How. [62 U. S.] 244, and Maguire v. Card, Id. 248. But it is insisted that the suits are founded in tort for the wrongful injury to the canal-boat, she having been forced upon the rocks

by the negligence and carelessness of the McDonald. In our view of the question, it is quite immaterial whether we assume the libel to be in contract or tort. In either aspect, the court below has no jurisdiction. The foundation principle is that the state governments have exclusive cognizance of their purely internal trade and commerce, and hence that the federal government is excluded therefrom. The grant of power on this subject to the latter is, "to regulate commerce with foreign nations, and among the several states." This clause has been expounded by the highest authority under the constitution as not embracing the exclusively internal trade of the states. The regulation of the trade must then depend upon state legislation, and upon state legislation alone. And if the district court, upon which exclusive admiralty power has been conferred in the federal government, should assume jurisdiction, it would be a jurisdiction to administer the local and municipal laws of the state, which is inconsistent with and repugnant to the principles of admiralty proceedings as they exist under the constitution and laws of congress. For the jurisdiction thus assumed would necessarily be governed and regulated, contracted or enlarged, according to the existing local and municipal laws of the state. We confess we have never seen any answer to this view of the objection to admiralty cognizance of the purely internal trade and commerce of the states. And the objection is just as applicable to the cases of tort as of contract; each is under the local legislation of the state. And the converse of the proposition is equally true, namely, that all cases growing out of foreign commerce, or commerce among the several states, and which are in their nature and character of admiralty cognizance, whether the cases relate to persons or property, or whether the tort or contract are within the jurisdiction of the federal government, which has been conferred on the district court. The determination of this class of cases depends, not upon the local and municipal laws of the states, but upon the more comprehensive principles of maritime and international law, modified and controlled by the constitution, laws of congress, and treaties.

So far as respects the regulation of foreign commerce, and commerce among the states, there can be no conflict between federal and state tribunals as to jurisdiction. For it is quite clear that, inasmuch as congress possesses the paramount power of legislation over the subject, it may not only pass laws regulating it, but may constitute tribunals to administer these laws. "The judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the United States and treaties." Const. art. 3, § 2.

The contested question of admiralty jurisdiction, except as it respects the internal trade of the states, does not concern the jurisdiction of state tribunals; as, independently of this internal commerce, the whole subject (foreign commerce, and commerce among the states) belongs to the federal government, and is subject to its regulation; and, consequently, within the above clause of the constitution, the federal court, upon which the power to administer the laws has been conferred, possesses the appropriate jurisdiction. Any dispute that may arise under the existing arrangement of the judicial power, involves simply the question whether the district court of the United States shall administer the law, or some other federal court on the common law side, instead of in admiralty. In some of the earlier cases in which the admiralty jurisdiction has been zealously and elaborately contested, the encroachment upon state jurisdiction and state laws constituted one of the prominent objections. Another was the substitution of civil law and its form of proceedings for the common law and the statutes of the states. [Waring v. Clarke] 5 How. [46 U. S.] 470, 490, 496, 500, Woodbury, J.; [New Jersey Steam Nav. Co. v. Merchants' Bank] 6 How. [47 U. S.] 397, 414, Daniel, J.

These objections, so far as the states are concerned, are certainly without any foundation. For the tribunals, modes of proceeding, and rules of decision depend upon the authority and direction of the federal government; and any questions that may arise in respect to them must be settled by that authority. Congress shall have power "to regulate commerce with foreign nations, and among the several states," and "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties," "to all cases of admiralty, and maritime jurisdiction," &c. This question of sovereignty, which has been drawn into the controversy concerning the admiralty jurisdiction, as between the states and federal government, of course did not enter into that carried on in England. Both the common law and admiralty powers of the respective tribunals depended there upon the same authority, the parliament of England. The struggle was between contesting tribunals for power under the same government; and with few exceptions, whichever tribunal in the end should take cognizance of the case, it was but to administer the same system of law; for in England, even when cognizance was taken by the common law courts of cases maritime in their nature, they applied the law of the seas as the rule of decision. So, in this country, under the constitution of the United States, whatever federal tribunal should take cognizance of maritime cases, or cases maritime in their nature, whether of common law or admiralty, it would be obliged to administer, generally speaking, the same system of jurisprudence.

We have said, and we think we have shown, that the tribunals of the states, under our system of government, have no interest in this controversy concerning the admiralty jurisdiction, nor can it be affected by the

laws of the states. We agree that, under the constitution and laws of congress, the question may be appropriately agitated in the judicial tribunals of the federal government, the same as it was in England; and the line of jurisdiction, whatever it may be, whether of admiralty or of common law cognizance, in the federal government, under the clause in the constitution conferring upon it the power over foreign commerce, and commerce between the states, must depend ultimately upon the legislation of congress; and the same clause, by necessary implication, fixes the line of jurisdiction in the states, as all power over the subject, outside of this grant, is left to the states,—in other words, remains where it existed before the adoption of the constitution,—and comprehends jurisdiction over all their exclusively internal trade and commerce. By adhering to this line, there need be no conflict between the two systems of government. The purely domestic concerns of the states are left to their own regulation: those foreign, or which concern sister states, are subject to the regulation of the federal government. In the working of our complex system there may be, at times, apparent difficulties; but when brought to the test of the constitution, the paramount law, they disappear. As an instance, a foreign ship, or one trading between different states, may be found in the internal waters of a state, and meet there a vessel engaged in its purely internal trade, each under the regulation of a different and conflicting system of law, proceeding from different sovereignties; and where a collision is imminent, or may have occurred, and the question arises which system is to govern, the constitution settles it. "This constitution, and all laws of the United States which shall be made in pursuance thereof, and all treaties, &c., shall be the supreme law of the land; and the judges, in every state, shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." We are satisfied the decree of the court below in denying jurisdiction in the case was right, and should be affirmed.

[For opinion of circuit court as to costs, see Case No. 8,756.]

POAGE (UNITED STATES v.). See Case No. 16,059.

POCKLINGTON (UNITED STATES v.). See Case No. 16,060.

Case No. 11,240.

POE v. MOUNGER.

[1 Cranch, C. C. 145.] [1]

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

BAIL—SUFFICIENCY.

A recognizance of bail taken out of court is only de bene esse; and upon the return of the writ and recognizance the plaintiff may object to the sufficiency of the bail, and if adjudged insufficient the marshal is not discharged. In order to save himself he must take a bail-bond, for the appearance of the defendant in all cases.

Motion to amerce the marshal, the bail named in the recognizance taken before justices of the peace, being alleged to be insufficient.

Mr. Mason, for plaintiff. The act of Maryland of April, 1715 (chapter 28, § 2), requires that bail should be first given to the sheriff, by the defendant for his appearance, that is, by the usual bail-bond; and then, in order to save the necessity of his going into court to give bail to the action, he may enter into recognizance out of court, in the manner provided for by the act; but by the fourth section, it is to have only the like force and effect as if the same were taken de bene esse before the justices of the court during the sitting. And by the fifth section the courts may "make rules and orders for justifying such bails and making the same absolute, as to them shall seem meet, so as the cognizor or cognizors of such bail, or bails, be not compelled to appear in person in the provincial court to justify him or themselves." The act of October, 1778 (chapter 21) only alters the form of the recognizance, but does not make the bail absolute. The sheriff ought, in all cases, to take an appearance bond; and, if he does not, he takes the bail-piece at his peril.

P. B. Key, contra. The act of 1715 was to take away the necessity of a bail-bond. The recognizance is the same thing as if taken in court. The fourth section of the act of 1715 requires that the court shall, upon the appearance being entered for the defendant, receive the recognizance of bail so taken. The act of 1778 (chapter 21, § 5) requires the justices, who take the bail, carefully to examine into the sufficiency or such bail, and to be careful that they do not take insufficient bail; which would be unnecessary if the sufficiency was to be examined into again in open court. The justices out of court act judicially in taking bail, and their judgment is conclusive, they are substituted for the court. If bail is taken in court the marshal is discharged, he has no power to take the party again. It is not necessary that the sheriff should take a bail-bond, if he returns a regular recognizance of bail to the action.

Mr. Mason, in reply. Before 1715, the law of Maryland was as in England. This recognizance before justices is only de bene esse. The object of the act of 1715, was to save the trouble of going to court to give bail to the action; which the defendant was bound to do, by his bail-bond given to the sheriff. The bail-bond is not discharged until the recognizance is returned and approved by the court. It is to have the same effect as a bail-piece de bene esse taken in court. What is the meaning of the terms "bail de bene esse," used in the act? and why should it provide

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

for rules for making the bail absolute, unless the plaintiff had a right to object to the sufficiency of the bail upon the return of the bail-piece? The marshal ought to take a bail-bond, and on taking such a bond, the defendant is then discharged from his custody, and he cannot take him again.

THE COURT was of opinion, that the bail-pieces were not absolute, but open to objection as to the insufficiency of the bail, and that when objected to they were not to be received without the bail's justifying. But THE COURT made an order that any affidavits made by the bail before a justice of the peace of Washington county, should be deemed as if taken in court. The bail-pieces not being received, the marshal was called and produced the defendant, who was committed.

POILLON (GRANT v.). See Case No. 5,700.

Case No. 11,241.

POILLON v. SCHMIDT.

[6 Blatchf. 299; 3 Fish. Pat. Cas. 476; 37 How. Prac. 77; Merw. Pat. Inv. 321.][1]

Circuit Court, S. D. New York. Jan. 30, 1869.

PATENTS — VALIDITY — CONSTRUCTION OF CLAIM — ANTICIPATION — "AN ART OR PROCESS."

1. The letters patent granted to Peter Poillon, July 21st, 1857, for "means for rendering joints steam-tight," are valid.

2. The claim of that patent, to "the method, herein described, of causing steam to become a packing to itself, in steam cylinders or other parts of steam machinery, by allowing the steam to act in one or more grooves, substantially as specified," does not claim the use of such grooved surfaces in themselves, or in connection with air, instead of steam.

3. The patentee having discovered the fact that steam might be made self-packing, when introduced into small grooves in one of two contiguous surfaces not actually in contact with each other, his patent is not invalidated by the fact that air had previously been made self-packing in an air engine by the use of like grooves.

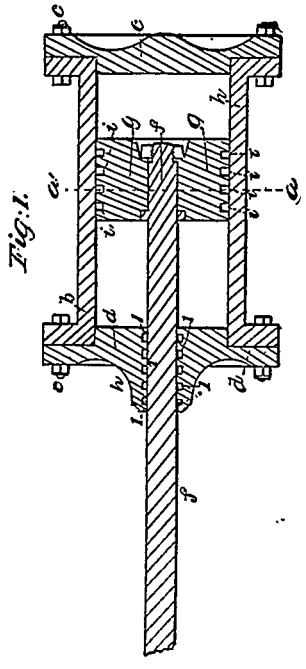
4. The claim of such patent is a claim to an art or process.

5. The case of Le Roy v. Tatham, 22 How. [63 U. S.] 132, cited and applied.

This was an action at law [by Peter Poillon against Joseph Schmidt] for the infringement of letters patent [No. 17,855] granted to the plaintiff on the 21st of July, 1857, for a new and useful "means for rendering joints steam-tight." The invention was made by William S. Gale, and assigned to the plaintiff. The specification spoke of the invention as "a substitute for all known means of packing pistons or other steam joints." It consisted of a grooved or a corrugated surface, with an opposing smooth or plain surface. The grooves could be made in the surface of the piston, or in the interior surface of the cylinder, as preferred. The specification described as follows the working of the structure:

The steam, as it is let into the cylinder, rushes in between the piston and cylinder, and fills up the grooves and the intervening space between the piston and cylinder, where it practically forms a complete packing. The steam which fills the grooves and intervenes between the piston and cylinder, also acts as a cushion to partially relieve the piston and cylinder from contact and friction. The grooves may be one or many, at more or less distance apart, more or less wide or deep, and they may be perpendicular, or more or less oblique to the moving surface and of any sectional form. The best method is to groove one moving surface and leave the opposing surface smooth, to make the grooves thin and frequent, and the corresponding ribs or flanges of the same, or about the same, thickness as the width of the grooves. The grooves need not be deep. From one-quarter to one-half inch will answer. The piston can be of any ordinary size and dimensions now in use, or a trifle larger. It should fit easy, and does not require to be in actual contact with the cylinder. To cut the grooves perpendicular to the axis of the joint, or to the moving surface, and in the sectional form of a parallelogram, is the better way, and sufficient for all purposes, and is the most simple and cheap in construction. See representation in the accompanying drawing.

[Drawing of patent No. 17,855, granted July 21, 1857, to W. S. Gale. Published from the records of the United States patent office.]



[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Merw. Pat. Inv. 321, contains only a partial report.]

"It will be apparent that my grooves and intervening ribs may be used on any joint between two surfaces subject to the operation of steam under pressure, to cause steam to become self-packing. The particular point of my invention and discovery, and its importance, will be perceived from the following. Since the introduction of steam as a motive power, it has always been supposed that two contiguous surfaces could only be rendered steam-tight by actual contact. Hence, every steam engine that has heretofore been made, has depended upon smooth surfaces in contact, or else upon some character of elastic packing that would set steam-tight against its adjacent surface. To accomplish this, great varieties of metallic and other packing have been devised, and vast expenses incurred to make the pistons and other moving joints steam-tight; and this course has heretofore been universally pursued. I believe myself, therefore, to be the original and first inventor or discoverer of the fact that steam, when introduced into small grooves, in one of the contiguous surfaces, will itself form a packing, without said surfaces actually being in contact. I, however, wish it to be understood, that I do not claim the grooved surfaces in themselves, as these have heretofore been used for other purposes, and have been used in connection with air engines."

The claim was to "the method, herein described, of causing steam to become a packing to itself, in steam cylinders or other parts of steam machinery, by allowing the steam to act in one or more grooves, substantially as specified." The case was tried before the court without a jury.

Frederick H. Betts, for plaintiff.
Samuel D. Cozzens, for defendant.

BLATCHFORD, District Judge. If the patent be valid, the infringement is not denied. The defence is put upon the ground of a want of novelty in the invention. What is adduced to defeat the patent is, a publication in a work in German called the "Schauplatz," published at Weimar, in Germany, in 1847. The text of the publication is accompanied by a drawing, and is this, as translated: "Mr. Cavé uses for his blowing machines a very ingeniously arranged piston, whereby the leather packing becomes unnecessary, which is perfectly air-tight, has no friction, does not become heated, and requires no cost for keeping it in order. This piston consists of a hollow cast-iron ring, which has a diameter about two or three millimeters less than the cylinder, and whose outer surface has the greatest practicable number of annular and square sectioned depressions a, b, c, d. If now, for example, a piston arranged in this way goes upward and compresses the air which is found above it, and then this air, in part, presses in between the walls of the cylinder and the outer wall of the piston, having reached a, it freely expands, so that it compresses the air therein contained, and then loses for once a part of the force by which it had been pressed in, by which its motion is hindered, and there is opposed to it on the other side, to which it tends to go, a certain resistance. It follows from this, that the air pressed into a works backward, one after another, into the grooves, b, c, d, with a force which constantly decreases and which, for a sufficient number of grooves can become zero. Therefore, theoretically considered, the number of grooves must stand in direct proportion to the pressure. Mr. Cavé has employed these pistons for very many blowing cylinders, and even, too, for one of three metres in diameter. He has made careful experiments with this contrivance, and the results obtained agree in all respects with the theory. An essential condition for the employment of this piston is a perfect centricity of the cylinder, a condition which we can now easily obtain by means of the vertical boring machine."

The first question to be decided is—what is the proper construction of the plaintiff's patent? If it claims merely the arrangement of the grooves in one of the two surfaces, one of the two surfaces being a moving surface, then, undoubtedly, the arrangement of Cavé is an answer to the patent. But the specification says, that the inventor does not claim "the grooved surfaces in themselves." Nor does he claim the use of the grooved surfaces in connection with air, for, the specification states that they have "been used in connection with air engines." The inventor, from the language of his specification, may fairly be said to have had in view the apparatus of Cavé, which used grooved surfaces, in an air engine. He puts his invention, however, on an entirely different point, and claims that, notwithstanding Cavé, he has made a patentable invention. He says that he has discovered the fact that steam may be made to pack in, and of, itself, or to become what he calls "self-packing"; that, prior to his invention, it had always been supposed, ever since steam had been introduced as a motive power, that two contiguous surfaces could be rendered steam-tight only by actual contact; that, consequently, all steam engines had depended, for steam-tight moving joints, on the contact of smooth surfaces, or on elastic packing set steam-tight against its adjacent surface; that, in carrying out this idea, great varieties of packing had been devised at great expense; and that he first discovered the fact that steam, when introduced into small grooves in one of two contiguous surfaces, will itself form a packing without the surfaces being actually in contact. It is not attempted to be shown, on the part of the defence, that these allegations of the specification are not true, otherwise than by introducing the description and drawing of the Cavé apparatus. But it is

insisted, that air, the elastic fluid used in the Cavé apparatus, operated therein in the same manner, in connection with the grooves, as steam, the elastic fluid used in the plaintiff's apparatus, operates therein in connection with the grooves; and that, the grooves and the grooved surfaces being alike in the two, and the air and the steam, as used, being equivalents for each other, there is no patentable novelty in using the grooves in connection with steam, but that it is merely the application of an old apparatus to a new use. Opposed to these suggestions is the fact, that, until this patent was issued, the idea was not promulgated that steam could be made self-packing, and the publication in the "Schauplatz," that air could be made self-packing in an air engine, remained before the world ten years prior to the patenting of Gale's invention, without that being suggested which is now asserted to be so obvious, in view of the apparatus of Cavé. The invention, as set forth in the specification, is a highly meritorious and useful one, and one which a court will desire to sustain, if consistent with the principles of law.

The claim is to "the method, herein described, of causing steam to become a packing to itself, in steam cylinders, or other parts of steam machinery, by allowing the steam to act in one or more grooves, substantially as specified." It is not possible to mistake the tenor and purport of this claim, when it is read in connection with the rest of the specification. It is a claim to an art or process. It is not a claim to the grooved surfaces. But it is a claim to the process of the self-packing of steam, used in steam machinery, when effected by allowing the steam to act in one or more grooves, as described in the specification. Gale, undoubtedly, was the first to discover that steam could be made to pack itself, and that it could be made to do so by causing it to act in the way described, in one or more grooves. The grooves, used in an air engine were, indeed, old. But it by no means followed, because air would work successfully in the apparatus of Cavé, that steam could be made to pack itself, or to do so by means of grooves, or to do so in the apparatus of Cavé. There was room for experiment as to the capability of steam to act in that way, and as to the character of the grooves to be used, and as to what space might or might not be left between the contiguous surfaces. And it does not detract from the novelty or patentability of the invention, that, in carrying it out in practice, the use of grooves like those in Cavé's apparatus was found beneficial. The claim is not to all methods of causing steam to become a packing to itself, in steam machinery, but to the method described in the specification, whereby the property of steam discovered by Gale is made to subserve a useful purpose, by being carried into effect in a practical mode. The newly discovered property of steam, and the practical adaptation of it to a useful end, by the means described, is the invention made and claimed.

It is difficult to distinguish this case from that of the Hanson patent for making lead pipe, which was sustained as a valid patent, by the supreme court, in Le Roy v. Tatham, 22 How. [63 U. S.] 132. The Hansons discovered that lead, when recently set and solid, but still under heat and extreme pressure, in a close vessel, would reunite perfectly after a separation of its parts. Availing themselves of this property in lead, the inventors succeeded in making by machinery, at a reduced expense, lead pipe of a better quality than had before been known. The claim of the patent was to the combination of machinery employed, "when used to form pipes of metal under heat and pressure, in the manner set forth, or in any other manner substantially the same." The machinery used was shown to be, in principle, substantially the same with machinery which had before been used to make maccaroni, and with machinery which had before been used to make clay pipe. The claim was stated by the court to be a claim to the machinery only when used to form pipes of metal under heat and pressure; and it was sustained by the court, against the objection that it only claimed the application of an old machine to a new use, or to produce a new result. The claim in the Hanson patent would have been the same, to all intents, if it had claimed the method of causing lead to separate and reunite, at a welding heat, under pressure in a close vessel, by the use of the machinery described, to form lead pipe, in the manner set forth. The claim of the Gale patent would be the same, in effect, if it were to claim the arrangement of the grooves, substantially as specified, when used in connection with steam, to cause the steam, by acting in the grooves in the manner described, to become a packing to itself in steam machinery.

I am satisfied that the Gale patent is valid, that the claim is sustainable, that the invention claimed is new and useful, and that the plaintiff is entitled to a verdict for $50, on the two machines proved to have been used by the defendant, the license fee fixed by the plaintiff being shown to be $25 on each machine.

Case No. 11,241a.

POLACK v. UNITED STATES.

[See Case No. 16,061.]

Case No. 11,242.

The POLAND.

[2 Mich. Lawy. 16.]

District Court, E. D. Michigan. 1877.

WITNESS — PARTIES IN INTEREST — ADMIRALTY — DEATH OF PARTY.

1. When, after the filing of a libel against a vessel and giving the stipulation to answer judg-

ment, the claimant and owner of the vessel dies, and the answer is put in by the administrator of his estate, the same rule with regard to the exclusion of parties in interest as witnesses (section 858, Rev. St. U. S.) applies as if the case were an ordinary common-law action brought against the administrator.

2. In such a case the surviving party is not entitled, as a matter of right, to testify as to transactions with the intestate; but, when the court can see that justice demands that he should be sworn, it is within its discretion to permit his testimony to be given.

On petition of libelants to permit themselves to be sworn as witnesses in their own behalf.

This was a libel for services rendered in towing the barge Poland from Port Huron to East Saginaw. After the filing of the libel, and giving the stipulation to answer judgment, the claimant and owner of the vessel died, and the answer was put in by the administrator of his estate. Upon the hearing, libelants offered themselves as witnesses to certain transactions between them and the deceased. It was claimed, however, in defense, and the court so held, that the case fell within the proviso of section 858 of the Revised Statutes, and that they could not testify as to any transactions with or statements by the deceased claimant. The trial was then stopped, and the case ordered reheard at the next term of court. Libelants then petitioned the court for leave to testify at the rehearing, claiming that the matter was within the discretion of the court.

George E. Halladay, for libelants.
F. H. Canfield, for claimants.

BROWN, District Judge. It was insisted at the hearing that as the action was not originally brought against the administrator, but was a proceeding in rem, the case did not fall within the proviso of section 858, and that the libelants were entitled to be sworn as to transactions with the intestate as a matter of right. I am satisfied, however, with the ruling made at the hearing upon this point. It was held in the case of U. S. v. Ten Thousand Cigars [Case No. 16,451] that a proceeding in rem to obtain a forfeiture of property for violation of the internal revenue law was a "civil action," within the meaning of the section above quoted. Libelants would undoubtedly have been entitled to be sworn had it not been for the proviso, although the action was not originally commenced against the administrator of the owner; still, it has been held that, after the giving of a stipulation to answer judgment in a suit in rem, the action becomes a personal one, as between the libelants and the claimant, and I think the same rule with regard to the exclusion of parties in interest as witnesses applies as if the case were an ordinary common-law action brought against the administrator.

The proviso, however, itself makes an exception in favor of parties "called to testify to transactions with the deceased by the opposite party, or required to testify thereto by the court." Libelants now petition for leave to be sworn under the last clause of this proviso. It is claimed by the defense, however, that this clause applies only to those cases where the opposite party is entitled to call his antagonist and cross-examine him as upon a bill of discovery; that is, although the party cannot make himself his own witness, he may be made a witness by the opposite party, though not for himself, as if he were a witness in his own behalf. Then analogies of chancery practice are suggested where it is understood a similar practice prevails. Benson v. Leroy, 1 Paige, 122; 3 Daniell, Ch. Prac. 884–885, notes.

Perhaps the use of the word "required," instead of permitted, gives some support to this theory; but I think this could not have been the intention of the legislature, as no such clause would have been necessary to produce this effect. The practice in admiralty is analogous to that in chancery, and whatever the rules of chancery practice would permit would also be permitted in admiralty without legislation. Both systems of practice are derived from the civil law, and the methods of procedure, after the institution of the suit, are similar, except where the peculiar exigencies of the admiralty suggest a different course. I think it was the intention of the legislature, by the clause in question, to permit the court, in cases falling within the proviso, to exercise its discretion in receiving the testimony of the party as a witness. Where the case turns upon a transaction between one party and another deceased, and the circumstances are such as to induce the court to believe that the transaction would be denied by the deceased party if he were alive, and there are no extraneous circumstances throwing light upon the subject, then the testimony of the surviving party should be excluded; but where the court can see that the transaction, as stated by the surviving party, is probable, and there are corroborating circumstances tending strongly to support his version,—in short, when it can see that justice demands that the surviving party should be sworn,—the discretion of the court should be exercised to permit his testimony to be given.

Apply this view of the law to the present case. While the barge was lying at Port Huron, a contract was made between the masters of the tug and barge, by which she was to be towed with other barges to Bay City for one hundred dollars. Shortly before reaching Pointe Aux Barques, the tow was overtaken by a heavy storm, the line connecting the Poland with the barge next in front of her gave way, and she was left adrift. After the tow was broken up, the tug went back to Port Huron, and in a day or two thereafter went in search of the barges, found the Poland at anchor about twenty-

five miles from Port Huron, towed her back to Port Huron, and the next day took her and another barge, and started again for Bay City. On reaching Saginaw Bay, another storm arose, the Poland's line again parted, and left her adrift. The tug then went into Bay City for more coal, and came out the next day to look after the barges. Just outside of Bay City, Mr. Clark, the original claimant and owner of the Poland, got on to the propeller from the tug, went up to Port Hope, where they learned that the barge Poland had gotten back to Port Huron, and the conversation sought to be given in evidence was then had. It is claimed by the libelant Graves, with whom the conversation was had, that, the wind being then ahead, he told the owner of the Poland that he would rather give him what he had done than go down after her to Port Huron; but Clark said he felt as if he ought to pay his tow bill; that he told the owner it would not pay him to go to Port Huron, and tow her up there for such a bill. The owner replied, he felt as if he ought to pay his tow bill, "after I had done what I had to get her there," and if he would go to Port Huron after his barge, and tow her to Bay City, and not tow anything else, he would give him another hundred dollars, which would make the bill two hundred instead of one hundred dollars. Another witness, not a party to the suit, testified that there was a conversation between these parties, and that the owner of the Poland told him "there was an extra." "They were to pay extra, but he did not understand what amount." As matter of fact, the tug did go to Port Huron, took the barge in tow, and towed her to Bay City alone, and delivered her there in safety. He also testifies that there was considerable reluctance on the part of the owner of the tug in undertaking to tow the Poland again. After the barge arrived at Bay City, a bill for two hundred dollars was made out; and it is also claimed by another party, libelant, that $102.50 was paid upon this bill, and that there now remains a balance of $97.50 due him. Libelants now request to be sworn as to conversation with the owner of the barge at Port Hope, and to the payment of $102.50. In determining this question, I consider myself at liberty to look, not only at the petition itself, but at all the testimony which was given at a former hearing, including the testimony of the parties themselves, which was ultimately ruled out. It is manifest that the service performed by the tug was a very arduous and meritorious one. In endeavoring to carry out his first contract, the tow was overtaken by two storms. The Poland's line parted twice, without any fault of the tug, and she was left adrift upon the lake. To have ventured, with other barges, to turn around and attempt to pick up a barge under such circumstances, would have been extremely hazardous, not only for the tug, but for the other barges, and I think that no prudent tug-master would have ventured to do this in his encumbered condition. In the case of The Clematis [Case No. 2,876] it was held by this court that the duty of turning back and endeavoring to pick up a tow of barges under those circumstances was a matter which rested to a great extent in the judgment and discretion of the master, and that a court would not interfere with or reverse that judgment if fairly exercised, although the burden of proof was upon the tug to show that his action was justified by the exigencies of the case. I question seriously whether the intervening circumstances were not such as to justify the master of the tug in treating his original contract as abandoned, and whether, if he had then succeeded in picking up the barge after the line was broken, he would not have been entitled to compensation in the nature of salvage. This view is supported by several recent English cases. The J. C. Potter, 3 Marit. Law Cas. 506; The Minnehaha, 1 Lush. 348; The Pericles, Brown. & L. 81; The Galatea, Swab. 350; The White Star, L. R. 1 Adm. & Ecc. 70; The Waverley, 1 Marit. Law Cas. (N. S.) 47. The proposed testimony tends to show that the original contract was abandoned by mutual consent; that a new contract was made, by which the tug agreed to go to Port Huron, and tow the barge alone to Bay City for $200.

The circumstances seem to me to indicate as quite probable that such contract was made. Libelants produce a bill for $200, upon which there is an endorsement, in writing, of a payment of $102.50. The claimant admits the payment of $100, but objects to the proof of the payment of a larger amount, on the ground that it was a transaction with the deceased. It seems to me highly improbable that the payment of a greater amount than the contract called for upon the theory of the claimant would have been made if the original contract had been considered still in force. It also seems to me improbable that libelants would admit a larger payment to have been made than was in fact made; and the endorsement upon the draft, though unexplained, seems to support his theory. It is also claimed by libelants that the owner of the barge admitted to them more than once the correctness of the account as rendered.

Under all the circumstances of the case, I am satisfied that justice requires that the libelants should be permitted to testify in their own behalf as to transactions with the deceased, and an order will be entered to that effect.

Case No. 11,243.

POLAND v. GLYN.

[Cited in Doan v. Compton, Case No. 3,940, and in Arnold v. Maynard, Id. 561. See 2 Dowl. & R. 310, and 4 Bing. 22, note.]

Case No. 11,244.

POLAND v. MARYLAND COAL CO.

[S Ben. 347.] [1]

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

CHARTER PARTY—TIME OF VOYAGE.

A vessel was chartered for a series of voyages from Georgetown, D. C., to Weymouth, Mass., "from the 2d day of May, 1874, until the 1st day of November, 1874." She made several voyages under the charter and arrived at Georgetown on October 19th, when the master reported to the charterers' agent and demanded a cargo, which the agent refused to give under the charter, unless the master would agree to finish his trip before November 1st. This the master declined to do. By special agreement the agent gave him a cargo at a less rate of freight than that stated in the charter, without prejudice to the rights of either party. This cargo he carried, and he then filed this libel against the charterers, to recover the difference of freight. *Held*, that the master, under this charter, was not entitled to claim the cargo unless the voyage was to be completed before November 1st; and, as the master declined to agree to do this, the charterer was justified in refusing to furnish the cargo.

[This was a libel by Nathan W. Poland against the Maryland Coal Company for freight.]

Scudder & Carter, for libellant.
Alexander & Green, for respondents.

BLATCHFORD, District Judge. By the charter party made in this case, the vessel was chartered "for a series of voyages from Georgetown, D. C., to Weymouth, Mass., below all bridges, from the 2d day of May, 1874, until the 1st day of November, 1874," the charterers to have the "privilege of sending the vessel two trips to Boston in lieu of two to Weymouth, on the terms following." The charterers were to furnish to the vessel "a full and complete cargo of coal, under deck, each trip," and to pay for the use of the vessel during the voyage $2.65 per ton of 2,240 pounds, delivered at Weymouth; freight payable on delivery of cargo; if to Boston, $2.50 per ton. The vessel made one trip to Boston and four to Weymouth, with cargoes. Her trip to Boston occupied 11 days in May. Her trips to Weymouth from Georgetown occupied respectively 9 days in June, 11 days in July, and 10 days in August. One of her trips to Weymouth seems, by special agreement, to have been made from Baltimore. Leaving Weymouth, October 10th, she arrived at Georgetown October 19th. Her master reported that day at Georgetown, to the proper agent of the respondents, and demanded a cargo. It was refused, unless the master would agree to finish his trip before November 1st. He declined so to agree. Subsequently he took a cargo from the respondents for Boston, at the rate of $1.60 per ton, under a special arrangement that it should be without prejudice to the claims of either party, under the charter party. This suit is brought to recover a freight of 90 cents a ton on 601 tons of coal, being the difference between the charter rate, $2.50, and the $1.60.

It clearly appears that the master contended, in his conferences with the agents of the respondents, that he was entitled to a cargo at the charter rate, provided he presented his vessel for such cargo before November 1st, and that the agents of the respondents contended that the charter rate applied only to cargoes which should be delivered before November 1st. I think the latter is the proper interpretation of the charter party. The hiring of the vessel is for the voyage as a whole, from Georgetown to Weymouth or Boston, with the cargo, and the freight is payable only on delivery of the cargo at the place of destination. No provision is made for freight pro rata itineris. As the master expressly declined to agree to complete the trip before November 1st, the respondents were justified in declining to give him a cargo under the charter party. The libel is dismissed, with costs.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 11,245.]

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

[2] [Affirmed in Case No. 11,245.]

Case No. 11,245.

POLAND v. MARYLAND COAL CO.

[14 Blatchf. 519.] [1]

Circuit Court, S. D. New York. June 21, 1878.[2]

CHARTER PARTY — CONSTRUCTION — DUTY TO FURNISH CARGO—LAY DAYS.

1. Where a vessel was chartered for "a series of voyages" from G. to W., from May 2d to November 1st, with coal as a cargo, each trip, for a compensation per ton of coal, the charterer was not bound to furnish a cargo, at G., on October 19th, unless there was reasonable cause to believe that the voyage could be completed, in the usual way, by November 1st.

2. As the charter specified what lay days should be allowed for loading, the charterer was not required to furnish a cargo, except at his own convenience, during such lay days.

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

[This was a libel by Nathan W. Poland against the Maryland Coal Company to recover balance of freight. From a decree of the district court dismissing the libel (Case No. 11,244), libellants appeal.]

George A. Black, for libellants.
Charles B. Alexander, for respondent.

WAITE, Circuit Justice. On May 2d, 1874, the schooner Lizzie Heyer, then being in the port of New York, was chartered by the respondent "for a series of voyages from Georgetown, D. C., to Weymouth, Mass., below all bridges, from the second day of May

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

[2] [Affirming Case No. 11,244.]

until the first day of November, 1874, charterers to have the privilege of sending the vessel two trips to Boston in lieu of two to Weymouth." The respondent engaged "to provide and furnish to the said vessel a full and complete cargo of coal, under deck, each trip, and to pay * * * for the use of said vessel, during the voyage aforesaid, two dollars and sixty-five cents ($2.65) per ton, of 2,240 lbs., delivered at Weymouth. Freight payable on delivery of cargo. If to Boston, two dollars and fifty cents ($2.50) per ton, and three cents per ton per bridge." The lay days allowed by the charter for loading and discharging were "at the rate of one day, Sundays and legal holidays excepted, for every hundred tons of cargo," commencing twenty-four hours after the arrival of the vessel in port, and notice thereof to the respondent, or its agents or consignees. The carrying capacity of the vessel was upward of six hundred tons. Under this charter the vessel made one voyage to Boston, three to Weymouth, and one, by special arrangement, between Baltimore and Weymouth. She sailed from New York to Georgetown, May 3d, and arrived May 10th; was loaded, and sailed for Boston, May 13th, arriving there May 24th; sailed for Georgetown, May 30th, where she arrived June 6th; sailed for Weymouth, June 10th, arriving June 19th; sailed again for Georgetown, July 1st, and arrived July 8th; sailed again for Weymouth, July 15th, and arrived July 26th; sailed for Georgetown, July 31st, and arrived August 7th; sailed for Weymouth, August 9th, arriving August 19th. From Weymouth, by special agreement, she then made a voyage to Baltimore and back, sailing from Weymouth, September 4th, and arriving at Baltimore, September 8th, and sailing from Baltimore, September 10th, and arriving at Weymouth, October 1st. She then sailed from Weymouth, October 10th, and arrived at Georgetown, October 19th. On her last arrival at Georgetown, she reported to the respondent, and demanded a cargo under the charter. At that time the ruling market rate of freight to Boston was one dollar and fifty cents per ton. The respondent offered to put a cargo on board, under the charter, for Boston, if the vessel would agree to deliver it at that place by November 1st. This agreement the libellant refused to make, but he offered to receive a cargo under the charter and enter upon the performance of his voyage. The respondent then offered to load her, and if she arrived in Boston by November 1st, pay the charter price, but, if after that date, the market price. This also was refused by the libellant. On October 24th, the respondent offered to load the vessel for Boston at one dollar and sixty cents per ton, "without reference or prejudice to claims of either party under charter, leaving claims for separate settlement, the captain to stipulate." This proposition was accepted October 26th. She was accordingly loaded under this arrangement, and sailed October 27th, arriving in Boston November 26th. She was detained on her voyage ten days at Hampton Roads, on account of an accident to her captain. The freight actually paid under this last shipment was $961.60, while, at the charter rate, it would have amounted to $1,502.50. This libel was filed to recover the difference, being $540.90.

The charter party being for "a series of voyages," the libellant could not be required to receive, or the respondent to furnish, a cargo under the charter, unless there was reasonable cause to believe that the voyage could be completed, in the usual and ordinary way, by November 1st.

The respondent could not be required to furnish a cargo, except at its own convenience, during the lay days allowed by the charter.

After allowing the respondent such time as it was entitled to, under the charter, for loading the vessel, there was no reasonable probability that a voyage to Boston could be completed by November 1st.

The libel should be dismissed. See Poland v. Maryland Coal Co. [Case No. 11,244] 8 Ben. 347.

Case No. 11,246.

POLAND et al. v. The SPARTAN.

[1 Ware (134) 130.] [1]

District Court, D. Maine. July 1, 1828.

SEAMEN'S WAGES — LIEN ON FREIGHT — STATUTE ALLOWING PROCESS AGAINST VESSEL—LIABILITY OF CHARTERERS—INSOLVENCY—PRIORITY.

1. The seamen have a lien, by the maritime law, on the freight as well as the vessel for their wages.

[Cited in The Hendrik Hudson, Case No. 6,358; The Hyperion's Cargo, Id. 6,987; The Eolian, Id. 4,504; McCarty v. The City of New Bedford, 4 Fed. 830.]

[Cited in Story v. Russell, 157 Mass. 157, 31 N. E. 753.]

2. This lien is not taken away by the statute of the United States for the government of seamen in the merchant service (volume 2, c. 56, § 6,) which allows process against the vessel.

3. When a ship is taken by a charter party, by the terms of which the charterers are to bear the expense of victualling and manning, and they become the owners for the voyage, the seamen have a lien for their wages on the cargo shipped on the account of the charterers, for a charge in the nature of freight.

[Cited in Smith v. The Creole, Case No. 13,032; The Hendrik Hudson, Id. 6,358.]

4. The charterers having become insolvent, and assigned their property in trust to pay their creditors, among whom the seamen were named, it was ruled that their wages were a privileged claim against the cargo, which was to be preferred to the title of the assignees under the assignment, and to that gained by the attaching creditors, and that they are not bound to wait to receive their wages in the order fixed by the assignment.

[Cited in note in Francis v. The Harrison, Case No. 5,038. Cited in The Sailor Prince,

[1] [Reported by Hon. Ashur Ware, District Judge.]

Id. 12,218; Maxwell v. The Powell, Id. 9,324; The Isabella, Id. 7,100; Taylor v. Carryl, 20 How. (61 U. S.) 605.]

5. When property is taken for security in the admiralty by a warrant of attachment, the attachment may be dissolved and the property restored to the claimant on his filing a stipulation, with sureties, according to the form used by the court.

[Cited in Wall v. The Royal Saxon, Case No. 17,093.]

[Cited in Keating v. Spink, 3 Ohio St. 122.]

[This was a libel by James Poland and others, against the freight and cargo of The Spartan (Jacob Quincy, Charles Fox, Joseph E. Foxcraft, and Robert H. Thayer, claimants).]

The facts upon which this case turns, lie in a narrow compass, and are not controverted. William J. and Charles E. Quincy chartered the brig Spartan of Zadock Prince and others, owners, for a voyage from Portland to the Western Islands, and back to Portland. The charterers, by the terms of the charter party, were to victual and man the ship, and bear all other charges, and pay for the hire of the vessel at the rate of one dollar per ton, by the month, in thirty days after the termination of the voyage. The crew were shipped by the charterers, who had the entire use and control of the vessel. She sailed on the 20th of September, 1827, performed her voyage successfully, and returned to Portland on the 25th of April last, with a cargo of 3,806 quintals of barilla, and a few other articles belonging to the charterers. Of the barilla, 1,616 quintals were shipped by Mr. Thayer, on freight, and consigned to himself, and 2,290 were shipped on account of the Messrs. Quincys. While the vessel was absent on her voyage, the charterers having become embarrassed in their business, made an assignment of all their property, including the return cargo of their vessel, to Jacob Quincy and Charles Fox, in trust, to pay their creditors in a certain specified order of preference. As soon as the brig arrived, the cargo was also attached by sundry of the creditors of the charterers. No provision was made for the payment of the wages of the seamen, except in the order in which they stood on the schedule of creditors attached to the deed of assignment. On this, the claims of several creditors to whom the charterers were indebted to a large amount, were preferred to that of the seamen. To secure their wages they filed their libel, in which they claim to be paid out of the freight earned in the voyage, in the hands of the captain, and also for process against that part of the cargo which is owned by the charterers, that it may be holden to respond to them for the amount due for wages. Several conflicting claims were interposed for the property, the merits of which are not involved in this case. No freight has been paid to the master by Mr. Thayer, but he has come in under the general monition, as a claimant, and filed a stipulation for the amount of freight due on his shipment. The master, in his answer, admits the wages of the seamen to be due, and submits the case to the decision of the court; but their right to proceed against the freight is resisted by the assignees, and by the sheriff in behalf of the attaching creditors.

Messrs. Greenleaf and Shepley, for libellants.

Mr. Longfellow, for assignees.

Fessenden & Deblois, for sheriff and attaching creditors.

C. S. Daveis, for Mr. Thayer.

WARE, District Judge. This is a case, novel in its form, and important in the principles which it involves; and it has very naturally excited considerable interest among mercantile men for the direct bearing it has on the great shipping interests of the country. It has been argued with eminent ability on both sides, and it is but an act of justice on my part to acknowledge my obligations to the learned counsel, for the pleasure as well as the assistance which I have received in coming to a result, from the very elaborate discussion of the questions which arise in the case. In my examination, I have attentively read all the cases and authorities cited at the bar, and have referred to some others having a bearing on the questions in litigation which I have met with in my own researches.

This is a suit for mariners' wages, a subject familiar to the jurisdiction of the admiralty, but as far as my information extends, and as far as I have been informed by the learned arguments at the bar, entirely novel in its form. The case is admitted to be of the first impression, and, without any judicial decisions for our guide, the court is left to thread its way through, with no landmarks to direct its steps but the general and leading principles of maritime jurisprudence. I have given to the subject the best consideration that is within my ability and means of information, and if I have been led to a wrong conclusion by false lights, it is a source of no little consolation to me that my errors can be corrected by a court to which the parties may appeal, with a perfect assurance that their rights will be thoroughly investigated in the final decision of the case.

The libel proceeds against the freight and cargo of the vessel for the wages of the mariners; that is, against the freight of so much as was taken on freight, and against that part of the cargo which the charterers shipped on their own account. It goes on the principle of a double maritime hypothecation; first, that the cargo is hypothecated for the freight, and secondly, that the freight is hypothecated for the wages. Both those principles are maintained by the counsel for the libellants, and it is further contended that the freight may be reached by the seamen, at least so much as is necessary to pay their wages, by a direct libel on the merchandise. Indeed,

the argument went the length of asserting a direct lien on the cargo, for the full amount of wages; but however strong the language of the old maritime law may be, it may be doubted whether the lien, if it ever existed to the extent contended for, must not now be considered as limited to tne amount of freight due upon it.

That the master has a lien on the cargo for his freight is a familiar principle of maritime law, not controverted by the respondents. It has been settled in numerous cases, and is laid down as a principle, not to be called in question, in all the elementary treatises. But while this is fully conceded, it was contended, in argument, that this is a mere naked authority to retain the goods for the purpose of compelling payment; and if the merchant chooses to suffer his goods to remain or perish in the master's hands, that the law furnishes no process, that it confers on the master no right of proceeding judicially against the cargo, to convert so much of it into money as will pay the freight. I have had occasion to examine this point in another libel against this cargo, and for the present I merely observe that in this libel, if the rights of the libellants are as they are contended to be by their counsel, I feel free to give them the remedy which they seek. If their lien extends to the merchandise, my opinion is, that this is the proper court to enforce it, and that they have elected the proper process by which to pursue their remedy. If it be admitted that the cargo is hypothecated for the freight, the next inquiry is, in what relation do the seamen stand to the freight.

Freight is the hire which is earned by the transportation of goods. This is the original and elementary signification of the word. It is due for the service which is rendered in transporting them from a place where they are supposed to be worth less, to a place where they are worth more. This service has given to the merchandise a new value, which it had not before; as much so as is given by a tailor to a piece of cloth which he has made into a coat, or by any other mechanic, when he has, in the way of his trade, changed the form of a thing, and converted it into what is technically called, in the civil law, a new species. Though here has been no change in the form of the thing, yet there has been a service performed, by which it has received a new and additional value, as certain and as distinguishable from its former value, as that which is given by a mechanic who converts one species into another. It is a general principle of law, extending to a great variety of cases, that a person who has, by his own labor, thus added a new value to a specific article, has a lien on the article for the value of his service. It is a right consonant to all ideas of natural equity, and is highly favored by the law. 2 Kent, Comm. 496. The mechanic is considered as gaining a qualified property in the article, when he has incorporated into it his own skill, care, and labor. Another general principle is, that when this sort of confusion of goods is produced at the request of the general owner, he that has given the last increment of value to the article, is entitled to be first satisfied out of the common stock. In the nature and reason of the thing there is no difference, in this respect, between the mechanic and the carrier. In the case of marine transportation, by whom has this service been performed? The answer obviously is, by the vessel and crew jointly. Neither has an exclusive agency, but their service is concurrent. In the common sense and equity of the case, the crew and the vessel have a joint or partnership interest in the freight, and independent of positive regulation, special contract, or a usage that has the force of law, no distinction can be made between the title of the crew to the freight, and that of the vessel or her owners. It is in its own nature as perfectly a joint or partnership interest as can be conceived. The opinions now expressed are not new. If there be no adjudicated case directly in point, they are at least supported by the dicta of learned jurists, and are in harmony with the general analogies of the law. The freight is steadily looked to as the proper fund out of which wages are to be paid. "In all cases," says Holt, Shipp. 275, "the question of wages turns upon the same principles, whether the ship has earned her freight or not." In a very late case, Lord Chief Justice Abbot, in very decisive terms, lays it down as a fixed rule of the law of England, that where no freight is earned no wages are due. "A seaman's wages," he says, "can only be recovered out of a certain fund, namely, the freight earned in the voyage." Brown v. Moates, Holt, Shipp. p. 276. The generality of this language must be received with several exceptions. But it serves to show how uniformly the eyes of English jurists are fixed on the freight as being, in the expressive language of the law, the mother of wages. Judge Winchester, in the case referred to in the argument, expressly says that "the contract of the sailors is a species of copartnership between them and the owners. If all is lost, the sailors lose their wages; but if all is not lost, that which remains of the ship and freight is a common property, pledged for the payment of wages. Freight gained and put on shore, is saved from a subsequent shipwreck. It goes into the common stock, but, like the savings from a wreck, is to the last nail or cable hypothecated to the wages. Freight is a trust fund in the hands of the owners, to be accounted for to those whose industry produced it." Relf v. The Maria [Case No. 11,692]. The lien of the seamen for their wages is expressed here in terms as strong as language can furnish. Emerigon, Traité des Contrats a la Grosse, tome 2, c. 17, sect. 11, § 2, and also 2 Boulay-Paty, Cours de Droit Com. Maritime, 223.

If the English books contain no adjudicated case directly in point, a satisfactory reason may be given for it. The common law courts prohibit the only court in which the lien can be enforced, from taking jurisdiction of the case. But the language of foreign writers on maritime law is clear and unequivocal. By the Marine Ordinance of Louis XIV. liv. 3, tit. 4, art. 19, the ship and freight are specifically pledged for the payment of the mariners' wages; and the principle is re-enacted in the Code de Commerce, § 271, in the same words. Valin, in his Commentary, says that if the freight has been paid to the master, and he applies it to the payment of his private debts, there will remain to the seamen only their personal action against the master; they can neither recover it against the merchant, nor against the captain's creditors, unless there has been fraud. They ought, he adds, to have taken the precaution to seize the freight in the hands of the merchant. 1 Valin, 751. Boucher, a late writer of respectable character, on maritime law, quotes and approves the decision of Valin. But he takes a distinction. If the captain receives his freight in part of the merchandise, and this is transferred by him in payment of a pre-existing debt, the seamen, he holds, can reclaim it in the hands of his creditors. His words are, "The freight being pledged for the payment of the wages of the sailors, they have the quality of proprietors to the amount due to them; and they may consequently reclaim them in the hands of the captain's creditors." Boucher, Droit Maritime, pt. 3, § 7, pars. 1159, 60-61. The reason of the distinction is, that the pieces of money paid cannot be identified, a reason purely technical; but he expressly affirms that the hypothecation gives to the sailors a proprietary interest in the freight. The marine law also of Spain and Portugal renders the freight as well as the vessel answerable for the wages of the seamen. Jac. Sea Laws, 150. Roccus affirms the general principle in the strongest terms, and overrules the distinction set up by Boucher. "Mariners," he says, "for their freights and wages, have an implied hypothecation, with right of preference, on all goods laden on board; by which right of preference, the sailors may recover money previously paid to other creditors." Ingersoll's Roccus, note 91. This action he affirms to be always open to the mariners, and he refers to a case decided in Portugal, and reported by Pierera de Castro. The same decision is cited by Valin, and denied to be good law in the extent to which it goes. 1 Valin, 752. The words of Cleirac, in his Commentary on the Laws of Oleron, are quoted by Abbot as constituting at this day an established principle in the maritime law, but as ineffective in England only because the court of admiralty, by which alone it can be made operative, is denied jurisdiction over the case. Law of Shipp. (Am. Ed.) 135, 136. "By custom," says Cleirac, "the ship is bound to the merchandise, and the merchandise to the ship." Us et Coutumes de la Mer, p. 72. By turning to page 503 of Les Us et Coutumes de la Mer, Navigation des Rivieres, articles 18, 19, we shall find Cleirac himself explaining what is meant by this maxim of the marine law. "The vessel," says he, using the same terms, "is bound to the merchandise and the merchandise to the vessel; that is to say, if the merchant fails in the time of payment and causes delay, the master or mariners are privileged to cause the goods which they have carried to be seized, and to be sold to the amount that is due them." He then states the reciprocal right of the merchant to hold the vessel to respond for any injury to the merchandise, occasioned by the fault of the master or mariners. It may be said that this relates only to river navigation, and stands on the ground of a positive ordinance. I refer to it only as a definition of the words used in another part of his work, where they are applied wholly to maritime navigation. Again, in the Jurisdiction de la Marine, p. 351, he is treating of maritime navigation, and says that the "wages of the mariners are to be preferred in a decree against the ship and merchandise, and over all other debts, so that, should there remain but so much of the ship and merchandise, even to the last nail, they shall have it." It appears from Voet that by the law of Holland the seamen have a lien on the cargo as well as the ship, for their wages in foreign voyages, and he quotes Grotius as affirming this right as a general principle of maritime law. Voet ad Pandectas, L. 20, tit. 2, § 30.

I do not find that the Consulate of the Sea, in express terms states that the freight is pledged for the wages of the mariners, but if we do not find the principle anywhere plainly expressed, in many parts of this venerable ordinance we find its rudiments recognized. It is said that the master is bound to pay the mariners with the freight that he receives. Consulat de la Mer, Boucher's trans. He is holden to pay the mariners immediately on receiving the freight, and in the same money that he receives of the merchants. Chapter 138. If the merchant, after the goods are laden, declines to send them, he is held to pay half freight, and in this case the sailors shall receive half their wages. Chapters 83, 84. All these provisions seem to import an interest of the seamen in the freight. It is also provided that no caution or security can be given for the freight, though in every other case the consuls who have, by that ordinance, jurisdiction over maritime affairs, are authorized to order security to be taken. Chapters 42, 196. The translator, in a note, observes that freight is singularly favored in this ordinance, because it is pledged for the payment of wages. These authorities go the full length of affirming it as a general principle of maritime law, that the seamen have a direct hypothecatory interest in the freight, for the amount of their wages.

Their lien on the freight is described in the same terms as their lien on the vessel; that this lien can be enforced by seizing the freight in the hands of the merchant, before it is paid over to the master; that if the merchants refuse payment, they can proceed against the merchandise, and compel a judicial sale of so much as is necessary to pay their wages. It is not distinctly stated whether they can enforce their claim for wages against the cargo to an extent beyond the amount of freight which is due upon it. But I think, upon principle, this must be the natural and necessary limitation of their privilege, where the owner of the ship and cargo are different persons; except in those cases of misfortune where a claim of salvage is mixed with a claim of wages. Taylor v. The Cato [Case No. 13,786], and Weeks v. The Catharina Maria [Id. 17,351], cited at the bar, were cases of this mixed character.

It is objected by the learned counsel for the respondents, that many of the authorities relied on at the argument, are either the positive enactments of foreign ordinances, or the dicta of foreign writers, which have not the force of law in this country. Proprio vigore it is true that they have not. But they have always been considered as high evidence of what the maritime law actually is; they are familiarly quoted in our courts of law, they are constantly referred to as of authority in our best elementary treatises, and are relied on by our highest courts of judicature, if not as express grounds of decision, at least as entitled to great respect in all cases involving the general principles of maritime law. In the very late case of The Neptune, which was a case of wages like the present, decided by Lord Stowell, in 1824, he overruled all the common law cases in which it is held that wages are dependent exclusively on the earning of freight, and professedly taking his stand on the general maritime law, and invoking, as authorities to sustain the principle, the marine law as held in France, in Spain in the height of her maritime greatness, of Holland in the period of her greatest commercial prosperity, of Denmark, and of this country, he ordered wages to be paid from the savings of a wreck, though no freight had been earned; thus at a single stroke completely revolutionizing all common law ideas on this subject, and overturning, or at least, very essentially qualifying a maxim that had stood unquestioned by the common law courts for ages. Holt, Shipp. 278.[2]

When we can trace up a principle to the very incunabula of the science, and find one uniform and concurring voice among the most respected writers of different ages and nations, and find this principle expressly and strongly asserted by one of the ablest of our own maritime judges, as the existing law of this country, it would certainly seem to be safe to rest on such authority, though no adjudicated case can be found directly in point. Such appears to me to be the authority for the principle that freight is pledged for wages, a principle which also comes so strongly recommended by the most obvious reasons of natural equity. But it is argued that, admitting the rule of the marine law to be as contended, the right of the seamen to proceed against the freight for their wages is taken away by the operation of the statute of the United States for the government and regulation of seamen in the merchant service. 2 Laws U. S. [Bior. & D.] c. 56, § 6 [1 Stat. 131]. I do not so understand the statute. It authorizes the seamen, under certain regulations, to obtain process against the vessel for the security of their wages. This merely affirms and regulates a remedy which they had before, and it would be going a great way to hold that this deprived them, by implication, of another concurrent remedy. The freight is the proper, it is the peculiar and appropriate fund out of which wages are to be paid, and the personal responsibility of the master is founded not so much on the contract, as on the fact that he

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2 "The marine law of the United States," says Chancellor Kent, "is the same as the marine law of Europe. It is not the law of a particular country, but the general law of nations;" and Lord Mansfield applied to its universal adoption the expressive language of Cicero, when speaking of the eternal laws of justice. "Nec erit alia lex Romæ alia Athænis; alia nunc alia posthac; sed et omnes gentes, et omni tempore una lex et sempiterna, et immortalis continebit."

"When Lord Mansfield mentioned the law of merchants as being a branch of public law, it was because that law did not rest essentially for its character and authority on the positive institutions and local customs of a particular country, but consisted of certain principles and usages which general convenience and a common sense of justice had established, to regulate the dealings among merchants and mariners, in all the commercial countries of the civilized world." 2 Kent, Comm. 509, 510.

Mr. Brougham, in his late speech on the "State of the Law," while he threatens to reform the whole municipal law of the kingdom, with an unsparing hand, and to strike out what he considers abuses, both in its principles and practice, with a boldness which, I think, must strike with dismay those who have been bred up in habits of veneration for black letter lore, and those who have been smitten with affection for the subtleties of special pleading, or are charmed with the mysteries of conveyancing, proposes to leave the commercial law as it is, and the reasons he gives for it are worth noticing. I quote them from a copy of his speech corrected and published by himself.

"I intend also to leave out of my plan the commercial law. It lies within a narrow compass, and it is far purer and freer from defects than any other part of the system. This arises from its later origin. It has grown up within two centuries, or little more, and been framed by degrees, as the exigencies of mercantile affairs require. It is accepted too, in many of its main branches, by other states, forming a code common to all trading nations, and which cannot be easily changed without their consent. Accordingly, the provisions of the French Civil Code, unsparing as they were of the old municipal law, excepted the law merchant, generally speaking, from the changes which they introduced."

is entitled to receive the freight for those to whom of right it belongs. If the seamen have not usually resorted to this fund, it is because the law supplies an easier and simpler remedy. But when a party has several remedies, it lies with him to elect that which he judges most advantageous for himself. On the whole, after the most deliberate examination I have been able to give the subject, I am brought to the conclusion that the seamen have a lien on the freight for their wages, which may be enforced by a libel in the admiralty. This applies to so much of the freight as is due on that part of the cargo which was shipped and consigned to Mr. Thayer.

With respect to the rest of the cargo, it is contended that no freight is due, except what is secured by the charter party. By the terms of that instrument, the charterers were to victual and man the ship, and to pay all charges. It is argued that being owners for the voyage, they are their own carriers, and no freight is due. If this be correct, as the charterers are insolvent and have assigned their whole property, including this cargo, the effect will be that the owners of the vessel will not only lose the whole charter of the ship, but will, through the liability of the vessel, indirectly have thrown upon them the additional burden of the seamen's wages. To my mind it appears that this part of the case turns simply on the question whether the lien of the seamen extends to the merchandise, or is confined to the hire for transportation stipulated between the ship-owners and the owners of the cargo. If the seamen can enforce their claim against the goods taken on freight, I see no reason, in principle, why they may not against the goods of the owner or charterer of the ship. The nature of their service is the same, and if it gives them a jus in re, if it creates a lien which adheres to the thing, it adheres to it, whoever may be the owner. Their own labor has been incorporated into the value of the merchandise in one case as it has in the other. The authorities go directly and fully to the point; the merchandise is declared to be hypothecated for wages, as well as the freight; that is, as I understand the law, hypothecated to the wages to the amount of freight due upon it, and the merchant is not entitled to receive his goods until the lien is discharged.[3] And this leads to an answer to another difficulty which was stated at the argument. The property has been attached by sundry creditors of the charterers, and the cases are now pending in the state courts. It is argued that, as different creditors are each pursuing their own rights against this property in different courts, it is a proper rule, to prevent collision of judicial authority, to give precedence to those who first lay their hands on the fund. This priority might be decisive if both creditors stood in the same relation to this specific property. But the reason no longer holds when the claim of one of the parties is, in its nature, a privileged claim. The very essence of a privilege is to give the creditor a preference over the general creditors of the debtor; and if such be the claim of the seamen, the attachment only created a lien on the property subject to such prior incumbrance. It can only extend to the whole right of the owner, and that was, to hold the property after discharging the lien. Another argument is, that a bonâ fide alienation defeats a tacit hypothecation, and the purchaser takes the property discharged of the lien. 2 Browne, Civ. Law, 143, is relied upon as sustaining the principle. He says, it is true, that by the civil law, things tacitly pledged might be freely alienated before they were arrested. The general rule of the civil law is certainly the reverse; the purchaser takes them cum onere. Brown refers as authority for this dictum, to the Digest, L. 20, 22, 29, and to Ayliffe's Civil Law. I have not seen Ayliffe, but the law cited in the Digest does not sustain the principle in the terms in which it is stated. The law is confined to a single case, the hypothecation which the landlord has in the movables of his tenant for rent, and merely gives to the tenant the power to manumit his slaves notwithstanding this tacit hypothecation, which he could not do if it was express. But when money is loaned for the repair of a house and the house is sold, it passes cum onere and the hypothecation follows it into the hands of the purchaser; and such would be a case analogous to the present. Another

[3] In the case of Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, it was decided that the seamen have a lien or privilege against the freight for their wages, but have no claim against the cargo. In that case, the seamen shipped for a voyage to the north-west coast of America, and thence to Canton, and from thence to the United States. The vessel stopped at Chili, and engaged in an illicit trade, and was seized and condemned by the Spanish authorities. Afterwards, an order of restoration was obtained from the king of Spain, but it remained unexecuted, and the owners filed their claim under the Florida treaty, and it was allowed. The owners of the ship were also owners of the cargo, and therefore no freight was earned eo nomine, but the commissioners awarded distinct sums for the ship, the cargo, and the freight. The court held that there being a restitution of the ship, in value, the proceeds of the ship were substituted for the ship itself, and that the lien re-attached to the proceeds; that freight being the natural fund out of which the wages were to be paid, the seamen had, upon the principles of the maritime law, a claim or privilege against it which might be enforced against the fund in the hands of the assignees, the owners having become bankrupt and assigned their claim for the benefit of their creditors; and ordered, after the proceeds of the ship were exhausted, wages to be subsidiarily paid out of the freight, thus awarded by the commissioners. Pages 710, 711. The question of the right of the seamen to proceed against the cargo for their wages, to the amount of a reasonable freight, where the owners of the ship are the owners of the cargo, again came before the court in the case of Skolfield v. Potter [Case No. 12,925], where the doctrine held in this case is further elucidated and reaffirmed notwithstanding the dictum in Sheppard v. Taylor [supra].

objection urged is the general inconvenience of admitting the principle that the cargo is liable to this process. The inconvenience is, I think, greatly overstated; and in cases like the present it is far from inconvenient, for it enables the seamen to extract their wages from that specific property which actually owes the debt. But in any case, when goods are attached for security, they can readily be discharged by the owners entering into a stipulation. It is the uniform practice of the admiralty to order goods which are so attached to be restored to the claimant on his filing a caution, with sureties, according to the form used by the court. Were it not for this practice, the argument ab inconvenienti would be quite as strong against holding the vessel liable.

Upon the whole, my opinion is, that the freight of that part of the cargo consigned to Mr. Thayer, is bound to the seamen for the payment of their wages to the amount stipulated in the bills of lading; and that they have a lien on that part of the cargo shipped and owned by the charterers, for a charge in the nature of freight, which overreaches the title gained by the assignees under the assignment, and that of the attaching creditors under the attachment. To the amount of a reasonable freight, at least, it appears to me that the seamen stand in the character of privileged creditors of this property, and are entitled to have their claim first satisfied.

POLAR STAR, The. See Case No. 4,281.

Case No. 11,247.

In re POLEMAN.

[5 Bis. 526;[1] 9 N. B. R. 376; 19 Int. Rev. Rec. 94; 6 Chi. Leg. News, 181.]

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

HOMESTEAD EXEMPTION — WAIVER — PRACTICE IN SETTING ASIDE HOMESTEAD.

1. A bankrupt is entitled to a homestead exemption in property occupied by him as a homestead, even though he had previously waived his homestead rights in favor of a particular creditor.

2. Such waiver only applies to persons claiming under the instrument in which the waiver was made, and does not inure to the benefit of the assignee or other creditors.

3. In Illinois, where the equity of redemption is less than one thousand dollars, the property should be set aside by the assignee as a homestead; where it exceeds that sum, the assignee should sell the property and pay the bankrupt one thousand dollars in cash from the proceeds, unless the property is susceptible of division so as to set apart the homestead.

In bankruptcy. This was an exception by William C. Poleman to the decision of the register sustaining the objections to the setting aside by the assignee of the bankrupt's homestead. At the time of the filing of the petition in bankruptcy, Poleman was the owner of certain real estate in Chicago, occupied by him as a homestead, on which he had given a trust deed to Baird & Bradley, to secure the sum of $3,500, and also a mortgage to D. Boynton to secure the sum of $2,250, in both of which the bankrupt and his wife had waived their homestead rights under the statute of the state of Illinois. The bankrupt applied to the assignee to have this property set aside as exempt, to which Carson, Pirie & Co., creditors, objected, claiming that the property was worth one thousand dollars or more, over and above the incumbrances, and that the bankrupt having once waived his homestead rights, could not claim them as against his general creditors. The assignee refused to set aside the property.

Rufus King, for bankrupt, cited the following authorities: Section 14 of the bankrupt act [of 1867 (14 Stat. 522)]; In re Griffin [Case No. 5,813]; In re Hester [Id. 6,437]; In re Stevens [Id. 13,392]; Cox v. Wilder [Id. 3,308]; Bartholomew v. West [Id. 1,071]; In re Jones [Id. 7,445].

Holmes, Rich & Noble, for creditors, cited: In re Whitehead [Case No. 17,562]; In re Jaycox [Id. 7,240]; section 20 of the bankrupt act [of 1867 (14 Stat. 526)]; Smith v. Kehr [Case No. 13,071]; Cox v. Wilder [Id. 3,309]; Cox v. Wilder [supra].

BLODGETT, District Judge. I have examined the questions presented by the objections to the setting aside by the assignee of the bankrupt's homestead, and am satisfied that they can not be sustained, although the bankrupt and his wife waived their homestead rights in the mortgages to Baird & Bradley and Mr. Boynton; yet those waivers can only be taken advantage of by persons claiming under or through those incumbrances. A waiver by the bankrupt of his homestead rights in favor of a particular creditor, does not confer upon his general creditors any special rights, nor operate in their favor; and where, as in this case, the assignee does not claim under these mortgages or either of them, it is as to him precisely the same as though he had never waived his homestead rights, and he is entitled to have his homestead set aside under the bankrupt act. The homestead law can not receive any such narrow or critical construction as claimed by the objecting creditors in this case. The Illinois homestead statute has already received from the supreme court of this state, whose decisions upon this question should be followed in this court, a liberal and broad construction for the benefit not only of the owner of the property, but of his family.

The exceptions are therefore sustained, and the order will be that the assignee allow the bankrupt a homestead exemption out of the real estate held and occupied by him as a homestead, to the extent of one thousand

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

dollars. And if the equity of redemption in the property is thought by the assignee to be worth more than one thousand dollars, that the assignee may take measures to sell the property and pay the bankrupt from the proceeds the sum of one thousand dollars in cash, unless the situation of the property be such that a homestead can be set apart without injury to the rest of the estate.

NOTE. The decisions of the supreme court of Illinois, so far as affecting the question under consideration above, are as follows: Moore v. Titman, 33 Ill. 358; Booker v. Anderson, 35 Ill. 66; Mooers v. Dixon, Id. 208; Wing v. Cropper, Id. 256; White v. Clark, 36 Ill. 285; Silsbe v. Lucas, Id. 462; Ives v. Mills, 37 Ill. 73. As to the excess over $1,000: Blue v. Blue, 38 Ill. 9; McDonald v. Crandall, 43 Ill. 231; Hume v. Gossett, Id. 297.

POLHAMUS (UNITED STATES v.). See Case No. 16,062.

POLICE BOAT.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Police Boat Seneca. See The Seneca, Case No. 12,668."]

Case No. 11,248.

POLK v. COSGROVE.

[4 Biss. 437.] [1]

Circuit Court, N. D. Illinois. Jan., 1865.

RECORD OF DEED—WHAT CONSTITUTES—NOTICE.

1. The filing a deed for record with the recorder of the proper county is, in Illinois, all that is required of the grantee, and his rights are not affected though the recorder fails to record it, or enter it in his minute book.

[Cited in Sinclair v. Slawson, 44 Mich. 125, 6 N. W. 208.]

2. Notice to the plaintiff's attorney in attachment proceedings of an unrecorded deed of the land attached operates as notice to the plaintiff.

3. But a clause in a deed from a stranger to the title is not notice to purchasers.

Ejectment for the one-third interest in the S. E. ¼ and N. W. ¼, section 12, township 39 N., range 13 E., in Cook county, Illinois.

It was stipulated that Joseph M. Faulkner had title on the 20th of June, 1836, and the plaintiff [Edward L. Polk] claimed under a deed in attachment proceedings instituted by James Marsh against Faulkner, February 15, 1838. Judgment recovered May 23, and deed in due form by the sheriff to Marsh November 1, 1840. Marsh afterwards conveyed to plaintiff.

The defendant [Alfred Cosgrove] claimed that on the 13th of September, 1836, Faulkner made a deed to one Birdsall, and that this deed was duly filed for record. Defendant had a conveyance from Birdsall.

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

DRUMMOND, District Judge (charging jury). If Faulkner made a valid deed of the property to Mr. Birdsall on the 13th of September, 1836, and that deed was filed for record in the recorder's office of this county where the land lies, and prior to the issuing of that attachment, as a matter of course, the plaintiff cannot recover.

By the law in force at that time, every deed took effect from the time it was filed for record as against third parties purchasing from the grantor in good faith and without notice of such deed. Of course, as between the parties, a deed is always good, whether recorded or not.

The law at that time also rendered it the duty of the recorder, when a deed was filed for record to make a memorandum of it in a book which he was required to keep, mentioning the date, the parties, and the place where the lands were situated. He was also required to make an alphabetical index to each record book, showing the page on which each instrument is recorded, with the names of the parties thereto, and he was required to give a receipt to the person bringing such deed or writing to be recorded, bearing date on the same day as the entry and containing the abstract aforesaid.

The testimony would seem to leave no reasonable doubt of the filing of the deed were it not for the absence of the deed upon the record, and also of any memorandum of it in the entry-book which the recorder was required to keep, while there is an entry on the entry-book and a record of the deed from Birdsall to Pell, which Mr. Pell says he forwarded at the same time and by the same agent. There is something very singular about this, which, it is insisted on the part of the plaintiff, throws doubt upon the fact whether the deed was ever actually filed for record.

Of course it was not enough that the deed was left in the recorder's office or left with the recorder. It must have been filed for record—given and received for that purpose. But I feel bound to say, as a matter of law, that if, from all the evidence, you believe that the deed was thus filed, that was all that was required of the party; that if it was not recorded, or even if it was not entered on the entry-book, I think that third parties ought not to be prejudiced by the neglect of the recorder. That I understand to be the law of this state. It may be a difficult and embarrassing question, because the very object of the law was that there should be spread upon the record authentic evidence of the transmission of title, and if a deed is actually left in the recorder's office, filed and received for entry, and no entry of it is made in the entry-book, none can tell that there is any transfer of title to the land; but still that is something which the law throws upon the recorder.

But it is contended on the part of the defendant that, admitting the deed never was

actually filed for record, still there was enough upon the records to inform every one that there was in existence a deed transferring the property from Faulkner to Birdsall, and to establish that, reliance is placed, first, upon the deed from Birdsall to Pell of November 22, 1836, recorded in 1837. This deed recites that Faulkner had conveyed the property to Birdsall on the 13th of September, 1836.

As a matter of law I think that recital does not bind any one claiming from Faulkner or any of his creditors. It does not bind Marsh the plaintiff in the attachment suit, though the deed was actually recorded before the attachment was issued. He had no clue by which he could follow the title. He therefore was not bound to look into a conveyance made from Birdsall. Birdsall was a stranger to the title, so far as he could see. There was nothing upon the records to show that Birdsall had any title. All that he was bound to do was to trace the title from Faulkner on the public records of the county, and there being no title thus traced in the recorder's office from Faulkner, he was not bound to look into any possible deed which might be upon the records of the county in order to determine whether there was not a recital therein that Faulkner had divested himself of title. This would be unreasonable.

But it is insisted further on the part of the defendant that there was a mortgage from Birdsall to Faulkner foreclosed, and an assignment November 23, 1836, of the mortgage by Faulkner to Grant & Bertel. The mortgage was dated September 13, 1836, the same date as the deed claimed to have been made by Faulkner to Birdsall. The bill was filed November 8, 1837, interlocutory decree made March 10, 1838, and final decree of foreclosure (what is called strict foreclosure) in August, 1838. It will be seen that the bill was filed before the attachment was issued, although the decree was not made until after.

It is argued on the part of the defendant that as this bill showed that Faulkner had made a conveyance to Birdsall and had assigned it to the plaintiff in the bill of foreclosure, and that these facts were known to the attorneys who instituted the proceedings in attachment, that notice to them of this deed was notice to Marsh. It is to be observed that the suit was pending at the time that the attachment was issued; so that they had the care of this suit at the time the attachment was issued. It was not actually disposed of, but was in progress. The question is, whether notice to the attorneys was notice to Marsh, so as to destroy the attachment issued and levied upon this property. This is a very nice question, and one by no means free from difficulty. I can only give you my impression at this time. It is true that an attachment can issue against a nonresident, which, it is conceded, was the fact here, by filing an affidavit and complying with the various requirements of law, without specifically setting forth the particular property which it is claimed that the court should attach, and therefore it may be true in a given case that the attorney may not actually know upon what particular property the process will be served when he obtains it for his client, but still the object of the attorney and of the client is the seizure of the property, either by attachment or by what is called a garnishee process, which is a branch of the attachment, and it is presumable that the client of the attorney has in view some property upon which the process is to be served, either when the writ issues or before it is served. It is said the sheriff executes the process. Of course he does, but the presumption is that he executes it under instruction from the client or the attorney, and I am inclined to think that where the attorney knows that property has been transferred before the attachment is served, that knowledge must be considered as being brought home to his client, so that if the attorneys in the foreclosure suit and in the attachment suit knew, as attorneys, that Faulkner had made a conveyance of this property in September, 1836, to Birdsall, when this attachment was issued and served, we must also suppose for the purpose of this case that Marsh knew it. They had not closed the litigation in which they were engaged for Grant & Bertel. It was still pending and undetermined, and while they were attorneys of these parties as to this very property an attachment was taken out by a third party and levied upon it. It is a little different from a case where the litigation had ended, and they had been employed in a new case where it may be supposed that the facts would have passed out of their mind.

The case was before them, not yet determined. But, notwithstanding Mr. Marsh might not have been a bona fide purchaser for value, still, anyone can protect himself, by either his own good faith, his want of notice and payment of value, or by claiming through any other person who has acquired the property in good faith, etc. The deed and mortgage not being notice to Marsh, no subsequent purchaser would be affected by the deed any more than Marsh, and no subsequent purchaser would be affected by notice to Marsh if he purchased in good faith, for value and without knowledge. Where it is claimed that a person is a subsequent purchaser, without notice and for value, the rule is that the party relying upon this fact must establish it, and by some proof independent of the mere deed.

Verdict for defendant.

NOTE. Omission by the register to index a conveyance does not prevent the conveyance being valid against subsequent purchasers. The index is no part of the record. Bishop v. Schneider, 46 Mo. 475. But the noting of a deed for record by the officer, which is withdrawn by the person taking the beneficial interest under it, before being spread upon the

record, gives it no priority. Hickman v. Perrin, 6 Cold. 135. Consult Riggs v. Boylan [Case No. 11,822]. That notice to an agent or solicitor of a person is notice to himself, see Mounce v. Byars, 11 Ga. 180. As to the recitals in conveyances being notice to the public, see next case.

Case No. 11,249.

POLK v. HILL et al.

[1 Brunner, Col. Cas. 126;[1] 2 Overt. 118.]

Circuit Court, D. Tennessee. June, 1811.

MAP ANNEXED TO GRANT—EFFECT—STATE GRANT—EVIDENCE TO IMPEACH VALIDITY—EJECTMENT—PRESUMPTION IN FAVOR OF GRANT—VOID AND VOIDABLE.

1. A plat annexed to a grant is not an essential part of it, and if recurred to, it must be for the purpose of explanation, and not to destroy its validity.

2. In ejectment no evidence other than of an entry can be received to impeach the validity of a state grant.

3. Irregularity or fraud in the procurement of a grant does not render it void but only voidable, and the law presumes as between third persons that all prerequisites to the issuance have been complied with.

4. A void grant is one issued entirely without authority, as distinguished from a voidable grant, which, though properly authorized, is irregularly issued.

This was an action of ejectment, to which the defendants pleaded not guilty, and issue joined. The plaintiff produced in evidence a grant from the state of North Carolina, to William Polk, for five thousand acres, dated April 17, 1800. This grant was founded on a removed warrant from John Armstrong's office, or the office opened pursuant to the act of 1783 (chapter 2).[2] The plaintiff proved his boundaries, and that the defendants were settled within them. The defendants produced a grant from the state of North Carolina to John Sevier for 25,060 acres, dated August 28, 1795, with mesne conveyances, deduced from that grant to themselves, and proved that the tract of the plaintiff for 5,000 acres lay wholly within the limits of the 25,060 acre tract under which they claimed. This grant on the face of it states that it issued by virtue of forty warrants of 640 acres each, but does not express whether they are county, John Armstrong's, military, or pre-emption warrants. A part of the grant is gone, by accident or otherwise. It is the part which expresses the consideration. Grants for John Armstrong's claims, and some of the county claims, express on the face the consideration of ten pounds for every hundred acres. Other county claims express the consideration of fifty shillings. Pre-emption warrants usually express a consideration of ten pounds per hundred. Military grants express a consideration of the "signal bravery and persevering zeal" of the officer or soldier. That part of the grant to Sevier which is lost, respects the consideration received by the state. It stands thus: For and in consideration of —— p —— unds. This grant or patent was sealed with the great seal of the state of North Carolina, and had on its face all the requisite forms of a state patent.

The plaintiff's counsel objected to the reading of this grant in evidence to the jury on the following grounds, which they said they were able to substantiate:—First. By the laws of North Carolina, no grant could lawfully issue for as large a number of acres as are included in the grant to Sevier. Second. Because the amount of the consideration, originally expressed on the face of that grant, appears to have been torn out. Third. That said grant on its face appears fraudulent, the number of acres mentioned being 25,060, the number of warrants forty, of 640 acres each, and yet the courses and distances mentioned in its body include more than 50,000 acres. Fourth. For the purpose of avoiding said grant to Sevier, it was offered to be proved that the forty warrants of 640 acres each, mentioned in the grant, under which the defendants claim, purport on their face to have been issued by Landon Carter, entry taker of Washington county; and that the land covered by said grant is situate between Cumberland Mountain and Tennessee river, and not within said county of Washington. Fifth. That the consideration of ten pounds for every hundred (if originally in the grant), was fraudulently inserted by procurement of said John Sevier, the grantee. Sixth. That no entries were ever made in the office of the entry taker of Washington county, nor elsewhere, authorizing the issuing of such warrants. Seventh. The said pretended warrants are forgeries. Eighth. That at the time of the cession of the western part of the state of North Carolina, now the state of Tennessee (see Act N. C. 1789, c. 3), to the United States, and at the time of the ratification thereof by congress, on the 2d April, 1790, (Folwell's Ed. Laws U. S. 92), said pretended forty warrants did not exist, nor were any locations or entries in the office of the entry taker of Washington county, from which they appear to have issued, authorizing their issuance. Ninth. That no consideration for said land was ever paid to the state of North North Carolina, or any of its officers. Tenth. And for the purpose of proving that the consideration mentioned in said grant to John Sevier had been altered from fifty shillings to ten pounds, the counsel for the plaintiff offered to read in evidence a letter from the grantee, under whom the defendants claim, to the secretary of the state of North Carolina in the following words: "Jonesborough,

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

[2] A removed warrant from any of the land offices, except the military, is one that is surveyed off the land located or entered, in consequence of the entry being lost or taken away by a better claim. In making a survey on a removed warrant, in these offices, a second entry or location is not necessary to authorize the survey. A grant was the first act of the claimant on record relative to such appropriations.

12 Nov., 1795. Dear Sir.—I am highly sensible of your goodness and friendship in executing my business at your office in the manner and form which I took the liberty to request. Permit me to solicit a completion of the small remainder in the hands of Mr. Gordon. Should there be no impropriety, I should consider myself much obliged to have ten pounds inserted in the room of fifty shillings. I have instructed Mr. Gordon to furnish you with a plat of the amount of three 640 acres, which I consider myself indebted to you for fees, etc., which I beg you will please accept, in case you can conceive that the three warrants will be adequate to the sum I am indebted to you." Eleventh. It was insisted that the person who had signed his name as deputy surveyor was not such, and therefore the grant was void.

Argument for the plaintiff:

The counsel for the plaintiff, in support of these objections to the reading of the grant, said that if the truth of the case could be come at, they would be able to show a more stupendous fraud than was ever perpetrated in any country. The Yazoo speculation was but as an atom in principle, compared to it. Can it be possible, in any civilized country whose laws are founded on the immutable principles of morality, that legal principles shall close the door against inquiry in such a case? According to the doctrine which had been lately advanced, if an officer of government do an act it must be binding on all, however unjust and iniquitous. No matter who is injured, the state or an individual, it must stand good. The face of the patent, it is admitted, imports a presumption that the officers of the government of the state of North Carolina, who issued it, acted honestly and according to law. But the principle is well known, that presumptions only stand until the contrary be shown. We are prepared to show the contrary if we are permitted. We state that these objections can be substantiated by proof. The court must presume it to be true in this stage of the cause. A fraudulent transaction any person may show, though he be a stranger, and make such act void. If this were not the case, no person could be safe, and fraud would be patronized instead of being suppressed. The idea of the acts of ministerial officers being beyond inquiry on the ground of fraud is absurd, and contrary to every principle to be found in the books. The governor and secretary of North Carolina who issued this grant are nothing more than ministerial officers. It is true the entry books of Washington county, whence we say these warrants issued, have been destroyed or accidentally lost; but we have an abstract showing the names of the enterers and the quantities entered. After the loss of the entry book, this abstract is the best evidence the nature of the case admits. Reporters of the decisions in other states show that fraud in obtaining grants may be inquired into. This has been particularly the case in Maryland and Virginia. There is no law of North Carolina authorizing the issuing of grants for more than five thousand acres in any case, except in a few cases to officers in the army of a superior grade. This will appear by reference to Act Nov. 1777, c. 1, § 3, respecting county claims; Act 1783, c. 3, § 9, John Armstrong's; and Act 1782, c. 2, § 6, the military claims. The act of 1784 (chapter 19), authorizing the consolidation of claims, is confined to the swamp lands near the seaboard in North Carolina. It never was intended to apply to the middle, and much less to the western, part of the state. On this ground, therefore, the grant is void, and ought not to be read to the jury. The secretary acts as a mere agent or attorney-in-fact in issuing the grant. If he exceed his powers, his act will be void. 1 Com. Dig. "Attorney," 13, p. 780. It has been urged that it was customary for North Carolina to consolidate claims for lands lying there, as well as in this state, and that usage is the safest interpreter of laws where they are doubtful. This we admit; but we never heard of such grants except in a few instances to Stockley Donnelson.

The second objection is also material. As the grant stands, there is no consideration expressed on the face of it. It is unintelligible. A consideration is indispensable to the validity of a deed (2 Bl. Comm. 296), and it was decided in the case of Butt's lessee in this court that the same rules and principles of law which apply to deeds apply to grants. An erasure or interlineation in a material part of a deed destroys its validity. Consequently the effect of this grant, as to the conveyance of the interest, is done away. False suggestions in a grant render it void agreeably to all the books; surely the part which expresses the consideration is material, and if there be any difference it must be the most so; it is therefore important this part of the grant should be preserved, and remain intelligible; without it the grant can have no effect. The consideration expressed having been torn out, it was incumbent on the defendants to produce a registered copy of the grant as the next best evidence; this they might have done; not having done so, it will be presumed this alteration was intentional and fraudulent.

The third objection to the reading this grant is very important, and on its result much of the interest of society depends. The grant is founded on forty warrants of 640 acres each (making 25,000 acres), and yet to calculate the acres included within the lines as called for in the grant, there are upwards of 50,000 acres. This could not have been a mere mistake in the secretary in making out the grant; the excess is too great for such presumption; there must have been fraud in this transaction; whether fraudulent or not the idea cannot be endured that the grantee shall be permitted to hold the whole of the

land; if void for a part it is void for the whole. 17 Vin. Abr. 80. The maxim "Id certum est quod certum reddi potest," strongly applies to this case. By calculation it can easily be reduced to certainty how much land there is within the bounds called for in the grant.

Fourth objection. We say by recurring to the plat and certificate of survey annexed to the grant, the particular number of these warrants will appear. Neither the grant nor plat states what kind of warrants they were, whether county, military, or John Armstrong's warrants, but we can prove by the secretary of North Carolina, in whose office the warrants, under the authority of which the survey was made, are lodged, that they are Carter's warrants, or in other words were issued purporting to be in pursuance to locations made in the entry taker's office for Washington county, of which Carter was entry taker. If permitted, we can further prove that warrants of the same numbers passed into grants elsewhere, and to other persons. This, however, is not the inquiry at present. The land now in dispute lies within the limits laid off for the satisfaction of John Armstrong's claims, agreeably to the acts of April, 1783 (chapter 2), and April, 1784 (chapter 14, § 2). These lands were sold at ten pounds per hundred (Act April, 1763, c. 2, § 10), and the county claims or those from the entry taker's office of Washington county were sold by the state of North Carolina at fifty shillings generally, or at most but five a hundred (Act Nov. 1777, c. 1, § 4). These lands lie within the particular limits described and laid off by law exclusively for the satisfaction of John Armstrong's claims. Those are county warrants on which Sevier's grant issued, as we can show; they could not be surveyed and granted at the place where they were, which was intended by law for another purpose.

It is not reasonable to suppose that the legislature ever designed that county warrants, the consideration of which, paid the state, was only fifty shillings, should be surveyed and granted on the lands which it designed should be set aside for the satisfaction of those claims, for which it had received ten pounds per hundred. Nor do the statutes warrant this idea; a short review will show this. The act of April, 1783 (chapter 3, § 7), describes the boundary within which the military claims were to be appropriated; the eighth section forbids any other person except pre-emptioners to enter therein within three years (section 4); this exclusive right to the officers and soldiers was continued from time to time, as will appear by various acts (Act 1786, c. 20, §§ 2, 4; Act 1789, c. 69), as well as the decisions of the state courts in the cases of Overton's Lessee v. Campbell [5 Hayw. (Tenn.) 165], and Goodloe's Heirs v. Wilson [2 Overt. 59]. The act of 1783 (chapter 2) opens John Armstrong's office. The third section of this act describes what was usually called Brown's line, due north of the mouth of Cloud's creek, westwardly of which it never was lawful to make entries in any of the county offices. Act April, 1778, c. 3, § 5. And the fourth section of the act of 1783 shows the same thing. Act April, 1780, c. 25, § 9, contains the same idea. The fifth section of the act of 1783 (chapter 2) points out the lands designed for the use of the Indians, which narrows the Indian limits allotted by the act of 1778 (chapter 3, § 5). At all times however, it was unlawful to enter land within the limits allotted them. We can show, if we be permitted, that the entries under which the defendants claim were made westwardly of Brown's line, and within the Indian boundary, and contrary to law. Many of the entries on which these warrants were issued were made on lands for which there was no authority by law; therefore the grants founded on them must be void. But we contend that, admitting it to be law that warrants or entries can be removed to vacant lands, when lost by better claims, at the place originally located—first, such removal must be confined to the limits of the country in which the original entry was made; and secondly, if that be not the case, we contend that these removals cannot be made to lands appropriated to special purposes, as for military, John Armstrong's, and the Indian claims, pointed out as above; each species of claims was to be confined to its proper limits, within which other claims were forbidden, either expressly or impliedly, to be entered, surveyed, or granted. Now the warrants on which Sevier's grant issued were removed from the county of Washington to the place where it was granted, within the special limits allotted for J. Armstrong's claims. The two acts which authorize removals are Act April, 1784, c. 14, § 7, and Act Oct. 1784, c. 19, § 6. These acts were manifestly intended to apply to John Armstrong's claims alone; the captions and whole tenor of these two acts show that county claims were not intended. In aid of this construction, the reason of the thing is very forcible. The county claims cost but fifty shillings, and to permit their removal to lands on which individuals had an equitable lien from the limits laid off for J. Armstrong's, and the payment of higher consideration would be absurd. The correct construction, therefore, is that these removals should be confined to John Armstrong's claims; or, at least, if county claims should be permitted to be removed, it should be within the same county in which the entries were made; in either case the survey and grant of Sevier were not authorized by law, and therefore void.

It will be contended, no doubt, that matter dehors the grant cannot be received in evidence to destroy its validity; but so far as it respects the introduction of the plat and certificate, the rule cannot apply in any event; it is a part of the grant itself, and is so considered by law. Anything referred to by a deed, though not under seal, makes a part of

the deed, and will be taken into view in its construction or otherwise. H. Bl. 254; 2 H. Bl. 557; 6 Term R. 710, 737; 8 Term R. 483; 2 Term R. 641; 6 Mod. 237; De Tastett v. Crousillat [Case No. 3,828]; 5 Com. Dig. "Pleader." 12; Atk. 550; Peake, Ev. 3; Co. Litt. 96; Plow. 130, 136. In fact, anything which has relation to the deed may be given in evidence. 2 Term R. 749; 7 Term R. 311, 314; 9 Coke, 467; 2 Term R. 474; 6 Coke, 15; 1 Burrows, 395; 4 Coke, 70; 3 Coke, 77, 68; 6 Coke, 15; 1 Coke, 4; Salk. 500; 7 Vin. Abr. It results from these authorities, as a necessary inference, that the plat and certificate of survey may be given in evidence, and so indeed may any other evidence showing the grant was improperly obtained and therefore void.

The fifth and tenth objections relate to the fraudulent conduct of the grantee and secretary of North Carolina, as respects the consideration of ten pounds for every hundred acres being inserted in the grant, instead of fifty shillings, which we contend was the consideration that ought to have been inserted, supposing the warrants to have been genuine. Will it ever be permitted to individuals to screen themselves under cover of a grant, when they have committed a fraud themselves, and procured an officer of government to commit one in issuing the grant? Fraud is so odious in the eye of the law that it vitiates and nullifies everything it touches, or with which it is connected.

The sixth, seventh, eighth, and ninth objections, it is of importance to consider in one point of view. In fact, this general view which will now be proposed will embrace the eight last objections. The general question is, will evidence be received in a court of law dehors a grant from the state to render it void or destroy its validity? In the examination of all the objections we have taken, except the first and second, this question is important. We contend that, agreeably to the principles of the common law, the king's grants may be avoided in a court of law on the ground of fraud, deception, or false suggestions; and that the grants from the state are on the same footing. In various instances evidence to show such fraud or deception has been received in courts of law under the general pleadings applicable to each action, as in 17 Vin. Abr. 78, 104, 114; Legat's Case, 10 Coke, 110; 4 Coke, 71; 6 Coke, 15; 1 Coke, 40; 6 Mod. 229; 3 Coke, 77; Burrows, 396. In England, grants are repealed according to the principles of the common law; it is done on the law, and not on the equity side of the court of chancery. It is done in the petty bag; and no instance can be produced where a grant was ever avoided by the court of equity in England. They are either expressly repealed and cancelled, or considered as void whenever, under the general issue in a court of law, evidence is produced showing they ought so to be considered on the ground of fraud or deception. Courts of equity act in personam only, not in rem. How, consistently with the primary principles of such a court, can the chancellor proceed to cancel a patent when sitting in a court of equity? A court of equity would not relieve against a judgment at law (2 Com. Dig. tit. "Chancery," 3), how then can it be expected it would relieve against a grant improperly obtained?

The act reviving the court of equity in North Carolina (1782, chapter 11) gave it the same powers usually exercised by the courts of chancery previous to the Revolution; hence, subsequent decisions of the English courts of equity, since the Revolution, ought not to be received in our courts. Many of them tend to enlarge the jurisdiction of the chancery court, and ought not to be adopted here. The true principle is, that where a person can get relief at law, he cannot go into equity. The books show that for fraud in obtaining a grant remedy may be had at law. The only case we know of where a person would be authorized to go into equity is to enable the youngest grantee to quiet his estate; by preventing multiplicity of suits. Thus we have shown that a court of equity cannot give relief; a court of law therefore must. What would be the use of driving a person into a court of equity, to be relieved against an act which is, and ought to be, absolutely void. The policy of the law should make it the interest of every individual in the community to suppress fraud; therefore it results that an act void in its commencement is always void, no matter what subsequent circumstances may attend. Baugh v. Price, 1 Wils. 320.

If this fraudulent transaction originated with the governor of North Carolina, set it aside in the same manner you would do with an individual. The principle of the English law is that every act in derogation of the rights of the king is void, so it is with us in relation to the state. It should be made the interest of every individual to take care of the public good. The public should not be cheated or defrauded, nor would it be unreasonable that every person in society should hold his property on that condition. Our law has provided a remedy against the holding of more lands than a grant calls for (Laws Tenn. 1807, c. 2, § 44), the surplus is to be thrown off. This, however, cannot be done in this action; and would it not be better that the grantee of this land should be obliged to give the whole of it up, than the state should be injured by being deprived of so much valuable soil? Our objections suppose that the grantee never paid North Carolina, its officers, or any other person, a single cent for this land. Surely we shall be permitted to introduce such testimony as we have in our power to substantiate these objections. The officers of North Carolina were not authorized to issue a grant without the receipt of the purchase-money; if they did, their authority was exceeded and the grant void.

There are a variety of cases to be found in the books, in which extrinsic testimony

was received in ejectment and other actions in courts of law to show that the king's grant was void on the ground of fraud or deception. 1 Burrows, 595; 9 Coke, 42; 6 Coke, 15; 4 Coke, 71; 10 Coke, 109; 1 Coke, 26; 1 Leon, 30; 17 Vin. Abr. 104, 114, pl. 2; 17 Vin. Abr. 106; 6 Mod. 226; Robert, Fraud. Conv. 502; 5 Com. Dig. 281; Rosc. Crim. Ev.; Peake, Ev. 113; 1 Fonbl. 112, note. A consideration not expressed in a deed may be shown by plea or evidence, as well as anything which has reference to a deed. 3 Term R. 474; 2 Wils. 347; 2 W. Bl. 1109; 3 Burrows, 1568; 4 Burrows, 2230; 1 Fonbl. 60, 61, note; Strange, 741; 1 P. Wms. 240, 727; Peake, Ev. 79; 8 Term R. 147. There can be neither sound policy, nor any good moral reason, why extrinsic testimony should not be received to avoid this grant. 1 Fonbl. 263. There is a distinction, to be sure, between an act that is absolutely void, and one that is only voidable, as may be seen from 1 Bl. Comm. 192, and 2 Strange, 1154. It is equally true that there are many cases where acts must be construed voidable only from their very nature; as in case of grants, our act of assembly having expressly said that unless registered within twelve months they shall be void, yet the court at Clarksville said it was only voidable, and by the state alone. The principal case, however, is different, as in contemplation of law the grant never had any force or efficacy; it was absolutely void on the ground of fraud. Where the legislature of North Carolina has used the word "void" in any of its statutes, it intends to communicate the idea we have contended for, that the act thus spoken of shall be so considered either in law or equity, whenever such a case discloses itself by evidence, either directly or collaterally. The ninth section of Act Nov. 1777, c. 1, is decisive on this ground. Agreeably to that section, if a grant be procured contrary to the provisions of, or in evasion of that act, it will be void; that is absolutely void, not merely voidable. See 1 Hayw. [N. C.] 107. The construction given by our courts to the expression "void" in Act 1786, c. 20, § 1, and Act 1787, c. 23, § 1, is that the grants therein contemplated are absolutely void. These two grants produced the main question in the case of Vincent's Lessee v. Conrad, 4 Am. Law J. 1. It was on the ground of this construction that the practice obtained of permitting the entry to be given in evidence in a court of law to do away the effect of a patent. The eighth section of Act 1783, c. 3, respecting the officers and soldiers, received the same construction by the courts of the state, as is evident from the cases of Overton's Lessee v. Campbell and Goodloe's Heirs v. Wilson.

The general principle of the common law we know is that the oldest grant shall prevail against a younger one in a court of law; but agreeably to our practice, founded on the statutes of 1786 (chapter 20) and 1787 (chapter 23), a younger grant, when supported by an older entry, is permitted to be given in evidence in ejectment. This construction is agreeable to the principles of the common law, in relation to grants of the king. 2 Bl. Comm. 348. This authority has given us a summary of the law of England on this point. If the king be deceived in his grant by fraud, false recitals, or false suggestions, his grant shall be void. Judge Tucker of Virginia is of opinion that the same law which applies to the king respecting his grants is obligatory in relation to the grants of the commonwealth.

We are told these defendants are innocent purchasers, and however fraudulent the transaction might have been, as between the state and grantee, it should not affect subsequent purchasers, who are innocent men; and the case in the supreme court, respecting the Yazoo claimants, has been mentioned in support of this proposition. We have heard much of the doctrine of innocent purchasers in this state, before the decision in that case; it is entirely new, and never was heard of in a court of law before. Suppose a man's horse is stolen, and sold to different persons who know nothing of the theft, will this give the purchasers an indefeasible right to the horse? The case of a gross fraud is perfectly similar. The state has been defrauded out of its land; it has never received a single cent as a consideration for it; the transaction is void in its commencement, communicates no right in the eye of the law, and consequently there is, legally speaking, no property of which subsequent purchasers can possess themselves, however innocent they may be. When a title is fraudulently obtained, subsequent purchasers are in no better situation than the original grantee, who is guilty of the fraudulent act. 1 Wils. 332; 1 Fonbl. 132, 268; 2 Powell, Cont. 176; 2 Vern. 475, 476; 1 P. Wms. 75; 1 Wash. [Va.] 17; 4 Term R. 32, 60. This grant, however, is fraudulent on the face of it, so that it does not fall within the principle which protects subsequent innocent purchasers. The courses expressed in the grant will show that it contains upwards of 50,000 acres, instead of 25,060, which is sufficient to put purchasers on an inquiry. Smith v. Low, 1 Atk. 490.

The eleventh objection presents a distinct ground; we say it appears from the plat annexed that George Gordon, who signed himself a deputy surveyor, surveyed this land, and that he never was a deputy surveyor, nor had any authority from the principal surveyor to make surveys. If he had any, it ought to be shown by the defendants who claim under the survey. It would be the most unreasonable thing imaginable that the surveys of private individuals should be considered good against the state or individuals; the law requires that surveyors should give bond and security by which a faithful discharge of their duties is secured; this is not

the case with private individuals; the state has no security on them for their good conduct; consequently any act of such a person is void, and cannot be the foundation of any right.

The eighth objection requires particular examination. In the year 1789 (chapter 3) the state of North Carolina ceded to the United States her western lands (now the state of Tennessee) on certain conditions; one of which (the second) secures to that state the right of perfecting certain inchoate titles. The right of removal, by this act, is confined to military and John Armstrong's claims; and it must be admitted that so far as this act is contrary to prior acts they are repealed; hence we say Act April, 1784, c. 14, § 7, and Act Oct., 1784, c. 19, § 6, so far as respects county claims, are repealed. The act of cession contains the terms of a contract between the state of North Carolina and the United States, which ought not to be evaded nor departed from. Besides, that condition of the cession only provides for perfecting titles where entries had been made. In this case we say, and wish to prove, that no entries were ever made; therefore the power of perfecting titles which North Carolina had reserved to herself by the cession act has been exceeded in the issuance of this grant; it is therefore void, and particularly so as it is destructive of the rights of a third party, who had no agency in the issuing the grant.

Before taking leave of this subject, it is necessary to notice the construction put on the ninth section of the act of November, 1777 (chapter 1). It provides that all grants obtained contrary to the provisions of the act, or in fraud, evasion, or elusion of it, shall be void; it has frequently been decided that all our land laws are to be taken as one in their construction; they are to be construed pari materia; hence it results that the provisions of the ninth section extend to subsequent acts. What is the meaning of that section is the inquiry. The defendants' counsel state that it only extends to such things as the laws require to be done previous to issuing the grant; is a part of the civil, and not political, institutions of the country; designed to regulate the conduct of individuals in relation to one another, and not their conduct in relation to the state. The words of the section are general; it contains no idea restrictive of its meaning, as the counsel for the defendants contend; why should it be restrained? There is no reason for it, either in public convenience or private morals. If a grant is unjustly and fraudulently obtained, it is correct, it should be void; and what can be more unjust than obtaining a grant from the state without paying a cent for it? In North Carolina it was a long time contested that a grant might be considered void in a court of law, by virtue of the ninth section of the act of 1777; at length after much contest it was decided that the propriety of obtaining a grant might be inquired of in a court of law. 2 Hayw. [N. C.] 98. The law has been considered as settled there ever since, and so we expect it will be settled in this state.

Argument for the defendants:

We object to the testimony offered, not because justice is not on our side, for we believe it may be safely averred that, if the testimony were received, the defendants can satisfy the court by evidence on their part that there was nothing immoral or improper in procuring the grant from the state. The defendants could prove, if it were necessary, the payment of the consideration money for these entries to the state of North Carolina. It might not have been paid at the time the locations were made, it might have been paid when the paper currency of the Revolution was much depreciated; it was, however, still a payment; was received by Carter the entry taker as such, for which he accounted to the state, agreeably to his bond and security (Act Nov., 1777, c. 1, § 14), or was held responsible, which was the same thing to us. Whether these locations were entered on the books of the entry taker, and thus technically speaking became entries, we care not, though we are informed they were. It is admitted the entry books of Washington county were lost or destroyed about the year 1795. The plaintiff's counsel say they have an abstract (by some private individual, there being no law for it). Every person who knows anything of the state of the land claims in this country must be informed that this abstract is a very imperfect document; the book copied by the agent to North Carolina, respecting Carter's warrants, show this. The number of the entry or warrant in that office proves nothing; it was opened as early as the year 1777, and such was the imperfect manner in which it was kept. We have no statute in existence making this abstract evidence in courts of law. The twelfth section of the act of 1807 (chapter 2) refers to this abstract as evidence to the board of commissioners in adjudging unperfected land claims; with them it is not conclusive, it is only assistant.

It is further asserted by us that the warrants which authorized the issuing of the grant under which the defendants claim are genuine warrants, issued by Landon Carter, who was entry taker of the county of Washington. But we ask how can their genuineness be proved otherwise than by the production of the original warrants in court. It is not pretended that they are in court; only copies are offered to be produced; the warrants are filed with the plat of survey in the secretary's office of North Carolina. Act Nov. 1777, c. 1, § 10. A decisive answer is at hand for this part of the case; the officers of government who were employed to issue the grant were the proper judges, whether the warrants were genuine or not. The emana-

tion of the grant is conclusive evidence that they were, in any dispute between citizen and citizen; as between the state and grantee, the question might be different; but we hear of no complaint from that quarter.

After these preliminary remarks, we proceed to the examination of the several objections made by the plaintiff's counsel to the reading in evidence the grant to Sevier. It may not, however, be unimportant to inquire, in the first place, whether the present application to reject the grant be not a little singular. The plaintiff has instituted a suit, which supposes an injury; how can the plaintiff say he has been injured? In the year 1795, the state granted the land to Sevier; the plaintiff then had no claim to this land, neither equitable nor legal. He had made an entry for 5,000 acres it is true, but in another place, perhaps a hundred miles from the place now claimed; in the year 1800, he removes this entry, surveys, and obtains a grant as now claimed. This is a succinct but correct history of the plaintiff's claim. What right has the plaintiff to complain that the state had granted this land to Sevier in 1795? He had no claim to it at that time to be affected. The state was competent to grant it, and to judge of the evidence necessary to authorize such grant.

Suppose the state was defrauded, was this anything to Polk, who had not taken any step to appropriate this land? The case of Upton v. Basset, Cro. Eliz. 445, shows the idea of the common law in relation to this subject. At the common law there was not any fraud remedied which should defeat an after purchase, but that only which was committed to defeat a former interest. When the state granted the land to Sevier, Polk had no former interest to be defeated. This principle of the common law is not, in general, unreasonable. The statutes of the 13th and 27th of Elizabeth respecting fraudulent conveyances, it is true, have introduced a new principle, but it cannot apply to the present case. The common-law principle is expressly recognized in the treatise on Fraudulent Conveyances by Roberts (pages 7–9, 14, 32, 59); so is the alteration by the introduction of a new principle (pages 35, 40, 46–59, 463, 464). It is by these statutes that subsequent legal purchasers are enabled to invalidate prior conveyances on the ground of fraud; and this provision is intended principally as a punishment on the person conveying with a fraudulent intent. It is the intent or mala fides of the person conveying which brings the statute into operation. From the nature of things, this principle of the statute law cannot apply to the case before the court. Who is it conveys in this case? The state. Now the state, in legal presumption, could not have conveyed to Sevier with an intent to defraud any person; we say neither the principles of the common law nor of the statutes will enable the plaintiff to support the objections he has taken to the reading this grant. On this ground, however, we do not mean to place our reliance entirely; the objections are opposed by the clearest principles of law.

The first four objections will be separately considered. It is said there is no law in existence authorizing the issuing of a grant for more than 5,000 acres; that ours is for 25,060 acres, and therefore void. To this we oppose the sound and correct interpretation of Act April, 1784, c. 19, § 3, together with the usage of the state, in issuing grants since the passage of that act. The act is in these words: "Where two or more persons agree to have their entries surveyed in one or more surveys, the surveyor is hereby empowered and required to survey the same accordingly in one entire survey." In the principal case it appears the survey was made by virtue of forty warrants founded on as many entries; the presumption of law is that these entries were made in the names of different persons. (Act 1777, c. 1, § 4), and as the law permits the assignment of entries and warrants, it is also a legal presumption that the whole of these forty warrants were assigned to Sevier, to whom the grant issued. Sevier having obtained all these entries or warrants by assignment, he applied to the surveyor to survey them in one entire survey. Could he, consistently with the spirit and meaning of the law, refuse it? He could not: the consent of any other person than Sevier was not necessary. He owned these warrants, and in him was concentrated by assignment all the power of consolidating the claims that resided in the original claimants. But we are told that the first section of the act of April, 1784 (chapter 19), which contains the preamble, is a key to unlock the meaning of the act. The preamble speaks of the difficulty in surveying swamps in the eastern part of the state. We admit the section provides a remedy for the evil complained of in the preamble, and is particularly applicable to swamp lands. The third section is a general provision, applicable to all kinds of land in every part of the state; its words are general, and we cannot suppose the legislature meant the same thing it did in the second section—to enact the same thing over again. [Murray v. The Charming Betsy] 2 Cranch [6 U. S.] 69. If this act were doubtful, we might recur to usage under it. Vaughan, 160; 3 Atk. 577; 6 Term R. 392; Jenk. Cent. 162, 169; 2 Mass. 117; 2 Evans' Poth. Obl. 10, 17, p. 10; Camp. 22. What has been the practice of the state under this law? To consolidate claims whenever desired; witness the large tracts granted in North Carolina about the years 1794 and 1795, to Allison, the Blounts, and others, when the rage for land speculation ran so high. So it is with respect to grants by North Carolina for lands in this state, where a number of large tracts have been granted to different individuals. Did any person ever hear till now that those grants were void? If so,

thousands of innocent families will be turned out of house and home in both states. Hardin, 568; 1 Caines, Cas. 1–7.

The second objection is almost too frivolous to require refutation. It is manifest how the grant stood; that the consideration was ten pounds per hundred. It must have been pounds, and whether five or ten is unimportant; it must have been one or the other, there being none other known of in the law. The habendum in the grant shows it to have been the intention of the state that the grantee and his heirs should hold this land to their own use, and by our law as to deeds a consideration is not necessary. Act 1715, c. 38, § 5. The books all agree that it is not necessary that a consideration should be expressed on the face of a bargain and sale; it is sufficient that it was paid, and may be proved aliunde. 2 Call, 125; Com. Dig. "Bargain and Sale," B, 11. In 1 Hayw. [N. C.] 99, a grant was permitted to be read though the seal was torn off. In bargains and sales, if it be for and in consideration of money received, it is sufficient without specifying the particular sum. 2 Johns. 254. We refer the court also to Johns. 402; Maryland [1 Har. & McH.] 327–329, 331. The grant should not be adjudged void if by any principle it may have effect. Wils. 78. In deeds of feoffment no consideration is necessary to the passing of the estate. 2 Atk. 150. The general principle of the common law is that instruments under seal ex rei natura import a consideration, and surely there is much greater reason for the application of this principle, as it respects so solemn an act as a state grant.

The third objection is equally untenable. Whether the courses and distances expressed in the grant, on calculation by a surveyor, would contain more than 25,060 acres we are unable to say; or whether the lines will actually measure the distances called for is uncertain; perhaps the surveyor has made a mistake in calling for the distances. The truth of the case is, we know, that there is not near the quantity of land called for, besides older and better claims. The state might have taken that circumstance into consideration, and no doubt did; for the plat will show that older claims were thrown out. For argument's sake, we will admit that the lines are actually of the length called for; still the grant is good for all that is contained within the lines as actually marked. This has been too often decided to be brought in question now. Litt. [Ky.] 44; 2 Caines, Cas. 181; 1 Hayw. [N. C.] 22, 237–239, 254, 258, 377.

The other objection we shall consider specially in proper time, but we have one argument which applies to the whole of them. Shall evidence dehors the grant be received in a court of law to destroy its validity? We say not, and we think this can be established by the principles of the common law, adjudged cases, and public convenience. A principle which pervades the last eight objections of the plaintiff involves the following suppositions: First, that it is proper to read the plat and certificate of survey as a part of the grant, or as evidence dehors; secondly, that on reading the plat and certificate of survey showing the numbers of the warrants, it will be proper to go further into extrinsic testimony to prove that these were county warrants, with circumstances to show that there never were any entries or genuine warrants, and that no consideration was paid the state.

The propriety of these inquiries has been urged on principle of common and statute law. It is insisted that the plat is a part of the grant; our act of assembly will settle this point. The tenth section of the act of November, 1777 (chapter 1), directs that the surveyor shall make two plats, which he shall return to the secretary, who shall file one in his office and annex the other to the grant. If it were the intention of the legislature to make it a part of the grant, it would so have expressed itself; but it conveys a very different idea by saying it shall be annexed. Again, the eleventh section of the same act directs the secretary to make out grants, and record them in his office before delivery to the owner. What has been the practical construction, not only of the secretary uniformly and from the earliest date, but of the registers in the different counties in relation to recording grants? Have they deemed it necessary to record the plat and certificate of survey as being part of the grant? No, they have not; gentlemen cannot dispute what we assert, that neither the secretary of North Carolina nor the registers of the different counties in the state ever thought the law required the registration of the plat and certificate of survey. The tenth section conveys a clear and distinct idea to the contrary, when it requires the secretary to file one of the plats in his office; if it intended to have it recorded it would have made use of the word "record" instead of "file." Did you ever hear of an objection in a court of justice to the reading a grant or a copy, that the plat and certificate of survey were not annexed in the one case, or certified as a part of the copy in the other? Never. Would it not have been made before this, had it been esteemed an essential part of a grant? Surely it would.

As our law required grants to be registered in the secretary's office, as well as in the counties in which the land might be situated; as grants without the plats and certificates have uniformly been registered in all these offices, and all this acquiesced in without an expression of a doubt, either in or out of court, we may fairly conclude the law did not consider a plat and certificate of survey as part of a grant at all. What design the legislature had in requiring that it should be annexed to the grant is unimportant; perhaps to exhibit to the claimant a

more perfect view of his tract to enable him to sell it with more facility, or as affording further information than could be obtained from the face of the grant. Besides these considerations, it might be useful in enabling the secretary to make out a grant with correctness. Be these matters as they may, we hold it as clear law that the plat makes no essential part of the grant, and as such cannot be read. Tenn. Laws 1806, c. 1, § 51. If received at all, it must be under the general principle that extrinsic evidence may be received with a view to invalidate a grant. This brings on the general question.

In England the doctrine of considering grants void in courts, in a variety of instances, seems incident to the rights of prerogative. Vincent's Lessee v. Conrad, 4 Am. Law J. 1. Amidst the numerous and contradictory decisions to be found in the English books on this subject, a sensible distinction is recognized; it lies between grants made on the suggestion of the grantee, as expressed on the face of the grant, and where the letters-patent are the words of the king. 17 Vin. Abr. 100; Ov. pl. 1, and note 151, mem. N. Various statutes in England have required these suggestions to be stated in the grant. 17 Vin. Abr. p. 109, pl. 8; St. 6 Hen. VIII. c. 15. The statute law of England respecting prerogativa regis never was adopted in this country. By statute these suggestions or recitals of the information received from the applicant (grantee) for a patent were intended for the king's benefit. If false, the statute enacted that grants should be void. 17 Vin. Abr. 109, pl. 8. The motive for granting was expressed in the grant by way of recital. By law it was incumbent on every person to examine into the truth of the statements made in the recital; if the king was deceived the grant was void. In common sense, there should be a distinction between grants where the consideration has been received, and so affirmed by the king, and where they depend for their consideration on the suggestion of the party. Hence we see that when the king designs to make an indefeasible grant he does it of his special grace and mere motion, or expresses the consideration to have been received. 17 Vin. Abr. 151; M. C. pl. 1, and note p. 8; 9 pl. 138, E. C. 3. The authority relied on by the other side (17 Vin. Abr. 80), that a grant void in part shall be void for the whole, shows that the case only applies to the king, and that, too, in the case of independent clauses. The law is not so, says the book, when applied to a common person. 17 Vin. Abr. 117; Md. [1 Har. & McH.] 310. With these distinctions respecting the king's grants, viz., those founded on affirmation and those founded on suggestion, or, in other words, assertive and suggestive, the differences in the books may be reconciled. Our grant contains no recital, and is of the assertive kind. The first class is bottomed on the knowledge of the person conveying (17 Vin. Abr. 138, 139; 2 Bl. Comm. 357, 358; 17 Vin. Abr. 104, 105; 2 Md. 187, 190, 310, 311); the other on the information of others. Where the books speak of the king having been deceived, and that therefore the grant is void, we expect the consideration of such a grant to have resulted from information, a case of recital, as in 17 Vin. Abr. 78, 104, 114; Legat's Case, 10 Coke, 110; 4 Coke, 71; 6 Coke, 15; 1 Coke, 40; 6 Mod. 229; 5 Com. Dig. 281, tit. "Patent," F, 1 E,—which have been relied on by the plaintiff; all of which either belong to the last class of cases, or do not apply to that before the court. The case in 1 Burrows 396, was an action on the case, and that in 3 Coke, 77, in chancery. We admit the distinction laid down in 1 Fonbl. 122, c. 2, § 8, note z, in notes. In this we perceive a judicious compilation of the exceptions to the general rule of law, that evidence dehors shall not be received to impeach or destroy a deed or grant. Patents vest such a title as cannot be disputed or divested in ejectment. 2 Wash. [Va.] 114, 115; Schoales & L. 67–70; 1 Pow. Carr. 532; Md. [1 Har. & McH.] 67, 161, 187; 1 Hayw. [N. C.] 356. The last case is an adjudication precisely in point.

The general rule of law is that extrinsic testimony shall not be received to destroy a grant or deed. 1 Hayw. [N. C.] 359; 2 Day, 45; 2 Johns. 84, 221; 3 Johns. 422; 4 Johns. 163; Md. 67, 162, 187, 190, 308, 309, 555; 3 Term R. 474; Roberts, Fraud. Conv. 1–90, 119, 120; 2 P. Wms. 203; 2 W. Bl. 1249; 1 Johns. 139; 2 Call, 310; 2 Pow. Carr. 7; Peake, Ev. 112; 1 Caines, Cas. 493; 2 Johns. 37; 1 Hayw. [N. C.] 107, 378, note; Hardin, 307; 8 Term R. 379; 5 East, 138, 139; 2 W. Bl. 1250; 2 Wash. [Va.] 201; 2 Johns. 603; 1 Johns. 571; 2 Hen. & M. 621; 2 Dall. 171; 1 Dall. 19, 193, 426; 1 Hen. & M. 306. The case before the court falls within none of the exceptions to the general rule as laid down in 1 Fonbl. 122, note; and this general rule excludes the testimony now proposed to impeach the grant to Sevier. There is a clear distinction to be found in all the books, between acts which are absolutely void and such as are only voidable. It is illustrated in Whelpdale's Case, 5 Coke, 119, and in Bac. Abr. tit. "Void and Voidable." In England the king's grants shall be construed to take effect, if by any legal means they can, and always favorably for the subject. Wils. 78; 17 Vin. Abr. 151; 5 Law Rep. 6; 3 Law Rep. 56, 167; 10 Law Rep. 56, 67; 11 Law Rep. 116; 5 Mod. 301; 8 Law Rep. 111, 112.

The authorities adduced by the plaintiff's counsel showing that instruments referred to in deeds may be received in evidence under certain limitations, we admit are correct. We have already spoken in answer to them. No instance, however, has ever occurred in courts of law where such evidence was received, with a view to destroy the validity of a deed, except in the cases referred to in 1 Fonbl. 122, c. 2, § 8, note z, and under particular statutes, as concerning fraudulent conveyances, gaming, etc.

From a full and correct view of all these cases, we conclude the general principle of law is that evidence dehors a grant cannot be received to impeach it; and consequently that the evidence now sought to be introduced cannot be received. We have been told that courts of equity have not power to avoid a grant, and that no instance has ever occurred in an English court of equity. In answer to this assertion, we refer the court to 17 Vin. Abr. 119, pl. 22, and 1 Vern. 270, 370, 390, where the reverse of this proposition is expressly laid down; we also refer to the practice of every state in America where there is a court of equity. It is particularly insisted on that our courts of equity have no such power, whatever might be the case in England. In that country the jurisdiction of the court of equity has been continually increasing; this cannot, say our opponents, be the case here, because Act 1782, c. 11, establishing our courts of equity, has limited its powers to the cases of which such courts had cognizance previously to the Revolution. This reasoning is by no means admitted. The second section of the act provides that the court of equity shall possess such powers "as are properly and rightfully incident to such a court." Law, as well as equity, finds its limits in principle, and not in precedent. The latter is only evidence of the former. Hardin, 464.

For the sake of uniformity, to prevent misconception and misapplication of principle, we admit it is of much importance to the happiness of society that precedents should not hastily be departed from. It must not, however, be forgotten that there shall be no injury without a remedy; and in all cases which the forms of law cannot reach, a court of equity must (1 Ves. Sr. 424), unless opposed by public policy or convenience. Hence it is essential to the very existence of a court of equity that as society progresses new species of injuries arise, and with it an increase of equitable precedents—not an increase of jurisdiction, which exists in principle, as we have before observed. The nature of things points out an equitable court, as the proper forum to impeach a grant. There parties can be apprised by their pleadings of the nature of the complaint and defense; this cannot be done in ejectment under the general issue. All the books show, in ejectment, nothing is contemplated but legal title and boundary. The idea that a court of equity can only act in personam and not in rem, is of very ancient date, and by no means comports with the powers possessed by such a court at this day, either in this country or in England. Almost half the cases in our courts are predicated on a different idea. Our statutes (Act N. C. 1787, c. 22, and Act Tenn. 1801, c. 6, § 48) are extensive in their operation on this ground.

It has been strenuously contended on the other side that whatever may be their fate, agreeably to the authorities, yet the ninth section of the act of November, 1777 (chapter 1), lets in the testimony contended for. Let us briefly examine whether this section has introduced any new principle into the law. It provides that every title etc., to land, etc., which shall not be obtained agreeably to the provisions of that act, or in fraud, evasion, or elusion of it, should be void. What were the provisions of this act is the first inquiry; first, to sell (Act 1777, c. 1, §§ 1, 2); secondly, that purchasers should be citizens, or should take an oath of allegiance (sections 1, 3, 4); thirdly, the mode of instituting a claim after payment, by making an entry (section 5); fourth, that settlers should have a preference in purchasing; fifth, a remedy to settle all disputes by caveat (sections 5–7); sixth, method to be observed in making surveys, grants, security for the good behavior of the officers employed, etc. (sections 10–16, 18, 19). This act had obviously in view two primary objects: security to the state, and security for the rights of individuals. How did the legislature provide for the first? It is answered by requiring an oath of office, with bond and good security from its officers. Section 14. In further confirmation of this idea, and that it was the uniform practice of the government of North Carolina to hold their officers responsible, we refer to the acts (Act 1783, c. 2, § 13; Act 1793, c. 23, § 1) requiring entry takers to give bond once in two years, or their offices should be vacated (section 4), and to return a list of entries once a year to the comptroller of the treasury, for which they were to be held accountable. Act 1794, c. 17, § 2, complains that entry takers had permitted entries to be made without paying the purchase-money, therefore section 2 forbids the entry takers to receive any money in future for entries thereafter to be made, and that persons who shall make entries should pay the consideration immediately to the treasurer of the state. In Act 1795, c. 17, entry takers were forbidden to concern with entries made between 1777 and 1795; that they should put the entry books into the hands of the respective clerks of counties. Act 1796, c. 7, § 9, required entry takers to transmit periodically lists of all entries made in their offices to the treasurer of the state, from which he was enabled to bring enterers to account for the purchase-money. Thus we have a history of the accountability of entry takers to the state. This view of the subject clearly proves that the legislature discovered some of those officers had not accounted to the state for the moneys arising on the respective entries made in their offices. Each entry taker was held accountable for every entry made in his office. Act 1777, c. 1, § 14: Act April, 1778, c. 3, § 6. When land speculation was running high, on account of the influx of discontented Europeans, many of the entry takers of North Carolina were prevailed upon to suffer entries for large quantities of land to be made without payment of

the purchase-money; speculators were trusted; of course many of them deceived and never paid a cent. Was it ever supposed by any person that these grants were void? This happened in North Carolina about the year 1795. Is there a lawyer at the bar, either in North Carolina or this state, who ever supposed the state could resume these lands after being granted? No, not one, we will venture to say. Can the gentlemen on the other side show the smallest intimation by the legislature of North Carolina that it considered grants for lands not paid for void? When its own acts show a conviction that entry takers had failed to account, is it not natural to suppose it would in some of these acts have declared grants thus obtained void, if it thought so? It never did, nor by any act of its government were these lands resumed. In the act of October, 1784 (chapter 19, § 3), the receipt of counterfeit certificates is complained of, but no declaration that grants should be void after going out of the office. How far the legislature might go whilst the property remained in the hands of the person committing the fraud, we will not undertake to say. But we deny that North Carolina had any power to nullify a grant against innocent subsequent purchasers as our clients are; this point is so clear that we will not insult the understanding, nor impose on the patience of the court, by an attempt to argue it. A law book can scarcely be opened but you see the recognition of this principle. Fletcher v. Peck, 6 Cranch [10 U. S.] 87.

After the year 1795, when the state had been very much injured by the insolvency of some of its entry takers, it became still more cautious as appears from subsequent acts. In November, 1795 (Act 1795, c. 17, §§ 1, 3), it is provided, if entries be not paid for within six months, the claims shall lapse or be forfeited; the time for payment was occasionally enlarged as the legislature thought just. Act 1796, c. 7, § 7; Act 1800, c. 7; Act 1801, c. 2, § 3; Act 1802, c. 9; Act 1803, c. 14. As early as November, 1794 (chapter 17), North Carolina determined not to issue any grants to individuals on entries after that time without a receipt from the chief officer of the state (the treasurer) that the money was paid. The act of 1798 (chapter 4, §§ 1, 2), provided a method by which proofs should be made respecting the payment of the consideration in other cases.

The state has appointed its own officers for the purpose of perfecting titles; it has taken what security was thought proper for their good conduct as it respected itself, and as it might respect the citizens at large. Our clients had nothing to do with their appointment, nor any control over them; therefore, what could be more cruel and unjust than that they should be affected by the conduct of those officers; it is opposed to every idea of national faith, honor, and consistency. We hold it to be a self-evident truth that a state cannot disavow its own act (or the act of its officer which is the same thing) to the prejudice of a third person relying on the ordinary legal evidences of titles. It is a maxim of equity and of reason, in a dispute between two persons who are equally innocent, that he who trusts most shall suffer most. This view of the subject leads us to believe that wherever the state has made a grant, the law presumes that it is just and legal; that in disputes between man and man it will not permit any evidence to be received to overturn this presumption, which it considers as highly beneficial in preserving the order, peace, and happiness of society. Fraud is odious in law and never presumed. From this part of the argument, we may fairly conclude that it could not have been the intention of the legislature in passing the ninth section of the act of November, 1777 (chapter 1), to make grants void when coming collaterally into view, on the ground of any act which would affect the state.

Our next inquiry is, how far the ninth section will render grants void on the ground of non-compliance with the provisions of the act, in relation to the rights of citizens. We have already examined whether the validity of grants can be affected by an infringement of the rights of the state in obtaining them. With a view to a correct construction in this respect, it may not be amiss to observe that at that time North Carolina had not any court of equity; and consequently we believe the only remedy designed to adjust disputes between individuals was a caveat, as provided in the fifth, sixth, and seventh sections of the act. This remedy was intended to enable individuals to adjust their disputes before the emanation of a grant. It embraced all cases, and ever has been considered as an equitable proceeding. We therefore conclude that the only case in which the ninth section could possibly operate agreeably to the intention of the legislature was where an individual had surreptitiously obtained a grant before the expiration of the time allowed to caveat, which was three months, agreeably to the fifth section. Act April, 1779, c. 6, §§ 2–4; Act 1783, c. 2, §§ 20, 21; Act April, 1778, c. 3, § 4. After affording this opportunity to contest, the legislature presumed no citizen ought to be dissatisfied, or have any further remedy. It is true since the revival of the court of equity the remedy by caveat has in most instances been considered as no bar to a suit in equity. This, however, results from the nature of equity; in cases respecting inheritance, one trial never has been considered as conclusive in equity (2 Ves. 554), in addition to the unforeseen grounds of complaint noticed in the acts of North Carolina (Act 1786, c. 20; Act 1787, c. 23; Act 1796, cc. 7, 9).

We have been told by the opposite counsel that the construction put on the expression "void" under the acts of 1786 (chapter 20) and 1787 (chapter 23), serves as a further

illustration of the doctrine they advocate. Laws made on the same subject, it is said, are to be considered together, and the same expression should have the same meaning annexed to it, though used in different acts; hence they conclude that the expression "void," used in these two acts, having been construed to mean absolutely void, that the expression "void" in the ninth section of Act Nov., 1777, c. 1, should bear the same meaning. We do not admit that the same expression must bear the same meaning at all times; it depends on the context. Our reasoning in relation to the meaning of the ninth section of the act of 1777 renders it unnecessary that we should examine the question any further with that view; because we insist that, admitting the ninth section to have the meaning they contend, it does not nor ever was intended to apply to the principle which pervades these objections—the admission of testimony dehors a grant.

A few remarks will suffice respecting the construction put on Act 1786, c. 20, § 1, and Act 1787, c. 23, § 1. In relation to the single point of the reception of an entry against a grant, it has been determined that the expression "void," used in these acts, is to be construed "absolutely void." Further than this the state courts have refused to go. In this opinion there always was a division in the court, and no doubt can be entertained that the decision was not conformable to the principles of law. Vincent's Lessee v. Conrad, 4 Am. Law J. 1. In further corroboration of this idea, we have only to remark that it is directly opposed to the contemporaneous construction of those acts. 1 Hayw. [N. C.] 259. North Carolina, by whose legislature these acts were passed, has uniformly to the present day, through the medium of its courts, refused to admit an entry, or any other extrinsic evidence, in opposition to a grant. Now, it is evident that the courts of one or the other of the states are wrong; and this court is at liberty to say what is the law in this respect. One thing is certain, that the admission of the entry with concomitant proofs in evidence has been the parent of endless confusion and litigation ever since the decision took place. We have been told in argument by the other side, that the law as now settled in North Carolina permits extrinsic evidence to be offered to do away the effect of a grant, and for this purpose 2 Hayw. [N. C.] 98, has been relied on. Gentlemen will not surely seriously affirm that such is the understanding of the courts at this day, or ever was; they cannot do it, for the practice is well known to be otherwise there. Nor does the decision referred to in any manner warrant the assertion made; the case decides no such thing; it only decides the grant was void, having been made previously to the Revolution, which is correct, agreeably to Act 1776, c. 1, § 3.

On the ground of fraud it has also been insisted, that the case of Witherinton v. McDonald, 1 Hen. & M. 306, shows it was the opinion of the court of appeals in Virginia that extrinsic testimony may be received against a grant. We have only to say that the decision does not settle the law as contended for; this point was not decided in the case alluded to; it only refers to one in which the case supposes the point of fraud had been determined, as affording a ground to impeach a grant. With that decision a majority of the court appear to be much dissatisfied; and, so far as anything can be collected from the case, it proves the reverse of what is contended for.

So much of the argument, on the part of the plaintiff, as respects fraud and want of consideration, involved in the fourth, fifth, sixth, seventh, eighth, ninth, and tenth objections, we shall dismiss.

The fourth and eighth objections contain other views which we deem of sufficient consideration to merit an answer. The fourth asserts that our grant was founded on county warrants, which could not be appropriated where they were. It is admitted that this grant covers land within the limits assigned to John Armstrong's claims under Act 1783, c. 2. The proposition on the other side is that the warrants or entries on which Sevier's grant issued could not be granted within the limits originally assigned for John Armstrong's claims; that county warrants, which they insist ours are, could not be removed without the limits of the county in which the entries were made; but if they could, the law did not authorize their appropriation, within John Armstrong's bounds. Neither of these propositions is correct. The whole weight of this part of the argument rests on the construction of Act April, 1784, c. 14, § 7, Act Oct., 1784, c. 19, § 6, and Act 1786, c. 20, § 7. These were all the acts passed by the legislature of North Carolina respecting removals previously to the cession. It will be recollected that North Carolina, by the cession act, reserved to itself the power of completing all claims to land which had originated previously to the cession of 1789; hence some of the laws passed by that state, respecting the completion of these titles, are considered as obligatory; and all the land laws of that state, though passed since the cession, are referred to by our courts for the purpose of explanation. We will suppose some of the acts respecting lands passed previous to the cession may be doubtful; the opinion expressed by North Carolina in her legislative acts, on such parts of the law, has been considered good authority.

With this preliminary view, we proceed to inquire for the meaning of the legislature, as expressed in Act April, 1784, c. 14, § 7; Act Oct., 1784, c. 19, § 6; Act 1786, c. 20, § 7. Was it its intention that county entries, when lost by better claims, might be removed, first, without the county in which the entry was made; and granting the affirmative, whether they could be removed within John Armstrong's bounds. This part of the land law

will be considered under the impression of its history, the acts of assembly and usage, all of which we assert will support the affirmative of these propositions. North Carolina, at the commencement of the Revolution, deemed it proper to procure funds to carry on the war; she opened a land office in each county, offering her lands for sale at fifty shillings per hundred acres. Act Nov., 1777, c. 1. In June, 1781 (chapter 7, § 7), she stopped the sale of her lands by shutting the entry offices. In April, 1783 (chapter 2), the county offices were again opened, except within the limits designed for John Armstrong's claims, and for these the act opened an office at Hillsborough. Section 14. We assert that when these offices were opened by this act, viz., those of the counties and John Armstrong's, the state price was the same in them all, ten pounds for every hundred acres. Our opponents assert that the price of ten pounds only applied to John Armstrong's office; more of this hereafter. We will proceed with our historical view of the subject. In April, 1784 (chapter 12, § 3), all the offices for lands in the western part of the state of North Carolina (now the state of Tennessee) were shut; and as to these lands, never were opened again by North Carolina; after 1789, and making the cession to the United States, she had no power to do so. At the same session (April, 1784), when these western offices were shut, the legislature passed an act to authorize removals. Chapter 4, § 7. Its words are, "and in case any entry shall be made for lands which have been previously granted or entered and located, the surveyor shall, and he is hereby authorized to survey the quantity on any vacant land in this state, which may be located and described by the person who made the entry, or any other person authorized for the purpose."

The act of October, 1784 (chapter 19, § 6), provides "that if any person or persons shall have, by virtue of the law commonly called the land law, now in force in this state, located his or their entry," etc., provides in substance the same as the last act. The act of 1786 (chapter 20, § 7), it is admitted on all hands, has not much agency in this argument; it declares that surveys on warrants from John Armstrong's office which had been removed should be good and legal. The only idea that can be collected from this section is that the legislature conceived it was doubtful whether the two acts of April and October, 1784, would cover the case of removals in John Armstrong's office; and is evincive that these acts were never intended to apply to John Armstrong's office alone, as has been insisted on the other side. If so, the legislature must have known it, being but two years afterwards; and representatives who legislate are presumed to know, not only the meaning of previous acts, but the general sense of society on those acts. Had they been sensible the acts of April and October, 1784, applied particularly to John Armstrong's claims, would they have conceived it necessary to pass the act of 1786, particularly to remove doubts respecting those claims?

One thing is too evident to admit of much argument, that the words of the two acts of April and October, 1784, embrace all land claims, as well one kind as another. Some are of opinion that the first of these two acts operated in cases respecting entries thereafter to be made; the other, an extension of the principle of the first to all entries which had been previously made. Between the two acts, no rational doubt can exist that all claims are included, whether John Armstrong's, military, or county. The words are general, and why should we seek to restrict their meaning? We shall be able to show there is no reason for such restrictive interpretation.

With the counsel for the plaintiff, we admit the legislature designed to set aside a particular tract of country for the satisfaction of the military claims and pre-emption settlers, etc., therein; this is described in the seventh section of the act of 1783 (chapter 3), and that agreeably to this and the eighth section, those claims and no others were to be appropriated within those limits; agreeably to the case Goodloe's Heirs v. Wilson, if laid without those limits, under the laws of North Carolina, such grants would be void. We also admit that the country south of French Broad River and Holston was set aside as Indian hunting ground, and appropriations of any kind forbidden therein. Act April, 1778, c. 3, § 5; Act 1783, c. 2, § 5. But we say that the balance of the state of North Carolina (including now this state), agreeably to these two acts of April, 1784 (chapter 14, § 7), and October, 1784 (chapter 19, § 6), was equally open to appropriation, without regard to county or John Armstrong's bounds. It is asked, why should the military tract and Indian hunting ground be excluded from general appropriation? It is replied, because the acts respecting these portions of country negatived the idea of any others entering or appropriating lands therein; these provisions have no connection with the general law, or that respecting the county and John Armstrong's office. Act 1783, c. 3, §§ 2, 3.

The acts respecting the military and Indian lands had only passed about a year before the first of the two respecting removals; compensation to the officers and soldiers of the Revolution, and the rights of the Indians, were important objects to the state. Very few of the officers and soldiers had located their lands in April or October, 1784; and it was of the last consequence to the public that the Indians should be protected in their hunting grounds. If there were no negative words in the acts respecting the military and Indian lands, it is clear the legislature did not intend by its acts of April, 1784 (chapter 14, § 7), and October, 1784 (chapter 19, § 6), to authorize individuals to appropriate lands within those tracts or portions of country by removal.

Is there any reason that can be advanced why any other parts of the country should be

excluded from appropriation by removal or the operation of these two sections? The first expressly says, that in case of loss by better claims, the enterers may remove to any other vacant land within the state. Our opponents say the state received a higher price for John Armstrong's lands than those entered in the counties. This is a point on which much stress has been laid; we will therefore proceed to examine it. It is clear the legislature, by the act of 1783 (chapter 2), designed to include in the provisions of that act county claims, as well as those in John Armstrong's office or her western lands. When the legislature designed by that act to confine a regulation to John Armstrong's office, it was so expressed, otherwise the enactments are general, of which denomination is the price of land. Section 10. To show this, we will examine every section of the act. Without exhausting the patience of the court, we have only to observe that the caption is general, the preamble is equally so; the second section revives the county offices which had been shut; the language of the third section is, "that the western boundary be enlarged," etc., describing this extension. The fourth, fifth, sixth, seventh, and eighth sections respect Indian lands; the ninth section is confined to John Armstrong's office. The tenth section respects the price of lands. Is it confined to John Armstrong's lands? Its words are, "every person, before he shall be entitled to enter a claim for any of the said lands"; what lands, is the question. We say any lands in the state entered in any office. See Caption, §§ 1, 2, and first part of section 3.

Thus it already appears that the price of lands in North Carolina, not only in the county but John Armstrong's office, was ten pounds per hundred; the price of lands before that time was fifty shillings. This every man knows who entered lands in those days. Ask all our old settlers, and they will tell you this. Gentlemen on the other side tell us ours are county warrants; if so, we would ask them to tell us whether they were at fifty shillings or ten pounds; the first was the price of county lands till June, 1781, when those offices were shut, and raised to ten pounds by the act of 1783, when the second section of the act opened them again. We have another remark to make on this part of the case, that fifty shillings in 1777 and 1778 was of more intrinsic value than ten pounds in certificates, etc., in 1783. Certificates might then be purchased for an eighth and a tenth; it was their common price. So that the state received a better price for the lands sold previous to 1781 than after it opened its offices in 1784. Money had vastly depreciated in the course of the Revolution, and certificates so plenty as to be worth almost nothing. The idea of difference of price, so much insisted on, therefore vanishes. We find that the state, until the offices were shut in 1781, made no difference in the price of its lands; nor did it on opening the offices in 1783; the price was all the same in the counties as well as John Armstrong's office; it was raised, to be sure, from fifty shillings to ten pounds. In the session of April and May, 1784, when it authorized removals, there was no entry office for western lands; all the entries that ever were made for lands in this country were then in existence, and no more were permitted. In this state of things was there any possible reason why removals should be confined to counties, or John Armstrong's bounds kept free, or excluded from the general words of Act April, 1784, c. 14, § 7, and Act Oct. 1784, c. 19, § 6?

Claimants in Armstrong's office were on an equal footing with those in the country; when their money was paid they made entries, and thus had an opportunity of making at once a choice. If lost by better claims, they should be on the same footing as to removals; that is, anywhere in the state where they could find vacant land, except within the military and Indian lands.

In dismissing this inquiry into the meaning of the act of 1783 (chapter 2), we have only to observe that the court will perceive that the ninth, fourteenth, and twenty-fourth sections of the act are confined to J. Armstrong's claims; the balance of the act is general. See section 22. Why should boundary make any difference? No reason can be seen why John Armstrong's bounds should be exempted from removals; the price, we have seen, was the same in all parts of the state. If any doubt could remain on this point the act of North Carolina of 1790 (chapter 14, Caption, and section 2) places it out of dispute. This act expressly refers to and repeals part of the act of 1783 (chapter 2), reducing the price of lands from ten pounds to thirty shillings. At this time North Carolina had not a foot of land in the limits which were assigned to John Armstrong's office.

That part of the plaintiff's argument respecting removals which confines them to the limits of the county in which the entries were made is refuted by the opinion of the legislature of North Carolina, as expressed in its act of 1794 (chapter 17, § 3). This section enacts that in future warrants shall not be removed out of the county. The act had no obligatory force here, having been made since the cession; but it is a legislative construction of the acts of April, 1784 (chapter 14, § 6), and October, 1784 (chapter 19, § 7), the force and obligation of which are common to both states.

In this construction of the acts respecting removals, we are further opposed by the plaintiff's counsel calling to their aid the doctrine of refunding purchase-money in case of loss by better claims. The acts of November, 1777 (chapter 1, § 6) and April, 1778 (chapter 3, §§ 2, 5), are referred to. The principle of these acts is contained in the second section of the act of 1778; it provides that if on survey it shall appear that

part of the entry be lost by an older or better claim, the entry taker shall refund in proportion to the part lost. We are told that this is the only provision for county claims, and that removals were intended solely for John Armstrong's claims. We have already at length examined this point; some other and further views will be taken of it. The acts of April, 1784 (chapter 14, § 7), and October, 1784 (chapter 19, § 6), in this respect are cumulative. Camp. 214; 2 Hayw. [N. C.] 227, 228; 2 Cranch, 389. This idea is confirmed by the legislative opinion of North Carolina (Act 1794, c. 17, § 3). The proviso to the fifth section of the act of North Carolina of 1791 (chapter 21) is in further confirmation of this idea. That act provides a method by which entry takers should proceed in refunding money where part of tracts has been lost, agreeably to the principle laid down in the act of April, 1778 (chapter 3, § 2). The proviso excludes the ceded territory (this country) from the operation of the act. Not only from the fact of North Carolina having parted with all interest in the lands of this country (Act 1789, c. 3), but from this proviso we must be convinced that the state would never agree to refund money for lands lost by better claims here. Nor has it ever been contended that entries from that state could be removed to this since the cession; and vice versa.

Should any doubt remain that the power of removal given by the act of 1784 is merely cumulative, the opinion of the legislature of North Carolina thereon, as expressed in the act of 1793 (chapter 23, § 5), is decisive. These are the express words: "That it shall not be lawful for any person making an entry of land to withdraw the same, but all entrance moneys shall be paid by the respective entry takers into the public treasury; and in case of deficiencies when the land entered shall be surveyed, the persons entering may avail themselves of the mode of relief already pointed out by law"; that is, by removal. The cession act of North Carolina of 1789 (2d Ed., c. 3, § 1) has been relied upon. It is asserted that admitting the acts of April and October, 1784, authorize removals, the cession act repeals them. We admit that so far as any of the provisions of the cession act are contrary to those of prior date, those acts are repealed; but we insist there is nothing in the cession act that countenances the idea contended for on the other side. This act, after providing for the removal of military and John Armstrong's claims, particularly has this clause: "And where entries have been made agreeably to law, and titles under them not perfected by grant or otherwise, then and in that case the governor for the time being shall, and he is hereby required to, perfect from time to time such titles in such manner as if this act had never been passed; and that all entries made by, or grants made to, all and every person and persons whatsoever, agreeably to law, and within the limits hereby intended to be ceded to the United States, shall have the same force and effect as if such cession had not been made." The eighth condition of the same act provides that the laws of North Carolina shall continue in force. Before the cession the titles might be perfected by removal; so it remained afterwards; no alteration was made by the cession act in this respect.

In concluding this argument we have to observe that if doubts existed respecting these statutes, usage is on our side. On the eastern side of Cumberland Mountains, in this state, there are few other grants, except such as are founded on removed county warrants. There is scarcely a claim in Granger, Claiborne, Campbell, Anderson, Roane, Knox, Blount, Sevier, Cock, and Jefferson counties but is founded on these removed county warrants; with safety we can affirm two thirds in these counties are of that kind. In North Carolina claims of this nature are innumerable; shall they at this day be overturned?

In addition to the reasons we have offered to the court, it must not be forgotten that the same question respecting removals has been decided by the state courts more than once. In the case of Cocke v. Dotson, in the superior court of Hamilton district, this question occurred, and on the principles we contend for, received the same determination. 1 Overt. 169, 323.

The tenth objection refutes itself. The date of the letter from Sevier to the secretary of North Carolina is subsequent to the date of the grant, and its contents relate to other matters.

OPINION OF THE COURT. Viewing the manner in which the consideration is usually expressed in grants, we are of opinion that the consideration of ten pounds is sufficiently intelligible. There are usually but three kinds of consideration—fifty shillings, ten pounds, and military. It will not admit of being construed as founded on the first and last of these claims; it must of necessity be the second; on this ground the grant cannot be rejected.

We are of opinion that the plat annexed to the grant is not an essential part of it; if recurred to it must be for the purpose of explanation, and not to destroy its validity. So it is in relation to the cases read by the plaintiff's counsel; they relate to papers referred to in a deed or instrument of writing. In considering the papers thus referred to as part of the instrument, the court goes on the idea of supporting the existence of the deed. Here we are asked to permit parol and extrinsic testimony with a view of destroying the existence of a grant. This, consistently with the principles of law, cannot be done. Once for all, we wish to be understood that no kind of evidence can be received to impeach the

validity of a state grant except an entry.

And per TODD, Circuit Justice: If this point were res integra, I should be strongly inclined to think an entry could not be received in evidence in ejectment, under the acts of 1796 (chapter 20) and 1787 (chapter 23).

BY THE COURT. The general principle of law is that evidence dehors cannot be received to impeach the validity of a grant. The exceptions to this rule are collected in 1 Fonbl. 122, c. 2, § 8, in notes. The ground of these exceptions arise from acts which are contra bonos mores, malum in se, or malum prohibitum.

None of the objections taken by the plaintiff fall within the exceptions; the general rule of law must apply. It was understood that the practice of admitting an entry in evidence in ejectment originated in the construction of the acts of 1786 and 1787. The decision at Jonesborough in the year 1798 (Russell's Rep. v. Blair) was founded on the ninth section of the act of 1777 (chapter 1). The decision, however, was strenuously arraigned, which produced an abandonment of the ground on which it took place, and that furnished by the acts of 1786 and 1787 taken in its stead. See 1 Overt. 419. This principle having obtained in practice, the court was not inclined to disturb it, whatever ideas might be entertained respecting the true construction of those acts. In questions arising under the land laws, the court was informed that it was the only exception to the general rule of law which had obtained in the state courts. No such principle had been established in any state where there were courts of equity, and we think no other exception should prevail. In the procurement of land titles the law requires many things to be done by its officers which are directory. To impeach the validity of grants on the ground of non-compliance with these parts of the law would be attended with great public inconvenience. See 1 Burrows, 447. The state has intrusted certain officers of government, and the law presumes, as it respects points of regularity, that what they have done was authorized and correct, as the acts of surveyors, chain carriers, markers, etc. We take a distinction between an entire want of authority in the officers issuing a grant, and whether it were regularly done. Where limits are assigned for the appropriation of particular species of claims, as the military lands and other kinds of claims are granted, such grants are merely void, as in the case referred to at the bar. (Hughes, 39, 203.) There would be an entire lack of authority to grant such lands. So of the lands set apart for the use of the Indians. It would be of very mischievous consequence to society if the propriety of issuing grants could be inquired into on the ground of irregularity. There is a sound distinction in law between acts which are absolutely void and such as are only voidable. On general principles grants are not void on the ground of fraud or irregularity in obtaining them, but voidable by those who are injured.

The English authorities show there are two kinds of grants. One made on the suggestion or surmise of the person applying for a grant; in this case the suggestions are stated by way of recital; the other kind, made on the king's own knowledge, and contains his affirmation simply. The grant objected to is of the latter kind, which cannot be defeated by any extrinsic testimony. The court cannot inquire whether the consideration were paid or not, the deputy surveyor duly authorized, or whether the lines of the tract be too long. The statutes of North Carolina relative to the appropriation of lands must be construed pari materia. Defects and doubtful points arising out of one act may be supplied and explained by clauses in the same or other acts. The act of 1783 (chapter 2) seems to have been correctly considered by the defendant's counsel. In general this act is not insulated in its provisions; it revives and amends the laws respecting county offices; in addition opens John Armstrong's for the sale of the western lands at the same price paid for lands in the county offices. We cannot perceive that the ninth section of the act of November, 1777, (chapter 1), affects the case any way.

The court deems it unimportant to inquire whether the two acts of April and October, 1784, respecting removals, be intended in the one case to operate in future and the other in the past tense. These clauses are general in their operation, and not confined to any species of land claims. Taking the whole of the land laws of North Carolina into view, it appears to have been the intention of the legislature that claimants should get other vacant land in lieu of what might be taken by better claims, or that they should receive a pecuniary compensation for the part lost. Nor does it appear to us that the acts of April, 1784 (chapter 14, § 7), and October, 1784 (chapter 19, § 7), repealed the act of April, 1778 (chapter 3, § 2), which directed the entry takers to refund in case of loss; the latter acts were cumulative. If the usual rules of construction left this point doubtful, the act of North Carolina, 1793 (chapter 23, § 5), would remove every difficulty on this ground.

What would be the situation of things if removals were not permitted? Enterers of lands in the counties of Washington, Sullivan and Greene would be without remedy. The proviso to the fifth section of the act of North Carolina of 1791 (chapter 21) expressly says that moneys shall not be refunded, agreeably to the act of April, 1778 (chapter 3, § 2), for lost lands in the ceded territory, now the state of Tennessee. Besides, the act of North Carolina of 1793 (chapter 2) puts an end to refunding in case of loss, and leaves in force the remedy by removal alone.

A court of equity is the proper tribunal for avoiding a grant; there the parties are apprised by the pleadings of the nature of the complaint and defense, and come prepared to

the contest. In ejectment legal title and boundary only come in question. The case of Witherington v. McDonald, 1 Hen. & M. 307, is a solitary case, without authority. Nor did the judges of the court of appeals in Virginia, in reviewing this case, appear to be satisfied with it. The case then before the court did not make it necessary to give a decisive opinion on it; but considering what dropped from the court incidentally, it is plainly to be inferred that a majority of the judges did not think it was law. In North Carolina it appears the courts will not receive extrinsic testimony to impeach a grant. This practice is founded on the general principle of law, and we are not inclined to go any further than the practice of the state in furnishing exceptions to this general rule.

Contemporaneous expositions of the land laws are certainly most to be relied on. In the course of the argument we wished to be satisfied whether county warrants could be appropriated within John Armstrong's limits, we are satisfied on this ground that they can, not only from considering the whole of the land laws together, but the usage and practice in North Carolina in granting lands is corroborative of this idea.

It is objected the state of North Carolina could not issue a grant for more than five thousand acres, and the third section of the act of November, 1777 (chapter 1), and Act 1783, c. 2, § 9, have been referred to in support of this objection. These statutes are directory as to the quantities to be entered. The act of April, 1784 (chapter 19, § 3), is a general law, and not confined to swamp lands; its language is general, and we see no reason why a restrictive interpretation should take place. After removal and consolidation of entries the third section does not limit the quantity to be surveyed in one entire tract. The act being posterior in date to those directing the quantities to be entered in the respective offices, and taking into view the practical interpretation of this section by the state of North Carolina, we are of opinion the grant is not void on this ground.

And per M'NAIRY, District Judge. Independent of this act, he should be inclined to think the grant would not be void. The acts of April and October, 1784, which authorize removals, contain no negative words respecting consolidation; if a man has purchased several entries which would have been lost by better claims, and is under a necessity of removing, no reason can be seen why he may not survey such removed claims adjoining each other; the law does not forbid this; different grants may issue to the same person for the lands thus adjoining; the effect is the same as if only one grant had issued; for if the same man can appropriate to himself a body of adjacent land by different entries and different grants, it amounts to the same thing in substance as if but one grant had issued; the land appropriated by the same individual is precisely the same, whether conveyed by one or many grants. At best it can only be matter of form, and for this to avoid a grant would be absurd.

PER CURIAM. The cession act leaves things as to perfecting land titles precisely as they were before its passage. In doubtful cases usage may be safely recurred to, in order to ascertain the meaning of the legislature. Of such force and importance has this principle been considered that the supreme court of the United States, in a case which came up from the state of Pennsylvania, adhered to practice or precedent, though contrary to their understanding of the law.

And per M'NAIRY, District Judge. Where statutes declare that proceedings shall be void, he was inclined to think they should be considered absolutely void either in law or equity. The acts of 1786 (chapter 20) and 1787 (chapter 23) enact that when grants shall be obtained on younger entries to the prejudice of older ones, such grants shall be void and utterly of no effect. The circumstances disclosing the avoidance, he was of opinion, might be shown in a court of law as well as in equity, in the single case of an older entry under these two statutes.

The grant to Sevier was read; the counsel for the plaintiff excepted to the opinion of the court on the ground of the first ten objections, and prayed a writ of error to remove the cause to the supreme court of the United States.

Verdict for the defendants.

[NOTE. This cause was subsequently carried to the supreme court on writ of error, when the judgment of this court was reversed. 9 Cranch (13 U. S.) 87. The cause was again heard on the subject as to the admissibilty of duplicate warrants and of entry taker's books to prove forgery. In that case there was judgment for defendants. Case No. 11,251. But on writ of error to the supreme court the judgment was reversed. 5 Wheat. (18 U. S.) 293.]

Case No. 11,250.

POLK v. ROBERTSON et al.

[1 Brunner, Col. Cas. 103;[1] 1 Overt. 456.]

Circuit Court, D. Tennessee. June, 1809.

PRACTICE — ADMISSION OF WRITTEN TESTIMONY — BOUNDARIES — ADMISSION OF PARTIES AS EVIDENCE.

1. Written testimony to which objection has been made should be handed to the court for inspection, without being read, for a determination of its admissibility.

2. The admissions of parties are competent evidence to the establishment of boundaries, but are not competent to determine the law applicable thereto.

Ejectment; plea not guilty, and issue.

The plaintiff produced the oldest grant for five thousand acres of land, dated about the

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

year 1786, lying on the head waters of Richland creek, beginning at John Nelson's southeast corner (of grant No. 1,120), thence north one thousand two hundred and fifty poles, east six hundred and forty poles, south and west to the beginning, in an oblong. John Nelson's grant was read, which calls to begin about three and a half miles nearly north from the mouth of Robertson's creek, lying on the head waters of Richland and Robertson's creeks. It was proved that these lands, with other adjoining tracts, had been diligently searched after previous to the opening of the office, in August, 1807, and could not be found, and therefore were not placed on the general plan contemplated by the sixth section of the act of 1806 (chapter 1). It was admitted that the defendants made their entry after the opening of the land office in that year, and obtained a grant before any corners or line of Polk's tract, or the others adjoining, could be found, which was in the year 1808.

In order to prove the southeast corner of Nelson's tract, copies of two other grants to Nelson of five thousand acres each, two to Martin Armstrong, and one to John Armstrong, all for five thousand acres each, were offered in evidence; this was objected to on the ground that grants which were not called for either directly or indirectly by Polk, the plaintiff, could not be read, being irrelevant. It was answered that a party had a right to read what records he thought proper as evidence, and the jury would judge whether the evidence had any bearing on the question or not.

TODD, Circuit Justice (M'NAIRY, District Judge, having an interest, did not sit). It is the duty of the court to see that the evidence is relevant, as much as it is, that it should be competent. When objections are made the court will exclude testimony upon either ground, when the incompetency or irrelevancy clearly appears. [Turner v. Fendall] 1 Cranch [5 U. S.] 118.

When objections are taken to written testimony it should be handed to the court for their inspection without reading, so that it may not have an effect upon the jury. [Levy v. Gadsby] 3 Cranch [7 U. S.] 186; [Burd v. Smith] 4 Dall. [4 U. S.] 88; 3 Bin. 329.

Upon examination of the copies offered, THE COURT said it was proper to receive the evidence, as there was such a connection in the calls of the grants as tended to show the boundaries of the plaintiff's tract; the dispute was a matter of identity only, and the evidence was proper. Copies of these grants were then read, from which appeared the following references in the grants: First. John Armstrong's claim called to include the mouth of Robertson creek, and to adjoin Martin Armstrong; this claim of Armstrong calls to adjoin another claim of his, and this last to adjoin Thomas Polk, the plaintiff. The second claim of John Nelson calls to begin at the southeast corner of his other tract. John Nelson's third tract calls to begin at John Armstrong's southwest corner, all of which may be seen in the subjoined plat. Several searches had been made for these tracts without effect; at length among a number of persons in search of them, Mr. Coffee and G. W. Campbell, Esq., found one of the corners of John Armstrong's claim as they supposed, viz., at H. This corner was found by accident. Upon running north trees were found marked at G., having a small variation from the course and distance called for in the grant; continuing north a beech was found at A. on the side of a dry branch, as called for in the grant. This tree also varied from a north course more than the first; the grant calls at A. for a beech marked E. H. R. W., and an elm. The proof was there was an elm on the opposite side of the branch, but not marked for a corner at all. This beech was marked with the letters E. H. R. W., and also with W. C. There was no line marked east, west, or north from this place; there appeared an old line marked about twenty poles south of this place; none of the lines of Thomas Polk's tract were ever marked, nor corners made, except the supposed one at A.

Haywood, Dickinson & Campbell, for plaintiffs, submitted the evidence to the jury without argument, considering it too plain to admit of any.

Grundy, White & Overton, argued for defendant:—

First. Upon the principle that the oldest grant holds the land conclusively in a court of law, and that nothing but questions respecting boundary can occur, it was contended that the evidence offered by the plaintiff did not establish the beech and elm as the southeast corner of John Nelson's first tract, and consequently the southwest of the plaintiff's. The claim of the plaintiff is not otherwise established than by reference to Nelson's southeast corner. How is that ascertained? It is said by finding marks at H. G. and at this place. There is no other proof. No person is produced who made any of these marks, or saw them made. The survey of John Nelson's second tract, and John Armstrong's, were made on the 11th and 12th of March, 1786. Ccl. Weekly was one of the persons along at the time the corners were made. Why is he not produced? There are many reasons why the beech at A. is not the southeast corner of Nelson's first tract, called for by Polk. This place is called for in Nelson's grant, as being about three and a half miles nearly north from the mouth of Robertson's creek. Mr. Coffee tells us it is more than three quarters of a mile east of a north course from the mouth of that creek, and about four miles from thence. It cannot be the place; the distance does not answer, and there is a great variation in the course. If a latitude of three quarters of a mile be allowed to the

east or west, any other greater distance may with equal propriety. The tract of which this is a corner (John Nelson's) calls for the head waters of Richland and Robertson's creeks. This supposed corner at A. is on the waters of Rock creek of Duck, another water course altogether, and is not marked as a corner for the tract; a beech and elm is called for in the grant; the elm is not marked at all, and stands on the opposite side of the branch, where it is not reasonable to suppose a person would call for it for a corner. A tree called for as a corner was surely marked as one. Besides, the beech does not answer the description. Though marked as a corner for four tracts, it has more letters than are called for in the grant, viz., W. C. The proof produced, so far from showing that this is the southwest corner of Polk's tract, shows that it cannot be. There was not a single corner made at B. C. nor D. nor any line marked anywhere, so as to assist in establishing this place. We admit that if the place at A. was clearly established as the corner of the tract, that other corners or lines of the tract not having been marked, would not destroy the claim; but that is far from being established.

The English law differs from ours as it respects ejectments. There, a person may recover by showing a right of possession alone, jus intrandi, without any title deeds whatever. 2 Bac. Abr tit. "Ejectment," A, D, 3; 3 East, 355-358. Here you must cover the possession by title. 2 Hayw. (N. C.) 11, 69, 88, 98, 114, 157, 336. If it be necessary for the plaintiff to show a title, it must of course be such a one as conforms to the principles of law. It must contain a description sufficiently special to give notice where the land is situated, so that other persons who might have desired to appropriate vacant lands, could have an opportunity of knowing where it lay, and thus avoid being entrapped. Our law requires that grants and title papers should be registered. What can that be for, except to give others who may be concerned to know, notice where land lies; and who can be more concerned to know, or more affected, than a subsequent enterer. Before the defendants made their entry this land could not be found; it was not on the general plan, and it is manifest that the calls of the grant of Polk and Nelson, to which it refers, never could enable a person to find the corner now claimed.

In this view of the subject it is insisted that we are not bound to notice the calls of any claim, but Polk's and Nelson's, to which it refers. Nelson's does not call for any other claim; it is to begin about three and a half miles nearly north from the mouth of Robertson's creek. The corner A. is three quarters of a mile from that course; the marks there do not agree. It is said that John Armstrong's claim reduces everything to a certainty, and id certum est quod certum reddi potest. How does this claim do it? By calling to include the mouth of Robertson's creek? It does not state in what part of the five thousand acre tract it shall be included. Here, then, is a latitude of one thousand two hundred and fifty poles to go on, nearly four miles; the mouth of Robertson's creek might be anywhere within that limit, agreeably to the grant. In looking for the tract after finding the mouth of Robertson's creek you would know that you were then within the bounds of John Armstrong's five thousand acre tract of land, and you might know you were within two miles of some corner, or one mile of some line; but you could not tell where, nor how to find them; this will not fix the corners; going north you cannot find the corner A. by three quarters of a mile; if you did, it would not answer the description as to marks; but the most decisive point of all, that the grant would not give notice, is, that the corner when found is on the waters of Duck and not Elk, as called for in their grants; nineteen-twentieths of their land at least lying upon Rock creek of Duck. The plaintiff might with as much propriety claim lands on Red river, one hundred miles north of this place. How could any subsequent locator ever suppose, under all these circumstances, that the tree marked at A. was Polk's southwest corner, supposing him to have stumbled on it, for it must have been found by accident. The plaintiff's claim does not include a single acre of Robertson's creek, and but very little of Preston's creek of Elk. We are told the ridge dividing Duck and Elk is very flat and low at this place, and consequently the surveyor and locator of the land might suppose they were on the waters of Elk. We are also told that the line which is found marked in going south from A. shows that the surveyor was running south, and consequently he might have traveled up Rock creek. In traveling from Elk north, it might have been more difficult to tell when you passed the ridge, but not vice versa. In this country it will be recollected that a grant can be legally obtained without an entry under the laws of North Carolina upon removal warrants. There was no record kept of the survey, except in the secretary's office of North Carolina, and that has been determined insufficient to afford even constructive notice. (It was so determined with respect to lands in the military boundary where an office was always open; but this decision did not extend to lands lying within John Armstrong's bounds. Hickman's Lessee v. Ward, Nashville, Nov., 1804.) The plaintiff had no entry; his grant then afforded us the only means of knowing the situation of his claim, and that alone was to govern our conduct in entering. It should therefore surely contain as much certainty as an entry. But it was intended by law to contain more. Act 1777, c. 1, §§ 5, 10. Certainty is what the law requires (Plow. 84, 202), and for want of this certainty, the reasons for requiring which we have stated, the grant is void.

The second ground we take is, that agreeably to the practice of this state, the younger grant can be given in evidence to defeat an older one not obtained agreeably to law; on this last ground then, no doubt can exist respecting the application of our argument, and that the plaintiff cannot recover.

The plaintiff's counsel in reply stated that they understood the court as having already intimated an opinion, that the question here was a mere matter of boundary. As to the doctrine of notice, or the notoriety of the calls of the grant, it is entirely out of the question in this action. If we establish this survey as having been made for the plaintiff, it is sufficient. All that we have to do is to satisfy the jury that these are our boundaries. But admitting that you can go into equitable circumstances in a court of law, even on that ground, Polk's grant is good. We admit that a title must be shown in this country. Our title is more than twenty years old; when the land was surveyed it was troublesome times with the Indians: the country a wilderness, but little explored, and mistakes almost unavoidable; and if no mistakes in grants can be overlooked, there is not one in a thousand that will stand. See 2 Bay, 539; 2 Binn. 100; Hardin, 438; 2 Hayw. (N. C.) 349; 3 Call, 242; 1 Hen. & M. 477; 2 Bay, 515. Surveyors are public officers appointed by the public, not under the control of the claimants; and it would be highly unjust that their mistakes should prejudice persons whose lands they surveyed; and for this was cited 1 Hayw. (N. C.) 100, 347, etc. 3 Call, 419; [Bell's Lessee v. Levers] 4 Dall. [4 U. S.] 210; [Chancellor v. Phillips] Id. 213; Taylor v. Brown, 5 Cranch [9 U. S.] 234; 3 Binn. 30, 32. But we insist that if you were to search for the land the calls are sufficiently special. It is to be nearly north from the mouth of Robertson's creek; go then to the mouth of the creek, and after going three and a half miles north, look about, and at three quarters of a mile's distance to the east you find the beginning; this is nearly north, and the claims of Martin Armstrong and John Armstrong prove it to be the place intended. Robertson, one of the defendants, who was with the party who found the corner, said he believed it was the corner of Polk, and told the plaintiff he would admit it, provided he would caveat him.

Some dispute arose as to the amount of the testimony respecting Robertson's admissions or acknowledgments.

PER CURIAM. Evidence of admissions can be received in questions of boundary, as well as in other cases, but they should be clear and unequivocal to have any effect. It is always a suspicious kind of evidence, and the jury should be convinced that it was the intention of the party to admit a fact, being satisfied of its truth. In this case there does not appear to be a clear admission of the fact, but the jury will judge of this. Admissions of law, or what the law is, have no effect in a court of justice; they are never noticed. Admissions are evidence as to boundary. See 3 Johns. 223, 400; 2 Johns. 120; 2 Dall. 94; 4 Hen. & M. 194; 2 Hayw. (N. C.) 210, note; Hardin, 232; Camp. 367; 4 Johns. 143; 2 Gould, Esp. N. P. 34. But not evidence as to title. See 6 Johns. 19.

The whole question before the jury depends upon the identity of the survey, or boundaries of the plaintiff's land. If the jury believe from the testimony they have heard, that this is the place surveyed for the plaintiff, and granted to him, they will find for him, otherwise for the defendant.

Verdict for the plaintiff.

Case No. 11,251.

POLK v. WINDEL et al.

[Brunner, Col. Cas. 168; [1] 2 Overt. 433.]

Circuit Court, D. Tennessee. June, 1817.[2]

GRANT—EFFECT OF NORTH CAROLINA ACT—FORGERY OF LAND WARRANT—PROOF—ENTRY UNDER GRANT—ADMISSIBILITY OF PAROL EVIDENCE TO DENY — PRODUCTION OF EVIDENCE — GENERAL RULE.

1. North Carolina had no power after the cession act to issue grants for land in territory ceded thereby, unless some incipient right previously existed. It is therefore competent to inquire whether there was an entry previous to the cession, or whether the warrant was a forgery.

2. Such evidence as would be competent on a scire facias by the state to repeal a grant, or in equity, is receivable to prove forgery of a land warrant.

3. Parol evidence of the contents of entry taker's books, which were lost, is inadmissible where abstracts of these books were made, and are in existence.

4. The best evidence of which the nature of a thing is capable must be given, and no evidence will be received, when better evidence is in the party's possession or power.

On the trial of this cause the plaintiff's counsel offered in evidence forty copies of warrants having the same numbers with those referred to in the grant to Sevier for twenty-five thousand acres, certified by the secretary of North Carolina to be the same warrants on which Sevier's grant issued. And also certified copies of other warrants of the same numbers, previously issued, some for the same, some for other quantities, upon which grants issued to otner persons, and previously to the date of Sevier's grant.

This evidence was offered for the purpose of showing that Sevier's grant had no legal foundation; not that it would directly prove it, but furnish facts from which the jury might draw such an inference, or that there never were any entries, and that the warrants were forgeries.

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

[2] [Reversed in 9 Cranch (13 U. S.) 87.]

This evidence was objected to on the ground that it was not the best of which the nature of the case is susceptible; that as it was admitted on the other side that the entry taker's books of Washington county, whilst a part of North Carolina, were lost, or no longer in existence, the next best evidence was the production of the warrants which had been lodged in the secretary's office of North Carolina. If they could not be had, the next best evidence would be the inspection of those warrants in the secretary's office by some respectable man acquainted with the writing of the entry taker Carter. If the first could not be had, the latter might, and no reason is given why either is not produced. And because no pertinent inference could be drawn from the evidence proposed, if received, it would tend only to mislead and inveigle the jury, and put to hazard the landed interest of the country, which ought to rest on certain, known, and fixed principles. The practice or manner in which the entry taker's office of Washington county was kept or conducted is well known. The court will take notice of that practice; and to show that practice, a certificate annexed to an abstract from the clerk of the board of commissioners of land claims for East Tennessee was referred to, from which it appeared that it had been the practice of the Washington entry taker's office to make a great many entries from the opening to the closing of the office, of the same numbers, and that nothing can be collected from that source in relation to the genuineness of the warrants on which Sevier's grant issued.

Before TODD, Circuit Justice, and M'NAIRY, District Judge.

TODD, Circuit Justice. The supreme court of the United States has determined that the state of North Carolina had no power, after the cession, to issue grants for lands within the ceded territory, unless where some incipient right previously existed. In this cause, then, it would be competent to inquire whether there was an entry previous to the cession, or whether the warrant was a forgery. But this must be ascertained by legal evidence; what would be competent evidence on a scire facias by the state to repeal a grant, or in equity, might be receivable here. But the evidence offered, in my opinion, is neither relevant or competent. Suppose this was an indictment for the alleged forgery. The original books, if under the control of the court, ought to be produced. They might be produced on a subpœna duces tecum to the secretary. It is true, as has been argued, that every forgery includes a fraud, but it is not true e converso. There are but a few excepted cases in which we can go beyond the grant for the purpose of avoiding it. And where forgery is recognized as one, it is that offense, technically speaking. To infer it from the fact that different warrants were to be found in the secretary's office of the same number would be dangerous in the extreme; that he would not permit the jury to infer it, and considering the practice of making entries in Carter's or Washington county entry taker's office, no such inference could be drawn from the copies proposed, if received.

M'NAIRY, District Judge. I concur with Judge TODD in the rejection of this evidence. I do not think it relevant. It might be different if evidence were first introduced to show that the warrants were not in the handwriting of the entry taker; irreparable injury might result to society if the principle were once established, that because two warrants were of the same number, the inference might be drawn that one of them was therefore a forgery.

The plaintiff's counsel then offered to read in evidence a certified copy of part of a paper, abstract, or book referred to in the twelfth section of the act of 1807, c. 2, so far as respects the numbers of warrants on which Sevier's grant issued. The abstract (that being the most proper appellation of such a paper) is stated in that section as a book procured from the office of the secretary of state of the United States. It was alleged that agreeably to that abstract there was but one entry for each of those numbers, and if admitted would show by other evidence that Sevier's grant could not have issued on the entries referred to in that paper. But the court rejected the evidence because the copy produced was only of a part of that abstract.

Parol proof was then offered to show circumstances respecting the loss of the entry books of Washington county about the year 1800, and also to establish the proposition that no such entries as those referred to in Sevier's grant ever were on those books. Several other attempts were made to produce parol proof to various points as stated, all of which evidence was offered with a view to annul or destroy the validity of Sevier's grant.

TODD, Circuit Justice. The question now presented to the view of the court is, whether parol evidence shall be received to prove that there were no such entries in the entry taker's books as those by virtue of which the warrants in question purport to have been issued. The original books are admitted to be lost. It appears, as well from the law as the evidence offered which has been rejected, that an abstract of these books was taken. The extract of that abstract has been rejected because it was not a complete copy. The object is to prove that no such entries ever existed on the books. How can this appear when neither the books nor a complete copy of them are produced? There is better evidence of the fact attempted to be proved. The abstract is certainly better evidence, and therefore parol testimony must be rejected.

M'NAIRY, District Judge. An attempt is now made to prove by parol evidence that certain entries which are presumed to exist

never had an existence. This, in my opinion, cannot be done. If, by the ravages of war, fire, or other casualty, the entry books, which are considered as public records, should be destroyed, and parol evidence could be received to show either the contents of the entries or that none such ever existed, with a view of destroying the validity of a state grant or patent, what would be the situation of society? Whose rights would be safe? The precedent would be of most dangerous tendency, and ought not to be established. This evidence must be rejected.

The jury found a verdict for the defendant. In the course of the trial the counsel for the plaintiff filed a bill of exceptions to the opinion of the court, with a view, as stated, of carrying up the cause by writ of error to the supreme court of the United States.

NOTE. This case and the one preceding it went to the United States supreme court on a writ of error, and the above decision as to admissibility of duplicate warrants and of entry taker's books to prove forgery, reversed. See Polk's Lessee v. Wendal, 9 Cranch [13 U. S.] 87; [Cohens v. Virginia] 5 Wheat. [18 U. S.] 303.

Case No. 11,252.

Ex parte POLLARD.

In re ELIOT FELTING MILLS.

[2 Lowell, 411; [1] 17 N. B. R. 228.]

District Court, D. Massachusetts. July, 1875.

BANKRUPTCY—UNLIQUIDATED DAMAGES.

1. Where A. was employed as superintendent of a factory by a written contract, which was to run for ten years, and the parties bound themselves to performance in the sum of $10,000 liquidated damages, and, in an earlier arrangement of a like kind, had called the sum both a penalty and liquidated damages,—*held*, a penalty.

[Cited in Heatwole v. Gorrell, 12 Pac. 138.]

2. The filing a petition in bankruptcy by a corporation, ipso facto, dissolves a contract with an employee, and is tantamount to a notice of its dissolution; and he may have his damages assessed, and prove the amount in the bankruptcy.

3. Semble, that damages for the breach of an implied contract may be proved in the same way.

4. If an absolute contract is broken, so that a cause of action has arisen, it is no objection to assessing and proving the damages in bankruptcy, that they may be difficult of estimation; though, where the debt is contingent, and the contingency has not happened, that consideration may be decisive against the proof.

The manufacturing corporation now bankrupt, made, through its treasurer, a written contract, July 1, 1873, with the petitioner, by which he was to serve them as superintendent for ten years, and to transfer to them, and to another corporation having the same treasurer, all inventions which should be made by him during that time and the patents granted therefor, the corporations paying all expenses connected with the inventions and the patents; and the felting mills were to pay him $4,000 a year and seven and a half per cent of their net profits, and to give him the use of a certain house free of rent. The parties bound themselves, each to the other, in the sum of $10,000, by way of liquidated damages. The contract was duly performed on both parts until Feb. 16, 1875, and the petitioner had obtained and transferred four patents in accordance therewith; on that day the felting mills filed their voluntary petition in bankruptcy. At the first meeting of creditors, the petitioner filed a proof for the $10,000 as liquidated damages and for some arrears of salary, and for the amount of a note of the corporation. His proof was suspended, and a part of it was disputed by the assignees when chosen. The assignees denied the authority of the treasurer to make the contract, and that there was any such breach of it as would allow of proof in bankruptcy, and disputed one of the items of set-off. A hearing was had before the court upon the matters of fact and law, excepting the amount for which the petitioner could prove, if he could prove at all, under the contract.

T. L. Wakefield, for petitioner.
W. P. Walley, for assignees.

LOWELL, District Judge. The evidence discloses that the treasurer of this corporation was the principal stockholder, and that he conducted its business affairs, referring to the board of directors such questions as he thought necessary; that he had made a similar contract with the petitioner for five years, which had expired by limitation before that of July, 1873, was entered on. Nothing was cited from the by-laws requiring such a contract to be made by the directors, and the directors are not proved to have been ignorant of this contract. I think both the petitioner's points are sustained: that the treasurer might lawfully make the contract, and that the directors may be presumed to have ratified it.

Is the sum of $10,000 to be considered as liquidated damages? It is called so by the parties, but it is not wholly immaterial to observe that in the earlier contract the same parties bound themselves to each other "in the penal sum of $10,000 liquidated damages." Upon reading the two contracts I do not think the omission of the expression "penal sum" was intended to change the character of the undertaking. The courts are very much disposed to treat these agreements for round sums as penal, that is to say, as having little or no meaning, and rightly, for I believe they are really so regarded by the parties in most cases. There are many forms of contract in which the practice is universal of inserting a sum of money, sometimes called penal and sometimes not, to the payment of which the parties bind themselves in case

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

or a breach, and I suppose the custom has grown out of an earlier state of the common law in which an advantage was gained by such a stipulation when the contract came to be sued on. It is a singular fact, that a penal sum is still inserted in the writ of injunction used by some of our courts, though it is wholly without meaning in that place. Cases can be cited in which what the parties have called penalties are held to be liquidated damages, but it is much more common to hold stipulated damages to be penal. The decisive point in this case is, that this contract was to run for ten years; and it can hardly be believed that the parties intended that the same amount should be paid for a breach in the last month of the tenth year, as for one in the first month of the first year.

Has there been such a breach of the contract as will give the petitioner a right of proof for any damages which he may have suffered thereby against the estate of the bankrupt corporation? This is the difficult question. It is easy to show the very great hardship of a negative answer to this question. No corporation that has been wound up in bankruptcy in this district has ever been revived in such a form as to give its old creditors redress. In most cases, here or elsewhere, a dividend is all that is left. Accordingly we find that the "Companies' Act," as it is called, in England, provides for the proof of all claims and demands, certain or uncertain, present or future, in words which undoubtedly include all damages, even for torts. 26 & 27 Vict. c. 89, § 158. And this is no more than common justice. It is to be regretted that the attention of congress was not attracted to this matter; but as the law stands, it is the same for corporations and individuals, notwithstanding the difference in their situation.

But I am of opinion that the law for individual bankrupts gives a right of proof in such a case. It is the obvious intent of the act to give to debtors all reasonable relief, and to creditors all reasonable remedy, by permitting proof of all debts and damages arising out of contract that can be fairly found to be due before the final settlement of the estate. The courts in this country have recognized this intended liberality. Thus it was held that unliquidated damages in matters of contract could be proved under the insolvent law of Massachusetts, though the written law spoke only of debts. Lothrop v. Reed, 13 Allen, 294. Our statute expressly provides for unliquidated damages. Rev. St. § 5067. I have had a few cases under this clause, but none which required a written judgment, and I remember fully but one, which is referred to and stated in my opinion in Ex parte Houghton [Case No. 6,725]. I have seen no report of any case elsewhere that will aid us.

It is now well settled that when one party to a contract definitely refuses to perform his part of it, even before the time of performance has arrived, the other party may have an action immediately; and, a fortiori, where after the execution of the agreement has been begun he refuses to complete it. The only doubt was whether the injured party could have an immediate and complete remedy, once for all, without tender of performance on his part, and the decision is, that he may. See Beckham v. Drake, 2 H. L. Cas. 645; Emmens v. Elderton, 4 H. L. Cas. 624; Cort v. Ambergate N. & B. & E. J. Ry. Co., 17 Q. B. 127; Hochster v. De la Tour, 2 El. & Bl. 678; Grove v. Donaldson, 15 Pa. St. (3 Har.) 128; In re Wheeler [Case No. 17,488]. It is plain, therefore, that if the company had discharged the petitioner the day before the proceedings in bankruptcy were begun, he would have a claim for damages which he might prove. The cases I have had were of that precise character, and it has not been denied that they were correctly decided.

Does it make any difference that the company neglected to give the petitioner a formal dismissal? I think not. They did an act which incapacitated them from fulfilling their contract, and I deem it an unnecessary and false nicety to hold that, because this act was the very filing the petition in bankruptcy, therefore there was no breach at the time of the petition. It resembles very much the case of an owner of a periodical publication, who, having contracted for a series of articles by an approved writer, should sell his magazine while the contract was running (Planchè v. Colburn, 8 Bing. 14), or of a man who, having promised to marry one woman, should marry another.

I hold that the contract was, ipso facto, dissolved by the filing of the petition in bankruptcy, which made its performance by the bankrupts impossible and by the petitioner illegal, for he had no right to employ a man or pay a dollar after that time; and that the fact that the bankrupt corporation did not, five minutes or more before such filing, formally dismiss the petitioner from their service is immaterial. It was argued that the contract was not dissolved, because the assignees might be authorized to carry on the business of the bankrupt for a period not exceeding nine months, with the assent of the court and of a certain portion of the creditors. But such an order, if passed, would not either continue or revive this contract; it would not require the assignees to employ the petitioner, unless they found it to be expedient, nor him to accept their employment. It would be a new engagement upon new terms. That the assignees consider the contract dissolved is plain, from their refusing to credit the petitioner the full amount of his salary, while he remained in charge of the works after the bankruptcy, saying that he must accept a quantum meruit, which is entirely just and sound.

One word as to the point that there is some contingency in this contract. I cannot see

any. It is an absolute contract for employment for a determinate period at a fixed compensation. The clause in the statute, concerning the proof of contingent debts and liabilities, aids us to discover the general intent that debts may be proved, though not either due or payable at the day of the bankruptcy, but it has no other bearing, that I see, upon this case. The contingent liabilities that the courts have always refused to assess, are those in which it is uncertain whether there ever will be any thing to assess. Riggin v. Magwire, 15 Wall. [82 U. S.] 549. It is no objection to a proof that the court or a jury may find difficulty in assessing damages for a breach of an absolutely broken contract, any more than that there may be complications in an account; and so is the law of contingent debts, if the contingency happens before the close of the bankruptcy. If the liability is absolute, there is no more or less difficulty in liquidating it, and no less obligation to liquidate it in the court of bankruptcy than in any other.

I have examined the English decisions under the act of 1861, which was somewhat similar to ours, in permitting proof for damages arising by contract (24 & 25 Vict. c. 134, § 153), and they do certainly put a narrow construction upon the words, by holding that the contract must be express, and the breach must precede the adjudication in bankruptcy. I am not sure that they intended to say that it might not be contemporaneous with the adjudication. The legislature were dissatisfied with those decisions, and in the act of 1869 have explicitly declared that damages for breach of a contract, express or implied, may be proved, and this whether the breach is before or after adjudication. 32 & 33 Vict. c. 71, § 31. I do not think that our statute will be found to need amendment in this respect. I do not expect to see it decided that damages for breach of an implied contract cannot be proved, and I doubt whether the time of breach will be so strictly confined as by the former English rule.

One item of the set-off is disputed, but the evidence does not enable me to pass upon it, and its decision will form part of the future adjustment or liquidation. The petitioner had $500 in his hands, and sets it against so much of his salary. There is no doubt that he can do this under the mutual credit clause of the statute, unless the money was put into his hands by the treasurer, at a time and under circumstances that would make it a preference if applied to pay the salary. It was said to be a sort of trust fund, but I do not so understand it. The petitioner was in the habit of receiving and paying out moneys for various purposes, and any balance that he might happen to have at the time of bankruptcy would clearly be a subject to set-off, whether he were in the habit of paying his own salary or not. I suppose it would be so under the ordinary practice in Massachusetts, but it is clearly within the bankrupt act.

Petitioner has the right to prove for damages as well as for the note and any arrears of salary. If the mode of assessing damages is not agreed on by the parties, the case will go to a jury.

Case No. 11,253.

POLLARD v. CITY OF PLEASANT HILL.

[3 Dill. 195; [1] 1 Cent. Law J. 155.]

Circuit Court, W. D. Missouri. Nov. Term, 1873.

MUNICIPAL BONDS—FUNDING BONDS—DEFENSES—INTEREST PAYABLE IN GOLD.

1. An innocent holder for value of negotiable municipal bonds is not bound to look further than to see that authority of law for their issue exists, and may rely upon the recital in the bonds that the preliminary conditions have been complied with by the municipal officers to whom the matter is confided by the legislation authorizing the issue of the bonds.

2. The funding bonds issued by the defendant city fall within the above principle.

3. The interest of authorized bonds may be made payable in gold.

Action on certain coupons originally attached to the negotiable bonds issued by the defendant city, under legislative authority. The bonds were of two classes. One issued in payment of stock in a railway company; the other, as recited on their face, under the funding act of the state authorizing municipalities to fund their indebtedness and issue bonds therefor. The nature of the defenses set up in the answer appears in the opinion of the court. The answer did not allege notice to the plaintiff [Isaac W. Pollard], nor deny that he was a holder for value. For this reason the plaintiff demurred to the several counts of the answer.

Judson & Barnard, for plaintiff.
Hall & Adams, for defendant.

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

KREKEL, District Judge. This action is brought on detached coupons of two classes of bonds, the first on subscription of $15,000 to the Pacific Railroad of Missouri; the second on bonds funding the debt of the city. Plaintiff claims to be holder for value before maturity.

As to the Pacific Railroad bonds and coupons, the answer sets up that the vote and ordinance authorizing the subscription were to the Pacific Railroad of Missouri in aid of constructing the Pleasant Hill and Lawrence Branch thereof; that the subscription was actually made to the Pleasant Hill and Lawrence Branch of the Pacific Railroad, and the bonds issued in payment thereof delivered to the St. Lawrence & Denver Rail-

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

road; that for not pursuing the authority, as cited in subscribing, the bonds and coupons are void. It is admitted by the pleading that the necessary two-thirds vote to authorize the taking of stock was had. The bonds on their face recite that they were issued to the Pacific Railroad.

An innocent holder is not required to look beyond the authority and recital in the bond to see whether formalities of any kind, embracing the question as to the subscription, has been complied with. This has been the uniform decision of the supreme court of Missouri from the case of Flagg v. City of Palmyra, 33 Mo. 440, to its last unreported utterances in the Clark County Case [Smith v. County of Clark, 54 Mo. 58]. Nor has the federal judiciary been wanting in its steadfast adherence to this doctrine. As late as Grand Chute v. Winegar, 15 Wall. [82 U. S.] 355, it has been re-asserted, and former cases affirmed.

As to the defense that the bonds are payable in legal tender notes, and that no authority exists to contract for gold coin in payment of interest, it is only necessary to refer to the case of Triblecock v. Wilson, 12 Wall. [79 U. S.] 687, to find the law as settled by the supreme court of the United States. It is there held that a contract may be made for gold coin or specie, and that such contract can not be satisfied by payment in legal tender notes. That a contract to pay bonds in legal tender notes and the interest thereon in gold coin can be made, it is apprehended will not be seriously questioned. It is a matter of contract purely, and when its conditions sufficiently appear, the court will enforce it. In this case the bonds call for six per cent interest, payable in gold coin, and the coupons conform to the bonds. No reasons are perceived why the contract thus specifically made for gold coin should not be valid and enforced. The demurrer to the second, third and fourth counts of the answer will therefore be sustained.

The second class of coupons sued on are on funding bonds, and the petition as to them alleges that they were issued in pursuance of an act of the general assembly of Missouri authorizing the funding of the floating debt of the city; that the bonds issued; that plaintiff became a holder for value before maturity, and that coupons were not paid on presentation.

The answer sets up that the bonds were not issued in payment of outstanding warrants, or in satisfaction of liabilities of the city, but that they were issued to raise funds to improperly influence legislation, quoting an ordinance of the city, from which it would appear that such was the case. However much we may deprecate that any people should thus expose themselves on their own record, and swift as this court would be to visit proper punishment upon the heads of those who would contaminate the fountain of legislation (if a proper case and parties were before the court), it would be but aiding and abetting the wrongful acts to allow them to come and set them up in their own defense against innocent holders of the commercial securities they issued. It is admitted that legal authority to fund the floating debt of the city existed, and that the bonds on their face purported to be issued under and by virtue of it. This binds the city. The use made of the proceeds of the bonds cannot affect holders for value.

The demurrer to second and third counts of answer, as to the second class, the funding bonds, will also be sustained. Judgment accordingly.

As to the first class of bonds mentioned in the foregoing opinion see Jordan v. Cass Co. [Case No. 7,517].

POLLOCK (BISPHAM v.). See Case No. 1,442.

POLLOCK (CRAIG v.). See Case No. 3,335.

Case No. 11,254.

POLLOCK et al. v. DONALDSON.

[3 Dall. 510.] [1]

Circuit Court, D. Pennsylvania. April Term, 1799.

MARINE INSURANCE — CONSTRUCTION OF POLICY — RIGHT TO PREMIUMS.

[A vessel laden at Hamburgh for Philadelphia was seized on her voyage by a French privateer, and carried into Dunkirk, where the cargo was permitted to be sold for the benefit of the owner. She then took on a small cargo, and sailed for Hamburgh, but was taken by a British privateer and carried to Falmouth, where she suffered an average loss of £90. Having been discharged, she returned to Hamburgh, took another cargo, and finally arrived at Philadelphia. On the date of the original loading at Hamburgh, the cargo was insured under a policy containing these provisions: "In port and at sea, and at all times and places, for the space of six callender months," etc. "The said goods and merchandizes, for so much as concerns the assured and assurers in this policy, are and shall be valued as interest shall appear." It being shown, by the evidence of an experienced insurance broker that under such policies it was the general usage of merchants that the underwriters should receive premiums only to the amount of their risks, the court adopted this construction, and therefore held that the underwriters could recover the stipulated premium, not upon the original cargo for the whole voyage, but only upon the different cargoes for the time they were respectively on board, deducting the amount of the average loss.]

This was an action brought by the underwriters, to recover a premium of 15 per cent. on a policy of insurance, upon the cargo of the brig Pilgrim. The policy was dated the 17th of November, 1794, and contained the following clauses;—namely, "lost, or not lost, in port and at sea, and at all times and places, for the space of six callender months,

[1] [Reported by A. J. Dallas, Esq.]

from the 8th day of September, 1794, to the 8th day of March, 1795, &c." "beginning the adventure upon the said goods and merchandizes from the loading thereof on board the said vessel, the 8th of September, 1794, and so shall continue and endure until the 8th of March, 1795, and continue at the same rate of premium, until her next arrival at Philadelphia, &c." "The said goods and merchandizes for so much as concerns the assured and assurers in this policy, are and shall be valued as interest shall appear." "The vessel and cargo warranted American property."

The facts were these: The brig was loaded at Hamburgh, on the 8th of September, 1794, with a cargo valued at 5,333 dollars, and sailed for the port of Philadelphia. On her passage, about the 14th of September, she was stopped by a French privateer and carried into Dunkirk, where the supercargo was permitted to sell the cargo, and to receive the proceeds on account of the owner. She then took on board a small cargo, valued at about 1,500 dollars, and in the beginning of October sailed from Dunkirk, bound to Hamburgh, but was taken on the passage by a British privateer, and carried into Falmouth, where an average loss was suffered, to the amount of £90 sterling. After a few days' detention and examination, the brig was discharged, pursued her course to Hamburgh, and arrived there towards the end of October. Having discharged her lading at Hamburgh, she took on board another cargo to the amount of 2,500 dollars; and sailed from that port in December, bound to Philadelphia; and arrived here in February, 1795.

The cause was tried by a special jury; when the plaintiffs contended, that they were entitled to the premium of 15 per cent. on the first cargo shipped at Hamburgh, valued at 5,333 dollars, under the words of the policy, insuring "in port and at sea, and at all times and places, for the space of six callender months, &c.," without regard to any change, or diminution, of the value of the cargo, during the term of the insurance. But the defendant insisted, that those words were controlled by the provision, that the cargo should be valued "as interest shall appear;" and as he, in case of a loss, would only have been entitled to recover an indemnity, co-extensive with the value of the cargo actually lost, the underwriters could not recover a premium for more than the amount of their risque.

The testimony of Mr. Isaac Wharton, an experienced insurance broker, proved that the defendant's construction of the policy was conformable to the general sense and usage of merchants, and it was accordingly adopted by the court and jury; the verdict allowing the premium of 15 per cent. upon the value of the different cargoes, for the time that they were respectively on board the brig, and deducting the amount of the average loss.

Case No. 11,255.

POLLOCK v. LAWRENCE COUNTY.

[7 Pittsb. Leg. J. 373; 3 West. Law Month. 68; 2 Pittsb. Rep. 137.]

Circuit Court, W. D. Pennsylvania. May 31, 1860.

MUNICIPAL CORPORATIONS — WHAT IS AN APPROPRIATION — EXCESS OF EXPENSES — VIGILANT CREDITORS—EXECUTION—ADOPTION OF PROCESS OF STATE COURT—ATTACHMENT—REQUISITES OF ANSWER.

1. An answer should be a counter statement of facts, a confutation of what is alleged by the other party, and should be neither evasive nor argumentative.

2. The annual estimate of the probable expenses of the county for the ensuing year, required by law to be made by the commissioners, is not an appropriation.

3. An appropriation is to set apart or vote a sum of money for a particular object.

4. There is no appropriation of any part of the common fund, until the commissioners, by their warrant on the treasurer, indicate the specific object to which it is to be applied or set apart. It is then severed from the mass and "appropriated," and not before.

5. When unfortunately the current expenses exceed the current income, and all cannot be promptly paid, to the vigilant must be given the first products of the treasury.

6. No capricious application of the public funds by the commissioners, in the face of a debt solemnly adjudicated, and after notice of an execution commanding its payment, will be permitted.

7. The execution provided by the act of 1834, relative to counties, operates as an injunction upon the commissioners, restraining them from drawing any warrant, or making any payment for any purpose whatever, until the judgment is satisfied.

8. The jurisdiction of a court is not exhausted, by the rendition of its judgment, but continues until the judgment shall be satisfied.

9. The writ authorized by the act of 1834 is not the prerogative writ of mandamus, for that can issue without a judgment, but this cannot.

10. Neither is it an original proceeding against the commissioners, but an execution and final process to enforce the payment of a judgment.

11. There can be no just ground of complaint, when the courts of the United States adopt the process of the courts of the state.

12. A refusal to obey the command of the execution, will be followed by an attachment against the commissioners.

At law.

Mr. Taylor, for plaintiff.

Mr. M'Combs, for defendant.

McCANDLESS, District Judge. This case was tried by jury at the November term of the circuit court, and a verdict and judgment rendered in favor of the plaintiff for the sum of $1,811.30. On the 4th day of January last, the counsel for the plaintiff issued his writ of special fi. fa., authorized by the act of the legislature of Pennsylvania of 1834, and adopted by this court as part of its final process against counties. To this writ the marshal made return that on the 12th of January he had duly served the same

on Isaac P. Cowden, Robert Fullerton and Thos. Cairns, commissioners of the county of Lawrence, and also upon the treasurer thereof. The commissioners having failed to pay any portion of the judgment, on the 7th of April plaintiff's counsel presented his petition to the court, charging that at the date of the service of this writ, "there were moneys in the treasury of said county, and subject to the order and warrant of said commissioners, to the amount of $5,800, unappropriated." That since the said service, "there has been received into the treasury, and subject to the warrant of the commissioners, the further sum of $2,000." Nevertheless that the said commissioners "being minded to evade the payment of the said judgment, and set at naught the process of this court, although often requested, have refused to pay, to the great wrong of the plaintiff, and the contempt of this court." He then prays the court for a rule on the said commissioners, to show cause why an attachment should not issue against them according to law. The rule was granted returnable at the first Monday of May. On that day the commissioners appeared by counsel, and put in their answer. After admitting the service of the writ upon the 12th January, they say that, at that date, "there were no unappropriated funds of said county under the power and control of these respondents, and for further answer they show that before the judgment in this case was obtained, and before these respondents knew that the said county would be liable to pay the debt for which it was rendered, the county commissioners of said county had made their estimates of the probable expenses of the said county for the ensuing year, and to the specific purposes embraced in said estimates, and, according to the laws of the state of Pennsylvania, all the revenues of the said county were appropriated." They further state, "that the whole receipt of moneys which have come under the control and power of the respondents, as the money of the county, is $1,727.48, and these moneys were solely provided for the purposes of the county, incident to the public weal and the administration of justice." An answer should be, what its name purports, a counter statement of facts, a confutation of what is alleged by the other party, and should be neither evasive nor argumentative. This is not a plain, direct statement of facts, responsive to the petition. It is evasive in not stating the amount of money in the treasury at the date of the service of the writ—that we have to glean from the statement of the treasurer. And to support the allegation that there was no money "under their control," it is argumentative in construing the annual estimate of the probable public expenditures to be a specific appropriation to each object.

By the act of 15th of April, 1834 (Purd. Dig. 777), "the commissioners of every county shall, at their first meeting, after the general election in every year, proceed to make an estimate of the probable expense of the county for the ensuing year." This is no appropriation. It is merely to calculate or compute what will be the probable expenses of the county for the next year, and to levy their tax accordingly. They cannot anticipate the public expenditure precisely, and hence they are to "estimate" the "probable" amount. They cannot foresee the exact amount required for each municipal purpose, and hence they cannot make a specific appropriation. An appropriation is to set apart, or vote a sum of money, for a particular object. And such appropriation, at the date of their annual estimate, would be impracticable for the reason that a considerable portion of the taxes assessed for the current year are not collected for years after, and much of the ordinary expenditure is paid out of funds which accumulated from the taxes of previous years. There is no appropriation of any part of the common fund, until the commissioners, by their warrant on the treasurer, indicate the specific object to which it is to be applied or set apart. It is then severed from the mass, and "appropriated," and not before. The treasurer is the mere custodian of the public money. The commissioners have the control of it; for none can be lawfully drawn from the treasury without their warrant. To them is confided the high prerogative of taxation, and the failure to exercise it, by them or their predecessors, is no legitimate answer to an execution. They are required by law to provide for certain municipal objects, to support their convicts, to build bridges, to maintain their courts of justice; but as the supreme court of Pennsylvania says in 4 Casey [28 Pa. St.] 210: "When unfortunately the current expenditures exceed the current income, and all cannot be promptly paid, to the vigilant must be given the first products of the treasury." And again: "No statutory regulation or appropriation by the city councils can give a higher sanction to the liquidation of a debt, than the judgment of a court of justice, in pursuance of law, that the debt is due and must be paid." So no capricious application of the public funds by the commissioners, in the face of a debt solemnly adjudicated, and after notice of an execution commanding its payment, can be held guiltless in sight of the law. The execution is an injunction upon the commissioners, restraining them from drawing any warrant, or making any payment for any purpose whatever, until the judgment is satisfied. If there are no unappropriated moneys, it is to be paid "out of the first moneys that shall be received for the use of said county." The language of the act is plain, and the duty of these officers imperative. They have no option or alternative, and a disregard or disobedience of the writ is followed by attachment.

By the county auditor's report for the year 1859, there appears to be a balance in the

hands of the treasurer of $6,478.42. This is only constructively so, for a large proportion of this sum is in the custody of his predecessors in office, who have not yet accounted for the same. We cannot hold the commissioners responsible for a contempt in refusing to apply what is not actually in the treasury. But the proofs before the court show, that at the date of the service of this writ of execution, on the 12th day of January last, there was in the treasury in money $639.86. The treasurer testifies that since that date he has received moneys of the county from other sources than his predecessor, $1,559.78, and from him $238.45, making in the aggregate $2,438.09, applicable to this execution, and more than sufficient to satisfy the same. The proofs further show, that, disregarding the command of the writ, from the date of service, to the 11th of May, the commissioners have drawn warrants on the treasurer to the amount of $3,997.74. Thus in violation of law, and to the prejudice of a judgment creditor refusing to pay his debt "out of the first moneys that shall be received for the use of such county." We are not here to enquire into the consideration of this judgment. It has received the sanction of a court of competent jurisdiction, and the creditor is entitled to its fruits, as if predicated of a cause of action the most meritorious. It must be enforced, otherwise judicial proceedings would be a mere mockery.

It is proper that the court should here notice the points submitted in the very able argument of the counsel for the respondents.

1. It is contended that we have no jurisdiction; that the courts of the United States have no control over state or county officers. It will not be denied that we have jurisdiction over the parties and the subject matter, the plaintiff being a citizen of the state of Ohio, the defendants citizens of Pennsylvania, and the sum in controversy is over $500.00. Does this jurisdiction terminate with the judgment? It has been decided otherwise by the supreme court of the United States, in Wayman v. Southard, 10 Wheat. [23 U. S.] 23. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done; and would consequently be necessary to the beneficial exercise of jurisdiction.

2. To sustain the second branch of the proposition it is argued that the writ authorized by the act of 1834, is a mandamus, and an original proceeding against the commissioners. But it is not the prerogative writ of mandamus, for that can issue without a judgment, and this cannot. As the cases cited at the argument show, that was a very imperfect remedy for the creditor, and its deficiency was one of the reasons for the enactment of this law. The commissioners of the Civil Code in their report of 1832, at page 6, strongly urge its passage by the legislature, because "the mechanic or tradesman who deals with the commissioners in their official capacity, has no ascertained remedy at present, to obtain payment of his demand, but the tedious and expensive course of an application to the supreme court for a mandamus, which, if obtained, may be from various causes, altogether unavailing." They declined to recommend the sale of county property, but proposed this writ of execution, obedience to which was to be enforced by attachment, "as affording greater expedition than at present exists." It is clear therefore that it is an execution, to enforce the payment of a judgment; that it is final process, and not an original proceeding against the commissioners, who are the tangible parties indicated in the act, upon whom all writs are to be served from the beginning.

To avoid prolixity the court need not repeat here what was said in the opinion delivered in the Oelrichs Case [Case No. 10,444] and the Dobbin Case [Id. 3,941] as to the legitimate and constitutional power of this court to add to or alter its process at discretion. There can be no just ground of complaint, when the courts of the United States adopt the process of the courts of the state. We have adopted this act of Pennsylvania of 1834, as part of the final process of this court, to enable citizens of other states seeking justice in the courts of the United States to reap the fruits of their judgments as readily as the citizens of this state, suing in their own courts, and expect a cheerful submission to its provisions.

The respondents, Isaac P. Cowden, Robert Fullerton and Thomas Cairns, commissioners of the county of Lawrence, having disobeyed the command of the writ of special fi. fa. issued in this case, the rule is made absolute and attachments awarded.

POLLOCK (NEBRASKA v.). See Case No. 10,077.

Case No. 11,256.

POLLOCK v. PRATT et al.

[2 Wash. C. C. 490.] [1]

Circuit Court, D. Pennsylvania. Jan., 1811.

BANKRUPTCY—PRIORITY OF CLAIMS—CUSTOMS DUTIES—RIGHTS OF SURETY WHO HAS PAID CLAIM.

1. P. paid a sum of money to the United States, as surety of S. in a bond for duties. S. became insolvent, and assigned his effects to Baker, who received four thousand dollars under the assignment, mixed the same with his own funds, and afterwards became bankrupt, and the defendants were appointed his assignees, but no effects, known to be part of the estate of

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

S. came into his hands. The plaintiff claimed to have a preference and priority over the general creditors of Baker.

2. Although the United States might, under the sixty-fifth section of the law to regulate the collection of duties [1 Stat. 669], be entitled to claim of the defendants, to the amount which came into the hands of B., as the assignee of S., the provisions of the law do not extend to the surety who has paid the bond, the same rights and privileges.

[Cited in Grove v. Little, 11 Leigh, 195; Jackson v. Davis, 4 Mackey, 194.]

This was an action [by Pollock against Pratt and Harvey, assignees of Baker] to recover the balance of a large sum of money, paid by the plaintiff to the United States, as surety for Mr. Swanwick, in a custom-house bond; Swanwick having become insolvent, and having assigned all his estate to Baker & Shoemaker, in trust, first to discharge his custom-bonds, to indemnify his sureties, and then in trust for his other creditors. The plaintiff received sundry payments from the assignees of Swanwick, and this suit was brought for two thousand one hundred and twenty-two dollars and thirty-six cents, the balance. Baker received from the estate of Swanwick, upwards of four thousand dollars, which he mixed with his own money, and afterwards became a bankrupt, and the defendants are his assignees. No part of the estate of Swanwick has ever come to the hands of the defendants. The jury found a verdict for the plaintiff, subject to the opinion of the court upon this point, whether the plaintiff is entitled to recover, and to have a preference and priority over the general creditors of Baker?

WASHINGTON, Circuit Justice. The question submitted to the court, depends upon the sixty-fifth section of the law to regulate the collection of duties, &c. (volume 4 [Laws, Folwell's Ed.] p. 386 [1 Stat. 669]). By this it is declared, that if the obligor in a custom-house bond, become insolvent, or if his estate, in the hands of the executors, administrators, or assignees, shall be insufficient to pay all the debts of the deceased, the debt due to the United States, on such bond, shall be first satisfied, and if any executor, administrator, or assignee, or other person, shall pay any debt due by the person or estate from (it should be "for") whom, or for which they are acting, before the debts due to the United States, from such person or estate, being first satisfied, he shall be answerable, in his own person and estate, for the debts due to the United States, and actions at law may be brought against him for the recovery of the said debts. And if the principal in any such bond shall be insolvent, or being dead, his estate and effects, which shall come to the hands of his executors, administrators, or assignees, shall be insufficient for the payment of his debts, and the surety, in either case, shall pay to the United States the money due on such bond, the surety shall have the like advantage, priority, or preference, for the recovery and receipt of the said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States, and may maintain a suit upon the said bond, in law or equity, in his own name, for the recovery of all moneys paid thereon. The law then proceeds to state, that cases of insolvency shall be such in which a debtor shall have made a voluntary assignment for the benefit of his creditors, his estate not being sufficient to pay his debts, or where the estate of an absconding, concealed, or absent debtor is attached, as well as to cases of legal bankruptcy.

The provisions of this law, as they concern the interest and security of the United States, are so general as to create a liability to pay a cusom-house bond, not only in the original debtors, and in those who legally represent them, but in any person who may have charge of the estate and effects of the original debtor, or any other, who, in legal contemplation, has made himself debtor to the United States for the whole, or any part of the original debt, and this liability is accompanied by the additional advantage of a preference over the other creditors of the person so chargeable. To exemplify this observation; the United States possessed a right of recovery and preference, not only against Swanwick and Pollock, and against the assignees of Swanwick, but against the assignees of Baker, because, by his receipt of four thousand dollars of the estate of Swanwick, he became a debtor to the United States, and he is a person, in the words of law, for whom, and his estate is one, for which his assignees are acting, and in that capacity they are forbid to pay the other creditors of Baker, before the debt due to the United States is paid, under penalty of being themselves personally answerable to the United States. But in regard to the advantages reserved to the surety in the custom-house bond, the provisions are confined to the estate and effects of his insolvent or deceased principal, so that although, without the aid of this law, such surety may, upon common law principles, have his remedy against the representative of him who, by receiving the effects of Swanwick, became liable to pay the creditors of Swanwick, yet, under this law, he cannot claim against him the same advantage, priority or preference, to which the United States was entitled; because no part of the estate of Swanwick ever came to his hands. The money paid to Baker by his co-assignee, was mingled with his own, probably used by him, and cannot, or has not been specifically traced into the hands of the defendants.

POLLY, The (PUTNAM v.). See Case No. 11,482.

POLLY, The (SKIDMORE v.). See Case No. 12,923.

POLLY AND JANE, The (UNITED STATES v.). See Case No. 16,063.

POLLY AND KITTY, The (RICE v.). See Case No. 11,754.

POLLY AND NANCY, The (UNITED STATES v.). See Case No. 16,064.

Case No. 11,257.

POLYDORE v. PRINCE.

[1 Ware (402) 411.] [1]

District Court, D. Maine. Aug. 21, 1837.

ADMIRALTY — SECURITY FOR COSTS — WAIVER OF RULE—POVERTY OF LIBELLANT—CIVIL DISQUALIFICATIONS BY LAW OF DOMICIL—SLAVERY—EFFECT.

1. The rule of the court requiring the libellant to give security for costs, is established for the benefit of the other party which he may waive at his pleasure.

2. If the libellant, in consequence of poverty, is unable to find sureties, his juratory caution will be taken instead of a stipulation with sureties.

[Cited in The Georgeanna, 31 Fed. 406; The Phœnix, 36 Fed. 272.]

3. Civil incapacities and disqualifications by which a person is affected, by the law of his domicil, are regarded in other countries as to acts done, or rights acquired in the place of his domicil, but not as to acts done, or rights acquired within another jurisdiction, where no such disqualifications are acknowledged.

[Cited in Ross v. Ross, 129 Mass. 246; Davidson v. City of Portland, 69 Me. 116.]

4. A person who is a slave by the law of his domicil, may maintain an action in his own name, in a country where slavery is not allowed, for a personal tort committed within that jurisdiction.

This was a libel for an assault and battery committed by the master on a passenger, on a voyage from Guadaloupe to Portland. It appeared from the evidence that the libellant was a slave in Guadaloupe, that he was put on board the vessel by his master, Mons. Bercier, in company with his son, Eugene, a youth of about seventeen years of age, whom he was to attend during his residence in this country, as his servant. One morning, some days after they had been at sea, the captain ordered Polydore to clean out a hen-coop, in which there were some live fowls. Polydore refused, and the captain in his answer, says, that he behaved otherwise insolently to him, and the testimony of some of the witnesses confirms his statement. But it is also in proof, that Polydore did not understand a word of English, nor did the master understand much more of French. It is also alleged by the master that in consequence of his taking Polydore at a low rate of passage money, he receiving sixty francs for Polydore and one hundred and fifty for Eugene, that Polydore was to perform such service in relation to Bercier, and also such service on board the vessel as might be properly required of him; that the fowls were for Eugene, and that it was Polydore's business to attend to them. But there is no proof in support of the first part of this allegation, and it appears in point of fact, that the fowls instead of being exclusively for Eugene, were used as a common stock on board the vessel. Upon the refusal of Polydore to do the service that he was ordered, the captain gave him a pretty severe flogging with a piece of dry twisted cowhide; some days afterwards, the cowhide was abstracted from the cabin and not to be found; on the captain's inquiring for it, he was told that Polydore had taken it and thrown it overboard, when in fact it had been taken and secreted by Eugene for the purpose of bringing it to this country and exhibiting it in court, as the instrument with which Polydore had been flogged. Both Eugene and Polydore concurred in deceiving the captain. The captain then gave Polydore another flogging with a small rope.

Codman & Fox, for libellant.
C. S. Daveis, for respondent.

WARE, District Judge. Several objections have been taken and learnedly argued by the counsel for the respondent, to the libellant's right to maintain this action. In the first place it is contended that he has not acquired a standing in court, by entering into the usual stipulation for costs, which was called for by the respondent when the libel was entered. By the rules of this court (rule 33), the respondent may always call for this stipulation, which the libellant is required to give, under the pain of having his libel dismissed; and this rule is in conformity with the ancient practice of the admiralty. Clerke, Praxis, Adm. tits. 11, 14; 2 Brown, Civ. & Adm. Law, 410. The stipulation ordinarily required is that with sureties or fidejussors. But this stipulation is never required of seamen, as it would seldom be in their power to obtain sureties, on account of their poverty; and to exact it of them would be equivalent to a denial of justice. It is said that the ground on which this rule of the court is waived in favor of seamen, is that they are a favored class in the admiralty. But the true reason why this rule is not enforced against them, is not because they have a claim to any special favor in this respect, but because they are usually unable to comply with it; and whenever the same reason exists, the same indulgence is, by the ordinary practice of the admiralty, shown to others. In all courts proceeding according to the course of the civil law, when a party is poor, and unable to obtain fidejussors the court will receive the juratory caution instead of a stipulation with sureties. Clerke, Praxis, Adm. art. 5. The libellant in this case is a servant, a slave in his own country, with no other friend or acquaintance here, than a minor, whom he attends in the quality of a servant. To require of him to enter into a stipulation for costs with sureties, would be the same thing in effect as saying that he had no right to ask redress in this court.

[1] [Reported by Hon. Ashur Ware, District Judge.]

It was on this ground that the motion of the respondent's counsel for a stipulation with sureties for costs, was overruled by the court. It is then said, that it was necessary for the libellant to tender the juratory caution in order to place himself rectus in curia. There is some misunderstanding between the opposing counsel, whether this tender was made or not. In the view which I take of the case, it is immaterial. The rule requiring a stipulation for costs, is a rule established for the benefit of the opposite party, which he may waive as he may any other right. And the principle applies to this as to other cases, "Quisque potest renuntiare jure pro se introducto." It is for the party to move for the security, if he wishes for it; and if he is silent it is considered as waived.

Another objection has been raised and learnedly argued by the respondent's counsel, which requires a more grave and mature consideration. It is founded on the supposed personal incapacity of the libellant to maintain any action in a court of justice, under any circumstances. It is alleged in the answer as a substantive ground of defence, and the fact is admitted on the other side that the libellant, in his own country, is a slave, and as such, incapable of appearing as a party in any court of justice; and it is contended that this personal incapacity upon the received principles of the jus gentium, or at least on the principles of national comity, follows him into whatever country he may voluntarily go or be carried by his master. The argument is, that the institution of personal servitude, however contrary it may be to natural right, is an institution admitted and acknowledged by the law of nations; that every nation having the exclusive right to regulate its own internal polity, and to determine the personal state or capacity of its members, all other nations are bound by the jus gentium, or by national comity, to take notice of, and recognize this personal status as it would be recognized in the forum of their original domicil, while they remain members of that community; that personal qualities impressed upon them by the law of their original domicil as to their civil capacities, or incapacities, travel with them wherever they go, until their legal connection with that country is dissolved.

I have stated the position of the counsel in its broadest and most comprehensive terms, and it is not to be disguised that it involves questions of serious difficulty, upon which there is no little diversity of opinion among the most eminent jurists, and on which there is not certainly an entire agreement in the practice of different nations. The whole subject is examined with all the learning which belongs to it by Mr. Justice Story, in his very learned and profound treatise on the Conflict of Laws (chapter 4). It may there be seen how many curious and perplexing questions may arise out of the conflicting laws of different nations, relating to the state or capacity of persons; questions which must often occur for discussion in the forum, and judicial decision, in an age of such constant intercourse and intercommunication for the purpose of business and pleasure among all civilized and commercial nations as the present. It may also be seen how much diversity and contrariety of opinion exists among the most celebrated and learned jurists on this subject. It is a large chapter, says Lord Stowell, and full of many difficult questions, that treats of such diversities in the writings of the civilians.

The general doctrine of foreign jurists seems to be, that the state of the person, that is, his legal capacity to do, or not to do, certain acts is to be determined by the law of his domicil, so that if he has by that law, the free administration of his goods, or the right to maintain an action in a court of justice there, he has the same capacity everywhere; and if that capacity is denied to him by the law of his domicil, it is denied everywhere; that the laws determining the civil qualities of the person, called by the foreign jurists personal statutes, follow the person wherever he goes, as the shadow follows the body, and adhere to him like the color of the skin which is impressed by the climate. Personal statutes are those which relate primarily to the person, and determine the civil privileges and disabilities, the legal capacity or incapacity of the individual, and do not affect his goods, but as they are accessory to the person. Such are those which relate to birth, legitimacy, freedom, majority or minority, capacity to enter into contracts, to make a will, to be a party to an action in a court of justice, with others of the like kind. Repertoire de Jurisprudence, mot "Statut." According to this principle, a person who is a major or a minor, a slave or a freeman, has, or has not a capacity to appear as a party to an action in a court of justice, stare in judicio, in his own country, has the same capacities and disabilities wherever he may be. The Code Napoleon has erected what seems to be the prevailing doctrine among the continental civilians into a positive law. "The laws concerning the state or capacity of persons govern Frenchmen, even when residing in a foreign country." Code Civile, art. 3. If this general principle is to be received without qualification, it would seem to decide the present case at once, for it is admitted that in Guadaloupe where the libellant has his domicil, he can maintain no action in a court of justice. But though the principle is stated in these broad and general terms, yet when it is brought to a practical application in its various modifications, in the actual business of life, it is found to be qualified by so many exceptions and limitations, that the principle itself is stripped of a great part of its imposing authority. No nation, it is believed, ever gave it effect in its practical jurisprudence, in its whole extent. Among these personal statutes, for which this ubiquity is claimed, are those which formerly over the whole of Europe, and still over a

large part of it, divide the people into different castes, as nobles and plebeians, clergy and laity. The favored classes were entitled to many personal privileges and immunities particularly beneficial and honorable to themselves. It cannot be supposed that these immunities would be allowed in a country which admitted no such distinctions in its domestic policy. If a bill in equity were filed in one of our courts against an English nobleman temporarily resident here, would he be allowed to put in an answer upon his honor, and not under oath, because he was entitled to that personal privilege in the forum of his domicil? I apprehend not. In like manner the disqualification and incapacities, by which persons may be affected by the municipal institutions of their own country, will not be recognized against them in countries by whose laws no such disqualifications are acknowledged. In England a person who has incurred the penalties of a premunire, or has suffered the process of outlawry against him, can maintain no action for the recovery of a debt, or the redress of a personal wrong. But would it be contended that because he could not maintain an action in the forum of his domicil he could have no remedy on a contract entered into, or a tort done to him within our jurisdiction? The reasons upon which an action is denied him in the forum of his domicil are peculiar to that country, and have no application within another jurisdiction. The incapacity is created for causes that relate entirely to the domestic and internal polity of that country. As soon as he has passed beyond its territorial limits, the reason of his incapacity ceases to operate, and in justice the incapacity should cease also.

Every nation has a perfect right to establish for itself its own forms of internal polity, and to determine the state and condition, the civil capacities and incapacities of its own members. Besides these personal laws determining the state and condition of individuals which are founded on natural relations and qualities, and such as are universally recognized among civilized communities, as those of parent and child, those resulting from marriage, from intellectual imbecility, and the like they may and in point of fact do establish distinctions which are not founded in nature, but relate only to the peculiarities of their own social organization, to their own municipal laws, and to the artificial forms of society, which are established among themselves. Now it is freely admitted that other nations are bound by the jus gentium to admit the validity of all those personal statutes of other communities establishing such distinctions among their members, whether natural or artificial, to a certain extent. Their validity will be admitted, and they will be enforced by the tribunals of other countries, as to acts which are done, and rights which are acquired within the territorial limits of the community where these laws are established. There they have a legal, and other nations are bound to admit, certainly as a general rule, a rightful authority. But it is by no means so clear that those personal distinctions which are not founded in nature, and are the result of mere civil institutions, can be allowed to accompany them, and give them personal immunities, or affect them with personal incapacities in other countries in which they may be temporarily resident or transiently passing, whose laws acknowledge no such distinction. The law of the place where a person is for the time being, as to acts done, or rights acquired within that jurisdiction, it would seem, ought to prevail so far as his civil rights depend on his personal status. For these personal statutes, establishing distinctions between individuals as to their civil qualities, have a direct relation to public order, and, as is remarked by one of the most eminent living jurists in continental Europe, "every person who establishes his dwelling in a country, or it may be added who is transiently within it, is bound to conform to the measures which the local law prescribes, in the interest of public decorum and good morals." Merl. Repert. "Effet Retroactif," sect. 3, § 2, art. 5. The observation is applied to the case of a married woman. If by the law of her domicil she is authorized to make valid contracts, and to maintain an action in a court of justice in her own name without the authorization of her husband, and she removes to a country by whose laws this power is denied to married women, she will not carry with her into her new residence the capacity to contract, to plead, and to be impleaded in a court of justice as she is allowed by the law of her domicil, this capacity being denied by the local law, as offensive to good-manners. If a person happens to transfer his residence to a country where the same personal distinctions are established, as are allowed in his own domestic forum, it is not intended to be denied, but that the tribunals of this country may allow him his personal immunities or affect him with the personal incapacity of his domicil; but it will, I apprehend, be according to the local law, and not according to the law of his domicil. If a Turkish or Hindoo husband were travelling in this country with his wife, or temporarily resident here, we should, without hesitation, acknowledge the relation of husband and wife between them; but the legal pre-eminence of the husband as to acts done here, would be admitted only to the extent that the marital rights are recognized by our laws, and not as they are recognized by the law of his domicil. If a Roman father, or a father from any country which had adopted the Roman law of paternal power, were travelling in this country with a minor child, we should acknowledge the relation of parent and child, but we should admit, I presume, as a general rule, the exercise of the paternal power no further than as it is authorized by our own law. If

a foreigner, in whose country slavery is established, were temporarily resident in Virginia, where slavery also exists, and had brought with him a slave as a servant, a court sitting in Virginia might, I suppose, recognize the relation of master and slave, because that is a relation known to the local law, but it would limit the exercise of the master's authority over his slave, by their own law, and not by the law of the master's domicil.

It is among the first maxims of the jus gentium that the legislative power of every nation is confined to its own territorial limits. This is a principle which results directly and necessarily from the independence of nations. Whatever may be the nature of the law, whether it relates purely to persons and their civil qualities, or to things, it can, proprio vigore, have no force within the territorial limits of another nation. It follows that the peculiar personal status, as to his capacities or incapacities, which an individual derives from the law of his domicil, and which are imparted only by that law, is suspended when he gets beyond the sphere in which that law is in force. And when he passes into another jurisdiction his personal status becomes immediately affected by a new law, and he has those personal capacities only which the local law allows. The civil capacities and incapacities with which he is affected by the law of his domicil, cannot avail either for his benefit or to his prejudice, any further than as they are coincident with those recognized by the local law, or as that community may, on principles of national comity, choose to adopt the foreign law. Though the civilians, as has been observed, generally, hold that the law of the domicil should govern as to the personal status, it is by no means true that they are universally agreed. Voet, one of the most eminent, of whom it has been said that by his clearness and logic he merits the title of the geometer of jurisprudence (Merl. Quest. de Droit Confession, § 2, note 1), after stating that such is the opinion of the majority, "plurium opinio," gives his own opinion in decisive terms, that personal statutes, as well as those relating to things, are limited in their operation to the country by which they are established; and he supports his opinion by the authority of the Roman law, as well as by that plain and obvious axiom of the jus gentium, that the legislative power of every government is confined to its own territorial limits. Ad Pand. lib. 1, tit. 4, pt. 2, notes 5, 7, 8. Gail, who has been styled the Papinian of Germany, maintains the same opinion in terms equally positive. Pract. Obs. lib. 8, Obs. 122, note 11.

The inconveniences which would result from a practical adoption of the principle that the law of the domicil must prevail, which determines the personal status of the individual, wherever he may be, would be found to be very great. If we admit that a foreigner has all those personal capacities and civil qualities in this country which the law of his domicil allows, to be consistent and follow out the principle we must adopt all those subsidiary laws of his domicil which regulate and protect him in the enjoyment of his personal status. If, for example, we acknowledge the relation of master and slave, our law should, in consistency, arm the master with the authority to govern his slave, with the power of disposing of his person and labor, which he enjoys by the law of his own country. It would be a mockery to acknowledge the relation of master and slave and to deny all the legal consequences which that relation imports. If we adopt the artificial distinctions of other nations with regard to their subjects, when they are temporarily resident among us, it would seem that we must also adopt that part of their laws which regulate those artificial relations, and the rights and duties which result from them. Natural relations of foreigners, and such as are established by our own domestic institutions, we recognize in foreigners who are temporarily resident among us; but the rights and obligations which flow from them must, as a general rule at least, be determined by our own law, and be enforced by such means only as the local law allows. But those merely artificial distinctions, those capacities and disqualifications of mere positive institution, established by different communities among their members, which are not founded in nature but which relate to their own domestic economy, their municipal institutions, and their peculiar social organization, cannot be admitted to follow them into other nations in whose laws such distinctions are unknown, without disturbing the whole order of society, and introducing into communities privileged castes of persons, each governed to a considerable extent by different laws and affected by personal privileges peculiar to themselves, and totally at variance with the habits, social order, and the laws of the community among whom they reside.

I have thus far considered the subject as it was presented in one branch of the argument, as purely a question of the jus gentium, to which the same considerations will apply whether it be raised in one country or another, and I come to the conclusion that the libellant is not disqualified from maintaining an action for a personal tort committed within our jurisdiction, merely because he is by the laws of his own country rendered incapable of maintaining an action in the forum of his domicil. And that conclusion will be fortified by recurring to our own domestic jurisprudence. It is stated by Mr. Justice Story as one of the rules which appear to be best established by the jurisprudence of this country and England, that personal disqualifications, not arising from the law of nature but from the principles of

the positive or customary law of a foreign country, are not generally regarded in other countries where the like disqualifications do not exist. Confl. Laws, 97. It is now fully settled in England, though it was once a doubtful question, that if a minor, who is disqualified from entering into the marriage contract without the consent of his guardian, goes into Scotland, where a minor has that capacity without such consent, and is married conformably to the laws of Scotland, the contract will be held valid and binding by the law of England. Compton v. Bearscroft, Bull. N. P. 115. The same principle is fully established in this country. 2 Kent, Comm. 92, 93; Story, Confl. Laws, 113, 116; Medway v. Needham, 16 Mass. 157; Inhabitants of West Cambridge v. Inhabitants of Lexington, 1 Pick. 506; Putnam v. Putnam, 8 Pick. 433. And though the considerations on which such marriages have been held valid in the domestic forum of the parties, where there has been a studied evasion of the law of their domicil, is the hardship and the mischief which would arise to society by bastardizing the issue of such marriages, yet it is not the less a distinct recognition of the principle that the legal capacity of a person to do an act depends on the law of the place where the act is done. Huber (De Conflictu Legum, 1–8) denies that the magistrate in the forum of the domicil is bound by the jus gentium to admit the validity of such marriages in direct evasion of the law of the parties' own country, yet no doubt can be entertained that they would be held valid in every other forum. And in a case where two British subjects, being minors, were in France for the purpose of education, and intermarried there, it was held that the validity of the marriage, and of course the capacity of the parties to enter into the contract, was to be determined by the law of France, and not by that of England, although the English domicil remained unchanged, and the marriage being a nullity by the law of France, was held to be void in England. Confl. Laws, 77; 2 Hagg. Consist. 407, 408. It has been decided in Massachusetts, after the most deliberate consideration, that a person who has been convicted of an infamous crime which rendered him incapable of being received as a witness in the country where the conviction took place, is a competent witness when in another jurisdiction. Com. v. Green, 17 Mass. 515. This is another application of the general principle that the personal status of an individual is to be determined by the law of the place where he is, as to acts done within that jurisdiction, and that the civil incapacities which attach to him in one country do not follow him into another. By the law of France a man does not attain to the age of legal majority until the age of twenty-five. If a Frenchman entered into a contract in this state, where the age of majority is twenty-one, between the ages of twenty-one and twenty-five would he be allowed to avoid it on the plea of minority? The supreme court of Louisiana has said that in such a case the contract would be binding, and that the capacity of the person would depend on the law of the place where the contract was made, and not on that of the person's domicil. Confl. Laws, 73; Saul v. His Creditors, 7 Mart. [N. S.] 596. And though that court does not appear to have a settled opinion on the general question how far the personal status of an individual, as it is fixed by the law of his domicil, may be changed by the law of the place where the act is done, it is apprehended that the opinion here expressed would be followed in this state.

But the clearest and most distinct recognition of the principle that the civil capacities and incapacities of an individual are to be determined by the law of the place where the person is, and not by that of his domicil, is found in the decisions upon the very subject which is involved in this case—that of slavery. It was decided in 1772, in Sommersett's Case, that a slave who was carried by his master to England, from any of the colonies, became free as soon as he stepped on English ground. 1 Black. 425, note; Loftt, 1; 11 State Tr. 340. A similar decision, some years after, was made in Scotland. 2 Hagg. Adm. 118. It is supposed, indeed, that a different rule prevailed before that decision. It is said that the traffic in slaves had for a long series of years been as public and notorious in London as in the colonies, and that the legality of it had been sustained by the most eminent lawyers in the kingdom. The Slave Grace, 2 Hagg. Adm. 105–114. However that may be, the law as it was then declared, has never since been brought into doubt; and whether the real grounds of the decision are to be found, as intimated by Lord Stowell, in the "increased refinement of the sentiments and manners of the age," or in the maxims of the ancient common law relating to villanage (2 Hagg. Adm. 109), it seems to me that it may be well vindicated upon those principles of the jus gentium which have already been frequently mentioned, and which are indicated by Lord Stowell in another part of the same opinion. "The entire change of the legal character of individuals, produced by a change of local situation, is far from being a novelty in the law. A residence in a new country introduces a change of legal condition, which imposes rights and obligations totally inconsistent with the former rights and obligations of the same persons. Persons bound by particular contracts which restrain their liberty, debtors, apprentices, and others, lose their character and condition for the time, when they reside in another country, and are entitled as persons totally free, though they return to their original servitude and obligations upon coming back to the country they

had quitted." 2 Hagg. Adm. 113. But if the decision in Sommersett's Case did not entirely approve itself to the judgment of that eminent magistrate, we may set against his doubts the opinion of another learned judge, although he also may be thought to trace the decision to the improved moral perceptions of the age, and the more full development of the principles of natural equity and universal justice, than to any ancient maxims of the common law, considered as a mere municipal code. "It is matter of pride to me," says Mr. Justice Best, "to recollect that while economists and politicians were recommending to the legislature the protection of this traffic, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the judges of the land, above the age in which they lived, standing on the high ground of natural right, and disdaining the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject-matter of property. As a lawyer, I speak of that early determination, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride." Forbes v. Cochrane, 2 Barn. & C. 448. But to whatever cause is to be ascribed this change of the common law of England, if change it was, it has since that time been considered the settled law, that a slave on being introduced into England becomes free. And the law as it was then declared by Lord Mansfield, is believed to be generally adopted by the non-slaveholding states, in this country. Confl. Laws, 92; Case of Francisco, 9 Am. Jur. 490. The question was very fully considered by the supreme court of Massachusetts, in the recent Case of the Slave Med (Com. v. Aves, 18 Pick. 193; Aug., 1836), and it was decided, that a slave on coming into that state became free, except in a case falling within the provisions of the constitution of the United States, and the act of congress of Feb. 12, 1793, by which provision is made for delivering up persons who are held to labor or service in one of the United States on their escaping into another. If the owner voluntarily brings his slave into the state, the case does not come within the provisions of the law, and he becomes free. The same doctrine was held by Mr. Justice Washington in the case of Butler v. Hooper [Case No. 2,241], and again in Ex parte Simmons [Id. 12,863]. And it appears from the cases of Lunsford v. Coquillon, 2 Mart. [N. S.] 404, and Rankin v. Lydia, 2 A. K. Marsh. 470, that the principle has been fully recognized in Louisiana and Kentucky, that the relation of master and slave is founded exclusively on municipal law for which the courts in those states do not claim any extra-territorial force.

All these cases stand upon the principle that slavery, and with it as a necessary consequence, all the civil incapacities which are peculiar to that servile state, depend entirely on the local law. It follows of course that when a slave passes into a country, by whose laws slavery is not recognized, his civil condition is changed from a state of servitude, to that of freedom, and he becomes invested with those civil capacities which the law of the place imparts to all who stand in the same category. It is, indeed, said by Chief Justice Shaw, in delivering the opinion of the court, in the Case of the Slave Med, that "slaves in such case become free, not so much because any alteration is made in their status or condition, as because there is no law which will warrant, but there are laws, if they choose to avail themselves of them, which prohibit their forcible detention, or forcible removal." If by this is meant there is no change in the personal state of a slave in relation to the law of the country he has left, it may well be admitted to be correct. The law of that country, notwithstanding he is for the time withdrawn from its direct and immediate control, would hold him to be a slave until he acquired his freedom in some of the forms of emancipation known to that law. His mere transit into a country whose law declared him free, within its jurisdictional limits would not per se liberate him from the incapacities and obligations resulting from the law of his domicil within the legitimate sphere of that law's operation, and if he were to return to that country the condition of servitude would reattach to him precisely as when he left it. So it was decided by Lord Stowell, in the Case of the Slave Grace, and the same principle is distinctly established by the case of Williams v. Brown, 3 Bos. & P. 69. But it by no means follows that because the law of his domicil holds him to be a slave, he has not, while within a jurisdiction which declares him to be free, all the faculties which belong to a state of freedom. It is difficult to understand what the law does, by declaring him free, if it does not invest him with the rights and capacities of a free man; and if it does, it confers upon him a personal state very different from that of slavery; and there is no absurdity or contradiction in supposing a man to be a free man in one country and a slave in another. Both result from the same principle, the absolute supremacy of the laws of every state within its own territorial limits. And though Lord Stowell rather sarcastically remarks, that the law of England, by adopting this principle, puts the liberty of a man, as it were, into a parenthesis, it is nothing different from what occurs in many other cases, in which an individual is affected by the law of his domicil with peculiar capacities and disqualifications, which are recognized either in his favor or against him while resident within another jurisdiction. When he returns to his own country he becomes reinvested with his original personal status, and the capacities and disqualifications of the law of his domicil attach. Take

a case of familiar and daily occurrence. A man is a magistrate in the place of his domicil. He passes out of that jurisdiction, and he can exercise no authority as a magistrate. He becomes a private person, but on his return to the place of his domicil he reassumes his personal status as a magistrate. The law which declares a slave free on his introduction into this country, by necessary consequences, if it be not an identical proposition, declares him to be possessed of the civil qualities of a freeman, and confers on him the faculty of vindicating his rights, and claiming redress for wrongs in the ordinary course of justice; and this general proposition is an answer to another part of the argument, that the libellant in this case, was put under the government of the respondent who stood loco domini, the owner having delegated to him his authority. That authority when the slave was within the jurisdiction of this country, could be exercised only under the restrictions of our law. Years before the decision of Sommersett's Case, it was said by Lord Chancellor Northington, that a negro might maintain an action in England, against his master for ill usage. Shanley v. Harvey, 2 Eden, 126, quoted, 2 Hagg. Adm. 116.

It was supposed in the argument that a distinction might be made, founded on the circumstance that the tort was committed on the high seas, which are within the common jurisdiction of all nations. It is true that no nation can claim an exclusive jurisdiction over any part of the high seas, but all nations can, and do claim an exclusive jurisdiction over their own vessels that float on the high seas. A foreigner who is a passenger on board an American vessel, when the vessel has left the port, and is beyond the jurisdiction of his own country, is amenable to the laws of this country and is under their protection. If he commits a crime he may be indicted in our courts, and punished by our laws. If he commits a tort, he is personally liable to answer for it in our courts, and if he suffers a wrong he may appeal to the laws of this country for redress, as much as though the wrong had been done him on land. If the libellant would not be precluded from maintaining an action for a tort done on land, he may equally maintain one for a tort done in an American vessel on the high seas. Forbes v. Cochrane, 2 Barn. & C. 448.

It was supposed at the argument that the capacity of the libellant to maintain this action in the courts of the United States may stand on grounds somewhat different from what it would in the state courts; that slavery existing in some of the individual states, and not being prohibited by the constitution and laws of the United States, the national courts might be bound by the principles of the jus gentium to recognize the incapacities of slaves having a foreign domicil, even where it would not be done by the state courts, and that the national tribunals are under the same obligations in this respect, whether sitting in a state where slavery is admitted, or where it is prohibited. If this were conceded, and in the view which I take of the case I do not think it necessary to give an opinion upon the question, the answer is, that a court sitting in Louisiana is no more bound, than one sitting in Maine, to recognize as to any acts, or rights acquired, within the exclusive jurisdiction of the United States, the artificial incapacities of persons resulting from a foreign law. The question in both cases, would be, whether the party could by the laws of the United States, have a standing in court. The court certainly is not bound to enforce against him, a personal incapacity derived from the law of his domicil, because that law can have no force in this country any further than our law on the principles of comity chooses to adopt it; and every nation will judge for itself how far it is consistent with its own interest and policy to extend its comity in this respect. If the legislative power has prescribed no rule, the courts must of necessity decide in each individual case as it is presented, and however embarrassing and perplexing the case may sometimes be, the courts cannot escape them. If the incapacity alleged were slavery, it is not for me to say what would be the judgment of a court sitting within a jurisdiction where slavery is allowed, but sitting as this court does, in a place where slavery by the local law is prohibited, I do not feel myself called upon to allow that disqualification when it is alleged by a wrongdoer, as attaching to the libellant by the laws of a foreign power, for the purpose of withdrawing himself from responsibility for his own wrong.

Case No. 11,258.

In re POMEROY.

[2 N. B. R. 14 (Quarto, 3).] [1]

District Court, E. D. Missouri. 1868.

BANKRUPTCY—OMISSION OF WIFE'S PROPERTY FROM SCHEDULES.

Where all of a bankrupt's right and title to property has been sold by creditors under judgment and execution, and purchased by his wife with her own separate funds, he has no title or estate in such property which he could be required to report in his schedules, and, hence, its omission cannot subject him to the penalties for false swearing.

It appeared, in the evidence, that the wife of the bankrupt had received from her grandmother some advances and a legacy, which the bankrupt testified he had never reduced to his possession, but had always treated the same as the separate property of his wife. These sums she had invested from time to time in the purchase of notes through a broker, until,

[1] [Reprinted by permission.]

in 1863, they amounted to five thousand dollars, when she purchased the house in which the bankrupt and his family lived, paying five thousand dollars cash, and giving notes endorsed by her husband for six thousand dollars, running through six years, with annual interest. The title was made to a trustee for the separate use of Mrs. P. The trustee, at the request of the wife, made a lease of the premises to the bankrupt for six years, at an annual rent, which would pay the accruing notes as they fell due, with taxes and insurance. With this rent the notes had been paid as they became due. Subsequently, in April, 1867, creditors of the bankrupt levied an execution upon the bankrupt's interest and estate in the property, and exposed it to sale. Mrs. Pomeroy procured money from a relative in New York, and through the interposition of a friend purchased the estate of the husband at sheriff's sale, for five hundred dollars, and the friend subsequently conveyed this title to the trustee of Mrs. Pomeroy.

TREAT, District Judge, held, that as all the title and estate of the bankrupt, whether as lessee or as husband, had by the creditors been sold under judgment and execution, and had been purchased by the wife with funds not derived from the husband, that it was not necessary to inquire into the effect of the statutes of the state (Rev. Code 1855, p. 724) exempting the property of the wife from execution for the debts of the husband. That as all his estate in the property, whether as lessee or husband, had been sold by the creditors upon execution, that the bankrupt had no title or estate in the land which he could be required to report in his schedules, and therefore, that there was no ground for the specification that he had sworn falsely in not reporting this property or the interest which might have attached to him for the sums advanced by way of rent in making the deferred payments. Objections overruled.

POMEROY (BELL v.). See Case No. 1,263.

Case No. 11,259.

POMEROY v. CONNISON.

[1 MacA. Pat. Cas. 40; Cranch, Pat. Dec. 112.]

Circuit Court, District of Columbia. Nov., 1842.

PATENT OFFICE APPEALS—INTERFERENCES—RIGHT OF PATENTEE TO APPEAL.

[In the case of an interference between an applicant and a patentee, the patentee has no right of appeal, under the act of 1836, from a decision awarding priority to the applicant and granting him a patent, for the existing patent is not invalidated or affected thereby.]

[Cited in Greenough v. Clark, Case No. 5,784; Yearsley v. Brookfield, Id. 18,131; Bowen v. Herriet, Id. 1,722; Whipple v. Renton, Id. 17,521; Hopkins v. Barnum, Id. 6,685; Jones v. Wetherill, Id. 7,508; King v. Gedney, Id. 7,795. Distinguished in Mowry v. Barber, Id. 9,892. Disapproved in Babcock v. Degener, Id. 698.]

[This was an appeal by Ralph Pomeroy, a patentee, from a decision by the commissioner of patents, in an interference, awarding priority of invention to Alexander Connison, and granting him a patent.]

B. S. Brooks, for appellant.

T. B. Jones (Seth P. Staples, of counsel), for appellee.

CRANCH, Chief Judge. Alexander Connison applied for a patent. The commissioner of patents being of opinion that the patent applied for would, if granted, interfere with a prior unexpired patent to Ralph Pomeroy, granted on the 24th day of January, 1841, gave him notice thereof, under the 8th section of the act of July 4, 1836 (volume 9, p. 549, c. 747 [Bior. & D. Laws; 5 Stat. 120]), and he appeared before the commissioner of patents, and contested the right of Mr. Connison, who claimed to be the first inventor. The commissioner, on the 26th of July, 1842, decided that a patent ought to issue to Alexander Connison, as the first original inventor, and that the same be accordingly issued, unless an appeal be entered within ten days.

From this decision Mr. Pomeroy appealed, and filed his reasons of appeal. The commissioner has laid before the judge the grounds of his decision, in writing, with the original papers and the evidence in the cause.

The first question is, has the judge jurisdiction upon this appeal from the decision of the commissioner—not rejecting, but granting, the application? In no other case under the patent laws can an appeal be taken from the decision of the commissioner, unless the application for a patent has been rejected by him. In no other case can an appeal be taken to the granting of a patent; and the reason for giving an appeal from the rejection of an application for a patent, and not giving an appeal from the granting of a patent, is, that the applicant whose application is rejected has no remedy. He cannot go into a court of law or equity to obtain a patent; nor can he maintain any action for the use of his invention. But, if the commissioner grant a patent erroneously, its validity may be tried; and any person interested may defeat it by a suit at law or in equity.

The general object in giving an appeal under the patent laws, therefore, is to correct the error of the commissioner in refusing to grant the patent applied for. This error in granting a patent is corrected by the ordinary tribunals of the country, and there was no need of a special tribunal for that purpose. This general object seems to me to govern all the provisions of the law upon this subject, and ought to be taken into consideration in their construction. Thus,

in the 7th section of the act of July 4, 1836, if the specification and claim shall not have been so modified as, in the opinion of the commissioners, shall entitle the applicant to a patent, he may on appeal, and upon request in writing, have the decision of a "board of examiners," &c., who may reverse the decision of the commissioner. And by the 16th section the remedy given by bill in equity is confined to the case of two interfering patents, and to the refusal of the board of examiners to grant a patent. The provisions of this section are, by the 10th section of the act of 1839 [5 Stat. 353], extended to all cases where patents are refused, for any reason whatever, by the commissioner of patents or by the judge, &c.

The proceedings before the commissioner and before the judge by appeals are all initiatory, all relating to the question whether a patent shall issue. They cannot affect a patent already issued. Such are the provisions of the act of 1836 (sections 5–12, 16), and of the act of 1839 (sections 10, 11). There is no section or clause in either of the acts which gives a patentee a right of appeal from the decision of the commissioner granting a patent to another person, unless that right be given by the 8th section of the act of 1836. By that section it is enacted: "That whenever an application shall be made for a patent, which, in the opinion of the commissioner, would interfere with any other patent for which an application may be pending, or with any unexpired patent which shall have been granted, it shall be the duty of the commissioner to give notice thereof to such applicants or patentees, as the case may be; and if either shall be dissatisfied with the decision of the commissioner on the question of priority of right of invention, on a hearing thereof he may appeal from such decision on the like terms and conditions as are provided in the preceding section of this act; and the like proceedings shall be had to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for."

The power and jurisdiction given by the patent laws to the board of examiners and to the judge are special and limited, and must be construed and exercised strictly. The judge can only decide such questions and render such judgment as he is expressly authorized by the statutes to decide and render. In the case stated in the 8th section of the act of 1836, the judge is only "to determine" which, or whether either, of the applicants is entitled to receive a patent as prayed for. He can only act in a case where there are contending applicants for a patent, and those applicants must have prayed for a patent. A patentee is not an applicant. He has already obtained all he asked for. If his patent can be supported at law, he has nothing to fear. The grant of a subsequent patent erroneously to another cannot affect the validity of his patent. The judge is to determine which, or whether either, of the applicants is entitled "to receive" a patent. It would be absurd to say that a patentee is entitled to receive a patent after he has already received it. It is true that the 8th section, after speaking of applicants and patentees, says, if either shall be dissatisfied, he may appeal. The word "either" may be satisfied by applying it to the words "such applicants,"—i. e. "either" of "such applicants." And that such was the understanding of the legislature seems probable from the fact that they have only authorized the judge to determine between contending applicants, and not between an applicant and a patentee; for when they come to say what the judge is to do upon the appeal, we find it is "to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for." The word "either" in the former parts of the clause is here explained to mean "either of the applicants." It cannot be contended that the judge is to decide whether a patentee is entitled to receive a patent which he has already received, and which he still has in his possession. This construction of this section is corroborated by the reference to it in the 12th section, which gives a right to file a caveat, and where it is said that "if in the opinion of the commissioner the specifications of claim interfere with each other, like proceedings may be had, in all respects as are in this act provided in the case of interfering applications," i. e. in the 8th section. The 16th section seems to give the remedy in a case of interfering patents, which this will be if the commissioner shall issue a patent to Mr. Connison. It also provides for the case if a patent is refused by the board of examiners on the ground that it would interfere with an unexpired patent; and the provisions of this section are extended, by the 10th section of the act of 1839, to all cases of refusal by the commissioner or the judge.

Where the patent has issued, the jurisdiction of the commissioner is exhausted. He has no further control over it, except in the case provided for in the 13th section of the act of 1836, where the patent is inoperative or invalid by reason of a defective or insufficient description. An adjudication of it by the commissioner or the judge has no effect upon a patent already granted, and is entirely inoperative as to the rights of the parties, unless the decision be against the applicant, against whom it would be conclusive, unless an appeal were given by the statute. He could apply to no other tribunal. But as to the patentee, a decision against him would be a brutum fulmen; and, if the second patentee should do any act under his patent to the supposed injury of the first patentee, he would have a right of action, and might maintain the validity of his patent in the same manner and to the same effect as if the second patent

had not issued. When the commissioner inquires as to the relative priority of invention between the applicant and the patentee, it is not for setting aside the patent already granted, over which he has no control. The decision of the commissioner does not affect the patentee if his patent is valid, and if it is invalid he has no right to complain. There was no necessity, therefore, that the patentee should have a right to appeal from the decision of the commissioner, which could have no effect upon his rights. This is a sufficient reason why the legislature should not give him the right to appeal in such a case. He has already abundant means of redress, both at law and in equity, if his patent is valid and should be violated; and this accounts for restraining the action of the judge to the case of contending applicants. An appeal is given to a disappointed applicant, because otherwise the decision of the commissioner would be conclusive against him. It is not given to the patentee, because the decision of the commissioner is not only not conclusive as to him, but does not in any manner affect his legal or equitable rights. And if the patent should be issued to Mr. Connison by the commissioner, the act of 1836 (section 16) expressly gives him a remedy in equity, where he may have the benefit of the oath of the patentee, in addition to all legal evidence taken, according to the rules of a court in equity, which has power and jurisdiction to act effectually in the case, and to adjudge either of the patents to be void; or, if he does not like the remedy by bill in equity, he may bring an action at law for a violation of his patent, in which case its validity may be tried and decided. In either of these cases his remedy may be full and conclusive, whereas, if he were to have an appeal, he would not thereby have any conclusive or effectual remedy; for, if upon such appeal, he should prevail in reversing the decision of the commissioner, the reversing decision would not be final and conclusive upon Mr. Connison. He would still have his remedy upon a bill in equity, under the same 16th section.

I am therefore of opinion that the legislature designedly limited the authority of the judge to the decision of the question "which, or whether either, of the applicants is entitled to receive a patent as prayed for"; and that, as in this case there is only one applicant, I have no jurisdiction under the 8th section of the act of 1836.

The only other case of appeal provided for in the statutes is when the application for a patent is rejected; and as the application of Mr. Connison was not rejected, but sustained, I have no jurisdiction of the appeal of Mr. Pomeroy, who is not an applicant.

Believing that I have no jurisdiction in this case, and that Mr. Pomeroy has all his rights and remedies reserved to him by the statutes upon this subject, I shall return the papers to the patent office, with a certificate of the substance of this opinion.

[Patent No. 2,872 was granted to A. Connison, December 5, 1842, and has not, so far as ascertained, been involved in any other cases reported prior to 1880.]

Case No. 11,260.

POMEROY v. MANIN et al.

[2 Paine, 476.] [1]

Circuit Court, D. Connecticut.[2]

EQUITY PLEADING—ANSWER—RESPONSIVE—HOW REBUTTED—PRACTICE OF STATE COURTS—RULES OF SUPREME COURT—PAROL EVIDENCE TO VARY WRITTEN AGREEMENT—LATENT AMBIGUITY—CONVEYANCE—VALIDITY AS AGAINST CREDITORS—TRUST.

1. In the state courts in Connecticut, an answer in chancery stands on the same footing as a plea, and is not evidence unless the complainant seeks a disclosure by an appeal to the conscience of the defendant.

2. In chancery proceedings in the courts of the United States, when the answer is responsive to allegations in the bill, it is considered as evidence, and must be rebutted by something more than simply the testimony of one witness.

3. The courts of the United States are not governed or controlled by the practice of the state courts, unless adopted by some law of the United States, or by some rule of court made in pursuance of an act of congress.

[Cited in Rusch v. Des Moines Co., Case No. 12,142.]

[Cited in brief in Merchants' Bank v. Evans, 51 Mo. 336.]

4. The supreme court of the United States has, under authority of an act of congress, adopted certain rules of practice for the courts of equity of the United States; one of which is, that in all cases where the rules prescribed by the supreme court, or by the circuit court, do not apply, the practice of the circuit courts shall be regulated by the practice of the high court of chancery in England.

5. The rule is well settled that parol evidence cannot be admitted to contradict or vary the terms of a written instrument; nor can a conveyance be shown by parol to be to another use or interest than that expressed in it. But a latent ambiguity arising from some collateral matter out of the instrument, may always be explained by parol evidence.

6. Where A. B. & C. were copartners, and A., without the knowledge of either of the other partners, drew funds from the concern while acting as the agent of D., which funds he furnished to D.; it was *held*, that a deed of certain property of less value than the funds so furnished to D., subsequently made by D., while in failing health, to B., reciting as the consideration thereof, the indebtedness of A. to B. & C., which D. assumed, was valid as against the creditors of D., and that the books of the partnership were admissible to show how the accounts stood as between the partners.

7. B. & C. were not creditors of D., but of A.; and therefore, the deed was not void under the statute of Connecticut of 1828, relative to conveyances in trust for creditors.

8. The deed could not be considered in trust for the creditors of the grantor within the stat-

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Date not given. 2 Paine includes cases from 1827 to 1840.]

ute of Connecticut, but rather an indemnity in the nature of a mortgage, or a power coupled with an interest, whereby the grantee was authorized to sell the property conveyed, and to retain and pay what was owing by A. to B. & C., and to pay over the surplus, if any, to the grantor or his legal representatives.

[This was a bill in equity by Benjamin Pomeroy, administrator of Charles E. Phelps, against D. F. Manin, B. F. Phelps, & Foote, to set aside and declare null and void a certain instrument executed by Charles E. Phelps in his lifetime to the defendant D. F. Manin.]

THOMPSON, Circuit Justice. The original bill or petition in this case was filed in the superior court for the county of New London, in the state of Connecticut, and was removed into this court under the provisions of an act of congress, on the ground that the defendants were citizens of the state of New York. This circumstance has been urged at the bar on the part of the complainants, as placing the cause, with respect to the effect and operation of the answers as matters of evidence, upon a different footing than if it had been originally commenced in this court. I can perceive no good reason for such a distinction; if it was the right or privilege of the defendants to be sued in this court, it ought not to be in the power of the opposite party to take away that right, or deprive them of any advantage, if any exists, which they may have in this respect. It seems to be admitted that in the state courts in Connecticut, an answer in chancery stands on the same footing as a plea, and is not evidence, unless the complainant seeks a disclosure by an appeal to the conscience of the defendant. This is different from the rule that prevails in chancery proceedings in the courts of the United States; when the answer is responsive to the allegations in the bill, it is considered as evidence, and must be rebutted by something more than simply the testimony of one witness. In this case the answers were filed in this court after the cause was removed here, and were, in point of fact, sworn to in conformity with the practice of this court. The courts of the United States are not governed or controlled by the practice of the state courts, unless adopted by some law of the United States, or by some rule of court made in pursuance of an act of congress. See Brewster v. Gelston [Case No. 1,853]. The supreme court of the United States has, under authority of an act of congress, adopted certain rules of practice for the courts of equity of the United States: one of which is, that in all cases where the rules prescribed by the supreme court or by the circuit court, do not apply, the practice of the circuit courts shall be regulated by the practice of the high court of chancery in England. And it has not been, and cannot, indeed, be denied, that by the practice of the English chancery, the answer is required to be put in under oath, and is received as evidence so far as it is responsive to the bill.[3]

[3] The general rule is, that whatever is responsive to the bill, is evidence for as well as against the defendant. Schwarz v. Wendell, Walk. (Mich.) 267. If a fact stated in the bill and answered by the defendant is material to complainant's case, or is a circumstance from which a material fact may be inferred, the answer in such case, is responsive to the bill, and is evidence in the cause. Id. An answer may sometimes be evidence of a fact not stated in the bill; as when the bill sets forth part of complainant's case only, instead of the whole, and the part omitted and stated in the answer, shows a different case from that made by the bill, and is not by avoidance merely. Id. An answer in chancery not sworn to, is not evidence in the cause for any purpose; it performs the office of a plea only. Willis v. Henderson, 4 Scam. 13. Where a general replication is put in and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill, shall be taken for true, unless they are disproved by two witnesses, or by one witness with pregnant circumstances. Hagthorp v. Hook's Adm'rs, 1 Gill & J. 270; Roberts v. Salisbury, 3 Gill & J. 425; Moffat v. McDowall, 1 McCord, Eq. 434; Hopkins v. Stump, 2 Har. & J. 301; Maupin v. Whiting, 1 Call, 224; Blanton v. Brackett, 5 Call, 232; McCaw v. Blewit, 2 McCord, Eq. 102; Leeds v. Marine Ins. Co., 2 Wheat. [15 U. S.] 380; Stafford v. Bryan, 1 Paige, 239, 3 Wend. 532; Searcy v. Pannell, Cook, Eq. 110; Martin v. Browning, 2 Hawks, 644; Green v. Vardiman, 2 Blackf. 324; Hart v. Ten Eyck, 2 Johns. Ch. 92; Neilson v. Dickenson, 1 Desaus, Eq. 134; Clark v. Van Reimsdyk, 9 Cranch [13 U. S.] 153; Estep v. Watkins, 1 Bland. 488. An answer, after replication, is not evidence for the defendant, except as it is made so, by discoveries called for in the bill, and which are responsive to direct charges or special interrogatories. Lyerly v. Wheeler, 3 Ired. Eq. 599. The denials of an answer cannot be rebutted by a single witness, unaided by corroborating circumstances. Clark v. Bailey, 2 Strob. Eq. 143. The defendant is bound to answer the charging part as well as the stating part of the bill; and his answer to the charging part, if responsive thereto, is evidence in his own favor, if an answer on oath has not been waived by the complainant. Smith v. Clark, 4 Paige, 368. Where an answer on oath is waived, the answer is not evidence in favor of the defendant for any purpose; but as a pleading, the defendant may avail himself of admissions and allegations contained therein which establish the case made by his bill. Bartlett v. Gale, Id. 504. An answer admitting the equitable allegations of a bill, but setting up matter in avoidance, is not evidence of such matter to the court on motion to dissolve an injunction on bill and answer, and the injunction will be continued till the hearing. Ferriday v. Selcer, Freem. Ch. (Miss.) 258; s. p., Planters' Bank v. Stockman, Id. 502; Oakey v. Rabb's Ex'rs, Freem. Ch. (Miss.) 546. Where a discovery is sought by the bill, the answer stands for proof unless rebutted by preponderating evidence; and although the testimony of a single witness, if corroborated by circumstances, is sufficient to disprove an answer, yet it is for the chancellor to judge of the weight of the evidence; and his decision against the evidence to contradict the answer, will not be interfered with, especially where the same facts are sworn to by two defendants in their several answers. Magwood v. Lubbock, Bailey, Eq. 382. Where the allegations of the bill are denied by the answer, a single witness is not sufficient to establish them, unless strongly supported by circumstances. Johnson v. Slawson, Id. 463. Where

The answers in this case must, therefore, be received and considered according to this rule.

The object of the bill in this case is to set aside, and declare null and void, a certain deed or instrument in writing, given by Charles E. Phelps to D. Forest Manin, one of the defendants in this case, bearing date the sixteenth day of May, in the year one thousand eight hundred and thirty-three, and which is set out in hæc verba in the bill. The allegations in the bill as the grounds upon which the relief is sought, are substantially that Charles E. Phelps, at the time of his death, had a large real and personal estate, to the amount of $20,000 and upwards. That he was largely indebted to more than that amount, which debts, at the time of the execution of the deed in question, were due and payable, and still remain unpaid; and that the property mentioned and described in said deed was liable to, and necessary for the payment of such debts, and the only fund to which the creditors can resort for such payment; and that unless the same shall be so applied, all his creditors must lose their debts. The bill further states that Benjamin F. Phelps, one of the defendants, was the brother of Charles E. Phelps, and was a partner in the mercantile house of Manin, Phelps & Co. That he was the only brother of the whole blood of the said Charles, and his sole heir-at-law. That at the time of the execution of the deed the said Charles had become weak, debilitated and much impaired both in body and mind, and was in daily expectation of dying at the house of his said brother Benjamin, where he was then sick, and under the entire influence and control of his brother, in the absence of all his other near relatives; and that the said Manin and Benjamin combining and conspiring together, secretly and away from the knowledge or observation of his other relatives, or any of the creditors,

a bank answered, under its corporate seal, and the cashier made affidavit that the statements of the answer were true, to the best of his knowledge and belief, without stating that he had any knowledge of the facts therein set forth, the answer was holden not to be evidence against the positive averments of the bill. McGuffie v. Planters' Bank, Freem. Ch. (Miss.) 383. An answer by a purchaser, denying notice of a prior unrecorded mortgage, is sufficiently disproved by the positive oath of a single witness, aided by corroborating circumstances. Martin v. Sale, Bailey, Eq. 1. The testimony of one witness is sufficient to prove fraud, although denied by the answer, if corroborated by the circumstances of the case. Rowe v. Cockrell, Id. 126. An answer to a bill charging fraud, responsive to the bill denying the charge, and uncontradicted by evidence, rebuts the idea of fraud. Murray v. Blatchford, 1 Wend. 583; Cunningham v. Freeborn, 3 Paige, 557. The answer of a wife cannot be read as evidence against her husband; nor can she be examined as a witness against him. City Bank v. Bangs, Id. 36. The answer of the wife can, in no case, affect the husband. Lingan v. Henderson, 1 Bland, 269. The answer in chancery of a corporate body, under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted. Haight v. Morris' Aqueduct [Case No. 5,902]. Where a replication is filed, no statement in the answer not responsive to the bill can avail the defendant unless it is established by proof. Wakeman v. Grover, 4 Paige, 23. The rule that proof cannot be received of the admissions of a party, unless there is an allegation, setting forth when, where, and to whom, such admissions are made, does not apply to the case made by the defendant in his answer. Brandon v. Cabiness, 10 Ala. 155. When an answer is positive no decree can be made against it upon the testimony of a single witness. If, however, there are circumstances which strengthen the witness and entitle him to greater credit, this forms an exception. In weighing circumstances, equal credit is to be given to each, and it is not to be forgotten that one is a disinterested witness. Sturtevant v. Waterbury, 1 Edw. Ch. 442. The answer of the defendant must be taken to be true, unless it is contradicted by the positive testimony of two witnesses, or the testimony of one witness, with strong circumstances. Id.; s. p., Neilson v. Dickenson, 1 Desaus. Eq. 134; Hart v. Ten Eyck, 2 Johns. Ch. 92; Hughes v. Blake, 6 Wheat. [19 U. S.] 468; Lee v. Vaughn, 1 Bibb, 235; Watkins v. Stockett, 6 Har. & J. 435. The general rule is, that either two witnesses or one witness, with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill. Id.; s. p., Norwood v. Norwood, 2 Har. & J. 238; Hopkins v. Stump, Id. 304. But there may be evidence, arising from circumstances, stronger than the testimony of any single witness. Id. The weight of an answer must also, from the nature of evidence, depend in some degree upon the fact stated. If a defendant asserts a fact which is not, and cannot be, within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. Id. Where the fact alleged cannot be supposed to be within the defendant's knowledge, proof, by one witness, in opposition to the answer, will be sufficient. Lawrence v. Lawrence, 4 Bibb, 358. The answer of a defendant professing a want of knowledge of the facts stated in the bill, is not evidence against those facts; its only effect is to put the complainant to the necessity of proving them. Drury v. Conner, 6 Har. & J. 288. So, an evasive answer, (though not excepted to as such,) is outweighed by the testimony of a single witness, and circumstances. Wilkins v. Woodfin, 5 Munf. 183. The testimony of one witness prevails against the denial of an answer sworn to only by a defendant who has no personal knowledge of the facts. Combs v. Boswell, 1 Dana, 474. Where a defendant in his answer only denies a fact charged in the bill, according to the best of his knowledge and belief, a single witness on the part of the complainant is sufficient to establish the fact. Knickerbacker v. Harris, 1 Paige, 209. The principle that an answer to a bill can only be overthrown by two witnesses, or by one witness and corroborating circumstances, does not apply to the case of the proof by one witness, of the execution of a written instrument which contradicts the answer. Thomason v. Smithson, 7 Port. (Ala.) 144. In chancery the testimony of one witness against the direct and positive averment of the answer, is not a sufficient ground for a decree. Pierson v. Catlin, 3 Vt. 272. But when the testimony of witnesses is corroborated by circumstances, it will be sufficient; and the answer containing the denial may also in itself contain the circumstances required. Id. It seems, the rule requiring two witnesses to disprove a responsive denial in an answer in chancery, does not apply where the defendant refers to facts not within his own knowledge, and where he gives no satisfactory reasons for being supposed in possession of such knowledge

obtained his signature to the said deed. And the bill charges that the said Manin and Benjamin fraudulently, as it respects all the creditors of said Charles, combined together to obtain and perfect before his death, the instrument of writing aforesaid, thereby to defraud, delay and hinder, and wholly to deprive all the just creditors of the said Charles of all the means of obtaining any part of their debts.

The grounds, therefore, assumed in the bill upon which the deed is sought to be set aside, are to be considered in two aspects: (1) As between grantor and grantee, unconnected with the creditors of the grantor; and (2) as against the creditors of the grantor.

Viewing the case under the first aspect, it is not perceived how the complainant can have any right to call in question the validity of this deed. Neither he nor those whom he professes to represent, have any interest in the matter. The bill alleges that Benjamin F. Phelps, one of the defendants, was the only brother of the whole blood of Charles E. Phelps, and his sole heir-at-law. He is, accordingly, in the absence of all creditors, the only party interested in the estate, and he admits in his answer, in the most full and unqualified manner, the validity of the deed. The deed is certainly not void on account of any defect appearing on its face. The recital shows a benefit received by the grantor, which, with the pecuniary consideration, although nominal, are abundantly sufficient to sustain it, unless the grantor was incompetent to make any valid instrument to pass his estate.

Admitting the right of the complainant to call this in question, how stands the case on this ground? The bill does not charge that the grantor was defrauded, deceived or imposed upon, or that the deed executed by him was in any respect different from what he intended. And how stands the case with

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of the facts denied, as would justify a response in the negative. Waters v. Creagh, 4 Stew. & P. 410. Where the fact alleged cannot be supposed to be within the defendant's knowledge, proof by one witness, in opposition to the answer, will be sufficient. Lawrence v. Lawrence, 4 Bibb, 358. The weight of an answer must, from the nature of evidence, depend in some degree on the fact stated. If a defendant asserts a fact which is not, and cannot be, within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. Clark's Adm'rs v. Van Reimsdyk, 9 Cranch [13 U. S.] 153. Where a discovery is sought by the bill, the answer stands for proof unless rebutted by preponderating evidence; and although the testimony of a single witness, if corroborated by circumstances, is sufficient to disprove an answer, yet it is for the chancellor to judge of the weight of the evidence; and his decision against the evidence to contradict the answer will not be interfered with, especially where the same facts are sworn to by two defendants in their several answers. Magwood v. Lubbock, Bailey, Eq. 382. Where the allegations of the bill are denied by the answer, a single witness is not sufficient to establish them, unless strongly supported by circumstances. Johnson v. Slawson, Id. 463. Affirmative allegations in an answer, not responsive to the bill, must be proved at the trial. But where the answer is not traversed, it is to be taken as true, it seems. Lucas v. Bank of Darien, 2 Stew. (Ala.) 280. To a bill of foreclosure, the answer of the defendant setting forth usury in the mortgage as a defence, is not to be taken as evidence for him, unless the plaintiff asks for a disclosure on that subject, but is only equivalent to a plea of the statute of usury. McDaniels v. Barnum, 5 Vt. 279. The answer of a defendant in equity, stating facts which are not inquired of in the bill, is not evidence of such facts. New England Bank v. Lewis, 8 Pick. 113. Relief was denied on the testimony of one witness in support of the bill, in opposition to a positive denial in the answer. Patterson v. Hobbs, 1 Litt. (Ky.) 275. An answer to new facts, as to which the defendant was not interrogated, must be sustained by evidence aliunde. The answer alone is no evidence. Gordon v. Saunders, 2 McCord, Eq. 156. A plaintiff cannot read his own answer to a bill of discovery in a cross suit, in evidence, unless the defendant chooses first to produce it. Phillips v. Thompson, 1 Johns. Ch. 131. Where an answer is put in issue, what is confessed and admitted need not be proved, but the defendant must prove what he insists on by way of avoidance. Hart v. Ten Eyck, 2 Johns. Ch. 89; Purcell v. Purcell, 4 Hen. & M. 511; Chinowith's Heirs v. Williamson, 2 Bibb. 38. Where an answer to the allegations of a bill sets up matter in avoidance, it is not evidence. Planters' Bank v. Stockman, Freem. Ch. (Miss.) 502; Ferriday v. Selcer, Id. 258. Where the bill required the respondents, who were executors, to answer what estate of their testator they had received, and what had become of the same, and the respondents answered that the assets which came to their hands had been exhausted in payment of the debts of their testator, the answer was holden to be evidence against the complainants, and as there was no testimony disproving it, was taken as true, and the bill dismissed. Oakey v. Rabb's Ex'rs, Id. 546. An answer in chancery, (though in form responsive to a question put in the bill,) is not evidence when it asserts a right affirmatively in opposition to the plaintiff's demand, but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill. Paynes v. Coles, 1 Munf. 373.

An answer replied to is in no case evidence against the plaintiff, though the bill be sworn to; but an answer that cannot be replied to is evidence for the defendant, as in case of bills of discovery. Ragsdale v. Buford's Ex'r, 3 Hayw. (Tenn.) 192. On a hearing before a master upon a bill and answer, general allegations in the answer, containing matters of belief and inference from facts not particularly stated, are not conclusive, but may be controverted by testimony. Copeland v. Crane, 9 Pick. 73. The answer of a defendant to a bill in chancery, in a former cause, is not legal evidence in a cause against his legal representatives, relative to the same transactions. Drury v. Conner, 6 Har. & J. 288. To a bill for negroes the defendant answers, that the negroes were conveyed to plaintiff, to defraud the creditors of the defendant at law. The court held, the verdict and judgment were conclusive if pleaded in bar in equity. Gray v. Faris, 7 Yerg. 155. Where a case in chancery is heard on bill and answer alone, the answer must be taken as true, whether responsive to the bill or not. Lowry v. Mallory, 3 Stew. & P. 297. An answer can only be taken as true so far as it is responsive to the bill, where complainant replies and puts the answer in issue. Bates v. Murphy, 2 Stew. & P. 161, note; Smith v. Rogers, 1 Stew. & P. 317. So, an evasive answer (though not excepted to as such) is outweighed by the testimony of a single witness, and circumstances. Wilkins v. Woodfin, 5 Munf. 183.

respect to the allegation, that the grantor had become weak, debilitated, and much impaired both in body and mind, when he executed the deed.. The report of the commissioner upon this point is sufficient to remove all objections on this ground; he states that there was no proof of any such mental debility as would render him unable to make a valid contract, or would expose him peculiarly to undue influence or practices, but, on the contrary, his mind was clear and sound; and, indeed, the want of capacity in the grantor to make a valid deed, is entirely unsustained by the proofs in the case. But the contrary is most clearly and satisfactorily established. The answer of Benjamin F. Phelps (the only person, under the present view of the case, who is interested in the question), is sufficient to put this matter at rest. This part of the answer is directly responsive to the allegation in the bill. He admits that the deceased died without any child or other heir except this respondent; and that the deceased, at the time of the execution of the said instrument, had become weak, debilitated and much impaired in body, and his recovery deemed hopeless; but he expressly denies that the deceased was at that time weak, debilitated, or much, or at all, impaired in mind; but, on the contrary, that he was in the full and vigorous exercise of all his mental faculties, and so continued down to the hour of his death, in a remarkable degree. The allegation in the bill, that the grantor was under the influence and control of his brother Benjamin, is entirely unsupported by the proofs, and is expressly denied by the answer of Benjamin; so, also, the allegation that the deed was executed in the absence of all the grantor's relatives, except Benjamin, is not only unsupported by any evidence, but the contrary was expressly proved. The mother of the grantor was present, and had taken an active part in bringing about the arrangement, and procuring the deed to be given. The same remarks may be applied to all the other circumstances that have been urged as affording grounds for concluding that any undue or improper practices had been resorted to in procuring the deed in question. So far as any are specifically set out in the bill, they are denied by the answers, and not sustained by the proofs. It is deemed unnecessary to notice, in detail, the objections which have been urged against this deed, growing out of the time and manner in which it was executed; although the circumstances were a little unusual, and if accompanied by proof of any attempt to impose upon the grantor, would be entitled to great consideration, and might afford reasonable and plausible ground of argument and inference against the fairness of the transaction. But in the absence of all such proof, and in the face of the report of the commissioner, that the grantor was of sound mind, and not so debilitated as to expose him to undue influence and practices, any conclusion unfavorable to the deed on this account, must rest upon bare suspicion, and would not comport with a fair view of the evidence. This branch of the case is, therefore free from any difficulty, and the deed must be considered valid and operative, unless assailable by the creditors of the grantor on some other ground.

2. The second objection to the deed made in behalf of the creditors of the grantor, has been presented at the bar in two points of view: (1) As a voluntary deed, and void under the statute of frauds; and (2) as being void under the act of Connecticut of 1828 [Laws Conn. 1822–35, p. 182]. The bill, so far as it contains any allegation of fraud in fact, is fully met and denied by the answers, and is not, in any measure, sustained by the proofs, and may be dismissed without further consideration.

The first inquiry then is, whether it is fraudulent in law as a voluntary deed, and void under the statute of frauds. The indebtment of the grantor at the date of the deed is fully stated in the bill, and not denied by the answers; so that no question arises here, which has sometimes been made, as to a distinction between creditors antecedent and subsequent to the date of the deed. The consideration upon which the deed is sustained, appears by the recital: "Whereas Benjamin F. Phelps, of the city of New York, (one of the defendants,) is largely indebted unto the said party of the second part, and also to the said party of the second part and Erasmus D. Foote; and said party is under large and considerable responsibilities, together with said Foote, for said Benjamin F. Phelps, which said debts and responsibilities the said party of the first part has agreed to pay, and indemnify the said party of the second part, and said Foote against, as far forth as the property hereinafter conveyed will extend and enable him to do." The consideration here set out is, therefore, an agreement on the part of the grantor to pay certain debts due from Benjamin F. Phelps to the grantor, and also to the grantee and Erasmus D. Foote, and to indemnify them against responsibilities they were under for Benjamin F. Phelps. What these debts and responsibilities are does not appear upon the face of the deed, and it becomes a question whether parol evidence is admissible to explain it. It is a well-settled rule that parol evidence cannot be admitted, to contradict or vary the terms of a written instrument. Nor can a conveyance be shown by parol to be to another use or intent than that expressed in it. But the evidence in this case does not appear to me to violate these rules. It was introduced to prove a collateral agreement connected with the stipulations in the deed, and in no respect repugnant to it; it was matter extrinsic, and referred to as explanatory of the nature and extent of the consideration. It may be con-

sidered as partaking of the character of a latent ambiguity, arising from some collateral matter out of the instrument, which may always be explained by parol evidence.

If, then, the inquiry can be entertained as to the nature and extent of the consideration, does the evidence sustain the deed in this respect? How far the answers of the defendants on this branch of the case are to be received, will depend on the allegations in the bill. The bill, in substance, charges the defendants with fraudulently obtaining the deed from Charles E. Phelps, to the injury of his creditors, and to defeat their just debts; and this allegation rests materially, if not solely, upon the ground of want of consideration. The answers, therefore, showing what the consideration was, are responsive to the bill, and to be received as evidence. The commissioner reports, that from the answers, and various other sources of evidence, it appears that Benjamin F. Phelps was one of the firm of Manin, Phelps & Co., and this indeed is so alleged in the bill; and that in the year 1832, and in the early part of 1833, he was acting as the agent of his brother Charles E. Phelps, in New York, and constantly furnished him with funds to a large amount, which were extensively drawn from the funds of Manin, Phelps & Co., without the knowledge of either of the other partners, and in many instances grossly fraudulent. The evidence shows very satisfactorily, that the funds of the partnership, used by B. F. Phelps for the benefit of his brother, Charles E. Phelps, were to a greater amount than the value of the property conveyed to Manin by the deed in question. It was, therefore, in reality the debt of Charles E. Phelps himself, which his property went to pay; and, in this view of the case, every consideration of justice and equity, as against C. E. Phelps, calls for the establishment of the deed. This evidence was proper, as explanatory of the agreement of Charles E. Phelps, and to show the consideration upon which that agreement rested. It was in no respect repugnant to the deed, but related to matter collateral to and consistent with it; and, indeed, may well be considered as in direct answer to the allegations in the bill, so far as they rest upon the want of consideration in the deed.

But it is objected, that illegal evidence was admitted to establish this debt; that the books of the partnership could not be received for that purpose. The report of the commissioner shows the purpose for which the books were offered and received in evidence; it was not to show any debt against Charles E. Phelps, but to show how the accounts stood as between the partners themselves. The recital in the deed is that B. F. Phelps was largely indebted to Manin and to Manin & Foote, which debts the grantor, C. E. Phelps, had agreed to pay. The amount of the debts and responsibilities thus assumed by C. E. Phelps, does not appear by the recital, and this was necessary to be shown, at least to the extent of the value of the property conveyed. C. E. Phelps had appropriated his property only to that extent, and if there was any surplus it was reserved for his use, and would have been subject to the claims of his creditors. That the books were sufficiently proved to show how the accounts stood between the partners themselves, cannot be questioned. The books were objected to because all the clerks who made the entries were not produced as witnesses; but the commissioner states that they were admitted because it appeared that the clerks were the agents of the partners for the purpose of keeping the books, and that Wm. H. Plumer, who was sworn as a witness, was the principal clerk, and had the superintendence of all the books; and had himself made almost all the entries which related to the same charges. These clerks were the agents of all the partners, and their acts were binding upon all the partners. The books were admitted subject to any proof of collusion, fraud or mistake in the entries; but no such proof was offered. This was not evidence showing a different consideration from that expressed in the deed. The consideration in the deed was the assumption of the grantor to pay debts of B. F. Phelps to a large amount, and this evidence was to show such amount, which, as against the creditors of Charles E. Phelps, was necessary, in order to protect the property against their claim.

The case, then, is resolved into one where an insolvent debtor has appropriated his whole property towards the payment of the debt of a preferred creditor; and if the facts in the case will warrant this view of it, the validity of the deed cannot be questioned, for it is a well-settled and undisputed doctrine, that an insolvent debtor may prefer one creditor to another. This is believed not to be at this day an open question. It is a point too well settled to admit of argument. Whether originally settled upon sound principles of justice and policy, is not considered within the province of this court to examine. Had the deed been given to Benjamin F. Phelps, who was the creditor of Charles E. Phelps, its validity would have been clear. The only remaining inquiry is, whether this deed is void under the statute of Connecticut of 1828, relative to conveyances in trust for creditors? This act declares, "that all conveyances and assignments of any lands, tenements, goods, chattels or choses in action, hereafter made, directly or indirectly, by any person in failing circumstances, with a view to his insolvency, to any person or persons in trust for his creditors or any of them, shall, as against the creditors of the person making such conveyance or assignment, be deemed and adjudged fraudulent, and utterly void, unless the same be made in writing for the benefit of all the creditors in proportion to their respective claims, &c."

It is a sufficient answer to this objection, that this is not, in point of fact, a deed coming within the description contained in the act. It is not a deed given by Charles E. Phelps to any one in trust for his creditors. Manin & Foote are not the creditors of the grantor, they are the creditors of Benjamin F. Phelps. This is explicitly stated in the recital in the deed, and Benjamin F. Phelps is the creditor of Charles E. Phelps, who has assumed to pay the debt of Benjamin. The assignment being made with the assent of Benjamin, the proceeds of the sales of the property, on being received by Manin, would extinguish so much of Benjamin's debt. But this does not make it a deed in trust for the creditors of Charles; but it may well be questioned whether this can be considered, in any sense, a deed in trust. It is not a conveyance to one for the benefit of another, or for the grantee and another; it is for the benefit of the grantee himself. He may, in a certain sense, be said to hold the surplus, if any, in trust for the grantor; but this could not be considered in trust for the creditors of the grantor, within the statute of Connecticut. It may be considered more properly an indemnity, in the nature of a mortgage, or a power coupled with an interest. The grantor appoints the grantee his attorney irrevocably, and authorizes and empowers him to use and take all lawful ways and means to carry into full force and effect the true intent and meaning of the indenture, which was to sell and dispose of the property conveyed, and to retain and pay all such sums of money as are due, owing and payable, by the said Benjamin F. Phelps to Manin individually, or Manin & Foote, and pay over the surplus, if any, to the grantor or his legal representatives. It has been settled, in this state (Bates v. Coe, 10 Conn. 280) that this statute does not break in upon the long-established doctrine of the common law, that a debtor may prefer one creditor to another. Upon the whole, therefore, the complainant's bill must be dismissed without costs.

Case No. 11,261.

POMEROY v. NEW YORK & N. H. R. CO.

[4 Blatchf. 120.] [1]

Circuit Court, S. D. New York. Dec. 23, 1857.

JURISDICTION OF SUITS AGAINST FOREIGN CORPORATIONS—SERVICE ON OFFICER WITHIN DISTRICT—JUDICIARY ACT OF 1789—EFFECT OF STATE LAW.

1. This court has, under the 11th section of the judiciary act of 1789 (1 Stat. 78), no jurisdiction of a civil suit against a corporation created by the laws of another state, where the suit is commenced by the service of process within this district, upon an officer of the corporation.

[Cited in Hatch v. Chicago, R. I. & P. R. Co., Case No. 6,204; Myers v. Dorr, Id. 9,988; Decker v. New York Belting & Packing Co., Id. 3,727.]

[Distinguished in Baltimore & O. R. R. v. Wightman, 29 Grat. 436.]

2. The provisions of said 11th section, which require that every civil suit brought against an inhabitant of the United States must be brought in the district of which he is an inhabitant, or in which he is found at the time of serving the writ, cannot be altered or modified by any state law.

[Cited in Stillwell v. Empire Fire Ins. Co., Case No. 13,449; Williams v. Empire Transp. Co., Id. 17,720; Fonda v. British-American Assur. Co., Id. 4,904; Runkle v. Lamar Ins. Co., 2 Fed. 11.]

3. Therefore, a law of New York, in regard to a Connecticut corporation, declaring it liable to be sued by summons in the same manner as corporations created by the laws of New York, and that the process might be served on an officer or agent of the corporation, cannot have the effect to give to this court jurisdiction of a suit against such corporation, by the service of process, within this district, on an officer or agent of such corporation.

[Quoted in Williams v. Empire Transp. Co., Case No. 17,720. Cited in Main v. Second Nat. Bank, Id. 8,976; Kelsey v. Pennsylvania R. Co., Id. 7,679; Leonard v. Lycoming Fire Ins. Co., Id. 8,258; Ex parte Schollenberger, 96 U. S. 378; Zambrino v. Galveston, H. & S. A. Ry. Co., 38 Fed. 452.]

This was an action at law [by Alexander H. Pomeroy] against a corporation created by the laws of the state of Connecticut. The suit was commenced by the service of process upon an officer of the company within the Southern district of New York. The case came up on a demurrer to a replication to the plea of the defendants.

Daniel D. Lord, for plaintiff.
William Curtis Noyes, for defendants

NELSON, Circuit Justice. The question presented upon the pleadings is, whether or not the court has jurisdiction to hear and determine the matters in controversy.

The judiciary act of 1789 (1 Stat. 78, § 11) provides, that no civil suit shall be brought in the circuit court against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. In the case of Day v. Newark India Rubber Co. [Case No. 3,685], it was held, that a corporate body created by the legislature of New Jersey could have no existence beyond the limits of the territory of that state, and that the service of process upon its president in the city of New York, gave to the circuit court no jurisdiction over the defendants, it not being an inhabitant of the district, and the service of process upon the company not having been made within the district.

The case now before the court has a feature not found in that case, which is relied on to distinguish it. By a statute of New York, passed May 11th, 1846, permission and authority were given to this Connecticut company, to continue and extend its railroad,

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

(which was a road from New Haven to the New York line,) from the dividing line of the two states, through the county of Westchester, in New York, to connect with the New York and Harlem line of road; and it was authorized to take, transport and convey persons and property on the same, by the power of steam or animals. The company was also authorized to procure and hold such real estate as should be necessary and convenient for the purposes of the road, to construct the same with one or more tracks, to regulate the time and manner of transporting passengers and goods, to erect station-houses and other necessary buildings, and to fix and regulate the charges for the conveyance of persons and property, &c. The act further provided, that the company should be liable to be sued by summons, in the same manner as corporations created by the laws of the state, and that the process might be served on an officer or agent of the company. The company has availed itself of the privileges and franchises of this statute of New York, and has built the road and put it in operation, and is undoubtedly to be regarded as having submitted to the conditions imposed; and, if this were a suit in a state court of New York, there could be little, if any, difficulty in maintaining the suit upon the present service of the process. Indeed, this very point was decided in the case of Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 404. That was a suit upon a judgment recovered in a state court in Ohio, against a corporation of the state of Indiana, upon a service of process on an agent in Ohio. But the difficulty here is in giving effect to this law of New York, providing for service of process on the defendants. That is regulated, as to this court, by the act of congress of 1789, already referred to, and cannot be altered or modified by any state law. According to that act, the defendant must be an inhabitant of the district, or be served with process within it, in order to give the court jurisdiction. Now, service of process, by the assent of this company, upon an agent, within the state, or within the Southern district of New York, cannot be said to be service upon an inhabitant of the district, or upon a person within it. The corporation is still a Connecticut company, resident within the state of Connecticut, but consenting to be sued in New York by service of process on its agent; and, however effectual this service may be in conferring jurisdiction over the company, upon tribunals governed by the laws of New York, it cannot have that effect in respect to the federal tribunals, which are not only not governed by the state laws, but are governed by the act of congress, which has prescribed a different rule.

It is argued, however, that, in view of the facts, that the law of New York provides, and that of Connecticut consents, that the company may acquire lands in the former state, enter upon them, construct its road, regulate the running of the cars, fix charges for transportation, and run its trains, &c., and that the company is exercising and enjoying those franchises, it must be regarded as, in judgment of law, being present within the district at the time of the service of the process, and as being empowered to exist and act in the county of Westchester, and, of course, in the district; and that a corporation may have two domicils—one in New York and the other in Connecticut. Whether the two laws referred to have any other force or effect than to authorize and license a Connecticut corporation to enjoy and exercise certain rights and privileges in the state of New York, it is not important to inquire; for it seems to me, that, if any other or greater effect is to be given to them, and if that body is to be deemed to exist in New York, in its corporate capacity, it must be regarded as so existing as a New York corporation. As a foreign corporation, it cannot be said to have any legal existence in New York. Its existence in the foreign state may be recognized in New York, and the exercise of many rights and privileges may be permitted to it, either by express statute, or by the comity of her courts. Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519. But, its corporate existence in New York can be created only by New York laws, and by making it a New York corporation. The idea thrown out by Lord St. Leonards, in Carron Iron Co. v. Maclaren, 35 Eng. Law & Eq. 37, 57, 62, that the place of business of a foreign corporation may, for the purpose of jurisdiction, be properly deemed its domicil in the country in which the suit is brought, was not adopted by the other judges. And, certainly, there would be great difficulty in assenting to it, upon any sound principle, as giving jurisdiction over the corporation itself. The jurisdiction of the court over the property of the foreign company, found within the country, at its place of business, is a very different question. Lord Brougham put a very pertinent question, in his opinion upon this subject, by asking whether, in case the foreign corporation disobeyed the process served upon its agent, in another country, the court would punish the agent for the contumacy. In that case, the attempt was made to enjoin a Scotch corporation, by service upon its agent, at a place of business in England.

Upon the whole, as at present advised, I think the court has no jurisdiction of the defendants; and, if my opinion upon the point was more doubtful than it is, I should be unwilling, in a case of the magnitude of the present one, to entertain the jurisdiction, when there are tribunals before which the case may be heard and determined unembarrassed with this question.

There must be judgment for the defendants, on the demurrer.

POMEROY (SMITH v.). See Case No. 13,092.

POMEROY (UNITED STATES v.). See Case No. 16,065.

POMEROY (WILKINSON v.). See Cases Nos. 17,674 and 17,675.

Case No. 11,262.

POMERY v. SLACUM.

[1 Cranch, C. C. 578.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.[2]

BILLS AND NOTES—INDORSER'S LIABILITY—NOTICE OF PROTEST.

1. A Virginian, indorser of a bill of exchange drawn in Barbadoes, is liable to fifteen per cent. damages.

2. Notice of the protest must be given before suit brought.

Debt against the indorser of a bill of exchange drawn by Cadogan, at Barbadoes, in favor of the defendant, on merchants in England, indorsed by the defendant to the plaintiff in Alexandria, but not accepted nor paid.

Mr. Swann, for defendant, contended that the defendant is not liable to the fifteen per cent. damages under the act of assembly of the 12th November, 1792, p. 113. The act means bills drawn in Virginia. The defendant is not liable for more than he can recover from Cadogan. He becomes liable only as the drawer is liable, his responsibility follows the nature of that of the drawer, it is governed by the lex loci where the original contract was made.

Mr. Taylor, contra. The words of the act of assembly are general and apply to bills drawn anywhere, so far as to bind any person who draws or indorses a bill in Virginia. It is a new contract.

Mr. Swann, in reply. The act is an old act, made when the trade was carried on here by factors who advanced money to the planters and took their bills. The indorser is only a security; he is liable for whatever the drawer is liable for, and no more. The value in current money is not stated in the indorsement.

THE COURT was of opinion that the indorser in Virginia is liable to the fifteen per cent. damages, although the bill was drawn in Barbadoes, where the damages are only ten per cent.

THE COURT also instructed the jury that it is necessary that they should be satisfied that the plaintiff had reasonable notice of the protest for non-payment before the suit brought. It is a necessary part of the plaintiff's cause of action.[3]

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

[2] [Reversed in 6 Cranch (10 U. S.) 221.]

[3] The opinions of this court in this case were affirmed by the supreme court of the United States (6 Cranch [10 U. S.] 221), although the judgment was reversed for a defect in the declaration, not noticed in this court.

Case No. 11,263.

POMROY et al. v. HARTER et al.

BALDWIN et al. v. SAME.

[1 McLean, 448.] [1]

Circuit Court, D. Indiana. May Term, 1839.

MARSHAL'S FEES—COMMISSION ON EXECUTION ALLOWED BY STATE STATUTE—PAYMENT WITHOUT SALE OF PROPERTY.

Under the act of this state which regulates the fees of sheriffs, the marshal is entitled to receive, on an execution in his hands, the commission allowed by the statute, where the money is paid, without sale of the property. And it is not material whether the payment be made before or after the levy.

[Cited in Jerman v. Stewart, 12 Fed. 274.]

[These were bills by Pomroy, Wilson & Butler against Harter & Camden, and Baldwin & Lee against the same defendants.]

OPINION OF THE COURT. At the May term, 1838, the writs which had been issued in these cases were quashed, and to save costs, the defendants entered their appearance, and the causes were continued. At November term following, judgments were entered by default and executions were issued. While the executions were in the hands of the marshal, the defendants paid the plaintiffs by conveying lands, and the plaintiffs receipted in full for the judgments, except costs. According to the practice in this state, fee bills for the costs are issued with the executions, and a question is raised as to the amount of costs for which the defendants are liable. As the writs were quashed, the cost on them cannot be taxed against the defendants. The marshal has charged a commission on the judgments, and it is objected that not having made the levy nor received the money, he is not entitled to the commission. That this is given to compensate for the risk and labor of selling the property and receiving and paying over the money. This charge is regulated by the law of Indiana. The act of congress gives to marshals on executions, the same fees as are allowed to sheriffs, for similar services. The act regulating the fees and salaries of the several officers and persons therein named (Revised Code, 1831) provides that "the sheriff's fees shall be, for selling property on an execution, a commission of five per centum on the first three hundred dollars, and two per centum on all sums above that amount; but when the money is paid without sale, one half of the commissions only shall be allowed." It is insisted that the sheriff can only make this charge where the money passes through his hands. That the commission is given for services rendered, and not in a case where he does not receive money, and has made no levy, though the execution may be in his hands. If the payment of the money to the plaintiff by the defendant, when an execution shall be in the hands of the marshal, shall avoid the commission, the payment of it may be avoided as

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

well after the levy as before it. The law gives a compensation for the levy, and there seems to be no stronger reason for charging the per cent. allowed after the levy has been made than before it. Where the money is paid without sale, either before or after the levy, and whether it be paid to the plaintiff or the marshal, the court think that under the above statute, the marshal is entitled to the commissions charged.

POMPEY (UNITED STATES v.). See Case No. 16,066.

POND (RENWICK v.). See Case No. 11,702.

POND (STIMPSON v.). See Case No. 13,455.

POND (UNITED STATES v.). See Case No. 16,067.

Case No. 11,264.

POND et al. v. VERMONT VAL. R. CO. et al.

CHASE et al. v. SAME.[1]

Circuit Court, D. Vermont. Oct. 19, 1876.

CORPORATIONS—AUTHORITY TO LEASE THEIR PROPERTY — VOTE OF DIRECTORS — BOARD RESOLUTIONS WHICH PRECEDE COMPLETION OF ORGANIZATION—RIGHTS OF HOLDERS OF NEWLY-ISSUED STOCK — REGULARITY OF ELECTIONS — WHAT AMOUNTS TO A BINDING LEASE.

[1. A vote by directors of a corporation authorizing its officers to make a lease of its property does not compel them to take such action, and confers no rights upon the prospective lessee.]

[2. Trustees under a foreclosed railroad mortgage, who, in view of the organization by the bondholders of a new corporation to take over the property as provided by the laws of Vermont, discuss and agree upon a lease of the railroad to another company, do not thereby make a binding lease, nor do they estop one of their number to deny such a lease.]

[3. Resolutions of directors, authorizing a lease of the corporation's property, which have never been drawn in question by the board, are valid, although they precede the completion of the organization by filing the articles of association with the proper state officer.]

[4. Holders of newly-issued stock, if in a majority, may revoke a delegated authority to officers to lease the property of the corporation.]

[5. The regularity of corporate elections, and the title to corporate offices, may be inquired into by a court of equity, when necessary to complete justice in a pending suit.]

[6. An attempt by directors to defeat the rights of holders of newly-issued stock by postponing for six months the annual stockholders' meeting is not valid under a by-law fixing the time for such meeting in the month of June, "or at such other time as the directors may order."]

[These were bills in equity by George B. Chase and others against the Vermont Valley Railroad Company of 1871 to establish a lease; and by Charles M. Pond, survivor, and others, against the Vermont Valley Railroad Company of 1871, the Rutland Railroad Company, the Central Vermont Railroad Company, and others, for the cancellation of said lease, and other auxiliary relief. The jurisdiction of the court was heretofore sustained. Case No. 11,265. The cases are now on final hearing.]

JOHNSON, Circuit Judge. The decision of this court made by Judge Woodruff in the first of the above-entitled causes established two propositions: The one, that the case disclosed by the plaintiffs belonged to the cognizance of courts of equity; the second, that the plaintiffs were entitled to assert their equities in this court. Those propositions are consequently out of the field of debate, upon this final hearing of both causes. Assuming them to be established, the question in each case now is whether, upon the proofs, a case in equity is made out in favor of the plaintiffs.

The contest in each case relates to the control of the railroad of the Vermont Valley Railroad Company of 1871.

In the Chase and Butler suit, which was commenced in August, 1873, the plaintiffs, as shareholders in the said railroad company, asked a decree against that company establishing a lease, or an agreement for a lease, to the Rutland Railroad Company, for a period of 20 years from the expiration of a prior term of 10 years, which would expire on the 1st of June, 1875. In this suit only the Vermont Valley Railroad Company of 1871 is defendant. In the Pond suit, which was commenced in January, 1874, not only the Vermont Valley Railroad Company of 1871, but also the Rutland Railroad Company and the Central Vermont Railroad Company, and two sets of persons who claim to be directors of the Vermont Valley Railroad Company of 1871, are made defendants.

The relief sought by the bill is that the extended or new lease before mentioned may be given up or canceled, and that the Vermont Valley Railroad Company of 1871, and one set of the persons who claim to be directors of that company, being those who support the validity of the lease, or the pretensions of the Rutland Railroad Company to be entitled to a lease, viz. Page, Butler, Chase, Prout, Williams, and Slate, be perpetually enjoined from executing any lease of the road, unless it shall first have been authorized by a legal vote of the stockholders of the company at a meeting duly called and holden for that purpose, and also that the road itself, and the moneys and personal property belonging thereto, may be decreed to be surrendered, by such of the defendants as may hold and control the same, to the company, at such time as it should be entitled thereto, or to a receiver to be appointed by the court. The lease referred to in both bills is dated August 8, 1871, and is shown to have been executed, in so far as an execution had taken place, on the 7th of November, 1872. The parties named are the Vermont Valley Railroad Company of 1871, as lessor, and the Rutland Railroad Compa-

[1] [Not previously reported.]

ny, as lessee. The clause of execution is: "In testimony whereof, the said Vermont Valley Railroad Company of 1871, Governeur Morris & James H. Williams, their agents, duly authorized in that behalf, as appears by the vote or votes of said corporation, have caused the seal of said corporation to be hereto affixed, and the said Morris & Williams, for said Vermont Valley Railroad Company of 1871, have subscribed their names the day and year first above written." Beneath is affixed the seal of each corporation, and the signatures, "Vermont Valley Railroad Company of 1871, by J. H. Williams, Treasurer," "Rutland Railroad Company, by J. B. Page, President." Mr. Morris' signature, called for by the testimonium clause, is not put to the instrument. Its execution, therefore, appears to be imperfect inasmuch as a joint authority to two is recited, and but one appears to have acted. The only formal corporate action proved to sustain the execution of the instrument consists in the resolutions of July 3, 1871, and of November 7, 1872. In each of these, the authority conferred to execute a lease is given to the president and treasurer of the corporation. The resolutions are "that the president and treasurer of this corporation be authorized, and they are hereby authorized, to execute and deliver to the Rutland Railroad Company a lease," etc.

Leaving out of view all other questions in respect to this corporate action, it is plain that the authority to the two officers is joint, that neither alone has power to execute, and that the instrument executed by one alone does not bind the corporation, and is to be regarded, for legal purposes, as an unexecuted and inoperative instrument. Assuming it to be established that no lease has been executed, extending the right of the Rutland Railroad Company to a further term in the Vermont Valley Railroad beyond the period limited by the lease to Birchard and Page, the question arises whether, out of the matters which have occurred, an equitable right has accrued to the Rutland Railroad Company, or its assignees, to have such a lease executed.

Looking to the corporate action of the Vermont Valley Railroad of 1871, there are but two votes of the directors of the company which directly relate to the matter. These are the votes of July 3, 1871, and of November 7, 1872. In respect to the first, it is objected that it was adopted before the actual completion of the corporate organization by the filing of the articles as required by law. In regard to the second, it is insisted that the vote was ineffectual by reason of the vote at a previous stockholders' meeting, held on the 3d of September, 1872. It is, however, not necessary, at least, for the present, to consider these special grounds of objection, because, in my opinion, the two votes of July 3, 1871 and November 7, 1872, are only proof of authority conferred upon the president and treasurer to make a lease, and not proof of an agreement for a lease, obligatory upon the corporation. The language of the vote of July 3, 1871, is: "Voted, that the president & treasurer of this association be, and they are hereby, authorized to execute and deliver to the Rutland Railroad Company, with the usual covenants, a lease of the Vermont Valley Railroad Company of 1871, with all its property, for a period not exceeding 20 years, at the rate of $72,000 per annum, payable monthly, and taxes; said lease to take effect from and after the expiration of the lease of the same property to Birchard & Page." The vote of November, 1872, is to the same effect, and in substantially the same terms. These votes are merely indicative of the corporate delegation of power, to the individual officers designated, to execute and deliver such an instrument as is mentioned. No duty purports to be imposed upon them. The conferring of authority is quite distinguishable from directing its exercise. A power of attorney by an individual to another, to make a deed in his name, does not operate as a contract, or as evidence of a contract, in favor of a proposed grantee. It at least remained for the designated officers to settle, according to their own judgments, what "the usual terms" were, that are referred to in the votes. No engagement was, by the adoption of these votes, entered into with the Rutland Railroad Company, nor does that company appear to have entered into any corresponding engagement with the Vermont Valley Railroad Company of 1871. The transaction was internal entirely,—neither addressed nor authoritatively communicated to any one outside of the corporation,—and could, therefore, have no more effect in favor of another party than a private person's power of attorney, or his own unexpressed thoughts. Nor is this altered by the fact that among the directors adopting these votes were both stockholders and directors of the Rutland Railroad Company. Knowledge or notice thus obtained will not inure to bind the Vermont Valley Railroad Company of 1871 in favor of the Rutland Company. The whole direct action of the corporation in regard to the new lease has now been stated, and it is deemed to be established that no lease, and no corporate contract for or assent in writing to such a lease, has been made out. A right to such a lease is attempted to be made out on other grounds, to which attention must now be given.

The road about which this controversy is carried on was built by an earlier corporation,—the Vermont Valley Railroad Company. It was subject to two mortgages made by that company,—the first, of $500,000; and the second, of $300,000. In September, 1864, a decree of foreclosure upon the first of these mortgages was made by the court of chancery in Vermont in favor of the trustees under that mortgage, and the time limited for the

payment to them of the principal of those bonds was fixed at the 1st of October, 1872, provided the interest was punctually paid in the meantime. In default of these payments being made to the trustees, the foreclosure was declared absolute. Until the payment, the exclusive possession, control, and management of the mortgaged property was awarded to the trustees. Subsequently, and by deed dated May 12, 1865, and acknowledged May 26th, the trustees leased the road, and all the property belonging to it, to Birchard and Page, for 10 years from June 1, 1865, at a rent of $60,000 a year, payable monthly, in equal parts. The lease recites that the trustees were then in possession as such, and also under a deed of surrender executed to them September 11, 1865, by the Vermont Valley Railroad, in pursuance of a resolution of the stockholders authorizing and requiring the directors to make such surrender, as well as by the decree before mentioned. The lease was assented to in writing by the holders of over $300,000 of the first mortgage bonds, also by the holders of over $260,000 of the second mortgage bonds. It was ratified and confirmed in writing by the trustees of the second mortgage bonds. The directors of the railroad also voted to ratify and confirm the same, and finally, in stockholders' meeting held August 9, 1865, it was, by resolution, unanimously adopted, again ratified, and confirmed. Under this lease the road was operated by the lessees, or their assigns, so long as the term continued.

In the meantime a suit was instituted in the court of chancery in Vermont, by the trustees of the second mortgage, to foreclose that mortgage. On the 16th of October, 1869, a decree was made in that suit declaring that on the 1st of October, 1869, there was due on the bonds secured by the mortgage, including interest, $641,923.29, and ordering that sum, with interest, to be paid to the trustees, for the benefit of the bondholders, on or before October 1, 1870, with costs of suit, and that in default of such payment the equity of redemption should be foreclosed, and the trustees should hold the mortgaged premises, with power of sale, and should administer the mortgaged property under the mortgage and decree for the benefit of the second mortgage bondholders. The money not being paid by the day limited, the decree in favor of the trustees of the second mortgage bondholders became absolute on the 1st of October, 1870. But their rights were subject to the first mortgage, and to the decree which had been pronounced upon it, by force of which those rights would be extinguished if the required payments upon the first mortgage were not made by the 1st of October, 1872. At this time the trustees under both mortgages had come to be the same persons, viz. Morris, Page, and Williams; and the two latter were also directors of the Rutland Railroad Company, of which Page was also president.

In this situation of affairs the series of acts and transactions commenced and were carried on which it is now claimed, on the one side, and denied, on the other, resulted in giving to the Rutland Railroad Company the right to a further lease for 20 years of the Vermont Valley Railroad, to begin after the expiration of the lease to Birchard and Page. The first step which appears to have been taken was the adoption on the 3d of December, 1870, by the Rutland Railroad Company, of a resolution that "Mr. Barnes be a committee on behalf of this corporation authorized to take a lease of the Vermont Valley Railroad Company for a term not exceeding twenty years, providing a satisfactory arrangement can be made to do so." And this, it should be observed, was the only resolution or authority adopted or given by the Rutland Railroad Company in respect to a new or extended lease of the Vermont Valley road, so far as the record discloses. The directors present at this meeting were Page and Birchard, the lessees in the then existing lease; Butler, Chase, and Williams, afterwards directors of the Vermont Valley Road of 1871; and Lawrence Barnes, mentioned in the resolution. Ten days afterwards, on the 13th of December, 1870, the trustees of the Vermont Valley second mortgage (Morris, Page, and Williams) adopted a resolution reciting that the decree of foreclosure had expired on the 1st of October, then past, and voting to proceed to organize the same into a corporation under the laws of Vermont, with a capital or joint stock of $500,000, and that Judge Prout draw up articles of association necessary to perfect said organization. Under the laws of Vermont (Gen. St. c. 28, § 104), after the foreclosure of a railroad mortgage, and the vesting of the legal title in the mortgagees, any number of persons holding a majority in amount of the principal of the bonds so secured are authorized to form themselves into a corporation to operate and maintain the railroad, or part thereof, for public use in the conveyance of persons and property. The resolution last mentioned was rather a declaration of the purpose of the trustees to favor and promote such a reorganization, than an effectual step in the new organization, since the power to act was not in the trustees, but in the bondholders.

It is alleged that all the trustees were agreed in the purpose of getting or giving an extended lease of the Vermont Valley road in favor of the Rutland road; but it appears that Morris, when it was proposed that the trustees under the first mortgage should take action with that view, objected, on the ground, in substance, that such action would be premature until the foreclosure under that mortgage should become absolute. In respect to the action of the trustees under the second mortgage, which was also proposed, Morris seems to have suggested that the action ought to be taken by the new corporation. As the trustees under both mortgages

were the same persons, and as two of them were directors of the Rutland road, of which Page was also president, it is easy to understand that the meeting between both sets of trustees and the Rutland Railroad Company on the 13th of December, 1870, may not have involved the presence of any one except the three named persons, and that, while the talk of all of them may have been not unfavorable to the idea of an extended or new lease, yet that anything in the way of action upon the subject was declined by Morris, and not undertaken to be carried through by the others in the face of his objections. Nor were these objections on his part formal or unsubstantial; for it was entirely clear that on the 1st of October, 1872, unless means were found to pay off the first mortgage, the control of the road, no matter what lease might be made, would pass to the holders of the first mortgage bonds. And it was equally plain that a new organization under the statute of Vermont afforded the only means of getting an effective assent to the making of the proposed new lease. That Page and Williams were willing to do anything necessary to effect the new lease, with the assignment of the old, upon the enlarged rent, by which Page would personally benefit, may be taken to be true; but Morris, as it appears to me, upon the proof, declined to assent, and his holding the matter in suspense by the force of his suggestions, and the consequent acquiescence in nonaction of the other trustees, prevented the possibility of its being maintained that any bargain for a new lease received at that period the assent of any one capable of completely representing those interested in the property proposed to be leased. It seems to me, therefore, that no foundation at this period existed upon which a contract by parol can be asserted in favor of the Rutland Railroad Company, nor upon which anything in the nature of an estoppel in pais can be set up to prevent the free action of those in whom finally became vested the legal power of controlling the affairs of the new corporation when it came into existence. That this was the actual state of the case is shown by the agreement between the Rutland Railroad Company and the trustees and managers of the Vermont Central and Vermont & Canada Railroads, bearing date December 30, 1870, and by the action of the directors of the Rutland Company, and of its stockholders, in reference to that agreement, and also by the assignment of the Birchard and Page lease to the Rutland Company, and by that company to the trustees and managers of the Vermont Central and the Vermont & Canada roads.

First in order of time was the contract above mentioned, of December 30, 1870. The first eleven articles of this contract are occupied with the arrangements relating to the Rutland Railroad proper, and its management. Then comes a recital as follows: "Whereas, the Rutland Railroad Company, or parties in their interest, own and control certain railroads running in connection with the Rutland Railroad, and which are important to complete said lines, and for the development and protection of its traffic" (naming certain roads, and among them the Vermont Valley Railroad), and a further recital that it was important, for the interests of all concerned, that the management should be in the hands of the said trustees and managers of the Vermont Central and Vermont & Canada Railroads, along with the Rutland Railroad, in order to render the possession and control of the Rutland Railroad in the highest degree beneficial; and thereupon the parties of the first part (the Rutland Railroad Company) agree that the parties of the second part (the trustees and managers before mentioned) shall have the use and control of the Vermont Valley Railroad, and all other property and rights connected therewith, as described in the lease of the said railroad from Hamilton and others, trustees, to Page and Birchard, dated May 12, 1865, for 20 years from January 1, 1871, with the right to operate said railroad, and collect all the income therefrom. And the parties of the second part agree to pay to the parties of the first part, for the use of said railroad and property, at the rate of $65,000 per year during the remainder of the term provided for in the said lease, and after the expiration of said lease to pay to the party of the first part at the rate of $72,000 per annum while said railroad and property shall be held and enjoyed by the parties of the second part. Other parts of the instrument do not seem material to be stated, but it is apparent that the covenant of the Rutland Company, founded upon its reliance on parties in its interest to control the Vermont Valley Railroad, and not any contract existing, or supposed to exist, and entitling these parties to an extended lease, was the basis upon which they were dealing. In the same sense is to be interpreted the agreement for rent after the expiration of the existing lease, which is not for a definite period, like the engagement of the Rutland Company for 20 years from January 1, 1871, but only while the railroad should be held and enjoyed by the parties of the second part. On the next day (December 31, 1870) the Rutland directors (President Page in the chair, and Messrs. Butler, Chase, Birchard, Barnes, and Williams being the persons present) unanimously voted "that the president of the company be directed and authorized to execute, in its name and behalf, a contract or lease of their railroad and property, in connection with the other roads and lines, as well as to sell and transfer the supplies, fuel, lumber, contracts, and interests in said contracts named, to the managers of the Vermont Central and Vermont and Canada Railroads, for the purposes expressed in said contract, and upon the terms therein stipulated, which contract is dated the 30th day of December, 1870," upon certain condi-

tions, providing, among other things, that the corporation, at its adjourned annual meeting, assent, and that the court of chancery of Vermont allow such transfer and sale; and that the managers of the Vermont Central and Vermont & Canada Railroads should be authorized by the court of chancery to enter into the contracts, and also that it should be assented to and approved by the advisory committee of bondholders interested in said trusts, and who were appointed by the court of chancery. The contract was accordingly assented to by the advisory committee mentioned. On the 5th of January, 1871, the court of chancery of Vermont, on the petition of the trustees and managers, dated on that day, made an order by which, after reciting the petition, and that the boards of directors of the Vermont Central and of the Vermont & Canada Railroad Companies, and the advisory committee of the first and second mortgage bondholders of the Vermont Central, had approved of the contract of December 30, 1870, and had assented to an order of the court approving the same, the court approved and confirmed the action of the trustees and managers in entering into said contracts, and directed them to go on and execute the same, and declared that the liabilities incurred by the trustees and managers under the contract were a charge upon the trust property and its earnings under the management of the trustees and managers.

On the 23d day of January, 1871, Page and Butler, by deed, assigned to the Rutland Railroad Company their lease of the Vermont Valley road for the remainder of their term, upon the engagement of the Rutland Railroad Company to pay the rent according to the lease, and also a further sum monthly to Page and Birchard, of $466.67. This deed was acknowledged on the 26th of January, 1871, and on that day an adjourned meeting of the stockholders of the Rutland Company was held. At this meeting the contract of December 30, 1870, was ratified, confirmed, and adopted by the unanimous vote of the stockholders present, and also the assignments and contracts entered into by the president in behalf of the company with the said trustees and managers relating to the Vermont Valley Railroad, and other roads therein mentioned, and also the assignment, dated January 23, 1871, of the lease of the Vermont Valley Railroad, which the resolution designates as authorized by a vote of the directors of this (the Rutland) company, dated December 3, 1870, and also various other leases and contracts, not material to be stated. On the 30th of January, 1871, the Rutland Railroad Company and the trustees and managers aforesaid entered into a further indenture, whereby the Rutland Company, after reciting various railroad leases in which it was lessee, and certain contracts into which it had entered, and also that Page and Birchard, on the 23d of January, 1871, had transferred to it their lease of the Vermont Valley Railroad, dated May 12, 1865, and all their right and title thereto for the unexpired term, did assign, transfer, and set over to the said trustees and managers the said leases and contracts, and all right to the named terms of years unexpired under said leases, or either of them, as well as all interests, rights, and privileges acquired and existing, under or by virtue thereof, to said railroads, their real and personal property, or their management and control.

The Rutland Company does not attempt to transfer, or contract to transfer, to the trustees and managers, any interest in the Vermont Valley road, except the unexpired term of the lease to Birchard and Page. Anything further in that regard was left to the expectation of further action on the part of the parties who should become competent to act, and to the covenant of the Rutland Railroad Company in the contract of December 30, 1870. Looking at the structure of the various papers which have been stated, and the formal corporate action of the Rutland Company, the inference is strong that no one was misled, nor was there any intention to mislead any one, as to the actual relations of the parties contracting to the Vermont Valley Railroad. It was expected, undoubtedly, by the Rutland party, that, when the time should come that any one could act so as to control the Valley road, action would be taken which would subject that road to a further lease in favor of the Rutland and its assignees. But this rested in expectation alone, and had assumed no shape in which it could be laid hold of and enforced upon any principles administered in the courts. Morris, at least, among the parties in interest, had declined to enter into any contract, or semblance of a contract, in writing, upon the basis of a new or extended lease to the Rutland, and the matter had not been pressed by the other parties. There was but one interest which possessed the absolute control, and that was the first mortgage debt. The owners of that would, unless the debt was paid before October 1, 1872, become absolutely possessed of the road, and none of the other parties saw fit to make a further investment in money to the amount of that debt in order to secure beyond question the control of the road. They preferred to wait and see what would happen. Thus, at the consummation of the series of contracts and transactions which have been stated, no foundation existed upon which a demand for an extension of the lease of the Vermont Valley Railroad could be made against any representatives of the road, if any had then existed.

We are, in the next place, further to consider whether a right to such an extension ever came into existence. No steps appear to have been taken looking to the reorganization of the Valley Company after the resolution of the second mortgage trustees, December 13, 1870, until the preparation and

signing of the articles of association of the Vermont Valley Railroad Company of 1871, which bore date June 12, 1871, and which were formed with a view to action under the statute of Vermont before referred to. The articles of association were signed by the holders of $274,000 and over of the second mortgage bonds, the whole amount of which ever issued was $293,200. On the 3d of July, 1871, the majority of the directors named in the articles of association met and adopted by-laws, elected officers, and passed corporate resolutions, including that which conferred upon the president and treasurer authority to execute a lease to the Rutland Company, as before stated. The organization, however, was not formally completed by the filing of the articles of association as required by the statute, at least until the 29th of July, when they were filed in the office of the secretary of state, with the requisite affidavits sworn on the 7th and 10th days of July. As the proceedings of the meeting of July 3, 1871, went upon the minutes of the board as regularly transacted, and do not appear to have been subsequently brought in question by the board, I should regard them as being valid and operative, notwithstanding that they preceded the filing of the articles of association, and the completion of the acts necessary to create the corporation. Under the resolution respecting the lease, a draft of a proposed instrument was made by Mr. Prout, one of the directors and the solicitor of the corporation, and was given to Morris, the president, but it was never agreed to by the president and treasurer, nor by the corporation, nor was the paper ever executed, nor do its terms appear.

The first annual meeting of the stockholders of the corporation took place on the 20th of June, 1872, and the directors were all re-elected. The stockholders also voted "to increase the capital stock $500,000, only for the purpose of raising funds to pay the amount due on the first mortgage, and that the president and treasurer be, and they are hereby, authorized, in case they can negotiate a sale thereof, to issue said stock, and sell the same at par, but paying not exceeding three per cent. brokerage in effecting a sale of said stock." By another vote the same officers were also authorized, in case the stock could not be so disposed of, to make a mortgage, and issue bonds, and dispose of the same. As nothing was done under this last resolution, except to ascertain that such bonds could not be negotiated, nothing further need be said upon the subject. The action of the stockholders in respect to the increase of the capital stock was intended to be taken under the authority conferred upon them by the laws of Vermont (Laws 1864, approved Oct. 31), by an amendment to chapter 28 of the General Statutes. It was there provided that any association which had been formed into a company under section 104 of chapter 28 might, at any meeting of the stockholders legally called for that purpose, increase the capital stock to any amount not exceeding double the amount of principal and interest of the bonds foreclosed, and designated in their articles of association. The attention of the company being subsequently directed to the fact that the meeting of the stockholders had not been called for the purpose of acting upon a proposal to increase the capital stock, a special meeting was called, on the 19th of August, for the 3d of September, by a proper notice, specifying its objects, which were (1) to see if the stockholders would vote to increase the capital stock of the company to an amount not exceeding $500,000, and (2) to see if the stockholders would vote to authorize a lease of their railroad and other property. Before this meeting was held, a negotiation had been entered into between Morris, the president, and a firm of brokers in New York (Fanshaw & Milliken), for placing the new stock on terms covered by the resolution.

Before closing the arrangements, Fanshaw & Milliken addressed to Morris, under date of August 23, 1872, a letter, saying that they required to be satisfied that the company had no lawsuits on hand or threatened, and was free from all contracts, duties, and obligations, except those of which Morris had spoken, viz. the first mortgage debt of $500,000, to be paid by the proceeds of the stock and the lease of the road to Birchard and Page. To this letter Morris replied, under date of August 24th, stating, in the name of the president and directors of the Vermont Valley Railroad Company of 1871, that there were no liens upon the corporation, and no suits against it, either on hand or in prospect; that the road was owned in fee simple by its stockholders, and that it had created no corporate debts, liabilities, or obligations whatsoever, excepting that the road came into their hands subject to the Page and Birchard lease for 10 years from June 1, 1865, and which had been assigned to the Rutland Railroad Company, and to the mortgage debt of $500,000, payable October 1, 1872; and that the stock was being sold to pay that indebtedness. Copies of these letters were sent to Butler, Prout, Williams, and Slate, directors; Page and Chase, the other directors, being absent from the country. Butler signed Morris' letter as it was. Prout added to Morris' letter the phrase, "and also excepting the agreement, if any, implied in the vote hereto annexed," and signed it, "J. Prout, Director, Aug. 30, 1872," and annexed a copy of the vote of July 3, 1871, in respect to the authority of the president and treasurer to make a lease. Williams and Slate answered substantially as Judge Prout had. These answers were sent to Fanshaw & Milliken, and received by them, prior to their agreeing to take the stock. Before their final answer to the proposition, and on the 3d of September, the special stockholders' meeting was held, in pursuance of the notice. At this meeting the resolution which had been

passed at the meeting June 20, 1872, for issuing the new stock, was unanimously adopted in the terms before stated. At the same meeting it was also voted "that the president and treasurer, before signing a lease of our railroad, shall call a meeting of the stockholders, and submit a draft of said lease for their approval." Of these resolutions, Fanshaw & Milliken were at once notified; and they were also aware of the agreement between the Rutland Railroad Company and the trustees and managers, before mentioned. On the 7th of September the proposition to buy the stock at 97 was accepted in writing by Fanshaw & Milliken, and by the Vermont Valley Railroad Company of 1871, by Morris, its president; and on or before September 12th the $485,000 was, in pursuance of the contract, paid in to the Union Trust Company of New York, to the credit of the trustees of the first mortgage bonds, and the 10,000 shares of additional stock were soon after, and on the 12th of September, issued to the purchasers.

At this time, according to the views which have been expressed in the progress of this opinion, no legal or equitable obligation existed upon the Vermont Valley Railroad Company of 1871 to permit possession of its road to be retained by the Rutland Railroad Company, or its assigns, after the termination of the Page and Birchard lease. No lease had been executed, nor had there been any individual or corporate action which bound the company to assent to the agreement which the Rutland Company had entered into with the trustees and managers of the Vermont Central and the Vermont & Canada Railroad Companies. And at this time a new element had come into the Valley road of 1871, by means of the new issue of stock, which, being in itself a majority of the whole stock then existing, was entitled to its just influence in the management of the corporate affairs; and this consideration is not diminished in force by the fact that the money thus paid removed and replaced the mortgage debt, the holders of which, but for its payment, held the mastery over the affairs of the corporation. It could not be naturally supposed that these new stockholders paid half a million of dollars for stock, at 97, which was to pay only 7 per cent. on the par of the shares, merely in order to stand on an exact equality in income with a nearly equal amount of stock which had been taken at something less than 59 per cent., viz. $3^2/_5$ shares for each $100 of principal of bonds given up and paid for in second mortgage bonds at par, which, in the market, are said to have been held at 50 per cent. As the shares were $50 each, the one set of stockholders paid $48.50 a share; the others, about $14.75. Every one who knew of the transaction must have understood that this could not be the purpose of the purchasers. Assuming that they bought subject to all the legal and equitable rights of the Rutland Company and its assignees, we have seen that these were, in regard to an extended or further lease, mere expectations and desires, and not rights. The purchasers took all the precautions in the way of inquiry which were likely to prove available, and they were not told, in reply, that any equitable or other right existed, but were referred to "an agreement, if any, implied in a resolution" which carried with it no implication of an agreement. And therefore, if at the time of the purchase it was possible to acquire this new stock free from any equitable claim for a new lease or an extended possession, these purchasers so conducted the transaction as to occupy that position. But, in my opinion, no equity existed which bound the company itself. It remained free to act upon its own view of its own interest. That its managers had thought a new lease advantageous did not bind them to continue to think so, unless there was a contract with another party to that effect. No moral obligation was imposed on the purchasers to continue the connection with the Rutland road. It was equally right to connect with either set of roads, and the new purchasers were as free to seek the control of the road in order to form new connections as the original stockholders had been to form the old connection.

The directors in office when the new stock was issued passed no resolution directing a lease to be executed, nor affirming or ratifying any supposed contract for a future lease. But at their meeting November 7, 1872, they again adopted a resolution, expressed to be in accordance with former votes, authorizing the president and trustees to execute and deliver to the Rutland Company a lease of the Valley road, with the usual covenants, following the language of the resolution of July 3, 1871; and on the same day Williams, the treasurer, executed, as has been before stated, the lease dated August 8, 1871, on behalf of the Vermont Valley Railroad Company of 1871,—Morris, the president, refusing to execute, and the vice president, Page, who was also the president of the Rutland Company, executing on its behalf, without, as far as is shown, any authority to do so. At the same meeting, however, two resolutions were passed, which are important to be stated, as bearing upon the position of the parties. They were as follows: "Voted, that the president and clerk be, and they are hereby, directed not to call any special meeting of the stockholders without the direction of the board in meeting convened for that purpose. Voted, that the president and clerk be, and they are hereby, directed to call the next annual meeting of this company at Bellows Falls, in the month of December, 1873, and on such day in said month as the board may determine." The effect of these two resolutions, if they were operative, was to prevent any special meeting of the stockholders, except at the will of the directors, and also to postpone the annual meeting, which the by-laws appointed to be held in June, until the succeeding December, and

until such day in that month as the board might determine. By the postponement of the annual meeting, the election of directors in place of the board elected June 20, 1872, would also be postponed, and those in office would be continued in their places indefinitely, until it should please the same directors to allow the stockholders the opportunity of choosing others. I am persuaded that these changes or attempted changes were made, not merely because some of the directors and large stockholders were likely to be absent, but in order that the holders of the new stock might be precluded from enjoying their just authority as owners of the majority of the stock, and from preventing the execution of any new lease to the Rutland Company, except by an appeal to the courts. Subsequently, the new stockholders holding 10,000 shares of stock, and one of the old stockholders, having 893 shares, applied to the president to call a meeting of the directors to act upon their application for holding the annual stockholders' meeting in June, 1873. The president made the call for a meeting of the directors to be held at his house near New York, but no one attended, although notices thereof were given.

In May the same shareholders applied to the president to call the annual stockholders' meeting, which he did for the 27th of June, 1873, at Bellows Falls. The shareholders representing 12,299 shares appeared in person or by proxy at the meeting, but, it appearing that an injunction against the holding of an election had been served, the meeting was adjourned to the 21st of July, at the same place. At the adjourned day the same stockholders, except one who held 184 shares, attended; and, the injunction having been dissolved, they proceeded to an election, at which all the votes (being those representing 12,115 shares) were given for Morris, Bernall, Harris, Billings, Nash, Rockwell, and Waite, who all, save Morris, were new directors. The shareholders further unanimously resolved that no lease whatever of the Vermont Valley road, either to the Rutland Railroad Company, or to any other party, be made, contracted for, or ratified, until the same shall first have been authorized by vote of the stockholders of this company, in a meeting duly convened for that purpose. The board of directors thus chosen organized themselves by selecting Morris to be president, and others to the other corporate offices. Various demands were made upon the other board and the officers chosen by it, and notices were given to the parties concerned of what had been done, and finally the new board was requested, by Bernall, Robinson, Pond, and Mather, to bring a suit in the courts of Vermont, which the board, on the 13th of January, 1874, declined to do, and this suit was the consequence.

Under the circumstances disclosed in this case in connection with the issue of the new stock, and the vote of the stockholders in regard to a lease, which accompanied the resolution for its issue, and the substantial fact that all the directors but Morris were connected in interest with the Rutland road, action to give a lease against the will of the majority of the stockholders ought to be regarded as a breach of trust on the part of the directors, restrainable by injunction, within the principles of Dodge v. Woolsey, 16 How. [57 U. S.] 331, and the other cases cited and referred to by Judge Woodruff in his opinion in this case. Pond v. Vermont Val. R. Co. [Case No. 11,265].

Courts of equity do not ordinarily entertain questions of the regularity of corporate elections, or of the title to corporate offices. But when such an inquiry becomes incidentally necessary, in order that complete justice may be done in respect to a controversy over which they are compelled to take jurisdiction, they will not shrink from the duty. In this view, I think it necessary to consider which organization is entitled to be regarded as the board of directors of the Valley road of 1871.

The provisions of the by-laws which bear upon the subject of stockholders' meetings are contained in articles 1 and 2, and are as follows: "Article 1. The annual meeting of the stockholders of this association shall be held in the month of June, or at such other time as the directors may order. Art. 2. The annual and all special meetings of the corporation shall be called by the president or clerk, unless otherwise ordered by the directors, by giving at least ten days' notice of the same, and the purpose thereof, in one newspaper published in Windham county, and by mailing a notice to the address of each stockholder." Under this latter article, the power of the directors to "order otherwise" relates either to the officers who are designated to call meetings, or to the length or mode of notice to be given. In regard to the annual meeting, the action of the directors at their meeting of November 7, 1872, did not designate other officers, nor different notice, than article 2 of the by-laws had prescribed.

The alteration, if any was effected, was in the time for holding the annual meeting. That, by the first article, was fixed in the month of June, "or at such other time as the directors may order." The directors ordered that it should be called in December, 1873, and on such day in that month as the board should determine. Substantially, therefore, it was a declaration on the part of the directors that no annual meeting should be held until they chose to direct, and to be held at a day not earlier than December, 1873. This was not, in my opinion, a fixing of the time for the annual meeting, within the meaning of the by-laws, and it therefore left the by-laws in force as originally adopted. The power to hold the annual meeting at or about the period designated by the by-laws was of the utmost consequence to the safety of the rights of the stockholders, since in this way

only could they cause their will in respect to the management of their property to be regarded. A court will therefore look carefully at any attempt to defeat the exercise of this power, and will be even astute to lay hold of any ground to sustain the substantial control in the hands of the stockholders. I think, therefore, that the action of the president, in pursuance of a request of a majority of the stockholders, in calling the annual meeting in June, 1873, was regular, and that the board of directors chosen at the adjourned meeting in July after that period, were lawfully chosen, and became the regular organization of the Vermont Valley Railroad Company of 1871. Its successors are to be recognized as being the board of directors of that corporation.

In the view which has been taken of the rights of the parties on the expiration by lapse of time of the lease to Page and Birchard, all pretext for longer retaining possession by or under the Rutland Railroad was at an end. The trustees under the first mortgage had received funds amply sufficient to extinguish all possible balance remaining unpaid upon those bonds, or to them as trustees, and there was no obstacle to putting the corporation in possession of the road. Neither the trustees and managers of the Vermont & Canada, and the Vermont Central Railroads, nor their successors, the Central Vermont Railroad, had any title after the expiration of the lease to Page and Birchard; and there seems to be no reason why the court should not proceed to do complete justice between the parties, although the term did not expire until after the commencement of the suit. The whole merits have been tried in this suit, and to turn the parties over to another is quite unnecessary, and contrary to the rule by which a court of equity seeks to do complete justice, when, for any cause, it has once taken cognizance of a controversy. I am persuaded that the court of chancery of Vermont has not undertaken to extend a receivership against persons who are strangers to the controversy in which it was created, and over property not involved in such suit, and that any permission to make contracts given to the officer of the court was only intended for his protection in accounting.

The decision in the case of Vermont & C. R. Co. v. Vermont Cent. R. Co., 46 Vt. 794, extended only to the case of a party to the suit in which the receiver was appointed bringing an action against the receiver. In that case the party was enjoined from continuing the suit. Moreover, it is no bar to a suit in one jurisdiction that bringing it may be regarded as a contempt in another. It is for the court whose authority a party has disregarded to vindicate its own authority. Upon the whole case, there must be a decree for the plaintiffs in the suit first above entitled; among other things, declaring the lease executed by Williams and Page inoperative, and directing the same to be canceled, and enjoining the execution of any like lease, and also directing the trustees of the first mortgage to pay over any sum remaining in their hands after satisfying their just claims (as to which a reference will be directed to a master) to the corporation of 1871, represented by the directors who have succeeded to those elected in July, 1873, and also that the said corporation be let into possession of the Valley road, and the other property, if any, now held by the defendants, or either of them, belonging to said corporation, with costs, etc. This decree is to be settled upon notice. In the other suit, in which Chase and Butler are plaintiffs, a decree must be entered dismissing the bill, with costs.

Case No. 11,265.

POND et al. v. VERMONT VAL. R. CO. et al.

[12 Blatchf. 280.] [1]

Circuit Court, D. Vermont. Aug. 27, 1874.

JURISDICTION—CITIZENSHIP OF PARTIES—EQUITY—JURISDICTION TO RESTRAIN MISUSE OF CORPORATE POWERS OR PROPERTY — DIRECTORS AS WRONG-DOERS—BILL BY STOCKHOLDERS.

1. Citizens of Connecticut, as stockholders in a Vermont railroad corporation, brought this suit to restrain the execution of a lease of the railroad of the corporation to another Vermont railroad corporation, alleging that the execution of such lease was contrary to the expressed will of a majority of the stockholders, and in disregard of the rights and interests of all who were stockholders, and a fraud upon such rights; that the persons threatening to make such lease were a former board of directors, holding over after their term of office had expired, and being in the actual possession of the seal, books, papers, and money of the corporation, and in the apparent control and management of its affairs, but who were, in fact, largely interested in such other railroad company, and were thereby induced to sacrifice the interests of the plaintiffs' corporation, and were, to that end, conspiring with such other company, in fraud of the stockholders in the plaintiffs' corporation, and in breach of trust; that, to perpetuate such apparent control, and effect the fraudulent purpose aforesaid, such former board of directors refused to call a meeting of stockholders for the annual election of directors, thereby exposing the company to a forfeiture of its charter; that, notwithstanding such refusal, the president did call a meeting, at which a new board of directors was chosen, but such former directors denied the validity of such election, retained the possession and management of the affairs of the corporation, and persisted in their determination to execute such lease; that the plaintiffs had called upon such new board of directors, and required them, by suit or otherwise, to prevent the execution of such lease, and prevent the transfer or wrongful disposition of the property threatened by such holding over board, and to themselves obtain possession: but that, although such new board concurred with the plaintiffs, and admitted that such lease would be a violation of the rights of the stockholders, they refused to take any such measures, by suit or otherwise, alleging that they so refused in consideration of the many obstacles in the way of obtaining such relief in the state courts. The defendants were

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

the said former board of directors, (citizens of Vermont, Massachusetts, and New York,) the new board of directors, (citizens, also, of Vermont, Massachusetts, and New York,) and the corporation itself, with the other corporations embraced in the alleged conspiracy. The bill prayed for an injunction, and that such holding over directors be decreed to surrender the road and property to the corporation, or to a receiver, and give up the seal, books, papers, and money to the new board, or to a receiver, that a receiver be appointed, and for such other and further relief as to equity might appertain. To this bill one of the defendants pleaded to the jurisdiction of the court, that certain of the defendants were citizens of Vermont, and that their rights and interests were identical with those of the plaintiffs, and that they were made defendants for the purpose of giving this court a colorable and false jurisdiction, when, in truth, they were plaintiffs, aiding in the prosecution of the suit. Another defendant, after having answered the bill, made a motion, founded on affidavits, to dismiss the bill on the same grounds stated in the plea, and alleging that some of the defendants had conspired with the plaintiffs, for the fraudulent purpose of giving the court jurisdiction, and that the refusal of such new board of directors to bring suit was for the purpose of giving this court jurisdiction, and was a fraud upon the court. The court overruled the plea, and denied the motion.

2. A court of equity has jurisdiction, at the instance of stockholders in a corporation, to restrain the corporation and those who have the control and management thereof, from acts tending to the destruction of its franchises, from violations of the charter, from misuse or misappropriation of the corporate powers or property, and from other acts prejudicial to the stockholders, amounting to a breach of trust.

[Cited in Hardon v. Newton, Case No. 6,054.]

[Cited in Miner v. Belle Isle Ice Co. (Mich.) 53 N. W. 223.]

3. Such jurisdiction will be entertained notwithstanding the case may involve, as an incidental question, the inquiry which of two is the legal board of directors.

4. Where the board of directors are themselves the wrong-doers, or they refuse to prosecute, to restrain or redress the wrong, stockholders may file the bill.

[Cited in Hardon v. Newton, Case No. 6,054.]

[Cited in Davis v. Gemmell (Md.) 17 Atl. 265; Slattery v. St. Louis & N. O. Transp. Co., 91 Mo. 225, 4 S. W. 81.]

5. So, where one board, claiming to be directors, are the wrong-doers and the other board, claiming and alleged to be the legal directors, refuse to prosecute, stockholders may file the bill.

6. The plaintiffs cannot be defeated of their right to sue in the federal court by the fact that the members of such legal board of directors have, as stockholders, the same interest as the plaintiffs, or that they desire the success of the plaintiffs, nor by the fact that the refusal of the said legal board of directors was in order to drive the plaintiffs to bring the suit themselves, or even to enable the plaintiffs to bring their suit in the federal court.

7. The provisions of the judiciary act of 1789 [1 Stat. 73], giving the circuit courts jurisdiction where a suit is between a citizen of the state where the suit is brought and a citizen of another state, and declaring that no civil suit shall be brought therein against any inhabitant of the United States in any other district than that whereof he is an inhabitant, or in which he shall be found, do not forbid the exercise of jurisdiction where some of the defendants reside in the state in which the suit is brought, and other defendants, who appear and submit to the jurisdiction, reside in other states. In such case, any supposed defect of jurisdiction relates not to jurisdiction of the action, but to jurisdiction of the person, and is waived by appearance.

[Cited in Kemna v. Brockhaus, 5 Fed. 764.]

8. Under the act of February 28, 1839 (5 Stat. 321, § 1), the jurisdiction of the circuit court in such case is clear.

9. Hence, it is not a good plea, by a defendant residing in Vermont, the state wherein the suit is brought by plaintiffs residing in Connecticut, that some of the defendants are citizens of New York and some of Massachusetts.

10. Where the bill of complaint, on its face, shows want of jurisdiction, the appropriate mode of raising the objection is by demurrer, though there are precedents for a summary motion to dismiss the bill on that ground.

[Cited in Romaine v. Union Ins. Co., 28 Fed. 637.]

11. But, where the bill shows apparent jurisdiction, and a defendant desires to contest its allegations, or show new matter in avoidance of that jurisdiction, he must do so by plea, and not by motion founded on affidavits; and, when such defendant has appeared and answered to the merits, such a motion will not be entertained.

12. On final hearing, the court will see to it that it does not exceed its jurisdiction, where want of jurisdiction of the action appears, but parties must conform to the ordinary modes of placing on the record the defences on which they rely, so that the court may pass upon the issues made by the record, and so that they may be the subject of review, should the record be sent to an appellate tribunal.

[This was a bill in equity by Charles M. Pond and others, survivors of William P. Burrall, against the Vermont Valley Railroad Company and others, to restrain the execution of a lease.]

Edwin W. Stoughton, for plaintiffs.
George F. Edmunds, for defendants.

WOODRUFF, Circuit Judge. The bill of complaint herein was filed by William P. Burrall (now lately deceased) and the other complainants, citizens and residents of the state of Connecticut, as stockholders in the Vermont Valley Railroad Company, a corporation created and organized by or under the laws of the state of Vermont. The bill seeks to restrain the execution of a lease of the railroad of the said corporation for twenty years from the 1st of June, 1875, to the Rutland Railroad Company, (also a defendant), and to cancel such lease, if any have been executed (as is claimed and pretended) by the officers, (Page, as president, and Williams, as treasurer,) of the said Vermont Valley Railroad Company, or persons claiming to be such officers, and acting as such in the management thereof. This relief is sought upon various grounds, especially, that such a lease is contrary to the expressed will of a majority of the stockholders; that it is in disregard of the rights and interests of all who are stockholders of that corporation only, and a fraud upon such rights; that the persons proposing and threatening to make such lease are former directors of the said corporation, claiming to

hold over after the expiration of the term of office for which they were elected, and, being in the actual possession of the seal, books, papers, and money of the corporation, and so having apparent control and management of its affairs, are, in fact, largely interested in the said Rutland Railroad Company, and officers thereof, and are thereby induced to sacrifice the interests of the Vermont Valley Railroad Company to those of the Rutland Railroad Company and of the Central Vermont Railroad Company, (another defendant,) with whom they are conspiring, to the prejudice of the stockholders of the Vermont Valley Railroad Company, to defeat their will and destroy their interests; and that so the acts of these pretended officers and directors are practically the transfer of valuable interests to themselves, in fraud of the stockholders last mentioned, and, so far as they can be deemed to have power to bind the Vermont Valley Railroad Company, in breach of trust. Their breach of trust is further alleged, in refusing to call a meeting of stockholders to elect directors, as by the charter they are bound to do, and thereby expose the corporation to a forfeiture of the charter under the laws of Vermont. Various other details are given in the bill, tending to show gross misconduct on the part of the defendants who are made such as directors or pretended directors of the said corporation, and whose acts are sought to be restrained. To show still further the illegality of the conduct of these defendants, former directors, and still acting as such, claiming to hold over, as before stated, and proposing and threatening to make the lease aforesaid, the bill also alleges, that, before the period arrived at which the annual meeting of directors of the said corporation should regularly be held, and while they were in office under their prior election, the said defendants, by formal vote, forbade their officers from calling a meeting of the stockholders without their express direction, and further voted, that the next annual meeting for the election of directors, which should regularly be held in June, 1873, should not be called until such day in December, 1873, as should be thereafter designated by them, and they thereafter designated no day for that purpose, thus defeating, or attempting to defeat, the right of stockholders to choose the directors and managers of their property, and perpetuate their own control of the affairs of the corporation, against the will of the stockholders, and with design to wrongfully and illegally execute the lease aforesaid of the property of the company, against the will and the interests of the stockholders of the corporation; and that, in an endeavor to defeat such mismanagement, a majority of the stockholders procured the president, notwithstanding the vote of such directors, to call a meeting of stockholders for an election of directors, which meeting of stockholders was held, and a new board of directors was chosen at such meeting, but the said former directors deny the validity of such election, still retain possession and management of the affairs of the corporation, and persist in their determination to execute such lease. Other particulars are stated in the bill, but this is probably sufficient to indicate the nature of the subject of complaint and grievance. The bill then alleges, that the new board of directors, whom the complainants aver to be the legal board of directors of the corporation, have been applied to by the complainants, and have been requested by them, by suit or otherwise, to prevent the execution of the said lease, and to procure the cancellation thereof, if any has been executed, and to prevent the transfer or other wrongful disposition of the road and property of the company, as threatened and intended by the said former directors so claiming to hold over as aforesaid, and to take measures, by suit, or otherwise, to recover possession of the said road and property, in accordance with the right of the said Vermont Valley Railroad Company thereto; but that, although the said newly elected board of directors concur with the complainants in their views, and admit that any such lease which may have been executed is invalid, and ought to be cancelled, and that the execution of a lease, as threatened and attempted, would be wrongful, and in violation of the legal rights of said Vermont Valley Railroad Company, and of the complainants and the other stockholders thereof, yet said board of directors, in violation of their duty as such, in answer to said requests of the complainants, wholly decline to act in accordance therewith, or with either of them, and say that, in consideration of the many obstacles in the way of obtaining, in the state courts, the relief aforesaid, they decline and refuse to take any further proceedings, by suit or otherwise, to protect the property of said company, or the interests of the stockholders thereof, from the wrongs and threatened wrongs in the said bill of complaint set forth. The prayer of the bill is, that the said pretended lease claimed to have been executed may, if in existence, be decreed to be given up and cancelled; and that the defendants Page, Butler, Chase, Prout, Williams, Slate, and the Vermont Valley Railroad Company be enjoined from executing, or causing to be executed, any lease of the said railroad, unless authorized by a legal vote of the stockholders; that the persons last named be required to surrender the property to the said railroad company or to a receiver, and give up the books, papers, common seal and money of the company, either to the said newly elected board of directors or to a receiver; and that a receiver be appointed, and for such other and further relief as to equity and good conscience may "obtain." The defendants to this bill, sought to be en-

joined as last mentioned, are members of the said former board of directors, alleged to illegally hold over in possession, and claiming and threatening as above stated, and are Peter Butler and George B. Chase, citizens of Massachusetts, and John B. Page, John Prout, James H. Williams and George Slate, citizens of Vermont. Gouverneur Morris, a citizen of New York, is also made a defendant, he being a member of both boards, and alleged to have dissented from the action and proposed action of such former board. The defendants who are alleged to constitute the said newly elected and legal directors, but who refuse to institute proceedings for the protection of the stockholders are Silas M. Waite, William H. Rockwell, Junior, Frederick A. Nash and Frederick Billings, citizens of the state of Vermont, and Daniel L. Harris, a citizen of the state of Massachusetts.

To this bill the defendant John Prout interposed a plea to the jurisdiction of the court. The averments therein are, that the defendants the Vermont Valley Railroad Company, and the defendants John B. Page, James H. Williams and George Slate, are citizens of Vermont; that Silas M. Waite, William H. Rockwell, Frederick A. Nash and Frederick Billings, named defendants, are also citizens of Vermont, and their respective rights and interests in the subject of controversy, and embraced in said bill, are identical with, and the same as, those of the said complainants, and they seek the same relief and decree in said proceedings as the said complainants, and were made defendants in said bill for the purpose of giving this court a colorable and false jurisdiction of said bill and the parties aforesaid, when, in truth and in fact, the said Waite, Rockwell, Nash and Billings, as well as said Morris and Harris, are complainants in said bill, and aiding in the prosecution thereof. This plea the complainants set down for argument, without any replication thereto, and they are, therefore, to be taken to admit all material and issuable facts stated therein.

The defendant John B. Page, after appearing and answering the bill of complaint, made a motion to dismiss the suit, upon the ground that this court has no jurisdiction, in substance repeating the plea of the defendant Prout, and alleging that some of the defendants conspired and confederated with the complainants for the fraudulent purpose of giving this court a false jurisdiction of said bill or cause, and that such last named defendants were made defendants for the purposes of jurisdiction, without reference to their real relation, as parties, to the said bill and the subject-matter thereof, and that the refusal of the so-called new board of directors to bring suit was only for the purpose of giving the court jurisdiction, and is a fraud upon the court. In support of this motion, the said Page examined witnesses, and their affidavits, claimed to establish these grounds of the motion, are produced.

The case was heard both upon the plea and upon the motion; and, on the argument, it was also urged, that the want of jurisdiction was apparent upon the face of the bill of complaint, inasmuch as it appears thereby, that some of the defendants are not citizens of the state in which the suit is brought, the defendants Butler, Chase and Harris being citizens of the state of Massachusetts, and the defendant Morris being a citizen of the state of New York.

It is not insisted, and cannot be successfully claimed, that the matters complained of herein are not of equity cognizance; or that a court having general jurisdiction in equity has no jurisdiction, at the instance of stockholders, to restrain a corporation, or those engaged in the control and management of its affairs, from acts tending to the destruction of its franchises, or violations of the charter, and from misuse or misappropriation of the corporate powers or property, or other acts prejudicial to the stockholders, amounting to a breach of trust on the part of the managers. Dodge v. Woolsey, 18 How. [59 U. S.] 331, and numerous cases cited in the opinion in that case; and see Bacon v. Robertson, 18 How. [59 U. S.] 480, 488; Smith v. Swormstedt, 16 How. [57 U. S.] 288. The questions here do not, therefore, pertain to the general jurisdiction of courts of equity, but to the question whether the jurisdiction of the circuit court of the United States is so limited, that, for other reasons than the nature of the controversy, it has no jurisdiction of this cause.

It is true, that counsel insisted, that the suit was, in part, at least, to determine which of two boards of directors of the Vermont Valley Railroad Company is the legally elected board of directors, and entitled to the management of its affairs. That, however, is not the object of the bill, it is not the relief prayed, and, although it may not be possible to do all that is prayed for, without incidentally considering that question, such consideration would only be incidental, and it is not even essential to the determination of the principal question, whether the defendants who constitute the former board of directors, and the two corporations who are made defendants, shall be permitted to carry out the alleged scheme to give a lease of the Vermont Valley Railroad for twenty years, under the circumstances alleged in the bill of complaint. To justify interference by stockholders by a suit to restrain a wrong threatened, or to obtain redress for the corporation, it is necessary that it should appear that the directors of the corporation are either themselves the wrong-doers, or that they refuse to prosecute for that purpose; and, in the last-named case, such averment involves refusal by the legal board of directors; and where, as in this case, one set of defendants are alleged to be in the commission of the wrong and there be another set who claim to be the legal directors, who, nevertheless,

refuse to prosecute for the redress or protection of the rights of the stockholders, the averment that the last-named are, in fact, the legal directors, does not, even if incidentally necessary, change the nature of the controversy. The wrong threatened or committed, and the prevention or redress of the wrong, are still the principal subjects of the controversy, and within the jurisdiction of a court of equity. I repeat, therefore. that the question here is, whether, for reasons other than the nature of the controversy, the jurisdiction of the circuit court of the United States does or does not embrace this case.

1. Is it fatal to the jurisdiction, that it appears on the face of the bill, that, while some of the defendants are citizens of the state of Vermont, others of them are citizens of the state of Massachusetts, and one a citizen of the state of New York?

Two clauses of the judiciary act of 1789 (1 Stat. 78, § 11) are relied upon to show that the circuit court has no jurisdiction of such a case, such jurisdiction being confined to cases in which jurisdiction is affirmatively conferred by statute—First, the clause which gives jurisdiction when "the suit is between a citizen of the state where the suit is brought and a citizen of another state;" and, second, the clause of the same section which declares, in substance, that no civil suit shall be brought against any inhabitant of the United States, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of the service of the writ.

The question whether, where the suit was. in fact, against a citizen of the state in which the suit is brought, and by a citizen of another state, and for a matter properly cognizable by the circuit court, its jurisdiction of the action failed if a party having an interest in the subject, making him a necessary party, resided in still another state, was, under the act of 1789, one of much interest. Confessedly, the constitution of the United States did not require such a limitation of the jurisdiction. Cases might often arise in which it was of the utmost importance to citizens of one state to bring suit in the United States court in another state, where the matter in controversy arose, or the property or fund in question was situated, and where the principal defendants resided. When such a suit was brought against the defendants residing in the state where it was brought, was there a want of jurisdiction of the action itself, if it appeared that some other person, citizen of a third state, was a necessary party? I think not. The court might not be competent to make a decree in the absence of such party; but that would be not because the court was not competent to take jurisdiction of the action, but because it had not jurisdiction of all the parties to the action which were necessary before the court could act upon the subject in controversy. The two clauses in the act of 1789, read together, show precisely what congress intended. There must be a suit between a citizen of the state in which the suit is brought and a citizen of another state. If a citizen of a third state is a necessary party, you cannot compel his appearance by serving him with process, unless he is found in the district where the suit is pending, or unless he waives his privilege and voluntarily appears. The supposed defect of jurisdiction in such case pertains to jurisdiction of the person, and not to jurisdiction of the action; and it is not for a citizen of Vermont, who is rightly proceeded against, to say, that the court has no jurisdiction of the action because another person, who is defendant with him, but who appears and answers to the merits without objection, resides in some other state. The object of the apparent limitation was not to prevent a citizen of Vermont, (properly sued in his own district,) from having a citizen of some other state joined with him as defendant; but, so far as defendants were included, it was to protect citizens from being sued out of the district in which they reside or are found to be served. It does not prevent their voluntarily appearing and submitting to the jurisdiction in such a case.

I am aware, that, in numerous cases cited by counsel on the argument, observations are made, by analogy, at least, in conflict with this view of the proper construction of the act of 1789. See Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267; New Orleans v. Winter, 1 Wheat. [14 U. S.] 91; Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591; Conolly v. Taylor, 2 Pet. [27 U. S.] 564; Commercial & R. R. Bank v. Slocomb, 14 Pet. [39 U. S.] 60; Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286; Wood v. Davis, 18 How. [59 U. S.] 467; McDonald v. Smalley, 1 Pet. [26 U. S.] 620; Scott v. Sandford, 19 How. [60 U. S.] 393; Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 172; Sewing Machine Co.'s Case, 18 Wall. [85 U. S.] 553. But no decision of the supreme court was cited, and I have found none, holding the precise point, that, when the suit is brought in one state where defendants therein reside, and another defendant living in another state appears and answers without objection, such first named defendants can object that the court has, on that ground, no jurisdiction. On the contrary, the view which I have given of the true construction of the act of 1789 is affirmed by Chief Justice Marshall, and acted upon by the supreme court of the United States, in Russell v. Clark's Ex'rs, 7 Cranch [11 U. S.] 69, where the complainant lived in South Carolina and brought suit in Rhode Island, in the circuit court of the United States, against citizens of Rhode Island. That court dismissed the bill. The supreme court held certain assignees or trustees, residing in the state of New York, necessary parties to the suit, but reversed the judgment of the circuit court,

and remanded the case, to give the complainants the benefit of the possible willingness of those assignees or trustees to come in as parties and waive their privilege, and give the court jurisdiction of their persons, which alone was deemed requisite to the complete jurisdiction of the court over the whole matter. "It is possible," says the opinion, "that they may consent to make themselves parties in this cause;" and the court reversed the decree and remanded the cause, with leave to the complainant to make them parties. The distinguished chief justice and his associates were not ignorant of the distinction between jurisdiction of the person and jurisdiction of the action, or of the rule that a party may waive objection to jurisdiction of his person, but that consent cannot confer jurisdiction of the action itself. The court would not have remanded that cause when the immediate and direct effect of making those citizens of New York defendants would be to defeat the jurisdiction of the court. That case, therefore, is a direct decision of the supreme court in support of the views above expressed.

But, whatever doubt may be supposed to arise on this point out of the observations found in other cases in some degree analogous, the construction given by the supreme court to the act of February 28, 1839 (5 Stat. 321, § 1), is conclusive in support of the jurisdiction of the court in such case. In Jones v. Andrews, 10 Wall. [77 U. S.] 327, the bill was filed by a citizen of Georgia, in the circuit court of the United States for West Tennessee, against citizens of Tennessee and a citizen of New York. The latter was not only a necessary party, but, in interest, he was the principal party to be affected by the relief sought. The circuit court dismissed the bill for want of jurisdiction, upon grounds like those urged in this case. The supreme court reversed the decree. In the opinion of the court, by Mr. Justice Bradley, it is said: "The act of February 28, 1839, by implication, confers jurisdiction over non-residents of the district where the suit is brought, if they voluntarily appear therein. The suit can proceed against them if they voluntarily appear, or without them if they are not necessary parties. * * * In this case, Andrews was a necessary party, and he was not a resident of the district, and was not served with process, but he did voluntarily appear. * * * After this, the question of jurisdiction over the person was at an end, and the decree of the circuit court, dismissing the bill for want of jurisdiction, must be reversed." This decision meets the precise point raised by the defendants Prout and Page, that, upon the face of the bill, the court has no jurisdiction, because some of the persons made defendants do not reside in the district of Vermont, and establishes, that, if the court has obtained, or shall obtain, due jurisdiction of their persons, the jurisdiction of the court cannot be questioned on the ground so objected. Some of these defendants have appeared and answered to the merits, and the other may do so, if he sees fit, if he has not already appeared.

2. I come, next, to consider the case upon the plea of the defendant Prout. No facts alleged in that plea show want of jurisdiction. Undoubtedly, material and issuable facts averred in a plea, when the complainant sets the case down for a hearing on the bill and plea, are to be taken as admitted. The facts averred in this plea are, that certain of the defendants are residents of the state in which the suit is brought; that their respective rights and interests in the subject of controversy embraced in the bill are identical, and the same as those of the complainants, and they seek the same relief and decree; and they were made defendants for the purpose of giving this court a colorable and false jurisdiction; and that, in fact, they are complainants in said bill, and aiding in the prosecution thereof. Divesting these averments of what is false, and inconsistent, in the terms used, with the plea itself, namely, that those defendants "seek the same relief," &c., and that those defendants "are, in fact, complainants," and giving to these loose and inconsistent averments their only proper meaning, the plea amounts to this—the defendants named have the same interest as the complainants, they wish that the relief sought may be granted, they are aiding in the prosecution of the suit, and they are made defendants for the purpose of giving the court jurisdiction. If, notwithstanding the facts stated, the court has jurisdiction, then it is to no useful purpose that the defendant Prout calls it, in the plea, false and colorable. The jurisdiction is real, if it exists.

The defendants named are made defendants not by reason of their interests in the railroad company as stockholders, but by reason of their alleged official character as directors, refusing to perform their duty by bringing suit to redress or prevent the wrong done or threatened. The plea in no wise denies such refusal, nor states any fact in avoidance of the right of a stockholder to prosecute where those whose duty it is to protect the corporation and its stockholders refuse; and, certainly, it cannot prevent or defeat the right of the complainants to sue, if it be true that such directors refused to bring suit in order to drive the complainants to bring suit themselves for their own protection, which, however, is not averred in the plea. If the grounds of jurisdiction exist, the motives which led thereto are not material. This is illustrated by the removal of a citizen from one state to another. If such apparent change of residence or citizenship is apparent only, and there has been, in fact, no change of residence, but only a transfer of apparent residence, animo revertendi, to give color of jurisdiction in a suit in the state of actual residence, it may not

avail; but, where there is an actual change of residence and citizenship before suit brought, the motive to such change is not material, even if it was a desire to give capacity to sue in the courts of the United States. So, also, those defendants, upon such refusal by them to prosecute, were necessarily made defendants. Without that, the complainants, as mere stockholders, could not sue at all in any court, for a cause of action arising out of such refusal. With that, the complainants have the right to sue in any court having jurisdiction. If they desired to come into the federal court, they had the right to do so, notwithstanding such recusant directors lived in Vermont; and they had no alternative but to make them defendants. Consistently with the fact standing undenied, that those defendants refused to be plaintiffs, the purpose to state the facts in their bill which should show jurisdiction in the federal court, and make them defendants, in order that such court should have jurisdiction of the action and of all necessary parties, is lawful and proper and in no wise defeats that jurisdiction; and, surely, the fact that the rights and interests of those defendants, as stockholders, are the same as the rights and interests of the complainants, does not affect the jurisdiction. As already suggested, they are not proceeded against as stockholders, nor are they made parties in respect of any interest they have as stockholders. The other defendants, who compose the alleged former board of directors, have also the same rights and interests, as stockholders, in the Vermont Valley Railroad Company and its management, as have the complainants, and so have all other stockholders in the company. All may not agree in their judgment of what is wise, best, or legal, and the interest of some may be overbalanced by their interest in other railroads, but, as stockholders of this company, all are, in fact, in the like interest. But this does not destroy the right of one or more of the stockholders, otherwise competent, to sue in the federal courts. Nor can the desire or wish of such other stockholders that the complainants may be successful, defeat such jurisdiction. The case of Dodge v. Woolsey, in the supreme court of the United States (18 How. [59 U. S.] 331), seems to me conclusive upon this aspect of the present case. There, as here, the directors refusing to sue resided in the same state with the other defendants. There, as here, those directors were of the same opinion with the complainant, that a wrong to the corporation had been done and was further threatened, and that the acts against which the complainant sought to protect the corporation were illegal. They, nevertheless, refused to sue, and their reason for refusal was identical with that here alleged, and neither in that case nor this did it appear that their refusal was not actual, or that they were not sincere in their reasons therefor. The court, in that case, declare most fully the jurisdiction of the federal court, and show the necessity of such jurisdiction, notwithstanding it was, on the face of the bill, true, as is alleged in the plea in the present case, that the interests and wishes of those defendants were the same as the rights, interests and wishes of the complainant, and that such defendants were in full accord with the complainant, as a stockholder in the corporation. That case shows, also, that the complainant was not bound to make stockholders residing in the state in which the suit was brought parties, and, inferentially, that a purposed omission to make them parties, in order that the jurisdiction of the federal court might not be defeated, did not defeat the jurisdiction. The court say, of the right of the stockholder to sue in such cases: "Courts of equity have jurisdiction over corporations, at the instance of one or more of their members;" and of the particular case then before them, at the instance of a single stockholder, the complainant, Woolsey: "Besides, it was not his interest alone which would be affected by the result. Hundreds, citizens of the state of Ohio and citizens of other states, are concerned in the question." The suit being brought in Ohio, if the complainant had made such other stockholders parties defendant, upon allegations adapted to charge them, it would not have deprived the court of jurisdiction. His omission to make them parties at all did not defeat the jurisdiction; and, if it had been alleged and proved that the reason he did not join with them as complainants, was his purpose to give the federal court jurisdiction, the fact would have been wholly immaterial, because he had the right to prosecute the suit himself, without making them parties. So, here, the complainants had the right to prosecute; and, if making stockholders who reside in Vermont parties plaintiff with them would deprive them of access to the federal courts, they had a right to sue by themselves and for that precise reason. The fact that all other stockholders have the same interest, no more destroys the jurisdiction than it did in Dodge v. Woolsey. I am, therefore, of the opinion that nothing alleged in the plea of the defendant Prout defeats the jurisdiction of this court, and that such plea should, therefore, be held insufficient. The complainants are, therefore, entitled to a decree notwithstanding such plea.

3. As to the motion to dismiss the bill, which is made by the defendant Page. So far as it was urged upon grounds arising on the face of the bill itself, what is firstly above suggested is a sufficient answer to the motion. The motion further proceeds mainly upon the grounds stated in the plea of the defendant Prout, and these have been above secondly considered, and my conclusion is adverse to the motion. If the motion be disposed of upon the proofs submit-

ted in support of the grounds alleged therefor, I am constrained to say, that those proofs do not satisfactorily establish such collusion or conspiracy or attempted fraud on the jurisdiction, as was claimed on the argument. A bill ought not to be dismissed on such grounds without clear proof. The complainants may be remediless, when the directors do, in fact, refuse to sue, and such refusal is sincere, unless jurisdiction be entertained.

Besides, so far as the motion proceeds on the allegation of facts not appearing on the face of the bill, but sought to be brought to the attention of the court by a defendant who has submitted to the jurisdiction of the court by answering to the merits, the motion ought not to be entertained. Where it appears by the complainant's own showing in his bill, that the court has no jurisdiction of the action, a defendant served with process may demur to the bill on that ground, and there are precedents for a summary motion to dismiss the bill. In such case, the question arises on the record, and can be reviewed on an appeal or writ of error, bringing the record before an appellate tribunal. But, where the bill shows apparent jurisdiction, and a defendant desires to contest the allegations, or introduce new allegations in avoidance of the jurisdiction, it should be done by plea to the jurisdiction, which will bring upon the record the allegations and the finding of facts thereupon, and not by a collateral proceeding, forming no part of the record proper, and not regularly brought before the appellate tribunal by the appeal or writ of error.

This is not inconsistent with the principle, that, whenever, in the progress of the cause, it appears that the court have no jurisdiction thereof, and cannot make a valid decree, the court will decline to act in the premises. The modes of judicial proceeding prescribe in what manner such facts must be made to appear by a party urging the objection. As to him, if he does not raise the objection in a proper form, but appears and answers to the merits, he has no cause of complaint, that the court do not afterwards receive from him the suggestion in an informal and summary manner. The record should show the question by proper allegation and issue thereupon. No doubt, the court has power to protect itself against imposition and fraud. But, parties should place their defences on the record in a form adapted to show on what they rely, and in a form in which, on a review of the record, the appellate court may have the proceedings before it, without searching for collateral and incidental proceedings, called out-branches of the record. This is in conformity with the opinion of the supreme court in Wickliffe v. Owings, 17 How. [58 U. S.] 47, to the effect, that, when the averments in the bill show jurisdiction, the defendant, if he wish to deny it, must show want of jurisdiction by plea controverting those averments; and, also, in harmony with the opinion of the supreme court, in Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 172, to the same effect; and, in Jones v. League, 18 How. [59 U. S.] 81, the court hold, that, when the facts creating jurisdiction are disputed, the facts must be pleaded in abatement, and this must be done in the order of pleading, as at the common law. See, also, Wickwire v. State, 19 Conn. 477.

It follows, that the motion must be denied, with costs. Counsel will prepare the proper orders, overruling the plea of the defendant Prout, and denying the motion of the defendant Page, in conformity with this opinion.

[NOTE. On final hearing, the bill of Chase was dismissed, and a decree entered for Pond. Case No. 11,264.]

Case No. 11,266.

PONSFORD v. JOHNSON et al.

[2 Blatchf. 51.] [1]

Circuit Court, S. D. New York. July 2, 1847.

MARRIAGE AND DIVORCE—LAW OF DOMICIL—PLACE WHERE CONTRACTED—VALIDITY—ADULTERY.

1. As a general rule, the capacity or incapacity to marry depends on the law of the place where the marriage is contracted, and not on the place of the domicil of the parties.

2. Prior to 1826, P. was married in New York to H., who, in that year, obtained from the court of chancery of New York a decree of divorce on account of the adultery of P. The decree dissolved the marriage, and freed each of the parties from the obligations of the same. The act under which the divorce was granted provided, that the party convicted of adultery should not marry again until the other should be actually dead. In 1837, while H. was still living, P. and A., both then residing in New York, were married to each other in New Jersey, in due form and according to the laws of that state. A. then knew nothing of the divorce or of H., and had only heard that P. had had a wife who was dead. A. was married in New Jersey in compliance with the wishes of P., and with no intention on her part of evading any law of New York. P. died in 1845, intestate, domiciled at the time in New York. Under the laws of New York, A., if his widow, was entitled to a share of his personal estate. The defendant J obtained administration in New York on P.'s estate, and received assets to a large amount, but refused to pay any portion of them to A. A bill filed by A. to compel such payment having been demurred to on the ground that the marriage between P. and A. was void, *held*, that the decree of divorce was an absolute dissolution of the marriage contract as to both parties.

3. The disability to marry imposed by the statute of New York attached to P., by way of penalty, only within that state.

[Cited in Phillips v. Madrid, 83 Me. 207, 22 Atl. 114.]

4. The marriage between A. and P. in New Jersey was valid.

[Cited in Van Voorhis v. Brintnall, 86 N. Y. 27.]

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

5. A. was entitled to all the rights of the lawful widow of P. under the laws of New York.

[Cited in Com. v. Lane, 113 Mass. 465.]

6. J. was bound to pay over to her her share of P.'s estate.

7. Semble, that the validity of the New Jersey marriage would not have been affected if both parties had resorted to that state to evade the prohibitory law of New York. And clearly, where one party was innocent and ignorant of such purpose, the mala fides of the other could not impeach the marriage, if it was lawful in other respects.

In equity. The plaintiff in this case [Amanda L. Ponsford] a citizen of New Jersey, filed her bill against William Johnson and others, citizens of New York. She claimed to be the widow of James Ponsford, deceased, the defendant Johnson was his administrator, and the other defendants were his next of kin. The facts were these: Some time prior to 1826, James Ponsford was married in New York to one Hannah Stanton, who, in that year, obtained from the court of chancery of the state of New York a decree of divorce on account of the adultery of Ponsford. He appeared in the suit brought by her, and the court had full jurisdiction, both of the subject-matter and of the parties. The decree of divorce was, that the marriage between the parties "be and the same is hereby dissolved, and that each of the said parties be freed from the obligations of the same, according to the provisions of the act of the legislature of the state of New York in such case made and provided." The act under which the divorce was decreed was entitled, "An act concerning divorces and for other purposes," passed April 13th, 1813. The fourth section of the act was the only one particularly involved, and was as follows: "If it shall satisfactorily appear to the court of chancery that the defendant has been guilty of the adultery charged in the bill, it shall be lawful for the said court to decree that the marriage between the parties shall be dissolved, and each party freed from the obligations thereof, but such dissolution shall not in any wise affect the legitimacy of the children thereof. And it shall be lawful for the complainant, after such dissolution of the marriage, to marry again, as though the defendant was actually dead. But it shall not be lawful for the defendant, who may be so convicted of adultery, to marry again until the complainant shall be actually dead." 2 Rev. Laws, 198, § 4. In September, 1837, the plaintiff and James Ponsford were married to each other, both then residing in New York. The marriage, however, took place in due form in New Jersey, in conformity to the laws of that state. From the time of this marriage until the death of Ponsford, he and the plaintiff lived together as husband and wife. The plaintiff, at the time of the marriage, knew nothing of said decree of divorce, or of the suit in which it was obtained. She had heard that Ponsford had been married, but was informed by him, prior to her marriage, that his former wife had been dead for many years. When Ponsford proposed to the plaintiff to go to New Jersey to be married, he assigned to her as a reason that he did not wish his friends to know of his marriage, and she was married in New Jersey in compliance with his wishes, and not with any intention on her part of evading or defeating any of the laws of New York. The plaintiff, at the time of her own marriage, was not acquainted with Hannah Ponsford or her family, or with James Ponsford's family, and heard nothing of Hannah or of her said marriage (except as before stated) until some time after her own marriage. Hannah was still living when this bill was filed. James Ponsford died in June, 1845, intestate, leaving no descendant or parent, but leaving the plaintiff, his widow, and a sister, and nephews and nieces, children of deceased brothers and sisters, as his next of kin. In July, 1845, the defendant Johnson, who was the husband of one of the nieces, obtained letters of administration on Ponsford's estate from the surrogate of the city of New York, where Ponsford left property, and received assets to the amount of over $32,000. By the laws of New York, where Ponsford was domiciled at the time of his death, the plaintiff, as his widow, would be entitled to one-half of his personal estate after the payment of his debts, to the whole of the residue if under $2,000, and, if the residue exceeded $2,000, then to $2,000 in addition to the one-half. The bill averred that Johnson would not pay the plaintiff any portion of the estate of Ponsford, but was about to pay it to the next of kin, and refused to recognize the plaintiff as the widow of Ponsford, pretending that she was never lawfully married to him, and that they could not and did not make a lawful contract of marriage in New Jersey. The bill prayed an account by Johnson, the payment to the plaintiff of her share of the estate, and an injunction.

The defendants demurred to the bill, assigning for cause that the plaintiff founded her claim on a pretended marriage between her and Ponsford, contracted while his wife Hannah was in full life, and while Ponsford had no capacity, by the laws of New York, where he was then domiciled and resident, to contract any such marriage during the life of Hannah.

Royal H. Waller, for defendants.

(1) The dissolution of the marriage of Ponsford, by the decree of divorce under the statute of New York, was not operative as to him. His subsequent marriage with the plaintiff was, therefore, void. (2) The marriage domicil in this case was not New Jersey, where the marriage ceremony was performed, but New York, where the parties intended to reside. The contract of marriage was, in the eye of the law, made in New York. (3) But, if made in New Jersey, it was a nullity, having been made in fraud and evasion of the law of New York. Story, Confl. Laws, §§ 86, 123; Jackson v. Jackson,

1 Johns. 424; Inhabitants of West Cambridge v. Inhabitants of Lexington, 1 Pick. 506. (4) The plaintiff makes her claim in this case under the New York statute of distributions, 2 Rev. St. 96, § 75, subd. 3. The question of the distribution, and consequently the question whether she is the widow of Ponsford, must be governed by the local law of New York. Story, Confl. Laws, §§ 380, 481, 482a. She cannot claim in violation of the marriage laws of the place of distribution. Haydon v. Gould, 1 Salk. 119; Hubb. Succ. 309, 310; Story, Confl. Laws, §§ 18, 51, 54, 65; Doe v. Vardill, 5 Barn. & C. 438, 9 Bligh, N. R. 32; Shelf. Mar. & Div. 126, 128.

William Bliss, for plaintiff.

The divorce was an entire dissolution and extinction of the former marriage, as to both parties. The restriction imposed by the statute on Ponsford against his marrying again until Hannah should be actually dead, created a mere personal disability. The statute was designed to act on a second marriage by a defendant convicted of adultery, only when such marriage should be contracted in New York. The fourth section of the act concerning divorces, construed in connection with the act of February 7, 1788 (1 Rev. Laws, 113), could operate on such second marriage only by way of punishment of the defendant, if he should enter into it. Being thus a penal statute, it only prohibited the re-marriage if it took place in New York.

George Wood, on the same side.

Is the plaintiff's marriage to be regarded in New York as a valid marriage? For, if not, she cannot claim as the widow of Ponsford. (1) The validity of the marriage is to be determined by the law of the place where it was contracted. Hubb. Succ. 330, 331; Dalrymple v. Dalrymple, 1 Hagg. Consist. 59. (2) Ponsford was entirely divorced by the decree from his former marriage. The decree and the statute (section 4) both of them declare the divorce to be perfect and entire. The same statute (2 Rev. Laws, 199, § 7) gives to the husband, where he is complainant and obtains a divorce for the adultery of his wife, the same rights in the wife's real and personal property "in like manner as though the marriage had continued," thus implying that the marriage is dissolved by a decree of divorce for adultery. The only cases where the lex loci contractus has not seemed to prevail on the question of the validity of a second marriage after a divorce, is where the first marriage was not completely dissolved by the divorce. Shel. Mar. & Div. 128; Conway v. Beazley, 3 Hagg. Ecc. 639. Marriage is a social relation, governed in part by the principles which govern contracts merely civil, but yet going further, and calling in other principles to regulate and determine its character. In this aspect, the law of marriage is a branch of the jus gentium. The present case must be considered by the rules of that law.

The objections to the validity of the plaintiff's marriage are: (1) That the parties were bound to marry according to the law of New York; (2) that the personal disability on Ponsford followed him into New Jersey. (1) The lex loci actus governs as to the validity of the marriage. Story, Confl. Laws, §§ 79, 81, 82, 86, 87, 89; Shelf. Mar. & Div. 123; Hubb. Succ. 330, 331, and authorities there collected. To this rule the only exception is, where the marriage violates principles of natural morality. Id. 332, 333. The American doctrine is, that if a person, divorced from his first wife, is rendered by the law of the place of the divorce incapable of contracting a second marriage, still, if he contracts marriage in another state, where the same disability does not exist, the marriage is valid; and this, although the marriage was celebrated in a foreign state in order to evade the law of the place of domicil. Story, Confl. Laws, §§ 89, 123, 123a, 123b; 2 Kent, Comm. (3d Ed.) 91–93; Id. 458, 459; Putnam v. Putnam, 8 Pick. 433; Inhabitants of West Cambridge v. Inhabitants of Lexington, 1 Pick. 506; Decouche v. Savetier, 3 Johns. Ch. 190. If, however, the evasion can in any event affect the validity of the marriage, both parties must concur in the evasion. The evasion, if the cause of the invalidity, must be determined by inquiring into the motives of the parties. It is not an intrinsic but an extrinsic cause. In this case, the plaintiff did not concur in the evasion. (2) The personal disability of Ponsford did not prevent his marrying in New Jersey. It was a mere personal disability. If a penalty, the penal laws of one country cannot be taken notice of in another. They are strictly local. Thus, a criminal sentence of attainder in the courts of one sovereign, although it creates a personal disability to sue there, does not carry the same disability with the person into other countries; and a person convicted of an infamous offence in one state is not thereby rendered incompetent as a witness in other states. Story, Confl. Laws, §§ 620, 621.

Daniel Lord, for defendants, in reply.

The question involved in this case is one not covered by any decision in the United States, except the case of Putnam v. Putnam, 8 Pick. 433, cited for the plaintiff, which is of no weight. If the doctrine of that case be sound, a man may have an unlimited number of wives. (1) Ponsford's first marriage was lawful and created an incapacity in him to marry again while it continued. The divorce under the New York statute (2 Rev. Laws, 198, § 4) did not relieve Ponsford from this incapacity. The marriage was not dissolved for all purposes. It was only dissolved so far as Hannah was concerned, and the statute expressly empowered her to marry again, which she could not otherwise have done. The decree of divorce released the

civil obligations of the parties to the first marriage, but it only released the civil incapacity of Hannah. The policy of the statute was to extinguish the force of the first marriage only as to the aggrieved party. The statute (section 4) imposed no disability on Ponsford, but merely left him where it found him, laboring under the disability created by his first marriage. In this view, the provision was not penal. The second marriage took place while the following provision of the Revised Statutes of New York was in force: "No second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, unless the marriage with such former husband or wife shall have been annulled or dissolved for some cause other than the adultery of such person. Every marriage contracted in violation of the provisions of this section shall be absolutely void." 2 Rev. St. 139, § 5. This provision is not limited to the state of New York. The language is positive and universal, and applies to all marriages, wherever contracted. (2) The plaintiff cannot set up a claim under the New York statute of distributions, and at the same time set up a right under the decree of divorce in this case as the foundation of that claim. The evasion of the law of New York by the husband was direct and intentional, and the marriage was as much a violation by both the parties of the policy of that law as if the contract had been made in New York. The lex loci actus is invoked as governing in the case. But the plaintiff's right to her distributive share, as the widow of Ponsford, is the creation of positive law, and is not in the nature of a contract. That right accrues to her, if at all, merely as an incident of her marriage. And, if the marriage was void, of course no incident could follow from it. The plaintiff is claiming rights that follow from a New York domicil, against the law of that domicil. In Haydon v. Gould, 1 Salk. 119 (cited in Hubb. Succ. 309), it was decided, that where the husband demanded a right to himself as husband under the ecclesiastical law, he ought to prove himself a husband by that law.

BETTS, District Judge. This case has been carefully considered by the court, and we are prepared to pronounce judgment in it. The urgency of other engagements since the argument has not allowed us time to draw up at length the reasons in support of the decision. The court is about to adjourn, and the judges cannot have opportunity for further conference previous to November; and, if we defer the decision to that period, a year's delay to the parties may be caused, should an appeal be taken. We shall therefore order judgment to be entered for the plaintiff on the demurrer, only indicating the general grounds upon which the decision is placed.

1. We consider that, as a general principle, the capacity or incapacity to marry depends on the law of the place where the marriage is contracted, and not on that of the domicil of the parties. This principle need not be asserted as absolute in all cases. Incest, polygamy, and practices outraging the moral sense and the usages of civilized nations, may be excepted from the rule, without impairing its justness and efficacy.

2. We regard the decree of divorce pronounced by the court of chancery of the state of New York to be, in its purport and by force of the statute of the state, an absolute dissolution of the marriage contract as to both parties, and that the disqualification or disability to marry declared by the statute, attached to Ponsford, by way of penalty, only within the state of New York, and did not incapacitate him from contracting a sound and valid marriage in the state of New Jersey, where the same disability did not exist.

3. We think that the validity of the marriage in New Jersey would not have been affected if both parties had resorted there to evade the prohibitory law of New York. And clearly, where one party was innocent and ignorant of such purpose, the mala fides of the other could not impeach the marriage, if it was lawful in all other respects. Judgment for the plaintiff.

PONSONBY (SHERRARD v.). See Case No. 12,772.

Case No. 11,267.

PONSOT v. MAXWELL.

[4 Blatchf. 43.] [1]

Circuit Court, S. D. New York. April 21, 1857.

CUSTOMS DUTIES—PROTEST—ACT FEB. 26, 1845.

Under the act of February 26, 1845 (5 Stat. 727), a protest "against paying 40 per cent. duty on rosewood furniture, believing it should pay 30 per cent., as cabinet furniture," cannot be extended to embrace other articles, or furniture of other woods, or furniture of rosewood and other woods combined, where such other woods form so large and so conspicuous a part of the furniture as to require it to be classed, in commercial transactions, by some other name than merely "rosewood furniture."

This was an action [by George Ponsot] against [Hugh Maxwell] the collector of the port of New York, to recover back an alleged excess of duties on sundry importations. At the trial, a verdict was rendered for the plaintiff, for $1,500, subject to the opinion of the court as to the sufficiency of the protests. There were six entries. The first entry was made April 19th, 1851, and embraced "rosewood and mahogany furniture," "common wood furniture," "rosewood furniture," and "silk and worsted goods." The protest, (annexed to the entry,) was "against paying 40 per cent. duty on rosewood furniture, as specified in this entry, believing it should pay 30

[1] [Reported by Hon. Samuel Blatchford, Chief Judge.]

per cent. as cabinet furniture." The second entry was made the same day, and embraced articles of "rosewood furniture," of "rosewood and mahogany furniture," and of "oak furniture." The protest was "against paying 40 per cent. on the article of rosewood furniture, specified in the entry attached, believing it should pay 30 per cent., as cabinet furniture." The third entry was made May 2d, 1851, and was of "rosewood furniture," of "common wood furniture" and of "rosewood and common wood furniture." The protest was the same as in the last case. The fourth and fifth entries, made the same day, were of the same general character, and the protests were substantially like the others. The last entry was made May 3d, 1851, of "rosewood and common wood furniture," of "rosewood furniture," of "rosewood," and of "varnish." The protest was in substance like the others.

John S. McCulloh, for plaintiff.
John McKeon, Dist. Atty., for defendant.

HALL, District Judge. These protests were all made in pursuance of the act of February 26, 1845 (5 Stat. 727), which requires a person protesting against any exaction of alleged excessive or illegal duties, to make his protest in writing, and set forth "distinctly and specifically the grounds of objection to the payment thereof." In this case, the protests were distinct and specific, and distinctly related to a specific article embraced in the invoices and entries to which the protests referred. "Rosewood furniture" is a well known and specific term, and these protests cannot be extended beyond what is properly and specifically embraced within them.

Most clearly, they cannot be extended so as to embrace any other article than rosewood furniture; and furniture of other woods, and silk and worsted goods, and varnish, are necessarily excluded from their operation. Furniture of rosewood and common wood together, or of rosewood and mahogany together, when the latter wood forms so large and so conspicuous a portion of the furniture as necessarily to require it to be classed, in commercial transactions, not as rosewood furniture but as rosewood and mahogany furniture, or rosewood and common wood furniture, must equally be excluded from their operation.

As there is nothing from which I can determine the articles or amounts to which these protests, under these principles, can be made to apply, the plaintiffs must have judgment for the sum appearing, on these principles, to be due to them, to be ascertained by adjustment at the custom-house, or as the parties may otherwise agree.

PONTIAC, The (McGINNIS v.). See Case No 8,801.

POOKE (HUNT v.). See Cases Nos. 6,895 and 6,896.

POOL (FLEEGER v.). See Case No. 4,860.

Case No. 11,268.

POOL v. McDONALD et al.

[15 N. B. R. 560; 9 Chi. Leg. News, 322; 4 Law & Eq. Rep. 27; 2 Cin. Law Bul. 151.] [1]

Circuit Court, N. D. Ohio. May 31, 1877.

BANKRUPTCY—PARTNERSHIP—COMPROMISE PROPOSITION SUBMITTED BY PARTNER—JURISDICTION—PRIOR ASSIGNMENT UNDER STATE LAW.

1. One member of a firm which has been adjudicated bankrupt may submit a proposition of composition to the creditors of the firm and his individual creditors.

2. The jurisdiction of the bankrupt court is not affected by the fact that an assignment for the benefit of creditors under the state law had been made prior to the adjudication.

[Cited in Re Waitzfelder, Case No. 17,048.]

[In review of the action of the district court of the United States for the Northern district of Ohio.]

This cause came on to be heard upon the exceptions of Hiram Pool, a creditor of McDonald & Co., and J. A. Saxton, to the ruling and judgment of the district court, in its affirmance of the proposition of composition made by J. A. Saxton and accepted by the requisite number and amount in value of the creditors of said bankrupt. It appears in evidence that the firm of McDonald & Co. was composed of J. A. Saxton, A. McDonald, and A. Laughlin; that the style of the firm was McDonald & Co.; that some of the creditors of said firm hold, as evidences of their claims, the paper of the firm, signed by the name of McDonald & Co.; that others hold paper signed McDonald & Co., indorsed by J. A. Saxton; that said firm, and Saxton in his individual capacity, made an assignment for the equal benefit of all their creditors on or about the 15th day of October, 1875, under the state law; that on the 15th day of February, 1876, the creditors of McDonald & Co. instituted proceedings in bankruptcy against the firm and its individual members, upon which said firm and its members were adjudicated bankrupts; that afterwards, in the month of November, 1876, the said Saxton, at the urgent solicitation of his creditors, submitted to the creditors of the firm and his individual creditors a proposition of composition, as provided for in the composition section of the bankrupt act [of 1867 (14 Stat. 517)]. That said proposition was accepted and confirmed by the requisite number and amount, as required by said statute. The district court afterward, upon hearing—exceptions having been filed to the register's report—approved the report of said composition, and ordered the same to be recorded. [Case unreported.]

SWAYNE, Circuit Justice. Hiram Pool comes into this court asking a review and reversal of the proceedings and judgment of

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[1] [Reprinted from 15 N. B. R. 560, by permission. 4 Law & Eq. Rep. 27, contains only a partial report.]

the district court approving of the composition made by J. A. Saxton and his creditors. He therefore invokes and thereby submits himself to the jurisdiction of the court. By his counsel he objects to the proceedings below, and amongst other things says that the proceedings were illegal, because the creditors holding the paper signed by McDonald & Co. were permitted to vote on the proposition submitted by said Saxton. On a full review of all the authorities cited and reasons urged, I find nothing in the manner of the vote, or the qualification of the voters, that is liable to the slightest criticism on the questions of law or matters of fact. I find that, out of a total of two hundred and eighty-seven firm creditors, two hundred and seventy-nine voted for and afterwards signed the resolution accepting the composition; that out of a total of fifty-six creditors having the indorsement of J. A. Saxton, as aforesaid, fifty-one signed a resolution accepting the composition, one creditor voting in the negative, and the other four not voting. The proceeding below is further objected to and claimed to be fatally defective for the reason that under section —— of the bankrupt act the proposition could not be made by J. A. S., but could only be made by the firm. This is purely a statutory question; the word "debtor" therein cannot be held to be merely applicable to the firm, but, in the liberal construction which should be given to it, should be interpreted to mean any one or more of the debtors; all the analogies of the law are against any such narrow interpretation. If judgment is rendered against numerous parties, there is no difficulty in one or more of them proceeding in error to review the same—the case at bar is much stronger in favor of the right of each debtor for himself to submit a proposition of composition. It is difficult to see how any creditor could be injured thereby. They have still all their rights of accepting or rejecting the proposition, and they are the sole and proper judges as to what is to their best interests.

The other debtors are not here objecting; then can Hiram Pool vicariously make this objection for the other debtors? Clearly, he could not. He has no locus standi in this court for any such purpose. Another fact has not escaped me in looking over the files in the case; that Mr. Pool did not attend the composition meeting, and did not appear in the proceedings in the district court where others made objection, and who have, since the decision below, retired from the contest. It is very doubtful whether this present contestant could stand by and look over the battle-field and witness the contest carried on by others, taking no part therein, and thereafter make himself a party to the proceedings, so as to entitle him to be heard in his objections; but, waiving that, I find and hold that the proceedings were in every respect, from their inception to their close, strictly and technically correct, and above and beyond the most captious criticism.

Another objection to the order of the court below is that there was an insurmountable barrier to the confirmation of the proposition on account of the state assignment and vested rights of the creditors thereunder. It would be a curious limitation of our power as a bankrupt court, if we should be compelled to abdicate our authority on the fact being brought to our knowledge that the bankrupts, or either of them, had, previous to adjudication in this court, made assignments of their property, under the state law. Such a fact would have no more control or effect upon our jurisdiction than any other act or transaction of the bankrupts with their property. There is no magic in the mere name of state assignment. It cannot annul the bankrupt act, nor interfere with our jurisdiction and power under it, and we dispose of the question before us as if no such assignment had ever been made.

We make no order in reference to the property in assignment, though it is evident that certain results do inevitably follow as the consequences of approving this composition. By its approval and confirmation McDonald & Co. and James A. Saxton are discharged and fully released from all their indebtedness as fully and completely as though they had received a certificate of discharge in bankruptcy. The state assignment, it has been said, has conveyed certain rights in property to the assignees, but the assignees could only hold and take such property in trust for the creditors, and on well-recognized elementary principles controlling trusts, when the reason for the trust has ceased, the property is relegated to the original assignor. So that, in this case, it follows, as a legal and logical sequence that, the creditors of Saxton and McDonald & Co. having been satisfied by this composition, there is nothing, so far as their debts are concerned, for either trustee or cestui que trust to hold or control any property assigned for the benefit of creditors who no longer sustain any such relation to the assignors. This composition annuls the debt or claim of the said Pool and others whose names appear upon the statements of creditors furnished by the debtors. We discharge the bankrupts from their liabilities. We have done what is clearly within the scope of our authority, and there can be no doubt in any legal mind of the effect and consequences that follow in the wake of our decision. If any creditors had received or obtained any money or dividend out of the assigned property before the acceptance and approval of the composition, we would have had no power or disposition to disturb them in that possession, but as the bankrupts are now discharged and the claims against them satisfied, by virtue of this composition, the creditors have no right or claim to any of the property remaining undisposed of or

money or assets now in the hands of the state assignees.

We have looked carefully through the testimony and find an almost unanimous vote of all classes of creditors in favor of the composition. We would readily conclude that this array of creditors judged rightly as to their best interests in casting their votes, and it would require a very strong showing to induce us to reverse the judgment of men who act deliberately and with a better knowledge of the circumstances than strangers to the transaction could have, but we find, in looking into the facts, that the composition was one most eminently fit and proper to be accepted by the creditors, and have no hesitation in pronouncing it for the best interests of all concerned. The judgment of the district court is affirmed.

Case No. 11,269.

POOL v. WELSH.

[Gilp. 193.] [1]

District Court, E. D. Pennsylvania. Dec. 31, 1830.

SEAMEN — DISCHARGE IN FOREIGN PORT — THREE MONTHS' WAGES — LIBEL BY SEAMAN — ACT FEB. 28, 1803 — PAYMENT TO CONSUL.

1. The payment of three months' wages, under the act of 28th February, 1803 [2 Stat. 203], is confined to cases of the voluntary discharge of seamen in a foreign port.

[Cited in The Dawn, Case No. 3,665.]

2. When a voyage is broken up without necessity in a foreign port, and the seamen are discharged, without payment to the consul of the three months' wages required by the act of 28th February, 1803, the court will, on a libel of the seamen, compel the owner to pay the three months' wages, two thirds to the seamen, and the other third for the use of the United States.

[Cited in The Dawn, Case No. 3,665.]

[Cited in Wilson v. Borstel, 73 Me. 275.]

3. It may be doubted, however, whether the intention of congress was to require or permit the payment to be made, elsewhere than to the consul at the port of discharge.

On the 18th June, 1829, the libellant [Joseph Pool] shipped at Philadelphia as a seaman on board the brig Juniata, bound to Antwerp and thence to Cadiz, his wages being fourteen dollars a month. On the 4th August, the vessel, having left Antwerp, encountered a gale by which she was driven ashore, near Flushing. While lying there, the mainmast was cut away, and the vessel continued for some days embedded in the sand. A survey was made by two captains of American vessels then at Flushing, who decided that "the expense of getting her off, and the necessary repairing, would amount to more than the value of the vessel after being so repaired." On the 15th August, she was, however, got off, and proceeded to Antwerp, a distance of seventy miles, where she arrived on the 17th. After a fresh examination, the captain determined to abandon the voyage on account of the state of the vessel, although no new survey appears to have been made. He informed the sailors of this determination, and advised them to ship on board of another vessel. The American consul also offered to provide passages for them to the United States, in American vessels, they doing duty on board of them. This was not accepted by the libellant, and some of the rest of the crew, who demanded the two months' pay allowed by law on the discharge of an American seaman in a foreign port. On the refusal of such payment, and the sale of the hull and spars of the vessel in their damaged state, which occurred soon after, the libellant returned by way of England to the United States. On the 19th March, 1830, the libel of the libellant was filed, claiming from the respondent [John Welsh], as owner of the brig, three months' wages, two thirds thereof to be paid to himself, and the other third to remain for the use of the United States. The answer of the respondent denied his liability, on the ground that the discharge of the libellant at Antwerp was not voluntary, but resulted from unavoidable necessity, the brig not being in a capacity to perform the residue of her voyage. On the 31st December, 1830, the case came on to be heard before Judge HOPKINSON. Evidence was offered by the respondent to prove that the vessel was so much injured as to be unworthy of repair, and that the voyage was abandoned from necessity. The libellant, on the other hand, produced testimony to show that, in fact, the injury by reason of her running ashore, might have been repaired, at comparatively small expense, on her return to Antwerp; and that, therefore, the abandonment of the voyage, and discharge of the crew, were not absolutely necessary.

Mr. Broom, for libellant.

The claim of the libellant is founded on the third section of the act of 28th February, 1803, which provides, that whenever a vessel belonging to a citizen of the United States, is sold in a foreign country, and her company discharged, or when a seaman who is a citizen of the United States, is discharged with his own consent in a foreign country, the master must exhibit to the consul the certified list of his ship's company, and pay to the consul for every seaman designated on the list as a citizen of the United States, and so discharged, three months' pay above his wages due, two thirds of which the consul is to pay to the seaman on his engagement on board of any vessel to return to the United States, and the other third he is to retain for the fund for the maintenance of destitute American seamen. It is not denied that the libellant was discharged, and no three months' wages paid. Does the respondent establish a sufficient legal reason for their not being paid? If the necessity of the discharge can ever afford one, it must at all events be

[1] [Reported by Henry D. Gilpin, Esq.]

necessity of the most urgent kind; not such as will enable a merchant, desirous of changing his voyage, to get rid of his seamen without expense. He must have no option. His vessel must be a wreck. If he can repair her he must do so; or if he does not choose, he must provide for his seamen, who are thrown ashore destitute, by a contrary determination. If he is bound, as he undoubtedly is, when his vessel is damaged, to send on the cargo to its place of destination; so is he bound to provide, in the manner the law has pointed out, for the future welfare of his crew, with whom his contract has been suddenly broken. But does the law admit even the absolute necessity of abandoning the voyage, to be a ground for discharging the seamen without any future provision? A previous section seems to designate the only circumstances under which a captain is allowed to leave a seaman, without such provision, in a foreign country, and they are when he dies, absconds, or is forcibly impressed into other service. It does not include the abandonment of the voyage, even when caused by necessity, because it was intended that a provision for such an event should always be made. The owner is to calculate for it exactly as for the other expenses of his voyage; it is as much part of them as are the wages stated in the shipping articles. It is not to be regarded as a penalty for a default, but a contribution incident to navigation. It may be further observed, that although the act of congress declares that the three months' wages shall be paid by the master, and to the consul, yet, that if they are not so paid, and the master has returned, they may be recovered here from the owner, or they will be entirely lost, and the law violated with impunity. 2 Story's Laws, 883, 884; Abb. Shipp. 146, 240; Emerson v. Howland [Case No. 4,441]; Spurr v. Pearson [Id. 13,268]; Orne v. Townsend [Id. 10,583]; Kimball v. Tucker, 10 Mass. 192; Reid v. Darby, 10 East, 143; Sheriff v. Potts, 5 Esp. 96.

Mr. Grinnell, for respondent.

When this libellant was discharged, the captain and the consul took every means to procure for him a speedy return to his own country. His discharge was the result of a misfortune, not of any unjust or unkind act. He has arrived safely here. Is the owner of the vessel, who has already lost so much, to pay this additional charge, namely, forty-two dollars for every seaman, whom nothing but shipwreck, the act of God, prevented him from longer protecting? If so, the provision of the law must be unquestionable. But it is not. 1. It does not extend to the owner, but is confined to the master; the payment is to be made by him, and properly so, for he is the person who discharges the seamen, his is the act which makes the payment necessary, it is one over which the owner has no control. 2. It provides that the payment is to be made to the consul, not to the seaman. It is part of a general system by which funds are provided abroad for destitute seamen. If the master neglected his duty, it was the fault of the consul, who could have compelled its performance on the spot. If the master and the consul both omitted to comply with, or enforce the law, the owner here, who did not cause, and could not prevent such omission, is not to be punished. 3. It never was intended to apply to a case like this. The law regards only cases of voluntary discharge; this was involuntary, owing to the inability of the vessel to perform the voyage. Two events are provided for, the sale of an American vessel in a foreign port, and the discharge abroad of an American seaman with his own consent; in these cases, and in these only, the law interposes to protect the seaman from his own imprudence. To exact additional sums of money from an American merchant who had already lost his vessel by shipwreck, never was contemplated; to make him pay additional wages, when all his freight, the mother of wages, was lost, never was intended. Now the evidence is conclusive, to show that this was not "a sale of the vessel," for she had become a mere wreck; nor was it a discharge of the libellant "with his own consent," for he refused the terms offered by the master and consul. It was in fact a termination of the contract by sheer and absolute necessity; by an act of Providence, which no human prudence could foresee or prevent. Abb. Shipp. 444; The Saratoga [Case No. 12,355]; U. S. v. Mitchell [Id. 15,791]; Ogden v. Orr, 12 Johns. 143; Van Beuren v. Wilson, 9 Cow. 158; Hamilton v. Mendes, 2 Burrows, 1198, 1209.

HOPKINSON, District Judge. By the third section of the act of congress of 28th February, 1803 (2 Story's Laws, 883 [2 Stat. 203]), it is enacted "that whenever a ship or vessel belonging to a citizen of the United States shall be sold in a foreign country, and her company discharged; or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master to produce to the consul, the list of the ship's company," and "to pay to such consul, for every seaman three months' pay over and above the wages which may be due him; two thirds thereof to be paid by such consul to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained to create the fund" therein named. The object and policy of this enactment seems to be, not only to provide the means of the return of every American seaman to the United States, but to induce him to return, by making his engagement on board of a vessel to return to the United States, a condition upon which he is to receive his two thirds of the three months' wages paid to the consul. By the plain terms of the law, too, this money

is to be paid by the master to the consul in the foreign port, who is made the trustee or agent of the United States, as to one third part of the amount paid to him, and of the seaman as to the other two thirds; and it is his duty to account to each of these parties for their respective proportions. It is also to be observed, that the part reserved for the United States is appropriated, by the act, to the "purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, and may be in a foreign port." The act further directs, that the sums thus retained for this fund, shall be accounted for with the treasury every six months. Thus it would seem, that not only the terms of the law, but the objects to be attained by it, to wit, the return of American seamen to their country, and their maintenance when found destitute in a foreign port, all require that this money shall be paid to the consul in the foreign port, where the seaman is discharged, and that no other payment or obligation to pay is recognised or created by the act.

I confess that this would be my opinion if the question came up in this case for the first time, and of course I should consider that no recovery of this additional sum could be had, either from the master or the owner of a vessel here. The court would make itself a volunteer unauthorised trustee of a public fund, without any legal direction for the disposition of it. The case of Emerson v. Howland [supra], reported and recognised in Judge Story's edition of Abbott on Shipping, (page 146,) has been cited to prove the right of recovery here from the owners of the vessel. It was a suit in the admiralty against the owners of a ship for subtraction of wages. The facts were that the seaman was shipped at Norfolk on a voyage to Liverpool, and thence to one or more ports in Europe, and back to the United States. She arrived at Liverpool, and sailed for Archangel, and while on that voyage was captured by a Danish cutter. The ship was finally restored; but ten days before the restoration, the captain discharged all his crew, under the pretence that they refused to remain any longer, and either had deserted or intended to desert. The ship did not pursue her voyage to Archangel, under the pretence that a suitable crew could not be obtained. She took in a cargo and went to Ireland, and thence to Liverpool, and from thence returned to the United States. The libellant received his discharge with the rest of the crew in Denmark, and the captain gave him a due bill for the amount of his wages up to that time. The claim was for wages to the time of the actual return of the ship to the United States, which was the termination of the voyage described in the articles. On the other side it was contended that the seaman was entitled to wages only to the time of his discharge. By this statement of the case, it appears that no question under the act of congress of 28th February, 1803, was involved in it. Nothing was demanded under that act; the circumstances did not bring it within the act. It does not appear that the seaman was discharged by his own consent. It is said that the captain discharged the crew under the pretence that they would desert. The expression implies that this was not the real cause, and without it there is no pretence of any consent on the part of the seamen to their discharge. This charge of insubordination, at least so far as it concerned the libellant, was repudiated by the certificate given by the captain at the time of his discharge, in which he speaks with approbation of his conduct, and states that he has been captured, and was under the necessity of discharging him. This necessity in the common understanding of the language, would be referred to the capture, and not to any menace of desertion on the part of the seaman. In this respect, therefore, that case did not fall under the provisions of the act of congress; nor did the claim of the libellant so consider it. The three months' additional wages were not demanded, but only what was considered to be due under, and by virtue of the contract, to wit, full wages to the end of the voyage.

On the conclusion of the argument by the counsel of the parties, Judge Story, before he decided the case, which he reserved for further consideration, threw out this observation; "In future, where seamen are discharged in a foreign port, I shall decree against the owners the whole of the three months' wages, authorised and required to be paid by the statute of 28th February, 1803. The practice has heretofore been to allow only the two months' wages which belong to the mariner. But the owner ought not to be in a better situation than if he had complied with the terms of the law; and it is the duty of the court to see that it is enforced. The additional month's wages will not, however, be paid over to the mariner, but retained in the registry for the use of the United States, to be applied according to the regulations of the statute." There is certainly not the cautious discrimination in the terms of this declaration, struck off in the course of a trial, which characterises the deliberate opinions of this learned judge. He says, "whenever a seaman is discharged in a foreign port," he will give the additional three months' wages, two of them to the seaman, and the third to the United States. But assuredly he would inquire whether the discharge is such a one as is expressly described in the act of congress; that is, "with the consent of the seaman." He would not, as his language imports, in every case of a discharge in a foreign port, without inquiry for what cause it was done, apply the remedy of the act of congress, which is given only to a discharge of a specified description, leaving the seaman to his ordinary rights and remedies for a discharge of another description. The judge says, that in a future case he

would so decree; but no such decree appears to have been made by him, unless it may be found in the manuscript case in the Massachusetts circuit court, referred to in Abbott on Shipping, but not reported. In a note to his last edition of that work (page 443,) the judge again repeats his opinion, or declaration, made in the case of Emerson v. Howland [supra]. He adds; "But it has been decided that a seaman cannot recover, in a suit at common law, the whole or any part;" and he cites the case of Ogden v. Orr, 12 Johns. 143. Before I turn to that case I will remark, that I presume there can be no difference between the duty of a common law and an admiralty court, in the construction of an act of congress. The object of both courts must be the same, to understand the law truly, as it was intended by the legislature, and to execute it according to that understanding. The case of Ogden v. Orr, in the supreme court of New York, was an action of assumpsit, for wages claimed by the plaintiff, as a seaman, and also for a breach of the shipping articles. The plaintiff had been discharged from the ship at Lisbon, and his demand was founded on the act of congress we have referred to. The plaintiff had left the vessel voluntarily, and with the master's consent, and had received his wages to the time of his discharge. The inferior court had given judgment for the plaintiff; but the supreme court thought there was an error in the construction of the act of congress. After reciting the statute, the court proceeds; "Assuming that the plaintiff below was discharged with his own consent, the question is, whether he can maintain an action for his two thirds of the three months' wages required, in such cases, to be paid by the master. The act directs it to be paid to the consul; it creates no obligation on the master to pay it to the seaman; and the policy of the law seems to have been, that the money shall pass through the hands of the consul, who is made, in some measure, the guardian of American seamen in foreign parts, for the purpose of protecting their rights, and relieving their wants. This three months' pay was intended as a kind of penalty, and to create a fund for a benevolent purpose. It is likewise taking from the consul a commission to which he is entitled by the act. Besides, this is a suit against the owner, and not against the master of the vessel." This judgment of the supreme court of New York was rendered in January, 1815; the dictum of Judge Story was delivered in May, 1816. It is probable that the case of Ogden v. Orr was not then known to the circuit court of Massachusetts. It does not appear to have been noticed either by the counsel or the court; and the volume containing it was not published until some time in 1816.

With these views of the subject it would be my duty to dismiss this libel, if the case did not present itself to the court under the protection of a judge who is entitled to high respect from every court, and especially upon a question of the description of that now under consideration. I am always unwilling to disturb such opinions, although they do not come in the shape or with the authority of judicial judgments. It is very desirable that an uniformity of decision, particularly on the construction of acts of congress, should prevail in the courts of the United States; and to this object I would yield much of my own opinions. If the dictum of Judge Story may be thought to have been hastily thrown out, yet we find he holds to it in the notes in his edition of Abbott on Shipping, already cited, (pages 145, 443.) I cannot but hesitate to oppose myself, without a more deliberate examination of the question, to this learned and enlightened judge, and therefore have reluctantly determined to sustain this suit; but, at the same time, I shall not hold myself to be bound by this decree, if at any future time, on a more full argument, or by my own more mature deliberation, I shall find my own impressions of the law to become deeper and stronger. As to the facts of the case, it is clear to me that no such necessity existed for breaking up the voyage and discharging the crew, as will take from it the character of voluntary discharge. The vessel was not greatly damaged by going on shore; or, certainly not so much so but that she might have readily been put in a condition to proceed on her voyage.

Decree: That the three months' wages be paid by the respondent; two thirds thereof to be paid to the libellant, Joseph Pool, and one third for the use of the United States, with costs.

Case No. 11,270.

POOLE et al. v. NIXON et al.

[9 Pet. Append. 770.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1834.

EQUITY PRACTICE—BILL OF REVIEW—WHEN ALLOWED—AFFIDAVITS—NEWLY DISCOVERED EVIDENCE—NEW MATTER—IN WHOSE FAVOR—REHEARING—PENDING APPEAL—REVERSING DECREE OF SUPREME COURT.

[1. Bills of review are an anomaly in the system of jurisprudence prevailing in England and the United States. Cognizance of them rests entirely on Lord Bacon's order by which they were first allowed, and the practice founded thereon. They are not favored, and the party applying for leave to file such a bill must not only perform, or give security for the performance of, the decree sought to be enjoined, but must support his application with a strong affidavit, showing that the new matter upon which the review is sought was not known to the party or his solicitor, and could not have been ascertained, at the time of the original decree.]

[2. The common affidavit to original bills cannot be received in such a case, but the affidavits must contain the averment, not only of the party, but of all other persons whose negligence may be imputable to him, that they could not possibly have secured the evidence claimed to be new at the hearing or before the decree.]

[1] [Reported by Richard Peters, Jr., Esq.]

[3. One J. petitioned for leave to file a bill of review, claiming to have new evidence upon a question of pedigree, which was the decisive question in the original suit, which evidence would suffice to alter such decree. It appeared that the facts upon such question which the new evidence tended to prove were all within the knowledge of the petitioner long before the rendition of the decree; that the most trustworthy evidence of such facts was accessible to the petitioner in the parish registers in England, where it should and could have been found, and that the new evidence consisted of memoranda and family records of a deceased person, confirmatory of the evidence of such registers, which memoranda and records were also insufficient, of themselves, to prove all the facts necessary to establish the petitioner's claim. *Held*, that no case was made out for a bill of review.]

[4. An entirely new title, in a new party, claiming adversely to all the original parties to a suit in which a title was established, cannot be considered newly-discovered matter, for the purpose of opening the decree in such suit by a bill of review.]

[5. A bill of review lies only in favor of a party or privy to the original suit, or of one who is aggrieved by the decree. Accordingly, where a decree had been rendered in favor of one W., as devisee of M., upon a finding that he was the heir of M., *held* that one J., not a party to the original suit, who claimed to be the true heir of M., and so entitled to the devise, was not entitled to file a bill of review.]

[6. A court of equity has no power to order a rehearing of a cause after the close of the term at which a final decree therein is rendered, but thereafter new parties and new matter can be introduced, as a ground for a prayer for revision and reversal of the decree, only by a bill of review.]

[7. A circuit court of the United States has cognizance of a bill of review, after an appeal to the supreme court from the decree sought to be reviewed, if it is brought on newly-discovered evidence of facts, though not if it is for error apparent in the body of the decree, and may permit such a bill to be filed as an amendment by adding new matter and parties to the original record.]

[8. Whether, on such a bill filed, the circuit court can reverse, for error in fact, a decree affirmed by the supreme court, quære.]

On a motion for leave to file a bill of review.

BALDWIN, Circuit Justice. To the April term of this court, in 1828, a suit in equity was brought by Samuel Packer against Henry Nixon, executor of the last will of Matthias Aspden, to recover the balance of the estate remaining in his hands unadministered; in the progress of the suit, other parties were added as complainants, among whom was John Aspden of Lancashire, England. He claimed as heir at law to the testator, by descent from William Aspden, whom he alleged to be the eldest uncle of the testator. On a reference to the master, he reported the said John Aspden to be the heir at law; which report, on exceptions taken, was confirmed by this court in May, 1832. In December, 1833, the cause came on to a final hearing, when a final decree was pronounced in favor of John Aspden, and the bill was dismissed as to all the other complainants; from this decree an appeal was taken to the supreme court at January term, last, which is now depending. On the 17th June, last, Jennet Jones, and Thomas Poole and Mary, his wife, filed their petition, setting forth that the said Jennet and Mary are the heirs at law of the testator, by lineal descent from John Aspden, the eldest uncle of the testator, and as such pray to be made parties to the original suit. They also ask leave to file their supplemental bill, and bill of review to reverse the decree so far as it declares John Aspden of Lancashire to be the heir at law of the testator, and directs the executor to pay him the balance of the estate. This is an application to the discretion of the court to allow an amendment, introducing new parties and new matter into a suit closed by a final decree on its merits; and, if the amendment is allowed, to revise and reconsider the decree as it may be affected by evidence offered by the new parties. If the amendment is refused, the petitioners are precluded from the benefit of a bill of review, however much the decree may affect their rights; on the other hand, if it is once allowed, the respondents must plead, demur, or answer to the new matter as if it were set out in an original bill (Dexter v. Arnold [Case No. 3,856]; 1 Vern. 418; Mitf. Eq. Pl. 236; 2 Madd. 543), or disprove it (Beames, Eq. Pl. 314).

The preliminary question, whether the bill shall be filed, is therefore an important one in all cases, and in some the only one; for the new matter may be of the most conclusive effect, if once it is introduced into the cause, and its truth admitted or made out in proof. In this case it is especially important to examine it in all its bearings, as well from the novelty of such applications in the courts of the United States, as the peculiar situations of the parties, and the cause which it is sought by the bill now offered to review and re-examine on its merits; and as they involve principles highly interesting to suitors, the profession, and the public, without taking into consideration the magnitude of the sum in controversy.

Bills of review in courts of equity are an anomaly in the system of jurisprudence which prevails in England and this country; no principle is better settled, or of more universal application, than that no court can reverse or annul its own decrees or judgment for errors in law or fact, after the term in which they are rendered, unless they have been entered by mistake of the clerk. Medford v. Dorsey [Case No. 9,389]; The Palmyra, 12 Wheat. [25 U. S.] 10; [Cameron v. M'Roberts] 3 Wheat. [16 U. S.] 591. The supreme court of the United States cannot reverse its own decisions [Martin v. Hunter] 1 Wheat. [14 U. S.] 355. They are conclusive on the rights of the parties. Same point [Cohens v. Virginia] 6 Wheat. [19 U. S.] 387. And so are the judgments of inferior courts while they remain unreversed. Courts of common law can reverse their

judgments only in one case. A writ of error coram vobis lies on an error in fact; but for an error in law they cannot reverse their own proceedings, nor can they grant a new trial on newly-discovered evidence after final judgment. A court of equity cannot reverse their decree, or rehear the cause, after a final decree enrolled; till then it is open for both purposes, but after that is done it is as a final judgment at law. Such was the rule in equity as late as 15 Jac. I., when a bill of review for a new matter was refused. Cary, R. 30. The law considers the record of a cause to be in the breast of the judges while the court is in session; they may alter or amend any entry of their proceedings during the term; but when they have made a record of their acts, and the term is closed, they become adjudicated matters, which give to the parties rights that cannot be taken from them, otherwise than by the powers of an appellate court. Judgments at common law are reviewed on writ of error as to matters of law; on matters of fact they cannot be revised by the court of error; this is not only a rule of the common law, but an express provision of the twenty-second section of the judiciary act, and of the seventh amendment of the constitution.

The question before the appellate court is, was the judgment correct; not the grounds on which the judgment professed to proceed. [M'Clung v. Silliman] 6 Wheat. [19 U. S.] 603; 4 Dow, P. C. 143. Final decrees in equity may be examined on appeal, both as to matters of law and fact; the appellate court gives such a decree as the circuit court ought to have given on the whole case. Jud. Act, § 24 [1 Stat. 85]. But bills of review differ from writs of error and appeals; the former being by the court which renders the decree, the latter by a superior tribunal. Under an appellate authority, conferred by statute or sanctioned by usage, defining the cases in which it can be exercised, if no power is given to any court to revise the proceedings of another, they become final and conclusive as to all matters adjudicated by them, whether in law, equity, or admiralty. No act of parliament has given to any court the power of taking cognizance of appeals from courts of equity, and none had assumed it before 1620, 1621. Up to 13 Jac. I., there was no precedent of even a prohibition to a court of equity in a county palatine. 1 Rolle, 246, 331. The first that issued was during the Protectorate, in 1651. 1 Rolle, Abr. 318. Nor to the stannary court in the duchy of Cornwall; an appeal lay only to the Prince of Wales, and, if there was no prince, then to the king in council. 1 Rolle. Abr. 246; 3 Bulst. 116. About this time the court of king's bench claimed the power of issuing writs of prohibition to the chancellor to prevent him from making a decree in matters cognizable at common law, or from interfering with the judgments of the courts of common law, for which Lord Coke gave this reason: "That the rules and judgments of courts of equity are as binding as the laws of the Medes and Persians, not to be altered, upon which no writ of error lies; they therefore ought to be prohibited before judgment, or the party has no remedy" (2 Bulst. 197, 215; Cro. Jac. 335, 336), except by petition to the king (3 Bulst. 118), who might refer the matter to the judges, to reverse the decree if they should think it ought to be (4 Inst. 85, 86; 42, 43 Eliz.; 3 Bulst. 118). The reason of applying to the king was that the chancellor was his representative; sitting and judging in his name, and by his authority; his decrees were the decrees of the king, not to be altered without his leave. Gilb. Forum Rom. 185, 183. The assertion by the king's bench of the right to grant prohibitions to the chancellor, led to a controversy which brought Lord Coke to his knees before the king in council; and it was determined, after a reference by the king to Lord Bacon and others, by a declaration of the king, that he had the sole power of deciding the jurisdiction of the several courts, and ordered that "the report made to him, with his proceedings thereon, should be enrolled in chancery, there to remain of record, for the better extinguishing of the like differences and questions that may arise in future times." 1 Ch. Rep. App. 1–50; Cary, 181–183 (A. D. 1616).

From this time there was no power in any court to revise the decrees of the chancellor (1 Ch. Cas. 44, 45), until Lord Bacon made an order on the subject of bills of review by the chancellor himself; but there was no appeal from his decision on a bill of review, or any other subject, until the house of lords, in 1620, 1621, sustained an appeal from a decree of Lord Bacon (3 Journal of the House of Lords, 50, 61–63, 67, 76, 78). This was held by the commons to be a novelty, and was resisted from time to time up to 1704. 3 Bl. Comm. 454; 1 Deb. House of Commons, 210, 240; 3 Deb. House of Commons, 302, 308. Since which time it has been at rest; "it has been submitted to, because it has been thought too much that the chancellor should bind all the property in the kingdom without appeal (Gilb. Forum Rom. 190, 191); and it is reasonable to have the examination of their sentences in the parliament, as well as of judgments at common law" (Show. Parl. Cas. 81).

The cognizance of bills of review rests entirely on the order of Lord Bacon; but, as it has been acquiesced in and acted on from the time of its adoption, it forms a part of the law of equity which has been adopted by the constitution of the United States as applicable to all cases in equity within the jurisdiction of the courts of the United States. [Parsons v. Bedford] 3 Pet. [28 U. S.] 446. This order is to be considered as an act of parliament or of congress, conferring on courts of equity a new power, which must be exercised conformably

to its provisions, and, being in derogation of the principles of the common law, must be construed strictly, so as to confine its application to the specified cases. When such a case arises as is proper for a bill of review, the final decree of the court of equity becomes the subject of appeal to the supreme court, in the same manner as a decree on an original bill; but no appeal lies upon any order or interlocutory decree; it is confined to those decrees which decide finally on the rights of the parties before the court. Jud. Act, § 22.

The present application is for an order to amend the proceedings in the original suit, the refusal or making of which is a proper ground for appeal in England (3 Atk. 34; 4 B. P. C. 465, 486; Gilb. Forum Rom. 188, 189), but not here, because it is not a final decree, and because it is a matter purely in the discretion of the court, with which the supreme court do not interfere in ordinary cases on questions of amendment ([Mandeville v. Wilson] 5 Cranch [9 U. S.] 15; [Walden v. Craig] 9 Wheat. [22 U. S.] 576; Chirac v. Reinicker] 11 Wheat. [24 U. S.] 302). The same rule applies to that part of the petition which prays to have the decree opened for revision on the new matter alleged, being in the notion of an application to a court of law for a new trial. [Barr v. Gratz] 4 Wheat. [17 U. S.] 220; [U. S. v. Buford] 3 Pet. [28 U. S.] 31, 32. The supreme court never give directions respecting amendments, but leave that question to the court below. [Skillern v. May] 6 Cranch [10 U. S.] 267. They will reverse a decree for the want of proper parties; but in such case "remand the cause for farther proceedings according to law and justice." [Ex parte Watkins] 3 Pet. [28 U. S.] 204.

Bills of review are not favored in equity. If they are founded on the discovery of new matter, the petitioner must make a deposit to cover the costs of the application. 2 Atk. 139. And the bill must be filed with the special leave of the court. Id. 139; Dickens, 612, 614, 616; Mitf. Eq. Pl. 71; 2 Ves. Sr. 598; 1 Johns. Ch. 490, 491. Though, if the bill is filed without leave or deposit made, the court will give leave to make it, and have it considered as made before the bill filed. Dickens, 223. The party praying for the bill of review must perform the decree; if for money, he must pay it; if to convey land, he must give up possession. Toth. 42; 2 Eq. Cas. Abr. 175, 176, pl. 13, note. But, if the act decreed to be done will extinguish the party's right, its performance will be spared till the bill of review is determined, but the sparing must be by the order of the court. Toth. Append. 41–47; 2 Har. Ch. 126; 1 Vern. 117, 264; Pr. Reg. 52; Bohun, 382; Gilb. Forum Rom. 185, 187; 2 B. P. C. 24, note; 2 Freem. 88. Or, if the party is unable to perform the decree, he must give good security or be committed (1 Ch. Cas. 42; Mitf. Eq. Pl. 70; 2 Johns. Ch. 491; 3 Johns. Ch. 128); unless he is an executor, who may have a review without performance (2 Eq. Cas. Abr. 175; 12 Mod. 343). The reason of imposing these conditions is obvious; "there is wisdom in the establishment of such a provision, and it ought to be duly enforced; the object is to prevent abuse in the administration of justice by filing bills of review for delay and vexation, or otherwise protracting litigation to the discouragement and distress of the adverse party." 2 Johns. Ch. 491. These rules form a part of the law of equity on bills of review in England; subject to which, they have been introduced into the equity jurisprudence of the United States.

The party must make a strong affidavit (16 Ves. 349) that he had not any knowledge of the new matter set forth in his petition and bill of review, at the time of the hearing, or when the original decree was given; that it has since come to his knowledge; and that it could not have been produced or used then. Mitf. Eq. Pl. 66; 2 P. Wms. 284; Gilb. Forum Rom. 187. The words of Lord Bacon's order are, "which could not possibly have been used at the time of the decree passed" (Toth. Append. 41, 42), which is adopted in the form of the affidavit (1 Har. 64, 76), the most approved treatises (Pr. Reg. 51; 2 Har. Ch. 123; 3 Bl. Comm. 454), and in judicial decisions of the highest authority (3 Johns. Ch. 126; 2 Johns. Ch. 492; 2 B. P. C. 108; Bohun, Curs. Can. 381; 1 Ves. Sr. 434; 3 Atk. 37). The affidavit must be by the party, and not the solicitor (4 Vin. Abr. 415; 2 Eq. Cas. Abr. 175, 176, pl. 13), unless good reasons appear for the party not making it. The court may hear counter affidavits, or other proof in opposition (Dexter v. Arnold [Case No. 3,856]) to the affidavit of the party, to show that he had knowledge of the alleged new matter before the decree, or that he had been negligent in searching (1 Ves. Sr. 435; Mitf. Eq. Pl. 70; 3 Johns. Ch. 125; 2 Browne, Parl. Cas. 25). They require to be satisfied that the new matter was not in the knowledge of the party, his solicitor or agent (2 Atk. 534; Dickens, 612, &c.), or country attorney (3 Atk. 35); the knowledge of either being the knowledge of the party (4 B. P. C. 465, 486). The party must have used active diligence (16 Ves. 351), or a reasonable diligence to procure the evidence before the decree (2 Atk. 40; 2 Johns. Ch. 491). If negligence is imputable to him, leave will not be granted. 1 Ch. Cas. 43; 4 Vin. Abr. 409, pl. 18; Bohun, Curs. Can. 384; 2 Eq. Cas. Abr. 176; 2 Browne, Parl. Cas. 109, 110; Gilb. Forum Rom. 187; 1 Hen. & M. 15. Inattention or misjudgment is no excuse (Prevost v. Gratz [Case No. 11,406]), as if the party had the paper in a trunk in his own possession, but did not know of it in time (Prevost v. Gratz [supra]); unless they had been in a distant place, or the party had no reason to believe that they were in the trunk, &c., in which

they were found (Gilb. Forum Rom. 187, 189; 1 Ves. Sr. 435; 16 Ves. 354; 3 Johns. Ch. 127; Dexter v. Arnold [supra]). So if there was enough in the knowledge of a party or his solicitor to put them on an inquiry; if by what was before him he was sufficiently apprised to enable him to acquire complete knowledge, or enough appeared in the bill to call upon a party using reasonable diligence to bring forward the whole case; he is not allowed to file his bill. 16 Ves. 350, 354. So if the paper discovered has been found in the appropriate office, without any previous search, as in the case of a vicar's bill for tithes, it is deemed negligence not to have searched in the augmentation office. 4 Cond. Eng. Ch. 114, 115; Jac. 243. It will not avail a party that he was prevented from offering the evidence by the advice of one of his counsel in the absence of the other. 3 Munf. 112, 115.

These rules show the caution with which the courts of equity act in the first attempt to disturb an enrolled decree; they are much more rigid than in any other case, showing that a bill of review, for newly-discovered matter, is considered as an extreme remedy for extreme cases, which public policy and peace alike require to be administered with extreme care, lest the sanctity of final decrees may become of too easy or common violation. These, too, are cases in which the greatest danger exists, if not of perjury, at least of the most latitudinous oaths in the affidavits of interested parties; the court must hear them in all cases; they must act in conformity to them if they are full, clear, and not contradicted; and, when they have given leave to file the bill, the new matter becomes incorporated into the proceedings in the original cause, as it is stated in the petition and bill of review. Then the usual course is for the defendant in the bill of review to plead and set forth the original decree, and then demur to the new matter set up for opening the enrollment; the court then judge from the face of the decree whether the new matter, as admitted by the demurrer, is sufficient for its reversal. Finch, 36, 209; 2 Atk. 534; 3 Atk. 627; 1 Vern. 392; 4 Hen. & M. 24, 34. Or the defendant may take issue on the truth of the new matter set up, when the court will open the publication to receive and decide on the evidence offered; if the facts, as alleged, are then established, the court review and revise the decree upon those facts. Dexter v. Arnold [supra]. These reasons induce a court to examine particularly into all these preliminary questions; not only to avoid interminable litigation, but doing injustice to a party in whose favor their deliberate decree has been made, by suffering it to be questioned on a suspicious application, founded on alleged new matter, or when that matter, as set forth, is not clearly relevant material, and would or might have led to a different result if it had been known and used at the hearing. Mitf. Eq. Pl. 66, 67; 1 Ves. Sr. 434; 2 Ves. Sr. 600; 3 Atk. 35, 36; 3 Johns. Ch. 127; 1 Hen. & M. 15; Dexter v. Arnold.

Few cases can arise in any court which call for more circumspection and deliberation in their every step than this; the final decree complained of was not rendered till the suit had been depending for more than five years, during which every preliminary question was contested before the master and the court, whether it was of law or fact. The case turned on two questions: First, the construction of the will of Matthias Aspden, the younger; and, next, on who was his heir at law. There were competent parties before the court, who were entitled to the fund on any construction which the court might put on the devise; an heir at law on the father's side, an heir at law on the mother's side, and the next of kin to the testator in all the ramifications of genealogy; all claiming from the executor, who was before the court with the fund in his hand, subject to their order. The heir at law on the father's side was identified in the person of John Aspden of Lancashire, England; he appeared, was made a party, and no one contested that character with him; the only controversy was as to his descent from the common ancestor, Thomas Aspden, of Simonstone, by legitimate succession. That fact was contested by the other parties before the master on the evidence before him, on an exception to his report, founded on the insufficiency of the evidence before him to prove the fact. The court deemed the evidence legally sufficient, and confirmed the report in May, 1832, from which time the question was no longer agitated; the decree assumed the fact of heirship in the person of the said John, and was founded upon it, as one not then in controversy; the only question open after the confirmation of the master's report being the construction of the will. It was not suggested to the court that there were parties in interest not before them; it was evident that the fund was fully represented by some one of the parties, for there was no character in which any one person could take under the will, which was not completely filled by some of the claimants. It was not, therefore, a case in which the court could suspend their decree for the want of parties, or one in which an appellate court could, on appeal, reverse, on that ground, a decree in favor of either description of claimants. [Russell v. Clark] 7 Cranch [11 U. S.] 87, 98.

As the counsel of the petitioners have alluded to an expression of the court in giving their opinion on the master's report and in rendering the final decree, we think it proper to observe that on the question of heirship the evidence was not so full or clear as it might have been; we gave our opinion upon it with some misgivings as to the fact of William

Aspden being the oldest brother of the testator's father. But then we had only to judge of its legal sufficiency, of which we had not then, and have not now, a doubt that from the facts before the master the legal conclusion was inevitable. What we said in reference to a future examination of that question was not intended, and could not be understood, as referring to any other revision than was usual in courts of equity, and consistent with its rules, that is, before a final decree was pronounced. When, in delivering the opinion, we assumed, "for the present," that John Aspden, of Lancashire, was the heir at law, it could not be intended that we would allow a revision of that fact after our power over the decree had terminated by an adjournment. The obvious as well as intended meaning was that up to the time of a decree for final distribution the question might be opened; and in the act of rendering that decree we did not consider it as finally closed, so long as by the rules of law it could be kept open,—that is, during the term. On a proper case being presented, new parties might have been introduced, the publication opened, new evidence received, and the cause reheard on the question of heirship, or any other matter proper for a rehearing; but when the term had closed upon a final decree on the merits between competent parties, ordering the payment of the fund to a claimant, and dismissing the bill as to all others, it was too late for a rehearing. There was no suit depending, no cause to rehear, no fact to decide, no question of law to examine; everything which had accrued in the cause had become a res adjudicata; and, unless for the purpose of appeal, there were no parties in court except the plaintiff John Aspden, and the executor, between whom all past questions were finally adjudicated, and no new ones could arise, otherwise than on the execution of the decree. It is, then, no case for rehearing, however clear may be the justice or abstract right of the petitioners, had they asserted their claim within that time during which the court had power to decide upon it. In the intermediate time between the pronouncing and enrolling the decree in England, or between the decree and the rising of the court at the end of the term in this country, a supplemental bill in the nature of a bill of review may be filed, making new parties, and introducing new matter as the ground of a prayer for rehearing. Mitf. Eq. Pl. 71; 2 Ves. Sr. 598; 2 Johns. Ch. 490; 2 Atk. 534; Dickens, 612, 616; 17 Ves. 177, 178; 2 Atk. 40. After the decree is enrolled, or the term elapsed in which it is given, new parties or new matter can be introduced by a bill of review, as a ground for a prayer for revision and reversal of the decree. 17 Ves. 177; Dexter v. Arnold [Case No. 3,856]. The supplemental bill, in the nature of a bill of review, and the bill of review, depend on the same rules as to granting or refusing them. 17 Ves. 176; 2 Johns. Ch. 490. Their prayer must be certain and specific as to the relief prayed (2 Anstr. 551), and not in the alternative (17 Ves. 177, 178; Dexter v. Arnold [supra]). When the petition is presented in time, it rests in the discretion of the court to allow it to be filed, in the exercise of which they will determine whether a proper case is made out (5 Mason, 315); but if the term elapses, they cannot act upon the petition, without an abuse as well as excess of jurisdiction; the court has no power to receive a supplemental bill after a final decree enrolled, nor to revise the decree in any other manner than a bill of review, or allow either to be filed, unless in the cases and for the causes specified in the rules which form the law of equity; discretion can be exercised only on the existence of the required case and cause, but on no other subject; the authority to open the decree is special, and must be pursued strictly. The chancellor must decide whether the given state of facts brings the case within the rules; but if he thinks they do not, he cannot permit the petitioner to proceed further.

This is the interesting question in the present case,—have the petitioners made out a case for a bill of review under any circumstances? If so, are those presented a sufficient cause for opening the decree? If they had done these, there is abundant reason for believing that their rights have been overlooked, and that the abstract justice and equity of their claim would have prevailed, had it been asserted in time. The evidence which is before us judicially, with that which has been known otherwise, makes out a case (till explained) of an imposing character as to original right, long neglected, and now for the first time asserted in this court. On the other hand, the case of the defendant is one not without its strong appeals, on account of the persevering efforts of years to disincumber his claim of the adversary pretensions of a host of claimants. He has hitherto been successful in establishing his right, according to all the forms and rules of law, so that it has become as perfect as the decree of this court could make it. If it shall remain unreversed, a princely fortune awaits him as the heir at law; it has been recovered by the exertions and active vigilance of the defendant, while its pursuit in this country was abandoned for two years after the death of the former owner, by the new petitioners, who first assert their claim after the defendant has removed all difficulties interposed by his former adversaries. If the prize is awarded to the petitioners, they are bound to pay no salvage; if retained by the defendant, the actual owner is entitled to no compensation for his lost right; in either event there must be abstract injustice; which, as individuals, it might appear to us to be the case of greater hardship, is not easy to say; as judges, our course is plain. With the relative claims of the two parties as they stood at the death of Matthias Aspden, we have now nothing to do, but must examine them as they were when this petition was filed; one comes before us on his original right; the other has, in addition, our final decree in favor of his; whether we have acted erroneously is not

for us to say; the cause is now out of our jurisdiction, unless it can be again brought within it by the matters set up now. Whether it can or cannot, it is not for us to look to consequences, we must follow the course prescribed by law, to ascertain, first, our power according to the rules of equity to open this decree on the case presented; next, the sufficiency of the causes alleged for its exercise. The importance of the case, in all respects, induces us to take a view of all the points it involves, as it is desirable that the general principles which govern cases of this description should be so explained as to leave, for the future, less doubt on their application than has attended this.

As the authority of a court of chancery to review its decrees rests on the order of Lord Bacon, we must consider it as a test to which all applications are to be applied. "No decree shall be reversed, altered or explained, being once enrolled, but upon bill of review; and no bill of review shall be admitted, except it be upon error in law appearing in the body of the decree, without farther examination of matters in fact; or he shall show some new matter which hath risen in time, after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof which hath come to light since, and after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be granted by the special license of the court, but not otherwise." Toth. Append. 41; Balt. Law Trans. 279, 280. Miscasting by an error in auditing or numbering, may be explained and reconciled by an order without bill of review. Toth. Append. 41, 42. The terms "imposed on the party" are specified as before referred to. Toth. Append 42–47. These orders have continued to be respected as the basis of equity jurisprudence till the present day (3 Atk. 35; 3 Johns. Ch., 126; 16 Ves. 350), both in England and the equity courts of the different states and of the United States (Dexter v. Arnold [supra]).

The first question in order is whether a bill of review can be filed in this court during the pendency of the cause in the supreme court by appeal. The question has never been decided in the courts of equity in England. 16 Ves. 89. In a late case on an appeal from the rolls, the chancellor decided on a petition presented for leave to file a bill of review, without adverting to its being on an appeal. 4 Cond. Ch. 114. So that we are without any direct decision on the point whether one could be filed with the master of the rolls, after an appeal to the chancellor, or before him after an appeal to the lords. Their appellate power, as we have seen, is an assumed one, from the necessity of the case; being neither conferred nor regulated by statute, it may, and has been, exercised according to the exigency of the case and the time, as either may call for the adoption of new rules or orders, which partake more of the character of legislation than the mere regulation of the forms and modes of proceeding in the practice of the courts. 4 Bridg. Eq. Dig. 50, pl. 49. Not restrained by any act of parliament, they permit or prohibit the action of courts of equity on cases appealed from, according to their discretion. By their ancient practice an appeal stayed all proceedings in the cause, and it continued—till the frequency of appeals, and their abuse, for the purposes of delay, induced the house of lords to alter it, and permit the chancellor to proceed after appeal; this was deemed indispensable, as an appeal might be taken on every order on a petition, motion, or interlocutory decree in the process of a suit in equity. 15 Ves. 184; 16 Ves. 213, 218; 18 Ves. 453; 1 Johns. Ch. 327; 3 Johns. Ch. 66, 68, 123, 162. This alteration of the practice took place, as Chancellor Kent says, in 1798. 1 Johns. Ch. 80. It is not followed in New York, where an appeal suspends proceedings on the point appealed from, but the chancellor may, in his discretion, proceed if the court of errors is not in session, or in possession of the case. 1 Johns. Ch. 81, 327; 3 Johns. Ch. 66, 68. In that state, too, that court has power to render its practice conformable to that of the house of lords, to prevent the abuse of appeals on orders and interlocutory decrees. 1 Johns. Ch. 327, 328; 3 Johns. Ch. 69, 123. And the court of chancery acts on the same principle in proceeding after appeal (3 Johns. Ch. 162, 166), not because the nature and effect of an appeal is not to suspend proceedings below in equity as a writ of error does in law, but because the exception is made from necessity. Lord Eldon says that in doing so "he acts by the authority of the lords; such is their clear understanding; as they permit the practice, it amounts to their authority." 9 Ves. 316. Chancellor Kent adopts this reason. 1 Johns. Ch. 80. It may therefore be taken as the settled practice in England and New York that an appeal does not stay proceedings, unless an order to that effect is made by the chancellor or the special order of the house of lords or court of errors, which either is competent to make; if not made, then the chancellor may proceed in the cause to its termination, when an appeal may be taken on the whole proceedings in the cause. 9 Ves. 319; 15 Ves. 184; 14 Ves. 585. "It is more expedient" (as Lord Eldon says) "to make the application to the house of lords than to the court below, as the order made upon that occasion may be the subject of appeal, and it is difficult to determine how far appeals may go" (15 Ves. 182), and if the court could not proceed after an appeal it "would make a chancery suit the greatest nuisance" (9 Ves. 318). It cannot be denied that these are powerful reasons for the prevailing practice, when the inferior and appellate courts have power to adopt it; they cannot, however, be applied to cases of appeal from the decrees of this court, which

must be final ones on all the matters in controversy between the parties, leaving nothing on which there is a power to act, except in their execution. The appeal is by a right given by a statute, of the benefits of which the party cannot be deprived, if he gives the security required by law. [Penhallow v. Doane] 3 Dall. [3 U. S.] 78. It is in the nature of an appeal or writ of error, to operate as a supersedeas ([Penhallow v. Doane] 3 Dall. [3 U. S.] 87, 118; [Taylor v. Brown] 5 Cranch [9 U. S.] 253), to the execution of the decree or judgment appealed from. The record is removed from the inferior to the superior court, leaving the former nothing to act upon. 15 Ves. 182. When the appeal or writ of error is matter of right, no terms can be imposed; if it is matter of favor or indulgence, they may be; as in appeals from the rolls to the chancellor, or rehearings, these are matters of indulgence known to no other than courts of equity; the proceedings at the rolls are not suspended except by special order, but that originates in a special order of Lord Clarendon, and is not founded on any general principle of the law of equity. 9 Ves. 317, 318.

When final judgments or decrees are removed, there is no proceeding to suspend except execution; the benefit of the appeal would therefore be lost if the court below could enforce it; hence has resulted the rule which makes them operate as a supersedeas. An appeal to the house of lords brings the cause and record before them (Gilb. Forum Rom. 190, 191), and by the ancient practice prior to 1798 stayed all proceedings in chancery (15 Ves. 184), and yet does in Scotch appeals (Id. 182). When the cause is once before the house of lords, it was necessary to obtain a special order that the respondents be at liberty to go on with the account before the master notwithstanding the appeal. 2 B. P. C. 108; M'Cartney v. Ludlow, 21 Journal House of Lords, 82. In the case of Popham v. Bampfield, the court of chancery proceeded in the account after an appeal, when the house was prorogued. 1 Vern. 344. This, however, was a special case; the appeal was made in June, 1685, and no parliament sat till 1689. This circumstance made an exception to the rule, which seems not to have been departed from in any other case till the late practice was introduced. 8 B. P. C. 2, 6. In 1686, during that long intermission of parliament, the chancellor, in the case of Barbon v. Searle, permitted a bill of review to be filed, after a decree of dismission had been affirmed in the house of lords, on the ground that the lords were not then in session to give directions; and if they were, yet as answers to petitions to them were not on oath, and the house had referred the cause back to be reheard as to one of the parties, the chancellor conceived that defendant ought to answer so as to enable the plaintiff to make application to the lords; the demurrer was overruled, defendant ordered to answer, but the plaintiff was not to proceed any further without the special order of the court. The plaintiff's counsel did not pretend that the court could alter or reverse the order of the house, but put the case on the same ground as the chancellor, alleging, as their reasons, that as the house could not act in the interval, there was a necessity for the action of the chancellor, or the party by death or otherwise might lose the benefit of the bill. 1 Vern. 416, 418. Vide 1 Johns. Ch. 196. In a prior case the defendant was decreed to answer a bill of review or demur on the errors assigned after the dismission of an appeal to the house of lords; but it was on an allegation that the cause was carried by collusion without defense, and the benefit of the order of dismission was saved to the defendant. Finch, 468, 469. This seems to be the utmost extent to which any court of equity have gone after an appeal; when they have gone further and attempted to review or reverse what had been done in the house of lords, the latter have asserted their powers as an appellate court.

In the case before referred to, of Popham v. Bampfield, a bill of review had been filed in chancery, after a decision on appeal; on a petition to the lords, suggesting that that court had proceeded to examine into an order made by them for the purpose of reversing it, the party and his solicitors were ordered to attend the house. 15 Journal House of Lords, 328. A committee was appointed to report what ought to be done (Id. 330), who reported that, as the chancellor had not proceeded on the bill of review, nothing need be done by the house (Id. 332, 8 B. C. 3). After this a petition was presented to the lords, praying directions by them to the court of chancery, to proceed on the bill of review. The petition was dismissed, "in regard, it appeared, that the motion therein complained of had been already settled by the house." 8 B. P. C. 8; 16 Journal House of Lords, 197. These cases show that, by the ancient practice, the court of chancery, in cases of necessity, might proceed, after an appeal from an interlocutory order, to settle an account before a master; that they might receive a bill of review after a decree of dismission in the house of lords, and act upon it by their special order; but that they viewed it as a contempt in the party and his counsel to examine their decree for the purpose of reversal by a bill of review in the court of chancery. This course seems to accord with the rules of equity, and to be particularly applicable to the judicial system of the United States. The equity powers of the supreme court, in ordinary cases, are exclusively appellate by the constitution; they cannot take cognizance of an original bill in equity for the want of jurisdiction; and as an appellate court cannot sustain an application for a bill of review (4 Desaus. Eq. 13, 14), or an appeal from an order of the circuit

court refusing it, as it is not a final decree, and no act of congress has extended their appellate power to such a case (1 Hen. & M. 557, 559; s. p. [Young v. Grundy] 6 Cranch [10 U. S.] 51; [Gibbons v. Ogden] 6 Wheat. [19 U. S.] 448), and as it is a matter of discretion.

A bill of revivor, a supplemental bill or bill of review, is an original bill, so far as it relates to the court in which it is filed, and any action upon it is by the original power of the court which gave the decree over its own proceedings; appellate power is exercised only over the proceedings of inferior courts, not on those of the appellate court. So, on the other hand, the inferior court, after the action of the appellate court, is bound by its decree as the law of the case, and must carry it into execution according to their mandate; they cannot vary it or examine it for any other purpose, or give any other or further relief. 1 Johns. Ch. 194, 196. They cannot sustain a bill of review on any matter finally decided on appeal (1 Hen. & M. 557, 558), or for error apparent in the decree of the appellate court (3 Munf. 228; Mitf. Eq. Pl. 69), or intermeddle with it further than to settle so much as had been remanded. 1 Johns. Ch. 196. The court of appeal decides on the whole case, and gives such decree as the court below ought to have made. Such is the acknowledged doctrine of courts of review (1 Johns. Ch. 194), and the express direction of the twenty-fourth section of the judiciary act (1 Story, Laws, 610 [1 Stat. 85]). And the supreme court remands the cause to the circuit, with a mandate to execute their decree. When this is done they will not grant a rehearing, and, on a subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate. [Browder v. McArthur] 7 Wheat. [20 U. S.] 58; [Himely v. Rose], 5 Cranch [9 U. S.] 313; [The Santa Maria] 10 Wheat. [23 U. S.] 442. Whatever was before the court, and disposed of by its decree, is considered as finally disposed of. The house of lords never grant a rehearing. 3 Dow, P. C. 157.

The supreme court have no power to review their decisions, whether in a case at law or in equity; a final decree in chancery is as conclusive as a judgment at law. [Martin v. Hunter] 1 Wheat. [14 U. S.] 355; [Hopkins v. Lee] 6 Wheat. [19 U. S.] 113, 116. Both are final as to the rights adjudicated upon. It is clear, therefore, that a circuit court cannot, on a bill of review, reverse a decree of the supreme court in a cause remanded to them for execution for error apparent, nor reverse their own decree during the pendency of an appeal, as that would be a direct interference with the power of the supreme court over a cause before them. If they should affirm the original decree, and remand the cause for execution, this court would be bound to obey the mandate; or on a simple affirmance would be equally obliged to execute it, notwithstanding their reversal on a bill of review. But they can do this,—give leave to file the bill as an amendment,—by adding new matter and parties to the original record. After a writ of error is brought, the court below may amend the record by adding the charge of the court, which had been excepted to (12 Serg. & R. 13, 14), and many other cases where the justice of the case requires it. A court of equity is not less liberal in allowing amendments than courts of law; and we can see no reason why they should not be made during the pendency of an appeal as before, especially when we consider that the benefit of the new matter may be lost by time or accident, or the party may lose the bill of review by the equitable limitation as to time. [Thomas v. Harvie] 10 Wheat. [23 U. S.] 149. What will be done with it after the court have given leave to file it, is another question. Should the supreme court award an order or certiorari to return it to them, the circuit court must obey the order, and then it will be for the supreme court to act upon the new matter or not, as they shall think belongs to them as an appellate court. If not, then it remains in the circuit court, as a subject not acted upon in either court.

In an admiralty case, the supreme court have decided that after their mandate has been before the circuit court, on all proceedings to carry it into effect, the original proceedings are always before the court so far as they are necessary to determine any new points or rights in controversy between the parties, which were not terminated by the original decree. They may inspect them to ascertain the merits or demerits of the parties, so far as they bear on the new claim, and must decide upon the whole examination what their duty requires. [The Santa Maria] 10 Wheat. [23 U. S.] 442. Where an application was made to the circuit court to open a decree in an admiralty case, after an appeal to the supreme court, the learned judge of the first circuit refused it, but considered it competent to allow the new evidence to be placed upon the record with a memorandum that it was brought in after the appeal, and it was transmitted together with the record. The London Packet [Case No. 8,474.] In these cases the application of new parties to be permitted to make claim after an appeal must be made in the circuit court. [The Mary] 9 Cranch [13 U. S.] 142. And all amendments must be made there ([The Marianna Flora] 11 Wheat. [24 U. S.] 38), though that court may make amendments in cases before them on appeal from the district court. In a common-law case it has been decided that after an affirmance of a judgment of the supreme court of New York by the court of errors, and their judgment affirmed in the supreme court of the United States, that a writ of error coram vobis will lie to reverse the original judgment for an error in fact. Packard v. Davis, 8 Pet. [33 U. S.] 324. There is a strong analogy between proceedings in admiralty and

chancery, but still stronger between a writ of error coram vobis, and a bill of review on matters of fact not in the record; both proceedings are in the same court, and, if there is a reversal, it is for error in fact. In the case of Packard v. Davis [supra] the fact of alleged error was that Davis was a consul, not suable in a state court, which did not appear in the record, but he is allowed to state it in his writ of error coram vobis, for the purpose of reversing the judgment. So here, the error in fact alleged is that the court decreed John Aspden of Lancashire to have been the heir at law of the testator, whereas, the petitioners allege that John Aspden of London was the heir at law; and they ask for leave to file their bill of review, to enable them to prove this fact, and on that ground to reverse the decree. We have, therefore, no doubt that we have cognizance of a bill of review after an appeal, if it is brought on newly-discovered evidence of facts; but not if it is for error apparent in the body of the decree. The whole case is now in the supreme court, on the law and the facts; they may affirm, or reverse in whole or in part, and, after rendering such decree as we ought to have done, will direct their mandate to us for its execution, which we must obey; we cannot alter, review, revise, reverse, or explain it, for any errors, however apparent, except miscasting or clerical mistakes. It will be time enough to decide whether we can reverse it for error in fact on the bill now offered, when it shall be necessary; in the meantime, we feel at perfect liberty to allow it to be filed, if in other respects a proper case is made out.

The next subject of inquiry is whether the petitioners are entitled to a bill to review the decree rendered in the case of Packer v. Nixon. The rule is well settled that it lies only in favor of a party or privy to the original suit, as in a writ of error (Pr. Reg. 50; Bohun, Curs. Can. 383; 1 Har. Ch. 290; [Green v. Watkins] 6 Wheat. [19 U. S.] 263; 4 Hen. & M. 244; 4 Vin. Abr. 410; Mitf. Eq. Pl. 72), or those who are aggrieved by the decree. As the petitioners were not parties to the original suit, the only question is whether there was a privity between them and any of the parties, or whether they come within the description of persons aggrieved by the decree, who may have a bill of review to revise and reverse it. Privity is fourfold: 1. Of estate, as donor or donee, lessor or lessee. 2. In blood, as heir to the ancestor, or between coparcenors. 3. In representation, as executors, &c., to the testator. 4. In tenure, as the lord and tenant, which may be reduced to two general heads, privies in deed, and privies in law. Co. Litt. 271a; Slack v. Walcott [Case No. 12,932]. Privity of title is where a party dies whose interest is transmitted to some other person, who succeeds by law to the title of the deceased; if he claims by purchase or devise, he introduces a new title not before the case; the privity must be by representation, as heir in relation to the real estate, and executors and administrators to the personal. Slack v. Walcott [supra]; Gilb. Forum Rom. 172, 186; 2 Har. Ch. 123. A devisee is not in privity with the testator, nor is an assignee or vendee in by privity (1 Ch. Cas. 123; 1 Eq. Cas. Abr. 164, pl. 3; Pr. Reg. 50; Bohun, Cars. Can. 383; 1 Ch. Cas. 174; Coop. 43, 44; Toth. 173; 1 Vin. Abr. 426; Slack v. Walcott [supra]) with the assignor. So in cases of bankruptcy the assignor cannot revive a decree in favor of the bankrupt, and in this respect the rule is the same in bills of revivor as of review (1 Atk. 88, 89; Comyn, 590), for privity of title is not enough, it must be privity of title derived by the act of the law. Slack v. Walcott [supra]. As to parties the rule is so strict that a bill of review lies not in favor of one in whose favor a decree is rendered for less than he claims (2 Freem. 182, 183; 4 Ch. R. 99, 100; Bohun, Curs. Can. 387; 2 Har. Ch. 127; 1 Ch. Cas. 53, contra, but by mistake in "overruled" instead of "allowed" in s. c.), it lies only in favor of him against whom the decree is rendered or whose bill is dismissed (2 Freem. 183; 2 Eq. Cas. Abr. 174). And when the heir of the mortgagee brought a bill against the mortgageor for foreclosure and obtained a decree, on a will being discovered which gave the mortgage money to the executor, the mortgageor exhibited his bill of review to be relieved against the decree, and praying the court to direct to whom the money should be paid, the court would not make the executor a party, but left him at liberty to sue the mortgageor on the mortgage covenant. 4 Ch. R. 52, 54; 2 Freem. 148, 149; 3 Ch. R. 94; 2 Eq. Cas. Abr. 173, 174.

In the present case the petitioners, as devisees, are in privity neither with the parties or the testator; they do not claim by representation, succession, or act of law, but as purchasers under the will, in which capacity they must take, if at all, as we decide in the original case. Had they been purchasers from any of the parties, they would not have been their privies in deed or in law. Their claim is adverse to all the parties in the cause, and, not coming in by any privity, cannot sustain a bill of review. It is unnecessary to examine the cases in which remainder-men, or others whose interest is affected by a decree to which they are not parties, may have a remedy in a court of equity; it is enough for this case that none but parties or privies are entitled to a bill of review, and that the petitioners appear before us in neither character. If they do not come within that class of persons who are aggrieved by the decree, their petition cannot be received. There is but one case of this description to be found in the books. A vicar sued the parish for tithes; four of the parishioners were appointed to defend the suit; a decree passed against the four, and all the miners in the parish. Vide 2 Vern. 184; 1 Eq. Cas. Abr. 163. The court said that one of the miners,

not one of the four, though not party or privy, might have a bill of review, because he is grieved by the decree. 1 Ch. Cas. 272; Pr. Reg. 50. It is obvious that this case cannot aid the petitioners; it was a peculiar one which requires no farther elucidation than to state it. Were we to consider this general expression, "persons grieved," as applying to all persons whose interest may be affected by a decree, we must extend it to devisees, purchasers, and assignees, in opposition to weight of authority which judicial power is incompetent to remove or shake.

On this ground, then, there is an insuperable objection to granting leave to file the bill now offered; we might stop here, but, as other important questions necessarily arise on the case, it is proper to decide them, as the merits depend as much on one view as another.

The objection taken to the affidavit is, we think, unanswerable. The one annexed to the petition by one of the solicitors, and to the bill by the agent of the petitioners, is in the common form of affidavits to original bills, which require the verification of the complainant; they want both form and substance, as neither of them contains the necessary averment which a party is bound to make. Neither does the supplemental affidavit of the two solicitors remove the difficulty. It presents this case: That about the 3d of June last they were retained in this cause, and in a few days afterwards discovered the new matter now set up for a bill of review; the petition was presented immediately containing an averment that neither the petitioners nor their agent, at the date of the decree, knew of the existence of the matter thus discovered, "and that it could not have been made use of by them in any way at the said hearing or before said decree." Now, there is no direct affidavit of this averment, even by reference to the petition or bill; the forms require it to be in the body of the affidavit; admitting that under the circumstances of this case, petitioners residing in London, and their agent here being a merchant, the affidavit of the solicitor might be taken as to the fact of discovery, it cannot be as to the all-important fact "that the matter could not have been used before the decree." It matters not that it was not known; if it could have been known and used by the exercise of a reasonable degree of active diligence at any time before the decree, it is a conclusive answer to the petition. How stands the case in this respect? The petitioners retain no solicitor till near six months after the decree; by the affidavit of Mr. Broom, it appears that in March, 1831, he communicated to Mr. Brown the pendency of the suit of Packer v. Nixon, its subject-matter, nature, and the parties respectively who claimed the estate of Mr. Aspden. The bill of review shows that from 1825 till 1830 a suit was depending in the court of chancery in England against the same defendant for the same subject-matter to which the petitioners were parties by a bill of revivor, which was dismissed, as they are informed and believe, upon an opinion that the personal property was distributable according to the laws of the United States; after which they brought another suit on the equity side of the court of exchequer, which was dismissed in 1831. After this active pursuit of the fund and the executor in the courts in England for six years, and with the knowledge that it was here in his hands for distribution, they make no claim, employ no counsel, or make any movement in the assertion of their rights till the summer of 1833, when they, as the bill alleges, gave some instructions to Mr. Bowen, which are not produced. When petitioners thus circumstanced appear in a court of equity and ask for leave to file a bill of review on new matter discovered in the possession of the executor, on the first search they had ever made, or authorized to be made, and that ten years after the death of the testator, it presents a case of the most gross and palpable negligence, while it remains unaccounted for. In such a case, we should require not only the strong affidavit which is necessary in all cases, but the strongest one which would be necessary from any petitioners, their solicitors, attorneys, and agents employed to conduct the suit in England, as well as their agent here. There must be a direct appeal to the conscience of all, by a searching, drastic affidavit, which should purge them all of such negligence. Yet from England we have not one word, from party, solicitor, country attorney, or law agent, though an affidavit on another matter has been taken in London since the pendency and knowledge of this petition. No person employed in the suits from 1825 to 1831 has given us his oath on any subject. A witness has been called from Lancashire to London to verify the parish registers for the purpose of showing the pedigree of the petitioners. His affidavit shows very active diligence in searching the registers as early as 24th July last, but it also shows that they were found where they ought to be, and where they were known to be,—that is, in the places where the persons lived and died; as that of the solicitors does, that the papers of the testator were found in his trunk in the hands of his executor; and both, so far from removing the imputation of negligence, confirm it most conclusively, in the absence of any affidavit by other persons.

Being satisfied that the evidence now discovered could, by the exercise of ordinary diligence, have been procured and used before the decree, we must refuse leave to file the bill on this ground, if it was the only one, and we must not be understood as deciding this point on the particular circumstances of this case alone. The common affidavits to original bills cannot be received on petitions for bills of review; they must be in the usual form, and contain the averment, not only of the party, but of all other per-

sons whose negligence may be imputable to the petitioners, that they could not possibly have used the evidence at the hearing, or before the decree. This is not merely form, but the very essence and substance of the application for review; no decree can be opened upon the mere fact of discovery, if there has been negligence in making the proper search; when a party has it in his power to remove the imputation, and does not do it, especially in a case like this, every presumption is against him.

It must, therefore, be understood as our decided opinion that, to all petitions for bills of review, the affidavit must be made by the party making the application, unless it shall appear from special circumstances that the whole subject is so fully in the knowledge of some other person, and that he can satisfy the court on all matters upon which they are to act. The most responsible and solemn act of civil justice which any court can perform is the reversing their own deliberate judgments; it is the most dangerous, too, when it is done on the affidavit of a party on whose oath a fortune depends, and especially when the decree points him exactly to the proof he is to make or procure; yet, if by such oath he makes out a case, we are bound to open a decree, if there is nothing to throw suspicion over the application. The rules of equity have wisely provided, not only that the party shall make an oath, but that the court shall be satisfied as well of the fact that new matter has been discovered, as that it could not have been known and used before. Their first step is the all-important one, and, as it necessarily leads to a second, it then becomes irrevocable; the decree becomes open for examination in a new course of litigation; it will be interminable; our most solemn proceedings will be but shadows, if, before we revise them on the oath of a litigant party, he is not required on his part to comply with every condition imposed on him, as indispensable to any movement of the court. If he does not do his duty, we directly violate ours in granting him a dispensation not warranted by the law or usages of a court of equity. In this case, we are not satisfied with the case presented by the affidavits; on the other hand, we think that it would be difficult to support it by any affidavit, however strong.

This leads to a consideration of the application as it would stand on satisfactory affidavits. Among the exhibits in the case of Packer v. Nixon is a copy of the bill filed in chancery by John Aspden of London, the father of the petitioners, against Mr. Nixon, the executor. This bill is referred to in the bill of review now offered for our allowance, and is therefore judicially before us. This bill was filed in 1825, praying that the complainant might be declared the heir at law to the testator, and, as such, entitled to his whole personal estate, and praying for an injunction to the transmission of the estate to the executor. The will and accompanying codicils or memoranda were set out at length, with an averment that Mr. Nixon had proved it here and in England; had taken on himself its execution, and possessed himself of all the personal property of testator. He then avers himself to be the heir at law; and, as evidence thereof, shows that Thomas Aspden, of Simonstone, in Lancashire, was the common ancester of the testator and himself, who had issue twelve children, the eldest of whom was John Aspden, who died and was buried at Deptford, in Kent, in 1754, leaving issue only one son, Andrew Aspden, who died and was buried in the same place in 1771, leaving issue the complainant, his only child and heir at law. That the testator was the only son of Matthias Aspden, the third son of Thomas, of Simonstone, the common ancester; he also stated that at the time of filing the bill he was eighty-five years of age. After their father's death, the petitioners became parties to the suit by bill of revivor in 1828, and its averments thus became theirs; they also filed a bill as heirs at law of the testator in the exchequer in 1831. Such was the case of the father from 1825 to 1828, and of the petitioners from 1828 till 1831, in the courts of England. This is precisely their case as first presented in this court in 1834; there is no new matter now introduced as evidence of their title,—not one fact alleged which was not before substantially averred. From the first to the present moment, the whole case rests on pedigree; it was necessary to trace it to a time beyond the memory of living witnesses; there could be no evidence to prove it but the registers of births, marriages, deaths, and burials, traditions, hearsay, or the written recognition of relationship by the testator or other members of the family. Let it come from whatever source, it tended to but one point,—the common ancestry of the complainant and the testator, and a lawful succession from the elder brother, all of which was as fully known in 1825 as now. John Aspden was then eighty-five years old; born in 1740, he was fourteen years of age when his grandfather died, and thirty-one at the death of his father; he must have been familiar with the family pedigree for more than half a century, after he came to man's estate, and when he was seeking a large fortune by an adversary suit, must have been aware of the necessity of proving his case; on what subject did he want knowledge? Pedigree; it was easily attainable at the places where he was bound first to look,—the registers; and the testator's papers would show it; if he did not examine them, there is gross negligence, in which case he is presumed to know all that he might have known with reasonable diligence. 16 Ves. 353. But it is needless to resort to presumption in such a case as this; it is neither possible nor credible that the counsel or solicitors in England would prosecute a suit by an heir at law whose succession was to be traced back one hundred and thirty-six years, without examining the registers; or that, if the search had been made without ef-

fect, they would not have advised the present petitioners to give some account of it. The deposition of Mr. Neville, with the accompanying copies of the registers, shows the facility with which they were obtained; those from Padeham and Whatley are dated on the 24th July, the same day on which Mr. Neville states he went there for the purpose; the others were obtained between the 4th and 8th of August, and the affidavit taken on the 9th, being only fifty-three days from filing the present petition.

There is no averment in the bill, petition, or in any other way, that all this evidence was not in possession of the parties from 1825; the counsel in their arguments have not pretended it; they surely cannot expect the court to presume it. The facts attested by the registers, therefore, cannot be deemed new matter.

This brings us to the consideration of the testator's memoranda on the two separate papers found in his trunk, with the entries in his Bible; and, as we should probably have permitted the petition to be amended so as to introduce the canceled wills of the testator, it may not be improper to refer to them, to avoid a future application. These memoranda are good evidence of pedigree, as the deliberate declarations of the testator, and tend strongly to prove the fact that his grandfather, Thomas, had twelve children, of whom John was the eldest; this is the very fact stated in the bill of 1825, and of course has not been newly discovered. These memoranda also note the baptism of several of the children, with their places of burial, but none of them take notice of the descendants of any, except Matthias, the father of the testator; so far as they relate to the baptism and burial, they correspond with the registers proved by Mr. Neville's affidavit, and thus far disclose no matter which the registers do not contain. They are not new in fact, or to the knowledge of the petitioners or their father, if they or either of them knew of the registers before; they cannot be deemed by the court to be new if the registers were known to their counsel, solicitors, attorneys or agent, for knowledge by either of them is knowledge by the parties; nor is the matter deemed new in law, if by reasonable diligence either might have known of it in time to use it before the decree. 3 Atk. 36; 4 Browne, Parl. Cas. 483, 484; Dexter v. Arnold [Case No. 3,856]. As facts, therefore, we cannot consider them as new matter, they can only be considered as new evidence of facts known since 1825. There are some other facts referred to in these memoranda, but it is necessary to inquire only into their materiality hereafter. The canceled wills are evidence not only of the intention of the testator at the time of making them (8 Serg. & R. 579; Seaton v. Kuhn, C. C.), but as the recognition of a kinsman or relation, and that there was a person in the family of the name of T. J., an elder of the brother of the William from whom the lessor claimed (11 East, 504, 506). In the will of 1776, a legacy of £100 is given "to my cousin John Aspden of London"; in that of March, 1791, he gives "to my second cousin John Aspden, living in Old street, London, £10, and to his two daughters the sum of £2 each"; this recognition of the testator is good evidence of the relationship of both the father and the present petitioners, but it is no newly-discovered fact. In 1825 John Aspden knew that the testator was the grandson of Thomas of Simonstone, and that he was his great-grandson; of necessity, then, they were cousins in fact, and so deemed in law; and nothing more is now discovered except the fact that the petitioners are the daughters of John.

The new discovery being then exclusively of the evidence of well-known facts, we proceed to inquire whether it is of that nature as suffices to open a decree, as also whether it is so relevant and material as if used before the decree would probably have produced a different result. The order of Lord Bacon, allowing bills of review, is in its terms and its uniform construction applicable only to two cases,—error in law in the body of the decree without farther examination of fact; the error must be apparent in the decree itself. Toth. Append, 41; 2 Ch. Cas. 153; Prec. Ch. 260; 1 Eq. Cas. Abr. 81; 4 Vin. Abr. 414, pl. 12. It is in the nature of a writ of error (4 Vin. Abr. 407), and lies for want or excess of jurisdiction (1 Vin. Abr. 292; 2 Har. Ch. 123, 127), or an error in conscience on a matter proved (4 Vin. Abr. 408; 1 Rolle, Abr. 382). The error must appear on the case as stated in the decree, and every fact must be admitted as stated. 2 Har. Ch. 124; Bohun, Curs. Can. 381, 386; 2 Eq. Cas. Abr. 174; 2 Freem. 182; 4 Vin. Abr. 407, 408; 1 Ch. Cas. 54, 55, 105; Hardin, 174. The decree is matter of record, and can be tried only by the record. Pr. Reg. in Chancery, 51. If there is a mistake of fact, it must be corrected on an appeal (2 Freem. 182; 1 Eq. Cas. Abr. 164; Lane, 68, 69), or the decree is final (4 Vin. Abr. 407; 1 Ch. Cas. 231, 233; Bohun, Curs. Can. 385, 386). And it is no error that the matter decreed is contrary to the proof (1 Vern. 166), for after decree it is presumed the court judged on the whole proof according to its purpose (Hardin, 174). Witnesses cannot be re-examined anew. 4 Vin. Abr. 407; 2 Freem. 181; 1 Eq. Cas. Abr. 81; Dickens, 614; 2 Madd. 536, etc.; Dexter v. Arnold [supra], full on these points. These bills are not favored, and a second will not be allowed, however manifest the error. 2 Ch. Cas. 133; 2 Madd. 541. And if a fact is omitted to be stated that is matter of appeal. 4 Vin. Abr. 408; 2 Keb. 279, pl. 46; Dexter v. Arnold [supra].

After a decree the proofs are no more to be questioned than the verdict of a jury on a writ of error. Hardin, 51, 127. Nor is a master's report confirmed on exceptions; it is as conclusive as a verdict. [Hopkins v. Lee] 6 Wheat. [19 U. S.] 113, 116. Error apparent does not apply to an erroneous judgment merely, and the question is not whether the cause is well decided, but whether the de-

cree is right or wrong on the face of it, as an infant not having a day allowed him, &c. (17 Ves. 178), a decree taken pro confesso, where the party was not brought in contempt (4 Ch. R. 64, 66), or the decree is contrary to a statute (4 Vin. Abr. 407; 1 Rolle, Abr. 382), or for decreeing a sale under the authority of a law without complying with its provisions ([Bank of U. S. v. Ritchie] 8 Pet. [33 U. S.] 145); not for any errors in the progress of a cause, or a master's report excepted to, because not in the body of the decree (2 Eq. Cas. Abr. 175, pl. 12; 4 Vin. Abr. 414, pl. 6; 8 B. P. C. 391, 392). But if part is repugnant to another (Bohun. Curs. Can. 381), or the decree impossible (1 Ch. Cas. 86), it lies. So if the decree is founded on a record made in a case depending in chancery, which was referred by the solicitor in the cause without the consent of the party. 1 Ch. Cas. 85, 86. But, to make a decree conclusive as to the facts, it must appear that the court rendered their judgment upon them as "on reading the proofs, it appeared." If it is on reading the proofs, it is decreed that is no decree on the evidence. 2 Ch. Cas. 161, 162; Bohun, Curs. Can. 388.

The new matter to sustain a bill of review must have risen in time since the decree (3 Atk. 627); and not any new proof which might have been used when the decree was made, unless it has come to light since, and could not possibly have been used, at the time of the decree (Toth. Append. 41). New matter means a fact in esse at the time of the decree, not then in the knowledge of the party, his solicitor or agent (2 Atk. 534; Dickens, 612, 614; 2 Atk. 178), not where a matter of fact was in issue at the hearing; though new proof of it is discovered since, it will not be admitted (2 Freem. 31; 4 C. R. 196; 3 P. Wms. 371; 4 Vin. Abr. 414; 2 Eq. Cas. Abr. 175, 176; 2 C. R. 45; Dexter v. Arnold [supra]). If the bill contain matter, part of which was in a former bill and decree, and part new or by a supplemental bill, the court will, on a demurrer to so much as was contained in the former bill, direct the master to see what was in the former bill, and allow the demurrer accordingly (Gilb. Eq. 183, 184), to what was in the former bill. No witnesses who were or might have been examined on the former bill shall be examined to any matter on a bill of review (Bohun, Curs. Can. 381; 2 Madd. 518; Pr. Reg. 53); as where "plaintiff would examine as to a matter of tender and refusal, which he could not prove before the hearing, but could now prove it, no precedents could be produced, and the bill was dismissed" (2 Ch. R. 66).

Nothing is a ground to direct a new trial at law that would not be a ground for a bill of review to reverse a decree. 1 Ch. Cas. 43; 2 Har. Ch. 125. Nor is the want of any evidence or matter which might have been used in the first cause, of which the party then had knowledge and there is no proof, but the plaintiff might have had the witnesses that were examined here at the trial; though the proof on the bill of review was such that the plaintiff in the original cause could not have recovered; it being his own confession, the court would not enjoin the judgment at law, and declared that a confession after a decree was no ground for a bill of review (1 Ch. Cas. 43, 44); or where the new evidence is not applicable to the original issue, nor where the original bill contained information on which he was required with reasonable diligence to try the case at first, on his whole evidence, and where the relief might have been effectually asked (16 Ves. 350, 354; Dexter v. Arnold [supra]). New evidence cannot be received on a bill of review in support of a case not in the record (16 Ves. 354; Amb. 293; 5 Mass. 313, 314); or to draw in question matters which have been settled on an account before the master, or put to an issue (2 Browne, Parl. Cas. 109; 2 Atk. 534). If a paper is produced by an adversary, it is the same as if produced by the party, and is not deemed new matter on a bill of review. 3 Atk. 37. The new matter set up must not be merely accumulation. Id.; 3 Johns. Ch. 127. It must not be the same or similar evidence, or corroboration. 1 Hen. & M. 15. If the party had knowledge of the matter, but offered no proof of it at the hearing, it is not the subject of a bill of review. 2 Freem. 178; 3 Ch. R. 76, 77. The new matter must show the right of the party at the time of the decree, which was not then known to him (2 Ves. Sr. 576); not additional circumstances, merely confirming facts before proved (1 Hen. & M. 179, 200), or proof on the same points which were in issue, or any evidence in the knowledge of the party before the decree (Gilb. Forum Rom. 186; Dexter v. Arnold [supra]). The course of the court on bills of review is conclusive to show the kind of evidence which alone can be sustained. The first object is a reversal of the decree. While it remains closed there can be no revision or explanation of it, except misstating. Gilb. Forum Rom. 184. On the plea by the defendant of the decree, and a demurrer to the new matter set up for opening it, as insufficient in law, the court decide whether there is a case for review. Gilb. Forum Rom. 189. In this stage of the cause nothing is read but what appears on the face of the decree, but after the demurrer is overruled the plaintiff is at liberty to read the bill and answer, or any other evidence, as at a rehearing, the cause being now equally open. 1 Atk. 290; Dexter v. Arnold. Defendant may, on a plea, disprove the new matter. 2 Madd. 543; Mitf. Eq. Pl. 236. But if he demurs, it is then too late to show that there is no new matter discovered, as it cannot be insisted on at that hearing. 2 Atk. 40; 3 Atk. 217. The court will not reverse a decree for any error not specially assigned in the bill or petition. Mitf. Eq. Pl. 70, 72; Dexter v. Arnold. If the decree is reversed, on a rehearing the cause is entirely open to the party in whose favor the decree is. As to the other, it is only open as to the facts complained of. If it is on new

proof, no other can be heard. 2 Madd. 483. There can be no new evidence on the merits (6 Johns. Ch. 256; 1 P. Wms. 300; 2 Vern. 463; 2 Har. Ch. 85), without special leave of the court, which is seldom granted (Gilb. Forum Rom. 183). These cases are evidence duly taken and omitted to be read; evidence of new matter not before ready; papers since found and allowed to be proved viva voce, or to impeach a witness before examined. 6 Johns. Ch. 256; Prec. Ch. 64; 10 Ves. 236; 13 Ves. 458; 1 Ves. & B. 153, 154. New evidence is not heard in the house of lords on appeal (2 Bl. Comm. 455; Gilb. Eq. 156; Amb. 90, 91), though it may be by the chancellor on appeal from the rolls (Prec. Ch. 496; 2 Atk. 408; 2 Vern. 463; Gilb. Eq. 151), it being in the nature of a rehearing. But the relation between these officers is peculiar, and the practice on such appeals is no guide to the course of equity, in cases where the rehearing is by the same court which gave the original decree, or to the proceedings in the courts of the United States on appeal. On a rehearing of a decree after the reversal on bill of review, the party must rely on the new matter in his bill, or the evidence already in the cause; he can introduce nothing which he had not assigned as a ground for opening the decree.

The court will not reverse a decree for extraneous matter arising in the progress of a cause not in the decree. Finch, 36, 209; 2 Atk. 534; 3 Atk. 627; 1 Vern. 392; 4 Hen. & M. 243, 244. The new matter must be such as will bear on the body of the decree, not on interlocutory orders. As the verdict of a jury cannot be revised on a writ of error, neither can the report of a master to which exceptions have been filed after confirmation, as it has all the legal effect of a verdict of the judgment.

The error assigned in this case is an error in fact, in declaring John Aspden of Lancashire to be the heir at law of the testator; if the decree is reversed, it must be on this ground alone; the other grounds taken in the petition are merely introductory to this. The only ground assumed by the petitioners is that they are the heirs at law, in which character they claim the fund in the hands of the executor, and this is the only fact on which they rest their case. They are not parties to the original suit; their title is nowhere set up, or appears in any part of the proceedings; it was not in the case or at issue in any way. John Aspden of Lancashire claimed in his own right by descent from William, the alleged eldest uncle of the testator on the father's side; he established his claim by competent evidence, without the least reference to there having been an uncle older than William.

We have, then, to decide upon a new case, by a new party, on a new title, no fact of which appeared before the final decree. The first question is whether an entire new title in a new party who is a stranger to the suit, claiming adversely to all the original parties, can be considered newly-discovered matter, for the opening of a decree. On this subject we have no doubt. There is not only no precedent for a new trial at law, or review in equity, in such a case, but it is opposed to the whole course of adjudication, in all courts, from the date of Lord Bacon's ordinances. If we take a narrower view of the case, the matter set up is only corroborative and confirmatory of the registers. The petitioners do not pretend that the fact of their heirship is matter come to light since the decree passed, or that the evidence of it by the registers has been newly discovered, or could not have been used at the hearing. They rest their bill of review solely on the memoranda and other papers of the testator, discovered in June last. Copies of these registers, duly attested or certified, are good evidence of all matters of pedigree. [Same Cause] 1 Dall. [1 U. S.] 2; Serg. & R. 389; 1 Yeates, 17, 15. They are the records of facts, beyond the memory of man, entitled to great weight; they are alone sufficient to establish pedigree of a much higher character than hearsay, which is also admissible.

As to distant facts, they are the primary and principal evidence, not to be lightly questioned. The contemporaneous memoranda of a member of the family, made from his own knowledge, may, in some cases, be as good or better evidence; or family records and muniments of title. But that is not this case; these memoranda refer to events before the testator was born; the last one was more than a century after the birth of his uncle John; his knowledge must, therefore, have been derived from hearsay, family papers and entries, or from the registers. In this case the registers must be considered as the primary and most authentic evidence, and the memoranda secondary or auxiliary; but view them in either way, they are only additional to the registers, if they had been produced before the decree tending to prove the same fact. Now, as it is clear that the family pedigree was known from 1825, and that the evidence of it by the registers could have been used at the hearing, the petitioners cannot be now put in a better situation than if they had been parties and had produced the registers; in which case the memoranda and canceled wills would have been confessedly mere accumulation. The delay of their application to become parties certainly gives them no better claims to the interference of a court of equity than if they had made it after they knew of the dismission of their bill, and that the injunction which prevented the transmission of the fund here to be distributed according to the law of this country had been dissolved. There is no principle or rule of equity in relation to this subject that we should not violate, by now permitting the registers to be used as a ground

for opening the decree; they cannot be used in an appellate court, nor could they be used at a rehearing if the decree was opened. It would be giving to the memoranda the effect of an "acetiam" or "quo minus" clause in a writ,—mere inducement to introduce inadmissible yet indispensable evidence, that would make bills of review matters of course; for the party would only be obliged to show some item of evidence connected with or forming a part of his title, which was newly discovered; then he could, by its potency, introduce an entire new case and title, and all other evidence, however long he had known of it, and however convenient it might have been to produce it before. The effect of the registers may be very powerful to show how good a case the petitioners had, and how easy it was to have established it by the most ordinary attention; but they also show that a good cause may be lost by negligence, and, when that negligence has been palpable and long continued, any hardship that awaits them is not the fault of the law. If they had a title or right to this estate, they had a remedy which they could lose only by their negligence; they knew the fund was here, and a small portion of the time and money expended in England in litigation would have sufficed long since to establish it here. No principle is more approved, both in courts of law and equity, than that the best right may be lost by negligence. It is necessary to the peace of society and the security of titles.

It remains to take a still closer view of these memoranda and canceled wills, their relevancy and materiality, in producing a different result in the original cause. The entry in the Bible and on the two papers produced are evidence of one fact,—that John Aspden was the eldest son of Thomas of Simonstone, and, as such, the stock from which the petitioners must trace their descent; the memoranda as to the other children of Thomas have no bearing on the case, as they relate only to the place or time of their burial; the succession from John is not brought down; his death, burial, and place and time, only are noted; this leaves a long chasm between him and the petitioners, as to which the memoranda or entry in the Bible gives no information. It shows that William, the ancestor of John of Lancashire, was not the eldest son of Thomas; but not that John of London was the grandson of John of Kent, the son of Thomas of Simonstone. The canceled wills show that John of London was the cousin or second cousin of Matthias, the testator, and that the petitioners are the daughters of this John, but not that John was a cousin by descent from John, the eldest son of Thomas; he is equally a cousin by descent from any of his children. The indispensable link to complete the chain is wanting; there is no evidence to prove the descent from John; the law cannot presume that John of London was his descendant, rather than of any other son; the fact must be made out in some other way than by the entry, memoranda, or canceled wills. Had they all been produced previous to the decree, they would not have authorized the court to declare that John of London was the heir. In our opinion on the exceptions to the master's report, we pointed out the course we should have pursued, but no notice was given that there was or would be any contest between two adversary claimants to the heirship on the father's side. Now, the newly-found evidence leaves a fatal chasm in the title of the petitioners; if we reverse the decree we cannot declare the petitioners heirs at law on the new matter set up; it may induce us to doubt whether John of Lancashire is the heir at law,—to believe that he is not; but, then, for what shall we reverse the decree, or permit it to be opened to receive evidence that does not make out the petitioners' case? If we do, then we must admit the registers, or proof by tradition, hearsay, or some other source not now pointed out. We cannot act upon the registers without making law to suit the case, and overturning every rule and principle which has been consecrated by courts of equity for two hundred years; we can act on no other evidence than that now set up without a second bill of review to let in new evidence from other sources than the register, or the papers now produced. If we could receive a second bill, we could act on nothing now before us; the consequence is that the petitioners have neither made out a case where they can be relieved by bill of review, or assigned any cause for review in the new matter set up.

The defendants have objected to the allowance of this bill on the ground that the proceedings in the court of chancery and exchequer in England, before referred to, are final and conclusive between the parties to those suits, and operate as a bar to any resort to the estate of the testator by the petitioners. If it were necessary to decide this question, we might not find it one of much difficulty; but it arises only collaterally on a preliminary proceeding resting in the discretion of the court, on which there can be no appeal, and, as we cannot grant leave to file the bill of review, it is unnecessary to decide it. Had the bill been filed, it would have been a proper matter to plead in bar, or to have set out as a ground of demurrer, or it may be pleaded to an original bill; in either case the decision of this court would be subject to an appeal; we therefore decline giving any opinion on this point.

There is another circumstance in this case which has not been noticed by the counsel on either side, and to which we advert only for the purpose of not being misunderstood in passing it without observation. The petitioners are certainly in time in making

their application for the bill of review in less than six months from the final decree. But the effect of time is important in other respects than as a mere legal limitation to the assertion of a claim in a court of equity; it has been before us on more than one occasion; we have expressed ourselves plainly and at length on the subject, and must not be understood as entertaining any doubts of the correctness of former opinions; whether they would apply to this case is another matter.

We have felt it our duty to give this case our fullest consideration; it has enabled us to come to a conclusion perfectly satisfactory to our own minds; we should have been better pleased if a case had been presented to us which would have authorized the opening of our former decree. It is highly desirable that justice should be so administered that no right should be without a remedy, especially in a court of equity. Yet no administration of justice can be so dangerous, as affording remedies in violation of the settled law of the land; the peace of society and the security of the rights of property are better preserved by leaving parties to suits to the effects of their own negligence, than disturbing the sanctity of judicial proceedings for light causes. It is for the interest of the public that there should be some end of suits, and the law aids the vigilant, not the negligent. The petition is dismissed.

[See Case No. 10,653 for opinion of circuit court in the case of Packer v. Nixon.]

Case No. 11,271.

POOLE et al. v. The WASHINGTON.

STURGES et al. v. The MAZEPPA.

[9 N. Y. Leg. Obs. 321.]

District Court, S. D. New York. April 9, 1851.

COLLISION—VESSELS FREE AND CLOSE-HAULED—RULE AT NIGHT—LOOK-OUT ON LEAVING PORT—PLEADING—STATING MATERIAL FACTS.

1. In admiralty pleadings the court requires that material facts within the knowledge of the parties should be distinctly stated, and a neglect in this respect is to be taken most unfavorably against the vessel omitting it.

2. The general rule that a vessel free, meeting one close-hauled, must give way, whether the close-hauled be on the larboard or starboard tack, applies in all cases where the facts are not doubtful as to how each vessel has the wind.

[Cited in The Catherine and Martha, Case No. 2,512.]

3. During a dark night, or under circumstances making it doubtful which vessel has the wind free, the larboard tack must give way in time, the starboard tack being regarded as privileged, although it may turn out that she had the wind some points free.

4. Where a practice was set up and a proof given, that on board vessels, more especially coasting schooners, no look-out was stationed exclusively to perform that duty when leaving the port of New York during daylight, but that all hands were on deck and were considered as sufficiently performing that duty among them. *Held*, such practice to be without law or reason, and that no practice can be more hazardous and reprehensible; that it is most pre-eminently and imperatively the duty of all vessels on leaving this port at all times to observe the precaution of a vigilant look-out.

[Cited in The Ancon, Case No. 348.]

5. The want of a look-out, detailed and stationed for the exclusive performance of that duty, was itself a circumstance of a strong condemnatory character, and exacted, from the vessel neglecting it, clear and satisfactory proof that the misfortune encountered was in no way ascribable to her misconduct in that particular.

[Cited in The Northern Indiana, Case No. 10,320.]

[These were cross libels by William S. Poole and others against the schooner Washington, and Lothrop L. Sturges and others against the bark Mazeppa, to recover damages sustained by a collision.]

Robert Emmet and W. Q. Morton, for the Mazeppa.

F. B. Cutting and E. H. Owen, for the Washington.

BETTS, District Judge. It is evident that the subject of controversy brought before the court in these suits was regarded as important in itself, and also as affording strong grounds of claim to each of the parties, as cross actions were instituted nearly simultaneously and have been both pursued with great earnestness to a final decision. The schooner Washington, on a voyage from New York to Alexandria and Georgetown, District of Columbia, and the barque Mazeppa, from New Orleans to New York, in the afternoon of September 15, 1848, came in collision, twenty or twenty-five miles southwardly of Sandy Hook, and some miles off the Jersey shore. The day was bright and clear, and no object intervened to embarrass the movements of the vessels, or intercept a distinct view of each other. Both received serious injuries from the collision. The Mazeppa lost her foretopmast backstay; was cut down a little farther aft within two feet of the water, which washed in; had her mainmast shattered by the bowsprit of the Washington; was nearly stripped of her starboard bulwarks from aft of the foreshrouds; starboard main-shrouds carried away; poop deck lifted up; cabin injured; stern boat knocked away; and from the tottering and dangerous condition of her mainmast it had to be cut adrift. Her anchors were let go at once; a pilot boat rendered salvage service; and the Mazeppa was towed to the city on the following day by a steamboat. Libels were filed against the Mazeppa for salvage on behalf of the pilot and steamboat, and the sums paid on their settlement claimed as part of the damages against the Washington. The Washington had her bowsprit broken short off; lost her figurehead, and was otherwise seriously injured about the bows; she continued her voyage, however, to Georgetown.

The owners of the Mazeppa filed their libel

against the Washington, on the 30th of September, to which an answer was interposed on the 9th of November following. On the 16th of the same month the owners of the Washington commenced their action against the Mazeppa, and the answer to that libel was filed the 5th of December thereafter. The cross actions were brought to hearing at the same time upon the double pleadings, and proofs taken in them conjointly. The owners of the Mazeppa pleaded that she was close-hauled on the larboard tack, the wind W. N. W., inclining to the N., and blowing a whole-sail breeze; and that the Washington, headed S. S. W., being to leeward of the Mazeppa, with all sails set, and running at least four points free, the wind abaft the beam, at the rate of nine knots the hour, struck the Mazeppa on her starboard and lee side abaft the fore-chains, and charges the damages incurred to be $10,000, besides salvage paid, &c. They charge that the collision took place three to five miles off shore, in full daylight, and was occasioned by the negligence and want of skill of those navigating the Washington, and the want of a proper and vigilant look-out on board her, and aver it was impossible for the Mazeppa to have done anything after her danger was discovered to avoid the Washington; that those on board the Mazeppa expected the Washington, in obedience to the rules of navigation, would have taken seasonable measures to avoid the Mazeppa. The owners of the Washington pleaded that the Washington was sailing along the land about one and a half mile off, as near thereto as was prudent or customary for vessels of her size and draught of water to go; steering by the compass S. by W. or thereabouts, the wind blowing a fresh breeze from W. with frequent squalls, in which it would vary a point or two; that she was under whole mainsail and foresail, standing and flying-jib and no other sail, and the mainsail and foresail were about a point off from being close-hauled, and she was going about seven knots. They charge that the weather was clear, so that objects could be seen at a great distance, and that the Mazeppa was to leeward and ran across the track of the Washington, the collision occurring between 3 and 4 o'clock p. m., and that it was impossible for the Washington to avoid it; the Washington did not any way change her course previously, and that the Mazeppa, by luffing or keeping away in time, could easily have avoided the collision, and charges the want of proper care and diligence in the master and look-out; the look-out not giving the pilot notice of the Washington till the two vessels were close upon each other, and allege the collision was occasioned solely by the fault of those on board the Mazeppa; and state the damages received by the Washington at $3,000 and more. They aver the master, his mate and three men were on deck and kept a proper look-out, and such as is usual to keep in the day time in fair weather.

The counter-pleadings introduce a multitude of particulars with a view to show the blame of the misfortune was imputable to the adverse vessel, but they consist rather of amplifications and inferences than allegations of any substantial points for proof or decision, and belong more to the province of argument than that of pleading. So far as they may be regarded as having a material bearing upon the merits of the case, they are noticed in the course of the decision, and it is unnecessary to spread them further on the statement of the case. The material issues involved in these pleadings are: Whether a proper look-out was stationed and kept on both vessels or either. Whether both vessels were close-hauled upon the wind, or if either, and which had the wind free; and to this inquiry, whether the wind was W. directly off shore, or W. N. W., including more N., the wind was W. directly off shore as the two were approaching each other. What was done or omitted on board either vessel immediately preceding the collision evincing the want of due precaution and skill. Upon these several points the statements in the pleadings are directly in conflict, each vessel representing itself in each particular wholly in the right, and the other one wholly in the wrong. The pleadings on each side are sufficiently full and precise, except that the Mazeppa fails to aver the course she was steering. The testimony adduced by her shows she was laying N. half E., but both in the libel and answer filed on her part, this particular is left unstated; it is only alleged, she lay close-hauled to the wind, blowing from W. N. W. tending more N. On the other hand, the Washington sets forth distinctly in the pleadings her course by the compass. This is the proper method of pleading. The court has a right to an unreserved and explicit statement on the pleadings of every fact known to the parties, which may be material to the maintenance of the case set up by them respectively, and it is thus not unfrequently enabled, upon the mutual representation of the positions and manœuvres of the two vessels, to ascertain whether the conduct of either was blamable, and if so, with which the fault lies. The neglect to supply this guide to the judgment of the court is always to be taken most unfavorably against the vessel omitting it, and the court will be cautious that such reserve shall not be used in her behalf to the surprise of her adversary, or so as to permit proofs to be shaped to meet any description of case she may find it advisable to set up on the trial. This point is not without materiality, for it is denied on the part of the Washington that the Mazeppa was holding a proper course, if she was in fact running close-hauled, and it was accordingly proper that she should have made a specific averment

on that head, which should announce the ground of her justification, and enable the Washington to meet it with the appropriate pleading and proofs, and the court be supplied a direct issue to decide upon. But as no exception was taken by the pleadings or in the course of the trial to this defect in the allegations of the Mazeppa, and as testimony was produced against her tending to show she was steering W. of N., I think it may be allowable and proper for the court to consider the evidence on both sides to this fact, although it is not formally put in issue by the pleadings.

Some of the issues raised present no questions important to the merits of the case. For instance, it is not shown to be of any consequence to the rights of either vessel whether the collision occurred 20 or 25 miles south of Sandy Hook or 1½ or 5 miles off the shore; for the evidence, so far as it applies to those inquiries, tends to show that at the time the wind was the same at all those points. It may occasionally happen that a current of wind runs up or down along shore, which is not felt in the same direction some miles from land, and that a change of wind is experienced soonest five miles nearest to the point at which it settles; but the clear bearing of the evidence in this case is that during the period embraced within the transaction in question the wind was felt from the same quarter at all the different places set up by the parties as the point of collision. The disagreement in the proofs to be settled by the court relates, therefore, solely to the question whether it blew directly from the W., or from W. N. W. inclining N., because all the witnesses in a position to speak to this fact at the time of the collision limit their testimony to the course of the wind then and there blowing. The chief discordance arises from varying estimates of distance from other places, in which the two vessels came in contact.

The maritime rule of law applicable to sailing vessels meeting under the circumstances stated in the pleadings is differently understood by the counsel for the respective parties. For the Washington, it is contended, that the vessel if running close-hauled with her starboard tacks on board, is entitled to hold her course when there is sea room sufficient, against another approaching her in a direct line, or on a parallel line so near as to endanger a collision, and that in either of such cases the vessel on the adverse course must give way, and they insist that the privilege is preserved to the starboard tack, although running free. The authorities referred to do not support the proposition in so general a form as it is put and maintained by the argument. Ang. Carr. § 654, gives the summary of the doctrine as he gathers it from the cases, and he annexes to the principle the important qualification that the starboard tack so situated retains her course in doubtful circumstances.

The case from which the proposition is extracted affords very little countenance to any idea that the old rule was intended to be changed by extending the privilege of the starboard tack beyond what had been always recognized in the established usages of navigation. In that case the vessels met in the night time, and it stood doubtful upon the pleadings and proofs which had the wind, and it appeared they were standing towards each other head and head, or nearly so, and that, when the starboard tack ported her helm to avoid the other, the larboard tack ported hers also; thus bearing up again into the same track with the other. There were here a duplication of faults by the larboard tack—First, as it was unknown which vessel had the wind most free, it was her duty to have given way to the starboard tack; and, second, after the starboard tack had adopted that measure herself, and had taken a course which would have carried the two clear of each other, the larboard tack bore up in the same direction, thus producing the collision, which could have been avoided had she held her course, or done what was, in doubtful circumstances, incumbent on her, kept away. The Ann and Mary, 2 W. Rob. Adm. 189. That case, moreover, must always be followed with great caution, as in a suit at law for the very collision a verdict and judgment had been rendered against the owners of the vessel on the starboard tack, fixing the blame on her. The comments of the Trinity masters appended to the case, and not adopted in its decision, can have very little weight in proof of the usage or customary rule of navigation, because the testimony of other Trinity masters, offered to prove the usage to be otherwise, was rejected by the court; and if their remarks were intended to cover the case of vessels running free, or nearly so, they will be found in conflict with the general course of decisions in that court. The observations of the Trinity masters most probably were meant to apply to vessels beating against the wind.

The case of The Traveller, also cited on the part of the Washington, brings out more distinctly than The Ann and Mary the doctrine alluded to in the terms employed by the court in pronouncing its opinion, for it is declared the duty of the larboard tack to give way at once when there is a probability of a collision; and this it seems she must do, although the starboard tack is a point or two free, and as much to leeward. 2 W. Rob. Adm. 197. The qualification of peculiar circumstances is, however, applied most distinctly to the doctrine, for in that case the vessels met in the night time, and each insisted her position was to the windward of the other. The course of the wind, and her own direction as claimed by each vessel, would put her close-hauled. They were running in opposite directions. One alleged she was steering S. with the wind W. S. W.; the other, that she was going in a northwesterly

course, the wind being W. by N. to W. N. W. The larboard tack was accordingly placed in a situation when, in the night time, it was incumbent on her to take seasonable precautions against the chance of an encounter with the vessel approaching her.

This review of the special grounds upon which the decisions in The Ann and Mary and The Traveller were placed relieves the cases of what might at first seem to be a conflict with the doctrines declared by the same court in previous judgments, and which have been adopted and approved extensively in the courts of the United States. From the time of the decision of The Woodrop-Syms, by Sir Wm. Scott (2 Dod. 83), to that in the two cases referred to, the rule in relation to sailing vessels has been uniform that the one running with the wind free must take measures to get out of the way of one approaching close-hauled on the wind, and this without regard to the fact whether the close-hauled vessel is on the starboard or larboard tack; and this is the rule of the Trinity House Corporation. Abb. Shipp. 234, 235; Ang. Carr. § 652; The Chester, 3 Hagg. Adm. 316; The Celt, Id. 321; Westm. Rev. (Sept., 1844) p. 60. So in the American books it is said, a vessel sailing with the wind free must give way to one sailing on the wind; the privilege of the starboard tack applying where both vessels are beating to windward, and are crossing each other in opposite directions, and there is the least doubt of their going clear. Story, Bailm. § 611; 1 Conk. Adm. Prac. 305; Dana, Seamen's Friend, 84, 186. The rule recommends itself to a strict observance from its precision and simplicity, and because in the day time it can rarely happen, when reasonable diligence is exercised, that both vessels will not readily discover their duty and privilege under it. The rule does not, in terms, apply so strictly to vessels approaching, but not crossing, each other with the wind free to each, for in that case the law of navigation requires each to pass to the larboard of the other. Trinity Rules, No. 2. Yet the general law, when one of the approaching vessels has the wind fair, imposes on her the duty to give way to the other on a wind. Id. No. 1.

The facts in proof, brought within these principles of law, evince the fault to have been with the Washington, because if it appeared doubtful at the time on board her whether the Mazeppa was not running free with the wind abeam, it was incumbent on her, being herself so situated, to have put her helm a-lee, leaving the Mazeppa an opportunity to pass on her larboard side; and, even if she was close-hauled, as is contended in her behalf, she had, in my judgment, no privilege to maintain her course in the day time against the Mazeppa, also close-hauled, for both should in such case port their helms passing larboard and larboard, as upon her theory, neither vessel was beating, and they were not crossing each other. Westm. Rev. (Sept., 1844) No. 164, p. 60; Abb. Shipp. 235; Lowry v. The Portland [Case No. 8,583]; The London Packet, 2 W. Rob. Adm. 216. And she might be required to give way from a privileged tack, when by so doing she could avoid a collision which was likely to occur from the larboard tack adhering to her course. The Lady Anne, 1 Eng. Law & Eq. 670. This view of the case necessarily defeats the claim of the Washington to damages, if it does not subject her to them, as her action cannot be maintained if she is guilty of any fault tending to produce the collision. The mere fault of the Mazeppa, provided it be shown she committed one, will not entitle the Washington to recover damages. There must be, on her part, due precaution, skill, and diligence, so that the injury could be no way justly imputable to her own misconduct. The action is founded upon the alleged correctness of her own conduct and the blamableness of the Mazeppa, and there must be affirmative proof supporting such posture of the case.

Again, upon the pleadings, there would be difficulty in the Washington maintaining a right to hold her course as a privileged tack. In The London Packet, 2 W. Rob. Adm. 216, Dr. Lushington interprets the rule of larboard and starboard tack to depend upon the presumption that the two vessels are directly opposing each other, and is not intended to apply where the heads of the respective vessels are lying in different directions. Such he asserts to be the case when one heads to the S. E., and the other is N. N. W. half W. It is obvious the courses differed only one and a half points from a coincident line. In the present case, the course of one vessel was N. half E., and of the other S. W., which would be the same deviation of a point and a half from coincident lines. The distinction is plain enough, perhaps, upon the compass, or in nautical arithmetic, but must be admitted an exceedingly close one for practical purposes, and does not seem to comport with the acknowledged law of navigation, which gives the privilege to the starboard tack close-hauled against the larboard close-hauled, when the vessels are crossing each others' courses; and would, moreover, seem not entirely accurate in its postulates, because the courses given must, if sufficiently protracted, cross each other. The same result is, however, obtained, whether Dr. Lushington's expression of the rule be adopted, or the more simple and perspicuous one of each vessel putting her helm a-port when the courses are upon or approximating to a common line, because in both instances the vessels give way, each passing to the larboard of the other.

In my opinion, a great preponderance of the testimony derived from witnesses not on board either vessel, and in situations to see and know the facts as to the direction of the wind, and the courses the vessels were steering, and their distance off the land, supports the case made by the Mazeppa, and contradicts that set up on the part of the Washington. It is satisfactorily proved that the two vessels were more than three miles from the Jersey shore

at the time of the collision, and that there was no impediment in the way of their free navigation. The atmosphere was clear, and the wind a whole-sail breeze. To the main particular in dispute between the parties, whether the wind was W., or to the N. of W., and about N. N. W., inclining still more to the N., the mate of the Washington, the man at her helm, and a deck hand testify it was W. The master and mate of another vessel, one and a half or two miles off, and running the same course with the Washington, and the master of a schooner, three miles off, going N., also support that testimony. The captain of the Washington was not examined in the cause. On the other hand, the pilot, master, chief mate, and five of the crew of the Mazeppa, including the man at the helm, all unite in asserting the wind was N. of W., and in this they are supported by two pilots who passed these vessels about the time of the collision, in charge of other vessels coming to New York, and by three other pilots who were in their pilot boat following the Washington down, and about a quarter of a mile from her at the time of the collision. The bearing of the testimony of the witnesses out of the Mazeppa tends to fix the wind at about W. N. W. to N. W. Their testimony furthermore corroborates that of the crew of the Mazeppa, that she was close-hauled and to windward of the Washington, and that the latter was running free, as were all the vessels in sight at the time going S. This evidence overbears in numbers and disinterestedness that which represents the Washington close-hauled and to windward of the Mazeppa at the time.

There would be no utility in extracting from the proofs the evidence in all its details. Every witness was subjected to the most careful and skilful examination by the counsel for the parties, and was led through the most minute statement of particulars directly or collaterally bearing upon the case. I did not at the trial discern, nor on more studying the evidence now do I find, reason for distrusting the intelligence and integrity of the witnesses. The discordance in their testimony is no doubt the result of misapprehension and mistake, but there is no reason disclosed upon the proofs which calls upon the court to adopt the statement of the lesser number, and reject that of the great majority of these witnesses. Accordingly, I feel bound to regard the facts testified in support of the Mazeppa, as presenting the true statement of the case in this particular, and that she was to the windward closehauled, and the Washington to leeward running two or three points free at the time of the collision.

This condition of things imposed on the Washington the obligation of proving that, notwithstanding her effort to keep out of the way of the Mazeppa, the fault of the latter had produced the injury sustained by her. The Mazeppa is charged with misconduct in not keeping a sufficient look-out, so as to be apprised of the situation of the Washington, and be able to take proper measures for avoiding her. This charge is supported by the evidence of Mr. Lothrop, a port warden, who testifies that about the time the Mazeppa came into port, he heard her captain and mate say, they did not see the Washington until she was within ten feet of the Mazeppa. The captain denies he made such declaration, and says he was called out of his cabin by the hail of the mate to the pilot, that a vessel was on the lee-bow, and as he came on deck he saw the Washington, then about ten lengths off. The mate had been examined on depositions out of court, previous to the trial, and was not present to be recalled after the testimony of Mr. Lothrop was given. He had sworn he was placed forward as look-out, and had seen the Washington a distance off, and had given the pilot notice of her, but it was supposed her then position and course would carry her entirely to leeward and clear of the Mazeppa. There is evidence tending to show that Mr. Lothrop had evinced a strong partizanship in the cause in favor of the owners of the Washington, and under that feeling had made charges derogatory to the character of the pilots examined as witnesses; and the court, under such a state of his mind, should exercise caution in allowing his recollection of casual remarks of the captain and mate to impeach their express and positive declarations on oath. This topic need not, however, be discussed at length. It is enough to say that Mr. Lothrop may have easily and innocently understood the assertion of the captain, that when he saw the Washington she was not more than ten lengths off, to be a distance of ten feet, and that she was then seen for the first time, and that kind of inconsistency, resting upon the memory of a mere word, could never be allowed in a court of justice to outweigh or discredit the direct and positive oath of a witness to a fact passing under his own eyes. I accordingly hold it proved that the mate was on the look-out and saw the Washington a sufficient distance off to enable the Mazeppa to avoid her, if it was her duty to do so, and that he and the pilot acted under the persuasion that the Washington was running a course, and at a distance off, which left the Mazeppa out of danger.

On the other hand, it is admitted on the part of the Washington, that she had no individual of the crew designated and stationed forward as a look-out, and that the Mazeppa was not seen until within two lengths, but it is asserted that the whole ship's company perform the duty of keeping a look-out. Evidence was given attempting to establish a usage with vessels leaving port, to rely upon the ship's company the first day out for that service, and not to detail and station any particular one or more to perform it. Such practice, so far as it exists, is without warrant of law or reason. The duty of a ship's company the day she leaves port, will probably be as absorbing, or more so, than on any other day of the voyage, in fair weather. Much must inevitably be left unfinished, in clearing the deck, stowing luggage or loose cargo, arranging or coiling

rigging, and various other services and necessities of the vessel, when she leaves her moorings, all which must be put in order by the crew as she goes out of port. No practice can be more hazardous and reprehensible than to leave the ship to run her course amidst the incoming and outgoing navigation crowding a harbor like New York, without the safeguard of a look-out properly stationed forward and assigned to that service, and instead of the first day being one on which she is exempt from employing that precaution, I hold it most pre-eminently and imperatively her duty to observe it with careful vigilance at all times. The want of a look-out at such time, is of itself a circumstance of a strong condemnatory character, and exacts from the Washington clear and satisfactory proof that the misfortune encountered is in no way ascribable to her misconduct in that particular.

Without discussing at length the facts in proof on all the points at issue, or determining whether the Mazeppa is proved to have run suddenly into the wind and against the Washington, I hold, upon the law and evidence of the case, that there was wrong and fault causing the injury, and that they lie upon the Washington, and the Mazeppa is entitled to recover the damages sustained thereby, and the Washington must be condemned therefor with costs. An order of reference will be taken to ascertain the amount of damages.

POOR (ARCHER v.). See Case No. 509.

Case No. 11,272.

POOR v. CARLETON et al.

[3 Sumn. 70.] [1]

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

INJUNCTION — ANSWER DENYING MERITS — AFFIDAVITS CONTRADICTING ANSWER — SPECIAL INJUNCTIONS.

1. In common cases, it is of cource to dissolve an injunction, if the answer denies the whole merits; and the plaintiff will not be permitted, upon a motion to dissolve the injunction, to read affidavits in contradiction to the answer. It is otherwise in cases of special injunctions.

[Cited in Orr v. Merrill, Case No. 10,591; Mittleburger v. Stanton, Id. 9,676; Woodworth v. Rogers, Id. 18,018.]

[Cited in Bailey v. Schnitzius, 45 N. J. Eq. 182, 16 Atl. 680.]

2. The continuance or dissolution of a special injunction, after the coming in of the answer, depends upon the sound discretion of the court.

[Cited in Orr v. Littlefield, Case No. 10,590; Clum v. Brewer, Id. 2,909. Quoted in U. S. v. Parrott, Id. 15,998.]

[Cited in Allen v. Hawley, 6 Fla. 142; Pineo v. Heffelfinger, 29 Minn. 184, 12 N. W. 523; Wise v. Lamb, 9 Grat. 301.]

3. The answer must positively deny the material facts of the bill, and the denial must be grounded on personal knowledge, not merely on information and belief, in order to support an application to dissolve a special injunction.

[Cited in Orr v. Badger, Case No. 10,587; Orr v. Littlefield, Id. 10,590. Quoted in U. S. v. Parrott, Id. 15,998. Cited in Same v. Same, Id. 15,999; Nelson v. Robinson, Id. 10,114; Woodworth v. Rogers, Id. 18,018; Platt v. McClure, Id. 11,218; Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Id. 2,990; Farmer v. Calvert Lithographing, etc., Co., Id. 4,651.]

[Cited in Cooper v. Tappan, 4 Wis. 370; Porter v. Jennings, 89 Cal. 446, 26 Pac. 967; Thompson v. Adams, 2 Ind. 152.]

4. In cases of irreparable mischief, the dissolution of an injunction rests in the sound discretion of the court, whether applied for before or after answer.

[Quoted in U. S. v. Parrott, Case No. 15,998.]

[Cited in Attorney General v. Oakland Co. Bank, Walk. (Mich.) 92.]

5. Affidavits may, after answer, be read by the plaintiff to support the injunction, as well as by the defendant to repel it; and this, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer. Semble, the practice on this subject is more liberal in America than in England.

[Quoted in U. S. v. Parrott, Case No. 15,998. Cited in Farmer v. Calvert Lithographing, etc., Co., Id. 4,651.]

Bill in equity. This was brought by David Poor, against Richard Carleton and others. It asserted a joint interest in Poor and one Isaac Carleton, of whom the defendants in the present case are the legal representatives, in a certain ship called the Boston; that the ship was built and sailed on joint account; and that it was afterwards seized and detained in Naples, and subsequently sold. "That since the decease of said Carleton, under and by virtue of a treaty duly concluded between the government of the United States and the king of Naples, certain indemnification was and is provided to be paid to the citizens of the United States, whose property had been unlawfully seized and detained or otherwise illegally disposed of, in the manner in said treaty set forth—and that by virtue of said treaty, and under the provisions thereof, your orator and the representatives and heirs of said Carleton, had jointly and equally a large and just claim for indemnification, for the detention, injury and loss of freight, and damages consequent thereon, of said ship and cargo at said Naples aforesaid—and that said defendants, the said Richard Carleton, Isaac Carleton, Charles Carleton, and one Eben Wheaton, of New York, a citizen of the state of New York—without the privity of your orator, and claiming to be the heirs at law of said Isaac Carleton deceased, did make claim and apply to certain commissioners, appointed by said United States, to ascertain and settle the claims of the citizens of the United States, under said treaty, to have allowance and award made to them, the said defendants and said Eben, of the full and whole amounts of damage and injury sustained by the seizure and detention of said vessel and cargo, as aforesaid—and did then and there present to said commissioners, the reg-

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

ister of said vessel, so made as aforesaid, in the sole name of said Carleton, deceased, as evidence that said vessel was the sole property of him, the said Carleton, whose sole heirs said defendants and said Eben claimed to be, and thereupon such proceedings were had, that said commissioners relying upon said register as evidence of the sole ownership by said Carleton, deceased, of said ship, did allow and award to said defendants and said Eben a large sum of money, for and on account of the seizure and detention of said vessel and cargo, as aforesaid,—and thereupon, pursuant to law in that case made and provided, the secretary of the treasury of said United States did thereafterwards, pursuant to said award, issue to said defendants and said Eben certain certificates, purporting to contain, that said defendants and said Eben were entitled to be paid, and that they and their assigns should be paid out of the moneys received under said treaty, in certain proportions or specified sums, the amount of nine thousand four hundred and thirty dollars and eighty cents. And your orator further shows, that said defendants and said Eben have received said certificates and now hold the same, and that your orator was justly, equitably, and in good conscience entitled to have received and been allowed and awarded one full moiety or half part of the amount so awarded to the defendants and said Eben, and that said certificates, or one moiety thereof in amount, and one moiety of all sums by said defendants and said Eben, or either of them, that have been or shall be received under and by virtue of said award and certificates, has been and will be received by said defendants and said Eben in trust for your orator, as jointly and equally interested with said Carleton, deceased, in said vessel, her freights and earnings."

The bill concluded with a prayer for a writ of injunction to the defendants, restraining them, and each of them, from any and all alienations, transfers, assignments, or other disposition of the said certificates, as also from any collection, the receiving by them, or either of them, or any person in their behalf, of any sums of money, payable under or by virtue of the said certificates.

Upon the coming in of the answer, Sprague, for the defendants, moved to dissolve the injunction which had been granted to restrain the defendants from disposing of the certificates of the stock stated in the bill, and receiving any instalments of money due or payable thereon.

The motion was resisted by Bartlett, for the plaintiff, who filed certain affidavits to establish the utter insolvency of one of the defendants, and the low character and irresponsibility of the other.

After the argument the following opinion was delivered by the court:

STORY, Circuit Justice. The motion to dissolve the injunction granted, in this case, has been made and argued by the counsel for the defendants upon the general ground, that by the rules of courts of equity, after the answers have come in, denying the whole equity of the bill, the defendants are entitled to have the injunction dissolved. On the other hand, the plaintiff insists, that the motion ought not to be granted, upon the ground of irreparable mischief; and in support of the argument he has offered and read certain depositions to establish, that one of the principal defendants is insolvent, and another is of low character, indigent, and irresponsible, and that the third is a minor; and if the certificates of stock stated in the bill are transferred, or payment of the sums due and recoverable on them is received by the defendants, there will, in the event of the suit being sustained, be an irreparable loss of the whole property to the plaintiff. The defendants insist, in reply to this statement, that the affidavits are not, in this stage of the cause, admissible, for the purposes alleged; and that if they are, the case made by them of insolvency, and low and irresponsible character, will not justify the court in the extraordinary step of continuing the present injunction, after such a full denial by the answer of the whole equity of the bill.

In the first place, let us consider the ground of the defendants, as to the right to have the injunction dissolved, upon the coming in of the answer. This, it is to be observed, is not the case of the common injunction issued against the defendants for not appearing, or for not answering the bill at the time prescribed by the practice of the court. In such cases, which usually occur in bills to stay proceedings at law, it is of course to dissolve such an injunction, if the answer denies the whole merits; and the plaintiff will not be permitted to read affidavits in contradiction to the answer, upon the motion to dissolve the injunction. This is sufficiently apparent from the statements made by Mr. Eden, in his valuable book on Injunctions. Eden, Inj. 88, 108, 109, 118, 326.

But the present case is one of a special injunction granted to restrain the negotiation of the certificates, and the receipts of payment thereon, until the further order of the court. Now, in such cases, there are two points which seem well established in practice; first, that the dissolution of the injunction is not of course upon the coming in of the answer, denying the merits; and secondly, that, upon the motion to dissolve such an injunction, the plaintiff, under some circumstances, is entitled to read affidavits in contradiction to the answer, not indeed to all points, but to many points. Mr. Eden (page 326) asserts, in broad terms, that "there are few points of practice which have been more discussed, or which are more satisfactorily established, than that by which the right of the plaintiff has been established to read affidavits on the motion to dissolve in contradiction to the defendant's answer." This is,

perhaps, stating the doctrine more broadly than the authorities will justify.

The main distinctions, which seem supported by the authorities, or at least by the weight of authority, are these. In the first place, in cases of special injunctions, if the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are exceptions to the doctrine, and these, for the most part, are fairly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violations of copyrights, or of patent rights. In cases of this sort, the court will look to the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion. This doctrine is, as I think, fully borne out by Lord Hardwicke, in Potter v. Chapman, 1 Amb. 99; 1 Dickens, 146; by Lord Talbot, in Gibbs v. Cole, 3 P. Wms. 255; by Lord Kenyon, in Strathmore v. Bowes, 2 Dickens, 673, 1 Cox, Ch. 263, 2 Brown, Ch. 88; by Lord Eldon, in Norway v. Rowe, 19 Ves. 153, and Peacock v. Peacock, 16 Ves. 49. See, also, Isaac v. Humpage, 1 Ves. Jr. 427, 2 Brown, Ch. 463; Mr. Swanston's note to Smythe v. Smythe, 1 Swanst. 254, note b; Wyatt, Prac. Reg. 236; Hendis. Ch. Prac. 596. A doubt too, in point of law, will furnish a sufficient ground against dissolving an injunction; and was so ruled in Maxwell v. Ward, 11 Price, 17. Indeed, Mr. Chancellor Kent, in Roberts v. Anderson, 2 Johns. Ch. 204, laid down the proposition generally, that the granting and continuing of injunctions must always rest in sound discretion, to be governed by the nature of the case.

It is true, that it was said by Lord Eldon, in Clapham v. White, 8 Ves. 36, 37, that "if the answer denies all the circumstances, upon which the equity is founded, the universal practice, as to the purpose of dissolving or not reviving the injunction, is, to give credit to the answer; and that is carried so far, that, except in the few excepted cases, though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to this purpose." This is strong language; but many qualifications must be engrafted on it, as will be manifest from the learned chancellor's own decision in Peacock v. Peacock, 16 Ves. 49, and Norway v. Rowe, 19 Ves. 144, on which I shall presently comment; and, indeed, as his own exceptive words, "in the few excepted cases" clearly import. I confess that I should be sorry to find that any such practice had been established, as that a special injunction should, at all events, be dissolved upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous; nay, might be the cause of irreparable mischief. The true rule seems to me to be, that the question of dissolution of a special injunction is one which, after the answer comes in, is addressed to the sound discretion of the court. In ordinary circumstances, the dissolution ought to be ordered, because the defendant has primâ facie repelled the whole merits of the claim asserted in the bill. But extraordinary circumstances may exist, which will not only justify, but demand, the continuation of the special injunction. This, upon the principles of courts of equity, which always act so as to prevent irreparable mischiefs and general inconvenience in the administration of public justice, ought to be the practical doctrine; and I am not satisfied that the authorities, properly considered, do establish a contrary doctrine. If they did, I should hesitate to follow them in a mere matter of practice, subversive of the very ends of justice.

Indeed, there are numerous cases, which show the gradual meliorations or changes, often silent and almost unperceived, which have been introduced into the practice of the courts of equity, to obviate the inconveniences which experience has demonstrated, and to adapt the remedial justice of these courts to the new exigencies of society. Thus, for example, thirty years ago, it seems to have been thought by Lord Eldon, that an injunction to restrain the negotiation of a negotiable instrument was an extraordinary interference of the court, and that, upon the coming in of the answer, the case stood exactly as if the case had been upon the common injunction to stay proceedings at law. Berkely v. Brymer, 9 Ves. 355, 356. And the case was then thought distinguishable from that of an injunction granted to stay waste, in which the court would interfere, on account of the danger of irreparable mischief, and continue the injunction to the hearing. But this doctrine has been since completely abandoned; and in Hood v. Aston, 1 Russ. 412, Lord Eldon himself, adverting to the supposed practice, not to interfere in cases of negotiable securities to prevent their negotiation, said: "I do not recollect such a doctrine to have been at any time in my experience the law of this court. It is true, that applications for injunctions of the sort now moved for, have become much more frequent than they were in former days. But the reason is, that in the present state and form of the transactions of mankind, there is an increased necessity for them; a necessity, too, which is not likely to become less." This last doctrine has been in the fullest manner recognised and acted upon by the supreme court of the United States. Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, 845.

But, supposing the doctrine were as comprehensive, as to the dissolving of a special injunction on the coming in of the answer, as the counsel for the defendants has contended; the question occurs, whether it is applicable to all kinds of answers, which deny the whole merits of the bill; or whether it is applicable to such answers only, as

contain statements and denials by defendants, conusant of the facts, and denying the allegations upon their own personal knowledge. It seems to me very clear upon principle, that it can apply to the latter only. The ground of the practice of dissolving an injunction upon a full denial, by the answer, of the material facts is, that in such a case, the court gives entire credit to the answer, upon the common rule in equity, that it is to prevail, if responsive to the charges of the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule, if we were to say, that a mere naked denial by a party, who had no personal knowledge of any of the material facts, were to receive the same credit, as if the denial were by a party having an actual knowledge of them. In the latter case, the conscience of the defendant is not at all sifted; and his denials must be founded upon his ignorance of the facts, and merely to put them in a train for contestation and due proof, to be made by the other side. This distinction is alluded to, and relied on, by the supreme court in Clarke's Ex'rs v. Van Raindyk, 9 Cranch [13 U. S.] 160, 161. See, also, Hughes v. Garner, 2 Younge & C. Exch. 328. The sole ground, upon which the defendants are entitled to a dissolution of an injunction upon an answer, is, that the answer in effect disproves the case made by the bill, by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery, sought by the plaintiff, to establish it. But what sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims; but merely establishes, that the defendant has no personal knowledge to aid it, or to disprove it. It is upon this ground, that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction. The cases of Roberts v. Anderson, 2 Johns. Ch. 202, 204; Ward v. Van Bokkelen, 1 Paige, 100; Fulton Bank v. New York & S. Canal Co., 1 Paige, 311; Rodgers v. Rodgers, 1 Paige, 426, —are fully in point.

The importance of this distinction is manifest in the present case. Here, the defendants are merely the heirs and representatives of the original party (Isaac Carleton) deceased; and the original transactions detailed in the bill, and under which the plaintiff asserts his title to relief, took place from twenty-eight to thirty years ago; and there is no pretence to say, that any of these defendants have any personal knowledge of these transactions. This is sufficiently apparent from their answers. But by a certificate of the births of the defendants, which is very properly in the case for the present purpose, it appears, that the principal defendants, Richard Carleton and Isaac Carleton, (the other defendant being yet a minor,) were, at the time of the transactions, so young as to demonstrate, that they could have no personal knowledge, Richard being then only nine or ten years old, and Isaac only two or three years old. For the purpose, then, of dissolving the injunction, their answers cannot be treated as competent evidence to repel the allegations of the bill, or to disprove the transactions, on which it is founded.

In regard to the admission of the affidavits, there are other considerations, which require attention. All the affidavits, except that of Josiah Barker, are simply to the point of the insolvency and indigence of the defendant, Isaac Carleton, and of the low character, intemperance and indigence of the defendant, Richard Carleton. They satisfactorily, to my mind, establish the facts, if they are admissible in evidence; and that they are so admissible, I cannot doubt, for they are merely to collateral matters, not touched by, or contradictory to the answers. Taggart v. Hewlett, 1 Mer. 499, and Morgan v. Goode, 3 Mer. 10, and other cases cited by Mr. Swanston in his note to Smythe v. Smythe, 1 Swanst. 254, sufficiently establish this position. See, also, Eden, Inj. 109. Without doubt the defendants are at liberty to repel such affidavits by counter affidavits to the same points; for otherwise they might be compromitted by statements which they would have no opportunity to answer.

In regard to the affidavit of Barker, that is of a very different character, and goes to the proof of the original transactions stated in the bill, and is in direct contradiction to the negative allegations in the answers. It was not filed, when the injunction was obtained; but it has been filed since the answers have come in. Under these circumstances the question arises, whether it is admissible to be read on the present motion. In cases of the common injunction, it has been already stated, that after an answer, denying the whole facts and merits, affidavits cannot be read to contradict the answer, on the motion to dissolve. The language of Lord Eldon, in Clapham v. White, 8 Ves. 35, 36, already cited, is full to this purpose. But in cases of special injunctions, affidavits filed in support of the original injunction may be read, upon the motion to dissolve in contradiction to the answer, in special cases, that is to say, in cases of irreparable mischief, such, for example, as of waste. See Eden, Inj. 326; Peacock v. Peacock, 16 Ves. 49, 50; Smythe v. Smythe, 1 Swanst. 253, and cases cited in note b, Id.; Norway v. Rowe, 19 Ves. 144; Charlton v. Poulter, 19 Ves. 149, note c. But it has been held by Lord Eldon, that even in cases of waste such affidavits are not admissible

to found a motion for an injunction after the answer (none having been previously granted); because, if the affidavits are filed before the answer, the defendant possesses an opportunity of explaining or denying the facts stated in those affidavits; but if the plaintiff reserves his affidavits until after the answer is filed, he does not deal fairly with the defendant, who is entitled, before answer, to be apprised of the points on which the plaintiff rests his case. Smythe v. Smythe, 1 Swanst. 253. I confess myself not so strongly impressed with the force of the reasoning, as the learned judge seems to have been. And it would be very easy to obviate the objection, by allowing the defendant, by his own, as well as other counter affidavits, to repel the statement, which he has not, by his answer, had an opportunity to meet and explain, or deny.

There is another qualification of the doctrine, in cases of irreparable mischief, and that is, that though the original affidavits may be read as to other facts contradicted by the answer, they cannot be read in support of the title of the plaintiff, which is contradicted by the answer. The ground of this exception seems to be, that the court ought not collaterally to decide upon the title. So the doctrine was established in Norway v. Rowe, 19 Ves. 144, 157. Whether that doctrine stands upon a satisfactory foundation, is quite a different question. Upon general principles, I cannot well see, why the court, to prevent irreparable mischief, may not, upon an application to continue an injunction, look to affidavits in affirmance of the plaintiff's title, not so much with a view to establish that title; but to see, whether it has such a probable foundation in the present stage of the cause, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded.

In cases of irreparable mischief—and I think the present case properly falls under that head, or stands upon the same analogy,—it seems to me, that the more fit course for the due administration of public justice is to follow out the suggestions of Lord Eldon himself, in the case of Peacock v. Peacock, 16 Ves. 51. His lordship in that case, which was upon a motion respecting an injunction in a case of partnership, said: "With regard to the point of practice as to reading affidavits, this court has interfered in these cases of partnership, upon principles, not the same, but analogous to those, on which it interposes in the case of waste. In that instance, if the fact can be maintained, the objection is proved with very little effect, that the parties may proceed, vieing with each other by affidavits without end. The court does permit affidavits, taking care to prescribe limits according to the circumstances of such case." This, it appears to me, is the true view of the matter. The admission of the affidavits, whether filed before, or after the answer, whether they are to the title of the plaintiff, or to the acts of the defendant, although they are contradictory to the answer, ought to rest in the sound discretion of the court, according to the circumstances of each particular case, without the court's binding itself by any fixed and unalterable rules, as to the exercise of that discretion. This seems to have been the course which commended itself to the mind of that great equity judge, Mr. Chancellor Kent. See Roberts v. Anderson, 2 Johns. Ch. 202, 205. But see Eastburn v. Kirk, 1 Johns. Ch. 444.

I have looked into the earlier practice of the court of chancery, in order to satisfy myself whether, in all cases of irreparable mischief, the court had positively limited its own discretion under all circumstances, in the manner supposed by the modern authorities. Mr. Dickens, whose great experience in the practice of the court has been thought by Lord Eldon to entitle his opinion to great weight in such matters (Norway v. Rowe, 19 Ves. 154, in reporting the case of Strathmore v. Bowes, 2 Dickens, 673, 1 Cox, Ch. 263, 2 Brown, Ch. 88), has, it is true, given us his view of the practice in the following terms: "On application to continue or dissolve an injunction, either of course, or special, I have always understood it to be the rule, that, though affidavits are not to be read to support the plaintiff's equity, that is, his right to come into the court, when denied by the defendant's answer, yet in injunctions to stay waste, or in the nature of waste, when the waste sworn to, and upon which the injunction is grounded, is denied, the court will admit proof by affidavit in support of the facts." This passage seems certainly corroborative of what has been supposed to be the later general practice. Yet it is difficult, notwithstanding Mr. Dickens's subsequent explanations of the grounds of this practice, to perceive what solid distinction there is, or ought to be, between admitting affidavits as to title and affidavits as to the facts of waste; for each of them are equally in opposition to the answer in relation to the material points of relief. Mr. Dickens at that time also thought, that affidavits by the defendant, in support of his answer, were not admissible. But Lord Eldon considers the present practice to be, or at least that it ought to be, upon principle, otherwise. However, Lord Eldon does not understand Mr. Dickens to mean to assert, what the passage abovecited may seem, at first sight, to import; for he says, in Norway v. Rowe, 19 Ves. 154: "Mr. Dickens, however, did not mean, that if there is, by the answer, a total denial of the plaintiff's title to stay waste, the plaintiff could not by affidavit assert his title, contradicting the answer in that respect;" a concession, if well founded, which removes the statement of Mr. Dickens out of the present case. See, also, Eden, Inj. p. 328.

The truth seems to be, that in cases of this

sort, the practice has been shifting from time to time, to meet the new exigencies of society and the pressure of peculiar circumstances; and the court has never suffered itself to be entrapped by its own rules, so as to interfere with the purposes of substantial justice. The practice in America has, I believe, on this subject, become more liberal, than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived, that, without it, irreparable mischiefs would arise. In the present case, there are circumstances, which might free me from the necessity of asserting so broad a doctrine. But I wish rather to dispose of the case upon the general ground, that the granting and dissolving injunctions in cases of irreparable mischief, rest in the sound discretion of the court, whether applied for before or after answer; and that affidavits may after answer be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer.

The motion to dissolve the injunction is accordingly refused.

POOR (CHESAPEAKE & O. CANAL CO. v.). See Case No. 2,651.

POOR (SMITH v.). See Case No. 13,093.

POOR (WILLIAMS v.). See Case No. 17,732.

Case No. 11,273.

POPE et al. v. BARRETT.

[1 Mason, 117.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1816.

CONSIGNEE'S LIABILITY FOR FAILING TO REMIT—DAMAGES—ASSUMPSIT—INTEREST.

1. In assumpsit against a consignee or bailiff of goods "to sell the same and render a reasonable account," damages, for not remitting when exchange was favorable, are not allowable.

[Cited in New Orleans Ins. Ass'n v. Piaggio, 16 Wall. (83 U. S.) 386.]

2. Quære, how it would be if there was a special promise to remit, and a breach assigned in the declaration?

[Cited in brief in Weed v. Marsh, 14 Vt. 82.]

3. Interest is allowable in such cases, and also in actions for money had and received, from the time of a demand made, where the defendant has refused to account or to make payment, or has converted the money to his own use.

[Cited in New Orleans Ins. Ass'n v. Piaggio, 16 Wall. (83 U. S.) 386.]

Assumpsit. The first count was for $7,000, money had and received of the plaintiffs [Henry Pope and others]. The second count charged, that the defendant [Charles Barrett] was bailiff of the plaintiffs of 23 packages of goods of the value of $7,000 "to sell and dispose thereof to the best advantage," and in consideration thereof "promised the plaintiffs to render them a reasonable account thereof on demand," and alleged that the defendant, though specially requested, had not rendered any reasonable account. The plea was the general issue. At the trial it appeared among other things in evidence, that the goods in question were consigned by the plaintiffs, who were merchants in Manchester in England, to one George Barrett, the brother and partner of the defendant, for sale and remittance, in the year 1811. The goods were first shipped to Canada, but were intended ultimately for sale in the United States. In 1812, George Barrett went to New Orleans and left the whole business under the agency of the partnership. George Barrett died in that year during his absence on the journey, leaving the defendant surviving partner of the firm, who assumed the agency, and sold, or directed the goods to be sold. The defendant had been repeatedly called on by the plaintiffs to account for the sales, and to remit the proceeds; but had declined to render any account, and offered no evidence whatsoever, either to excuse or defend himself against the action, relying altogether upon the supposed defect of the plaintiffs' evidence to sustain their case. The principal evidence of the plaintiffs arose from letters written by the defendant to the plaintiffs, or to the plaintiffs' attorney. In the latter he admitted, that the net proceeds of the sales, yet coming to the plaintiffs, would be about £1,200 sterling, but declined to go into any explanation, in detail, of the sales, or of the money, which had been actually received by him; and excused himself by pretences, that the means of an exact statement were not then in his possession. The invoice value of the twenty-three packages of goods was £1,648. 4s. 10d. sterling; from this a deduction was admitted of £100. 14s. 3d., and £119. 12s. for remittances made by George Barrett in his lifetime. The action was brought to recover the balance of £1,421. 18s. 7d. sterling, and also the sum of $1,148, which had been received by the defendant under a special power of attorney, as part of a debt due from Messrs. Bond and Prentiss to the plaintiffs. There was no dispute, that this last sum was due, and the defendant declared himself to have been always ready to pay it.

R. G. Amory, for plaintiffs, contended, that they were not only entitled to the principal sums and interest, but also to fifteen per cent. for the difference of exchange; which would have been a profit to the plaintiffs, if the remittance had been made at the time when the defendant ought to have remitted the money, received from the sales of the twenty-three packages. He claimed interest on the £1,421. 18s. 7d. sterling and $1,148, from the first of January, 1814, and the rate

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

of exchange in England, which, at the same period, was fifteen per cent. below par.

Mr. Cooke, for defendant, on the other hand, contended, that no interest was due, because the plaintiffs had not proved any direct demand or refusal, before the commencement of the suit; nor any specific period of time, when the sales of the goods were made, and the proceeds received by the defendant. And he further contended, that, for the same reasons, no difference of exchange ought to be allowed. And that as there was no special promise to remit the proceeds, or special damages laid in the declaration, even if a difference of exchange were, in a case like this, recoverable at law, no recovery could be here had for want of an appropriate declaration.

STORY, Circuit Justice, after summing up the facts, directed the jury, that if they were satisfied from the evidence, that the defendant became the agent, consignee, or factor of the plaintiffs (which appeared to him very strongly in proof), then, as the defendant had utterly refused to render any account of his sales, that the most unfavorable presumptions, which the evidence would admit of, ought to be made against him, in respect to the amount and value of the goods sold and unaccounted for. That as the case was principally supported by the written confessions of the defendant, those confessions were to be taken and weighed all together; and damages ought to be given to the full value of the goods, which came into the hands of the defendant, deducting therefrom all proper charges for disbursements, commissions, and expenses. And that interest ought to be allowed upon the amount, so found due, from the time of the actual sales, or the earliest subsequent opportunity to remit, up to the time of giving their verdict. That if the time of the actual sales was not distinctly proved, they ought to adopt that period, which, under all the circumstances of the case, seemed reasonable. That the defendant was not absolutely bound to remit during the war with England; for it might involve him in the penalty of illegal intercourse. But that he was bound to remit at as early a period after peace, as the case would admit. That under all the circumstances, perhaps it might be considered, that the sales were not all completed, and the remittances could not have been made earlier than August, 1815; and if they were of that opinion, interest ought to be calculated from that date.

In respect to the damages claimed under the special count, to account for the loss occasioned by the difference of exchange in not remitting the money, he doubted whether, as that count was framed, such an item of damages was admissible; as a promise to account upon a consignment to sell and dispose of the goods to the best advantage, did not seem to him to include a promise to remit the proceeds. Nevertheless, as the plaintiffs claimed such an allowance, for the purposes of this trial, he would direct them, that if they were satisfied, that, according to mercantile usage, when goods were received on consignment to sell and account for the same, the consignee, after sale, was bound to remit the net proceeds to his employer, without any special direction, and to allow him the benefit of the rate of exchange on the remittance; then they might add the item of the difference of exchange to the amount due to the plaintiffs.

The jury found a verdict for the plaintiffs for $9,335.92; and, upon an inquiry from the court, at the suggestion of the defendant's counsel, they declared, that they had allowed twelve and a half per cent. for the difference of exchange, considering it perfectly clear, that, according to mercantile usages upon foreign consignments, the remittances ought to have been made, and the benefit of the then state of exchange allowed to the consignee. They added, that they had given the plaintiffs the full invoice value of the goods, without any deductions for commissions or charges, because, taking all the circumstances of the case together, they were satisfied, as the defendant had rendered no account, and still refused to render any, that the goods sold for more than the invoice value, and the charges and commissions added to it.

After verdict, Mr. Cooke moved for a new trial: (1) For misdirection of the court, as to the allowance of the difference of exchange and interest. (2) Because the jury had given excessive damages. Upon the first ground he urged the same reasons that he had urged before at the trial, and further, that no interest ought to have been allowed on the $1,148, because it was received under a special authority, and there was no promise to remit; and that interest ought not to have been allowed without a special count for that purpose. That the counts in the declaration stated the promises to be made on the second day of January, 1813, and no money subsequently received could be recovered in this action, as it would not be a bar to any subsequent action. Upon the second point, he relied in addition upon the fact, that the jury had allowed the full invoice value of the goods, without any deduction for disbursements and commissions.

Mr. Amory, e contra, insisted that the defendant in fact promised to remit, as appeared by the original correspondence. That if the party was to account, the manner of accounting depended upon the circumstances of the case, and the original instructions. That however special those instructions might be, it was sufficient to charge in the declaration, that the party had promised to account generally, and the special

manner was mere matter of evidence; and that all damages for not accounting might be recovered, without laying the special damages in the declaration. That the interest was clearly allowable. The defendant had utterly refused to do his duty, and having kept the money of the plaintiffs, he was bound to pay interest for it; and that the uniform practice of the supreme court of Massachusetts was to allow interest in such cases. Wood v. Robbins, 11 Mass. 504.

STORY, Circuit Justice. The first question respects the direction of the court, as to the allowance of the profit, which would have accrued to the plaintiffs, if the proceeds of the sales of the consignments had been remitted to them in due season. At the trial, I felt great doubts if this item could be properly allowed in damages, under the declaration. It was clearly inadmissible under the count for money had and received. The special count, after stating the goods to have been received, "to sell and dispose thereof to the best advantage," and the promise, by the defendant, to render to the plaintiffs a reasonable account thereof on demand, assigns as a breach, the refusal to render such an account. There is no averment, that the defendant promised to remit the proceeds; and of course no breach assigned, or special damages claimed, for the violation of any such promise. Upon farther reflection since the argument, I am satisfied, that my doubts at the trial were well founded. Assuming that the plaintiffs could entitle themselves to the difference of exchange, upon a count properly formed for that purpose, from the neglect to remit in due season; the claim cannot be sustained under the present declaration. The contract here stated is merely to sell the goods, and render a reasonable account of the sales. Upon this count the defendant was not bound to remit; and if not so bound, he could not be liable for any loss occasioned by his omission to make a remittance. It is no sufficient answer, that the defendant would have been completely exonerated, if he had remitted the proceeds, by purchasing a bill of exchange; or that the plaintiffs, by the omission, have lost a profit, which they might otherwise have obtained. The defendant has a right to say, non in hæce fœdera veni. It is not for every possible loss, that the promisor renders himself liable by a breach of his promise. A party may, by the non-payment of money due to him, lose the opportunity of an advantageous bargain; but such a loss is not recoverable in an action for the money due. Upon every consignment of goods for sale, the law raises a promise to account (Wilkin v. Wilkin, 1 Salk. 9; Carth. 89; Topham v. Braddick, 1 Taunt. 572); but that promise is completely satisfied by payment over of the proceeds of the sale, upon demand of the consignor. If the usage of trade, or a special contract, bind the party to remit, it is an obligation, which the law does not enforce, unless averred in the declaration, and put in issue by the parties. Nor is it true, as supposed in the argument, that under a declaration to render a reasonable account, the plaintiff might give in evidence a contract to account in a special manner. However true this doctrine may be in actions of account, in respect to which special reasions may apply (Robsert v. Andrews, Cro. Eliz. 82; Godfrey v. Saunders, 3 Wils. 73), in actions of assumpsit the contract must be proved as laid; and if the undertaking be special, it must be so stated, or the variance will be fatal. If the law were otherwise, it would not help the present case; for a promise to remit is not, in the intendment of law, a promise to account in a special manner. It is to all important purposes, an independent and distinct part of the contract.

There might, indeed, be some question, whether, under a special count, the loss of the difference of exchange would be recoverable. The claim is founded on a rule, which will not always work equal justice. If the exchange be below par, then if the defendant does not remit, the plaintiff may have the difference, because the rule works in his favor. But if the exchange be above par, and the defendant does not remit, shall the latter be entitled to a proportionate reduction of the damages? If so, then the defendant gains a profit by his fraud or negligence; if not, then the rule has not that universality, which commends it for general adoption. However, on this I give no opinion. It is sufficient to decide what is necessarily before us. And my opinion accordingly is, that, upon this declaration, as framed, this item ought to be expunged from the damages. I will only add, that except in actions upon foreign bills of exchange, I have not found an instance, where re-exchange, or the difference of exchange, has been allowed in damages; and in cases of mere debts, it has been expressly denied. Mellish v. Simeon, 2 H. Bl. 378; Hendricks v. Franklin, 4 Johns. 119; Martin v. Franklin, Id. 124. The very form of declaring in assumpsit against a bailiff or factor, is of comparatively modern origin, as a substitute for the action of account. Wilkin v. Wilkin, 1 Salk. 9; Carth. 89; Poulter v. Cornwall, 1 Salk. 9; Bull, N. P. 148; Topham v. Braddick, 1 Taunt. 572. And in an action of account, a bailiff ad merchandizandum could not have been made chargeable, but for profits actually received in the way of merchandise. Com. Dig. "Accompt," E, 10; 1 Rolle, Abr. 125 (O.) pl. 35, 36, 40. Profits upon remittances do not seem ever to have been claimed or allowed. Godfrey v. Saunders, 3 Wils. 73; Topham v. Braddick, 1 Taunt. 572.

The next question is, as to the allowance of interest upon the sums found due to the plaintiffs. In the English decisions there

has been a singular fluctuation of opinion. The rule, at present established in England, seems to be, not to allow interest except in cases, where there is a written contract for the payment of money on a certain day; or where there has been an express promise to pay interest; or where, from the course of dealing betwen the parties, such a promise may be implied; or where it can be proved, that the money has been used, and interest has been actually made. De Havilland v. Bowerbank, 1 Camp. 50, 51; De Bernales v. Fuller, 2 Camp. 426, 428, note; Calton v. Bragg, 15 East, 223; Slack v. Lowell, 3 Taunt. 157; Gwyn v. Godby, 4 Taunt. 343; Middleton v. Gill, Id. 298; Marshall v. Poole; 13 East, 98. And see Mitchell v. Miniken, 6 Taunt. 117. In the United States a more liberal policy has been pursued; and interest has been allowed in a variety of cases, where it would have been refused by the English courts. Without going over the cases, which are ably collected by Mr. Justice Putnam, in delivering the opinion of the court in Wood v. Robbins, 11 Mass. 504, it seems to me, that the principles are perfectly sound and equitable, which assert, that interest is payable, when a man receives the property or money of another, and holds it against his consent, or converts it to his own use, or improperly refuses payment after a demand. Com. v. Crevor, 3 Bin. 121; Delaware Ins. Co. v. Delaunie, 3 Bin. 295; People v. Gasherie, 9 Johns. 71. In the present case it may be admitted, that no interest was due until after a demand made; or until gross laches and delay of payment, contrary to the express or implied contract of the parties. In respect to the special count, no interest could accrue until after a special demand of an account; for until that was made, the party was in no default. Topham v. Braddick, 1 Taunt. 572. But there is the strongest presumptive evidence of such a demand, long before the period at which the court directed the jury to allow interest. In respect to the count for money had and received, there is no difficulty in sustaining the claim for interest. The money, received from Messrs. Bond and Prentiss, was in the hands of the defendant at least a year before the period above stated; and, from the circumstances of the case, a demand and gross laches may be reasonably presumed against the defendant. There was also, from the same circumstances, a strong presumption, that the goods on consignment had been all sold, and the net proceeds received by the defendant, long before the same period. The defendant utterly refused to render any account of the sales, or to pay over the proceeds, after an explicit demand for this purpose. There was, therefore, not only a gross departure from duty, which would have authorized the jury to give interest; but the jury had a right to infer, from the conduct of the defendant, that he had unjustifiably converted the money to his own use. This is not all. By the contract of consignment, as well as by the usage of trade, as found by the jury, the defendant was bound to remit the proceeds; and by his neglect so to do, he has justly incurred the payment of interest; for this, at least, is a loss actually sustained by the plaintiffs. In every view, therefore, of this case, the jury were fully justified in making an allowance of interest from August, 1815; for there was a strong presumption, that the money was, after a demand, withheld against the plaintiffs' consent; that it was converted to the defendant's own use; and that there was a gross and improper refusal of payment. In estimating the interest, however, it appears, that the jury have by mistake, allowed a year's interest more, than according to the direction of the court, they intended to allow. This sum must, therefore, be deducted from the verdict.

The defendant also complains of the verdict, because the jury have allowed the full amount of the invoice value of the goods, without any deduction for commissions or charges. The jury were expressly directed to make such an allowance, and have assigned as a reason for giving the full invoice value, that, from the circumstances of the case, the goods having ultimately come to a high market after the peace, and the defendant having refused to render any account, they were satisfied, that they sold for a sum beyond the invoice value, sufficient to satisfy all charges. I cannot say, that the verdict was not fully justified by the facts of the case. There was the most reprehensible and studied refusal of the defendant to render any account, even at the trial. He contented himself with a profound silence, as to evidence of his own conduct, leaving the plaintiffs to grope their way through the cause, by doubtful and glimmering lights, gathered from his own imperfect confessions. If he has suffered by the verdict, it has been his own folly and gross negligence; and if it were properly within the province of a court to weigh in minute scales the items of damages (which it certainly is not), I should have been at a loss to conceive a reason for setting aside a verdict, so perfectly, in this case, consistent with the principles of equity and good faith.

Upon the whole, there must be a new trial, unless the plaintiffs will consent to remit the sum allowed for the difference of exchange, and the extra interest. If these sums are remitted, neither law nor justice requires the court to accede to the motion.

POPE (DREW v.). See Case No. 4,080.

Case No. 11,274.

POPE et al. v. NICKERSON et al.

[3 Story, 465; 7 Law Rep. 471; 12 Hunt, Mer. Mag. 179.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1844.

SHIPPING — ACCOUNTING BETWEEN SHIPPER AND OWNER—SALE OF CARGO IN FOREIGN PORT FOR REPAIRS—PERISHABLE ARTICLES — BOTTOMRY — GENERAL AVERAGE—AUTHORITY OF MASTER.

1. The schooner Annawan, bound from Malaga to Philadelphia, and owned in Massachusetts, having on board a cargo of fruit and wine, was obliged from stress of weather, to put into Bermuda, where she was surveyed and repaired, and the damaged part of the cargo was sold, and the proceeds appropriated to the payment of the repairs, and the balance required for the repairs was raised on a bottomry bond, on the vessel, freight, and cargo. The vessel then proceeded with the remainder of the cargo, and some copper on freight, and was again forced, by stress of weather, to put back to Bermuda, where, after a survey, the captain sold the vessel and the whole cargo, and with the proceeds paid the whole money on the bottomry bond, and detained the balance. The vessel was subsequently repaired, and brought to Philadelphia, with the sound part of the cargo. The present action is brought by the shippers, to recover the whole cargo. It was *held* that the responsibility of the owners of the schooner is governed by the laws of Massachusetts, where the owners reside, and not of Pennsylvania, or Spain.

[Cited in Hatton v. Melita, Case No. 6,218; The Brantford City, 29 Fed. 384; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 449, 454, 9 Sup. Ct. 475, 477.]

[Cited in brief in Dyke v. Erie Ry. Co., 45 N. Y. 114.]

2. The defendants are liable personally to the plaintiffs, for the monies of the shipper appropriated by the master towards the repairs of the ship, before the bottomry bond was given.

3. The defendants are not liable to the plaintiffs for the monies subsequently applied by the master to the payment of the bottomry bond; nor for the wrongful act of the master in selling the sound part of the cargo.

[Cited in brief in Drummond v. Winslow, 38 Me. 208.]

4. The sale of the perishing articles, and the appropriation of the proceeds thereof, to the repairs of the ship, was justifiable; but the sale of the sound part of the cargo was unjustifiable, and the master is responsible for the proceeds of such sale to the shippers.

[Cited in brief in Stirling v. Nevassa Phosphate Co., 35 Md. 132. Cited in Walker v. Boston & Hope Ins. Co., 14 Gray, 304.]

5. No general average is now, in this case, due to the defendants; but the general average should be applied pro tanto, as property of the ship-owners, in relief of the owners of the cargo, towards the bottomry bond.

[Cited in Hassam v. St. Louis Perpetual Ins. Co., 7 La. Ann. 11.]

6. By the laws of Spain, and of Massachusetts, the liability of the owners for the acts of the master is limited to the value of the vessel, and her freight, and does not include a general liability to the full extent of the loss or damage to the shippers, as by the laws of Pennsylvania.

[Distinguished in Faulkner v. Hart, 82 N. Y. 420.]

7. The master of a vessel has no power to bind the owners beyond the authority given to him by them, and the extent of that authority must be limited to their express or implied instructions, or to the law of the country, to which the ship belongs, and in which they reside.

[Cited in The Woodland, Case No. 17,976; The New World v. King, 16 How. (57 U. S.) 473; The Maggie Hammond, 9 Wall. (76 U. S.) 450; The William Cook, 12 Fed. 920; Force v. Providence Washington Ins. Co., 35 Fed. 779; The Scotia, Id. 908, 912; Card v. Hine, 39 Fed. 821; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 449, 454, 9 Sup. Ct. 475, 477.]

[Cited in Holcroft v. Halbert, 16 Ind. 257; Stirling v. Nevassa Phosphate Co., 35 Md. 140; Botsford v. Plummer, 67 Mich. 270, 34 N. W. 572; King v. Sarria, 69 N. Y. 33.]

8. The validity, nature, and interpretation of contracts, is governed by the law of the place where they are to be performed; unless they are void by the law of the place where they are made.

[Cited in Morrison v. The Unicorn, Case No. 9,849; The Avon, Id. 680.]

[Cited in brief in Talbott v. Merchants' Despatch Transp. Co., 41 Iowa, 248, 249. Cited in Barter v. Wheeler, 49 N. H. 29; Dickinson v. Edwards, 77 N. Y. 587; Faulkner v. Hart, 82 N. Y. 420.]

9. The cases of Malpica v. McKown, 1 La. 248, and of Arayo v. Currel, Id. 528, commented upon.

10. Bottomry bonds are not to be construed strictly, but liberally, so as to carry into effect the intention of the parties.

[Cited in Greely v. Smith, Case No. 5,750.]

11. The holder of a bottomry bond will not lose his money, where the non-performance of the voyage has not been occasioned by the enumerated perils, but has arisen from the fault or misconduct of the master or owner.

[Cited in Morrison v. The Unicorn, Case No. 9,849.]

12. In cases of bottomry, a loss, not strictly total, cannot be turned into a technical total loss, by abandonment, so as to excuse the borrower from payment; even although the expense of repairing the ship exceeds her value.

[Cited in Delaware Mut. Safety Ins. Co. v. Gossler, 96 U. S. 653.]

13. The master of a vessel has a right to sell a part of the cargo to make repairs, or to furnish necessaries for the completion of the voyage, and, by the general law in England and America, the owner would be responsible therefor to the shipper for the full amount, whatever it might be. It seems, that this rule would only apply, in case the vessel arrived at her port of destination, and not otherwise.

[Cited in Joy v. Allen, Case No. 7,552; Morrison v. The Unicorn, Id. 9,849.]

14. The only operation of the statute in Massachusetts on this rule, is to restrict the liability of the owners to the value of the ship and freight. But the shippers have a personal claim, and a lien therefor on the ship and freight, which attaches the moment the goods are appropriated.

[Cited in The Champion, Case No. 2,583.]

[Cited in Walker v. Hope Ins. Co., 14 Gray, 301.]

15. The statute of Massachusetts has reference only to cases where the master is guilty of tort or misconduct,—and not to cases of contracts by the master made lawfully, and within the scope of his authority.

[Cited in Walker v. Hope Ins. Co., 14 Gray, 304.]

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[1] [Reported by William W. Story, Esq. Law Rep. 471, and 12 Hunt, Mer. Mag. 179, contain only partial reports.]

16. The master has no right to sell the cargo, or any portion thereof, unless in case of a moral necessity, in order to prevent a greater loss to the shippers.

[Cited in Fitz v. The Amelie, Case No. 4,838; Astsrup v. Lewy, 19 Fed. 541.]

[Cited in Prince v. Ocean Ins. Co., 40 Me. 481.]

Assumpsit. The parties agreed upon the following statement of facts: "This is an action of assumpsit on four bills of lading, signed by the master of the schooner Annawan, belonging to the defendants [Thomas Nickerson and others] for a cargo of fruit and wine, shipped on board of her at Malaga, and consigned to the plaintiffs [Daniel Pope and others] at Philadelphia. The vessel, being seaworthy, sailed from Malaga on the 10th of October, 1840, and having experienced severe weather, by which she sustained damage on the 28th of November, the master decided, for the preservation of the vessel and cargo, to run for the nearest port, and arrived at St. George's, Bermuda, on December 5th. On her arrival a survey was held on the vessel and cargo. The former was ordered to be repaired, and such parts of the latter as were damaged, and in a perishable condition, were ordered to be sold. Such sale was accordingly made, and the proceeds, amounting to $1,029.70, were appropriated by the master towards defraying the expenses of the repairs. For the residue of the amount necessary for that purpose, the master procured funds by a bottomry bond, viz. $1,828.75. The bond recites in the preamble a necessity for hypothecating both vessel, freight and cargo, but only the vessel is named in the obligating part. The lender testifies, that it was the intention to include the cargo. The repairs being completed, the vessel took on board such of the cargo as had not been sold, and some copper on freight, and sailed for Philadelphia on February the 4th, 1841. She again encountered severe weather and lost a foremast, maintopmast, and jibboom, so that it was necessary to cut away every thing, to get clear of the wreck, and she was obliged to put back to Bermuda, where she arrived on the 18th. She was again surveyed, and an estimate made of the expenses of repairs, upon which the master concluded not to repair her, but to abandon the vessel and cargo, and to sell them. A survey was held on the cargo, in which it was ascertained, that part of the cargo, which consisted of fruit, was generally heated, and in a perishable condition; and the surveyors recommended, that it should be sold, —which was accordingly done. The master, having sold the vessel, concluded to sell the wine also, which was done. The proceeds of the vessel were applied to the payment of the bond, and being insufficient for its satisfaction, the agents of the vessel appointed by the master, who also were the holders of the bond, took the residue of the proceeds of the cargo; and the balance, amounting to about $1,800, was paid to the master. The vessel was not insured, and the master was not interested therein. The sum received by him has been retained by him, he declining to pay it to the owners of the cargo, unless they would give a receipt in full, releasing both him and the owners of the vessel from all further demands, and the owners of the vessel declining to receive it, on the ground that they had no interest in it. The plaintiffs claim the whole of the cargo shipped at Malaga. The defendants deny that, under the circumstances, they are liable at all, but contend, that, if liable at all, they are only liable for the actual proceeds of the cargo after deducting its contributary proportion thereof to all the expenses and charges incurred in general average. The writ, protest, surveys, bottomry bond, invoice accounts of Foyard and Smith, the vessel's agents at Bermuda, depositions taken there, bills of lading and statements of general average, form a part of the case for the use of either party. The case is submitted to the court to decide, whether the defendants are liable, and if so, on what principles the damages are to be assessed; and, if necessary, the cause may be sent to an auditor to ascertain the amount. Costs follow the result. Neither party is precluded by the statement from referring to any other fact appearing on the other papers of the case."

The bottomry bond referred to in the statement was as follows:

"These are to certify to all whom it may concern, that on the day of the date hereof, personally appeared before me, the consul aforesaid, John Scott Fisher, of the town of Saint George in the said islands of Bermuda, merchant, the deponent named in the affidavit hereunto annexed, being a person well known, and worthy of good credit, and by solemn oath which the said defendant then took before me upon the Holy Evangelists of Almighty God, did solemnly and sincerely testify and depose to be true, the several matters and things mentioned and contained in the said annexed affidavit. In testimony whereof I, the consul aforesaid, have caused my seal of office to be hereunto put and affixed, and also the bond mentioned in the said affidavit to be hereunto annexed; dated at the town of Saint George in the islands of Bermuda aforesaid, the second day of February, in the year of our Lord one thousand eight hundred and forty-one."

"John Scott Fisher, of the town of Saint George in the islands of Bermuda, merchant, maketh oath and saith, that he was present and did see Isaiah Atkins, master of the American schooner or vessel called the 'Annawan' now lying in the harbor of Saint George in the said islands, duly sign and seal, and as his act and deed deliver the bottomry bond hereunto annexed, bearing date the second day of February in the year of our Lord one thousand eight hundred and forty-one. And that the name 'Isaiah Atkins' thereunto set as the name of the party executing the same is of the proper handwriting of him

the said Isaiah Atkins, and that the names 'William Arthur Outerbridge' and 'John Scott Fisher,' respectively set or subscribed as witnesses to the execution of the said bottomry bond, are of the proper handwriting of the said John Scott Fisher and of the said William Arthur Outerbridge respectively. John Scott Fisher."

"Know all men by these presents that I, Isaiah Atkins, of Provincetown, state of Massachusetts, in the United States of America, master of the American schooner or vessel called the 'Annawan,' of the burthen of one hundred and twenty-three tons and fifty ninety-fifth parts of a ton, or thereabouts, belonging to Thomas Nickerson, Ebenezer Atkins, Jonathan Nickerson, Abraham Smalley, Isaac Smalley, Robert P. Miller, Stephen Nickerson, and Samuel Soper of Provincetown aforesaid, in the state of Massachusetts aforesaid, and now riding at anchor in the port of Saint George in the said islands of Bermuda, am held and firmly bound unto Augustus John Foyard, and Samuel Satton Smith, of the town of Saint George in the islands aforesaid, merchants, in the sum of four thousand and twenty-three dollars and fifty eight cents, to be paid to the said Augustus John Foyard and Samuel Satton Smith, or either of them, their or either of their certain attorneys or attorney, executors, administrators or assigns. For which payment to be well and truly made, I the said Isaiah Atkins do bind myself, my heirs, executors and administrators and every of them, and also the hull and appurtenances of the said schooner or vessel, firmly by these presents, sealed with my seal, dated this second day of February, in the year of our Lord one thousand eight hundred and forty-one. Whereas the said schooner or vessel called the 'Annawan' was, on or about the fifth day of December last past, whilst on a voyage from Malaga in Spain to Philadelphia in the United States of America, with a cargo of fruits and wines, forced and obliged by the perils of the sea to put into the port of Saint George in distress, and being thereupon found to be generally damaged and to require considerable repairs and supplies for the continuance and prosecution of the said voyage, the above bounden Isaiah Atkins hath been obliged and necessitated to take up and borrow upon the adventure of the said schooner or vessel, and the cargo on board thereof, the sum of one thousand eight hundred and twenty-eight dollars and seventy-five cents, being part of the amount required for repairing and furnishing the said schooner or vessel with materials, provisions and other necessaries, and setting her forth to sea to prosecute the said voyage, which said sum of one thousand eight hundred and twenty-eight dollars and seventy-five cents, the said Augustus John Foyard and Samuel Satton Smith have, at the request of the said Isaiah Atkins, lent and advanced to him the said Isaiah Atkins for the purpose aforesaid, at and after the rate of one hundred and ten dollars for every one hundred dollars of the said sum so advanced, being equal to the sum of two thousand and eleven dollars and seventy-nine cents, to be paid for the said sum of one thousand eight hundred and twenty-eight dollars and seventy-five cents, so lent and advanced for the said voyage. And the said Augustus John Foyard and Samuel Satton Smith are contented and have agreed to stand to and bear the hazard and adventure thereof on the hull or body and keel of the said schooner or vessel, and the goods, merchandize and effects, laden on board thereof, for and during the said voyage; and, therefore, the said Isaiah Atkins doth by these presents mortgage and hypothecate to the said Augustus John Foyard and Samuel Satton Smith and each or either of them, their and each or either of their executors, administrators and assigns, the said schooner or vessel called the 'Annawan,' with all her boats, tackle, apparel and furniture, and also the cargo, merchandize and effects laden on board thereof for the said voyage. Now the condition of the above written obligation is such, that if the said schooner or vessel called the 'Annawan' do and shall, with all convenient speed, proceed and sail from and out of the said port of Saint George, on her said voyage, and arrive at Philadelphia aforesaid, there to end her intended voyage, without deviation except by the dangers and casualties of the sea and rivers, and also if the above bounden Isaiah Atkins, his heirs, executors or administrators do and shall within the space of three days next after the arrival of the said schooner or vessel at Philadelphia aforesaid, or at any other port in the United States of America, well and truly pay, or cause to be paid, unto the said Augustus John Foyard and Samuel Satton Smith or to either of them or to their or either of their certain attorneys or attorney, executors or assigns the full sum of two thousand and eleven dollars and seventy-nine cents—or if a certain set of bills of exchange, drawn by the said Isaiah Atkins on the day of the date of these presents for the last mentioned sum of money upon Messrs. Pope and Aspinwall of Philadelphia, in favor of the said Augustus John Foyard and Samuel Satton Smith, as a collateral security only for the said sum of money so advanced as aforesaid, shall, within three days after the arrival of the said schooner or vessel at Philadelphia aforesaid, be duly paid, or after her arrival at any other port in the United States of America, the same be duly paid,—or if in the said voyage an utter loss of the said schooner or vessel by fire, enemies, pirates or any other casualty shall unavoidably happen (to be sufficiently proved by the said Isaiah Atkins his heirs, executors or administrators). Then the above written obligation shall be null and void, or else shall be and remain in full force and virtue. In witness whereof the said Isaiah Atkins hath set his hand and seal to two bonds of the same tenor and date, one of which being paid, the other to be null and void. Isaiah Atkins."

The bills of lading were drawn at Malaga, and contained divers shipments by different shippers at Malaga, in Spain, consigned to the plaintiffs Messrs. Pope and Aspinwall and deliverable at the port of Philadelphia to the consignees, "the act of God, the king's enemies, fire, all and every accident of the seas and navigation excepted."

The other papers, bearing only incidentally upon the question at issue, are not deemed necessary to be referred to at large in this place; as their bearings are sufficiently suggested in the arguments of the counsel and the opinion of the court.

E. H. Derby, for plaintiffs.
F. C. Loring, for defendants.

STORY, Circuit Justice. This case has been argued with great care, ability, and bearing by the counsel on each side, and all the appropriate topics have been by them brought under discussion, and indeed exhausted. In the views, which I have taken of the present case, I shall not deem it necessary to consider some of the points suggested at the bar; but shall content myself with an exposition of those, which in my judgment constitute the main grounds upon which the case must be determined.

The first point, which meets us at the threshold of the case, is as to the nature and extent of the liability of the defendants (the owners of the schooner) for the acts of the master. The bills of lading, upon which the original shipments were made, were executed at Malaga; the goods were consigned and to be delivered to the plaintiffs (the consignees) at Philadelphia; the schooner belonged to Massachusetts, and her owners resided there. It is not denied, that the vessel was a freighting vessel, and that the master was duly authorized to take the present shipments on board for the voyage. Whether the schooner was a common carrier, that is, a general carrier vessel whose mere employment was to take goods on board for hire for any persons whatever, or whether she was simply a carrier vessel employed on the present voyage pro hac vice, has been much discussed at the bar. But in my judgment, nothing does in this case turn upon any distinction between the cases; for under the bills of lading precisely the same obligations attach to the owners and the master in regard to the shippers—whether she was a general or common carrier, or simply a carrier pro hac vice. The bills of lading ascertain, and fix and control the liability, and the exceptions therein contained cover the usual risks, not taken by the owners.

It is under these circumstances, that a question has been made at the bar, by what law the present bills of lading are to be governed as to their obligation and extent upon the owners, whether by the law of Spain, where the contracts of shipment were made, or by the law of Pennsylvania, where the goods were to be delivered, or by the law of Massachusetts, where the owners reside, and to which the vessel belonged. And this point seems the more important to be decided, inasmuch as the liability of the owners for the acts, torts and misconduct of the master and mariners is by the law of Spain (Codigo de Commercio, promulgated in May, 1829, art. 622), and also by the law of Massachusetts (Rev. St. Mass. 1835, Ed. 1836, p. 295, c. 32, § 1), limited to the value of the vessel and her freight, and does not include a general liability to the full extent of the loss or damage sustained by the shippers, as is the law of Pennsylvania (see Del Col v. Arnold, 3 Dall. [3 U. S.] 333; The Amiable Nancy, 3 Wheat. [16 U. S.] 545; Abb. Shipp., Am. Ed. 1829, pt. 2, pp. 90–99, c. 2, §§ 1–11, and note 1; Id. pt. 3, pp. 263–269, c. 5, §§ 7–9), which in this respect follows the law of England as it was before the limitations prescribed by the acts of parliament (Story, Confl. Laws, §§ 242, 260, 263, 266, 270, 290). Questions of this nature, arising under the conflict of laws of different countries, are often attended with difficulties, and it is not easy in all cases to say, what the rules are or ought to be, which are, under all circumstances, to govern in respect to the validity, the nature, the interpretation, and the obligations of contracts. In general, it may be said, that the validity, the nature, the interpretation, and the obligations of contracts are to be governed by the lex loci contractus, that is, by the law of the place, where the contract is made, if it is to be performed there; but if it is to be performed in another place, then it is to be governed by the law of the latter place. Story, Confl. Laws, §§ 242, 260, 263, 266, 270, 290. But this doctrine will carry us but a little way in the solution of many important questions. Other distinctions and other considerations must be resorted to, partly founded upon notions of public policy, partly upon private convenience or necessity in the general intercourse of nations, and partly upon local statutes, observances and usages.

Looking at the question presented in the case at bar, as to the liability of the owner for the acts of the master, the natural inquiry first occurring to the mind, would be, what is that authority which the owners have confided to him. Is it a general authority to bind them in all cases whatsoever? Or is it a limited authority to bind them only in certain cases, and to a certain extent? There is no reason to say, that a master of a ship has any more authority to bind the owners, than any other agent has to bind his principal. The authority is deducible solely from the nature of his employment, and the express or implied incidents to the trade or business in which the ship is engaged. If the ship is owned and navigated under the flag of a foreign country, the authority of the master to contract for, and to bind the owners, must be measured by the laws of that country, unless he is held out to persons in other countries, as possessing a more enlarged authority. He is but an agent, and no person dealing with him has a right to suppose that he is clothed

with any authority beyond what the laws of the country, to which the ship belongs, deduces from the nature of his employment, or which, by his instructions, express or implied, he is held out to the world to possess. If any person chooses to trust him under any other circumstances, or beyond this—it is a matter of blind credulity, and at his own peril. No one ever imagined, that in any other case of agency to be transacted in a foreign country, the principal was bound beyond the instructions or authority given to his agent. It is every-day's experience to repudiate contracts and other transactions of agents in foreign countries, where they have exceeded the authority confided to them by their principals; and the authority confided by the principals is, in all such cases, measured by the interpretation and extent of that authority, by or according to the law of the place where it is given—by the lex loci, and not by the laws of a foreign country, of which the principal is, or may be wholly ignorant, and by whose regulations he is not bound. Any other rule would subject the principals to the most alarming responsibility, and be inconsistent with that just comity and public convenience, which lies at the foundation of international private law. No one ever imagined, that the master of an American ship ever possessed any power or authority over the voyages or concerns of that ship, or the interests of the owners, beyond what the law of his own country justified and sanctioned. No one ever imagined, that a master of an American ship could let his ship on freight, or enter into a charter party in a foreign country, unless that was the habitual employment of the ship, or was authorized by the instructions of the master. If we were to resort to a different rule—to the laws of the different countries which the ship might visit, for the interpretation of his powers, while he was in the ports of that country,—we should have the most extraordinary and conflicting obligations arising from the duties, and rights, and liabilities of the master, deducible from those laws, which, in many cases, limit those matters in a very different manner, and prescribe very different regulations.

If it should be said, that the laws of the country, where the master enters into a contract, are to govern as to the validity, obligation and effect thereof, that may be true as to himself. But how can the laws of a foreign country clothe him with an authority to bind his owners, which the latter have never given him, or which the laws of the country, to which the ship belongs, have denied him to possess? The owners cannot, in such cases, be bound by foreign laws, to which they have never assented, and under which they do not live. The general rule of international law on this subject, for the repose and convenience of the whole world is, "Statuta suis clauduntur territoriis, nec ultra territorium disperantur." The laws of a foreign country may regulate the rights of parties to property found in one country; but they cannot regulate rights of persons not subjected to their civil jurisdiction, or not residents within it. In the laws of England and America it is an established principle,—as old, almost, as the navigation of those countries,—that the authority of the master, as to the employment of the ship, or the repairing of the ship, or the supplying of the ship with provisions or other necessaries, abroad as well as at home, is limited by the express or implied authority derivable from the laws of the country, or the usage of the trade, or the business of the ship, or the instructions of the owner; and he cannot bind either the ship or owners beyond these limits. Mr. Abbott, in his treatise on Shipping (Am. Ed. 1829, pt. 2, pp. 90–132, c. 2, and chapter 3, per tot), lays down the principle in the broadest and most expressive terms, and illustrates it by references to adjudications, which constitute the laws of both countries. Nearly all those adjudications respect ships employed in foreign voyages, and the questions have generally been, whether, in the given case, there was an excess of authority on the part of the master, or not. No one ever heard of a discussion, in these cases, of whether the laws of a foreign country gave the master such an authority; but the sole point has been, whether the laws of his own country did. Their constant affirmation on one side, and their total silence on the other, as to the operation of foreign laws, in cases of such constant occurrence, are decisive to show the legal as well as the common understanding upon the subject. Upon money taken upon bottomry, or money advanced for expenses and supplies, and equipments, in foreign ports, we never inquire what would be the authority of the master in such cases, by the foreign law, in the port where the money is taken upon bottomry, or money is advanced; but whether, by our own laws, it was for necessaries, or within the scope of the master's authority according to the doctrines of our own law. The same test is applied to the case of a sale of the ship or cargo in a foreign port. It is held bad or good, according to the requirements of our law, and not of the foreign law. I do not go over the cases, either English or American, upon this subject. They will be found generally collected in the text of Mr. Abbott on Shipping, in the chapters already referred to, and in the notes to the American edition of 1829. The cases of The Gratitudine, 3 C. Rob. Adm. 240, and The Nelson, 1 Hagg. Adm. 169, 175, 176, before Lord Stowell; and the cases of The Aurora, 1 Wheat. [14 U. S.] 96, and The Virgin, 8 Pet. [33 U. S.] 538, before the supreme court of the United States,—are complete illustrations of the doctrine generally adopted, and seem of themselves, although there are many auxiliary authorities, to be decisive on the subject. I might, indeed, add the case of The Fortitude [Case No. 4,953], as in some measure expressive of

my own judicial opinion upon the general question, although that case did not call for any direct application of the foreign law. But the case of The Packet [Id. 10,654], did involve the very question of the Norwegian law, if it had been imagined by any one to be applicable. It is no answer to say, that the question was not made in any of these cases, because the general maritime law upon the subject was supposed to be the same in all commercial countries. The citations in the case of The Gratitudine, 3 C. Rob. Adm. 240, from foreign ordinances and jurists, sufficiently show, that great diversities do exist in foreign countries; and the arguments on the present occasion have brought some of them in review before the court. See, also, Story, Confl. Laws, § 286b; Appleton v. Crowninshield, 3 Mass. 443; Id., 8 Mass. 340. In the case of The Nelson, 1 Hagg. Adm. 169, 176, Lord Stowell, speaking upon the subject of bottomry bonds, said: "The form of these bonds is different in different countries; so is their authority. In some countries they bind the owner; in others not; and where they do not, though the form of the bond affects to bind the owner, that part is insignificant, and does not at all touch the efficacy of those parts which have an acknowledged operation." And he accordingly held, in that very case, which was of a bond executed at the Cape of Good Hope, that it did not bind the English owners personally, although in terms it purported so to do; but that it was inoperative, pro tanto.

If, indeed, there be any general rule deducible from the maritime law on the subject of the rights of the master, it is, that the master can bind the owners only so far as regards the employment and business of the ship. He has no general authority to bind the owners personally. The Roman law prescribed the general limits; and it constituted the basis of the laws of continental Europe. "Cum magistris propter navigandi necessitatem contrahamus, æquum fuit eum qui magistrum navi imposuit, tenerii ut tenetur qui institorem tabernæ vel negotio præposuit." Dig. lib. 14, tit. 1, c. 1, Intro. And again: "Omnia enim facta magistri debet præstare, qui eum præposuit; alioquin contrahentes decipientur." Dig. lib. 14, tit. 1, c. 1, § 5. But then it is added: "Non omni ex causa prætor dat in exercitorem actionem sed ejus rei nomine, cujus ibi præpositus fuerit; id est si in eam rem præpositus sit." Dig. lib. 14, tit. 1, c. 1, § 7. And the rule on the subject, generally proclaimed on the continent of Europe by the jurists and the ordinances of the different maritime nations generally, has been, that the master cannot bind the owners personally, at all; but only to the extent of their interest in the ship and freight. The Consolato del Mare, one of the earliest and most venerable monuments of the maritime law, and of the general customs and usages of the sea, asserts, in the most distinct terms, that the master has no power to bind either the person or the property of the owners, unless they have given him a sufficient power for that purpose. Consolato del Mare, c. 33, as cited by Emerigon, tom. 1, c. 4, § 11; Casaregis, tom. 3; Il Consolato del Mare (Ed. 1740) p. 115, c .33. And Emerigon cites many of the more modern jurists and ordinances to the same effect, that the master has no power to bind the owners personally, without an express authority, but the ship and freight only, even in cases of necessity. Emerig. Des. Assur. tom. 2, c. 4, §§ 7, 8, 11. See, also, Valin, Comm. 2, tom. 1, lib. 2, tit. 8, art. 2, and ordinances there referred to. The same rule is prescribed and recognized by the ordinance of the marine of France. Valin, Comm. tom. 1, lib. 2, p. 568, tit. 8, art. 2. Indeed, it may well be doubted, if any where, except in England and America, the rule has, for a great length of time, prevailed, that the liability of the owners, for the acts of the master, shall extend beyond the value of the ship and freight committed to his charge. But what I wish to rely on is the fact, that the master has no power to bind the owners, beyond the authority given to him by the owners; and that, from the nature of the case, the extent of that authority must be limited to the express instructions of the owners, or the law of the country where the ship belongs and they reside; for it is there that the authority is given, and there it is to be interpreted. If, by the law of the domicil of the ship and of the owners, the authority of the master is limited to the ship and freight, and does not, in the absence of express instructions, bind the owners personally, it seems difficult to understand how resort can be had to the law of a foreign country, unknown and unsuspected (it may be), by the owners, to expand that authority to the positive creation of personal obligation on the part of the owners; and that, too, according to the law of every successive country which the ship may visit in the course of a circuitous voyage. See Story, Confl. Laws, § 286b.

I am fully aware of the bearing of the cases of Malpica v. McKown, 1 La. 248, 254, and of Arayo v. Currel, Id. 528, in the state of Louisiana. With the greatest respect for the learning and ability of the judges who decided those cases, they appear to me to proceed upon false principles, and to be at war with the current doctrines of the common law. The decisions, in both of these cases, proceeded upon the ground, that there is no difference in the legal result, whether a contract is made in a foreign country by an agent, or it is made by the principal himself, personally, in that country. In each case it is to be treated as a contract made in that country, and possessing all the obligations of the like contracts in that country; personal, if personal, or real, if real; or both, if the lex loci contractus should so ordain. Assuming the general rule to be so, to what cases does it properly apply? Certainly to

those, and those only, where the agent possesses full authority to make the particular contract. If his authority is restricted or limited, then, if he exceeds the powers conferred to him, there is no binding obligation whatsoever upon the principal, and the contract is, as to him, a nullity. If the principal had himself been in the country, he might, if he chose, have made a more expanded contract, than his agent was authorized to make; or he might have made such a contract as his agent was authorized to make, with all its restrictions, and none other. This would depend solely upon his own pleasure. But when he has restricted the authority of his agent, in terms, to certain limits, or those limits result from the law of his own country, where the authority is given, and is to be interpreted, surely it cannot be pretended, that the contract of the agent in a foreign country, exceeding those limits, has the consent or authority of the principal. It appears to me that the leading error, in both of those decisions, (and I speak with the greatest respect and deference for these learned judges) is, that in both those cases, the rights and powers of the master to contract were treated exactly as if they were equal to, and coincident with, those of the owners, if the latter had been upon the spot. Whereas, the rights and powers of the master, so far from being coextensive with, and equal to, those of the owners, are, in most cases, far short of theirs, and are subject, at all times, to the control and restrictions which the owners personally, or the law of their country, impose or recognize. Emerigon has been supposed, by the learned judges, to have taken the same view of the matter which they have. But to me his opinion appears far otherwise. In the first place, he clearly admits, that the master has no authority to take up money on bottomry, except in cases of necessity; and then assuming, that the local law of the domicil of the owners of the ship clothes him with authority, in such a case, to take up money on bottomry, he discusses the question, whether, if the master were prohibited from so borrowing, by the instructions of the owners, unknown to the lender, the bottomry would be void; and he holds, that it would not; which is precisely the result to which our own law arrives. The ground obviously is, that private instructions, unknown to the lender, cannot affect his rights, when he knows that the general maritime law of the country, to which the ship belongs, imports that the master possesses the right to hypothecate, as a part of the common authority delegated to him. Indeed, throughout the whole of this section of his work, Emerigon relies upon the Roman law as the first foundation of the doctrine; and he cites it with approbation, and manifestly considers its application to the case which he was considering as controlled by the circumstances. What says the Roman law on the point? Every person, contracting with an agent, is bound to know the condition of the person with whom he contracts. If he is the master of a ship, that he has a right to trust him only with reference to that ship; and that the very appointment of the master imposes a certain law upon the contracting parties; so that if the authority is exceeded, the owner is not bound. "Qui cum alio contrahit vel est, vel debet, esse, non ignarus conditionis ejus." Dig. lib. 50, tit. 17, l. 19. "Ut sciat, in hoc se credere, cui rei magister quis sit præpositus." Dig. lib. 14, tit. 1, l. 7, Intro. "Præpositio certam legem dat contrahentibus, modum egressus non obligabit exercitorem." Dig. lib. 14, tit. 1, l. 1, § 12. Now, this is the very mode in which (as I understand) our law contemplates the same subject. If the party contracts with the master of a ship, he is bound to inquire what authority he has from the owners of the ship to make the particular contract, and whether he can bind them personally, or only bind the ship and freight thereby. The question is, not what authority the law of the country where the party making the contract with the master gives, but with what authority the master is clothed by the laws of the domicil of the owners. See Story, Confl. Laws, § 286b, and note, and Mr. Brodie's note to 2 Stair, Inst. pp. 955, 956.

Upon the whole, my opinion on this point is, that the master can make no contract in a foreign country, which shall bind the owners of the ship, except as to what they expressly authorize, or the general law of their own country has recognized and established; and then it will bind them no farther than that law binds them, whether it be in personam or in rem. Thus much I have thought it necessary and proper to say upon the point; although, if the law of Spain and that of Massachusetts be coincident, it might seem, at first view, not to be an important inquiry. But it has nevertheless, become indispensable, inasmuch as the plaintiffs contend, that the contracts of shipment, in the present case, are to be construed according to the law of Pennsylvania, as the goods were to be there delivered, and not by the law of Spain, or of Massachusetts, supposing the latter to impart a limited responsibility, on the part of the owners, for the contracts, as well as for the acts, torts and misconduct of the master during the voyage. I shall have occasion hereafter to consider the question, what is the true nature and interpretation of the statute of Massachusetts, and whether that statute recognizes or permits any distinction between the lawful contracts made by the master, in the course of his employment, authority and duty, in the course of the voyage, and his acts or torts or misconduct done in the course of the voyage, contrary to his authority and duty, and without the assent of the owners. At present, it is only necessary here to state, that the extent of the responsibility of the owners of

the schooner for and upon such contracts, or acts, torts or misconduct of the master, is to be measured altogether by the law of Massachusetts, and not by the law of Spain or of Pennsylvania. But when it is said (and it is most properly so said) that the law of a place where the contract is to be performed is to govern, and not the place where the contract is entered into, we are to understand this rule of international law with all its proper qualifications and limitations. In the first place, the rule cannot prevail, or be obligatory, where the very contract, in the form in which it is made, although to be performed or executed in a foreign country, is pronounced invalid or void by the law of the country where it is made. Thus, for example, a contract entered into in Massachusetts, for a voyage to Africa, and from thence to a foreign market, for the purpose of carrying on the African slave trade—prohibited by our laws—would be illegal and void here, even if it were lawful and valid in Africa. In the next place, if a contract is to be performed, partly in one country and partly in another country, it admits of a double aspect, nay, it has a double operation, and is, as to the particular parts, to be interpreted distinctively; that is, according to the laws of the country where the particular parts are to be performed or executed. This would be clearly seen in the case of a bill of lading of goods, deliverable in portions or parts at ports in different countries. Indeed, in cases of contracts of affreightment and shipment, it must often happen, that the contract looks to different portions of it to be performed in different countries; some portions at the home port, some at the foreign port, and some at the return port. In respect to the bills of lading in the present case, if the language admitted of two interpretations, that would certainly be adopted which comported most exactly with the apparent intention of the parties. For example, in this very case, we have some of the bills of lading in the Spanish form and language, and some in the American form and language. Which is to prevail, if the meaning of the words in both languages are not absolutely identical? Doubtless, that which will best effectuate the apparent intention of the parties, deducible from the objects of the contract. The goods here were deliverable in Philadelphia; and what would be an effectual delivery thereof, in the sense of the law, (which is sometimes a nice question) would, beyond question, be settled by the law of Pennsylvania. But to what extent the owners of the schooner are liable to the shippers for a nonfulfilment of the contract of shipment of the master,—whether they incur an absolute or a limited liability, must depend upon the nature and extent of the authority which the owners gave him, and this is to be measured by the law of Massachusetts.

Passing from this subject, let us next proceed to the consideration of the next point arising in judgment; did the bottomry bond in the present case cover the cargo, or only the ship and freight? In the obligatory part, the "hull and appurtenances" of the schooner only, are bound. But in the recital of the condition, it is expressly stated, that the money is to be taken upon "the adventure of the said schooner or vessel, and the cargo on board," &c.; and it is afterwards declared, "And, therefore, the said Isaiah Atkins (the master), doth mortgage, and hypothecate to the said Augustus John Foyard, and Samuel Satton Smith, and each or either of them, their and each or either of their executors, administrators, or assigns, the said schooner or vessel called 'the Annawan,' with all the boats, tackle, apparel, and furniture, and also the cargo, merchandise, and effects, laden on board thereof for the said voyage." Now, there can be no real doubt, upon these allegations, that it was the intention of the parties, that the cargo, as well as the schooner, should be submitted to the bottomry bond, and hypothecated accordingly. A court of admiralty, in cases within its civil jurisdiction, acts as a court of equity, and construes instruments, as a court of equity does, with a large and liberal indulgence. Bottomry bonds, are very informal instruments, inaccurately drawn, and in their forms varying, not only in different countries, but in the same country; and, therefore, are constantly construed with a wise reference to the laxity of the habits of merchants, and to the imperfections, which are usually found in commercial instruments. I have no doubt, whatsoever, that the present bottomry bond does contain a positive pledge of the cargo, as well as of the ship; and if it did not, and the omission was by mistake or fraud, I have as little doubt, of the competency and duties of a court of admiralty to reform it, and to enforce it according to the intention of the parties. Such was the doctrine of this court, in the case of The Zephyr [Case No. 18,210], and I feel not the slightest inclination now, to doubt it, or to depart from it. See, also, Emerig. Contrats a la Grosse, tom. 2, c. 5, § 1, note 3.

The next question is, whether in the events detailed in the statement of facts, and the evidence, the money on the bottomry bond became due, and payable to the lender? I am of opinion, that it did become due. The voyage was not completed from any incapacity of the schooner to perform it; and in point of fact, she did, after being repaired, return safely to the United States. The voyage was broken up by the master voluntarily, upon the ground, that the schooner was not worth repairing for the voyage, because the expense of the repairs would exceed her reasonable value, or what ought, with reference to the interests of the owners, to be expended upon her, to enable her to carry the cargo to the port of destination. I do not say, that the master acted unwisely or improperly, un-

der all the circumstances, in coming to this conclusion. Perhaps, it was exactly what the owners might have done, if they had been personally present. But upon this, I give no opinion. If the owners had so abandoned the voyage, being personally present, because their interest would have been injuriously affected by not so doing; what ground could there be to say, that the bottomry bond should not be paid? We all know, that in the case of a deviation from the voyage, or a voluntary abandonment of it, after it has been commenced, the bottomry bond would have become absolute. In short, the rule in all cases of this sort, is precisely that of common sense, and is deducible from the Roman law, that the bondholder shall not have his money, if the nonperformance of the voyage has not been occasioned by the enumerated perils, but has arisen from the fault or misconduct of the master, or owner. "Quia suspicit in se periculum navigationis, suscepit periculum fortunæ non culpæ." [2] In the present case, it was a duty which the owners owed to the bottomry holders, if the schooner could have been repaired, so as to perform the voyage, to have made the repairs. It is no answer to say, that it was not for their interest. The voyage was not lost from the utter innavigability of the schooner, as if she had been shipwrecked, or stranded, and could not be gotten off. The bottomry holders undertake the risk of the voyage, and that the schooner shall be able to perform it, notwithstanding the enumerated perils, which in the present case were fire, enemies, pirates, and other dangers, and casualties, of the seas and rivers. But they do not undertake, that the vessel shall be able to perform the voyage without any repairs, or without any retardations; but only that the dangers and casualties of the seas and rivers, and the other perils, shall not of themselves defeat the voyage. They are to be paid their money, unless the voyage is defeated by such dangers, and casualties, or other perils, and by these alone. The case is not like that of an insurance, where the underwriters are liable for a partial loss, and for total loss, either in fact, or in a technical sense. In cases of bottomry, there can be no such thing as an abandonment, by which a loss, not strictly total, can be turned into a technical total loss. It is true, that if the owners do not choose to repair the vessel, after she has met with disasters in the course of the voyage, when it may be done, they are at liberty to abandon her to her fate. But then the bottomry holder is entitled to his full lien upon the ship, and cargo, and, as far as they are saved, when the voyage is thus abandoned, he may proceed to enforce his lien pro tanto against them; for the case, in which he is to lose his money, has not occurred, that is, a total loss of the ship and the voyage, by the dangers, and casualties of the seas and rivers, and the other enumerated perils. The language of the present bond is still more expressive, than what is usually found in such instruments. It declares, "or if in the said voyage, an utter loss of the said schooner or vessel by fire, enemies, pirates, or other casualty, shall unavoidably happen, &c. &c., then the above written obligation shall be null and void, or else shall be and remain in full force and virtue." Now, can it be truly said in this case, that there was an utter loss of the schooner, an utter incapacity to perform her voyage, by reason of any of the enumerated perils. In Joyce v. Williamson (reported in Park, Ins., 7th Ed., p. 627, c. 21; 2 Marsh. Ins., 2d Ed., bk. 2, p. 754, c. 5, and since reported in 3 Doug. 164), which was an action of a bottomry bond, where a ship had been captured, and restored on payment of salvage, and was afterwards repaired, and performed her voyage, and carried freight, but the ship and freight were not then worth the sum mentioned in the bottomry bond, and the amount of the repairs; the court held the bondholder entitled to recover, upon the ground that the voyage had been performed. Lord Mansfield, in delivering the opinion of the court, said; that by the law of England, upon a bottomry bond, there is neither average, nor salvage; that although there had been a capture, yet to bring the case within the condition of the bottomry bond, it must not be a mere temporary taking, but be such a taking as constitutes the loss of the ship, and which would amount between the insurer and insured to a total loss. Now, by this language, his lordship must be understood to mean, not a technical total loss, entitling the insured to abandon; (for there can be no abandonment, technically so called, on a bottomry bond; and if there were, then the bottomry holder would, in fact, be liable for an average loss); but he meant a total loss in the sense, that the ship is reduced to a state of total incapacity to perform the voyage, and cannot be repaired, so as to perform it; or, in other words,—to use the phrase of foreign jurists,—that the ship is in a state of utter innavigability; such as arises from shipwreck, or stranding, when the ship cannot be gotten off, or repaired at all. We shall presently see, that if the ship can be gotten off, or repaired, no matter at what expense the repairs must be, the rights of the bondholder are not affected thereby. But what is most material to be considered, in the case of Joyce v. Williamson, is, that neither the repairs nor the salvage were taken into account in the suit on the bond; but the bondholder moved the full amount without any deduction whatsoever.

The doctrine already suggested, that in cases of bottomry, nothing but an actual total loss of the ship in the voyage will ex-

[2] Mr. Marshall (2d Ed., bk. 2, p. 756, c. 5) cites this as a passage from the title of the Digest (liber 22, tit. 2) "De Nautico Fœnore." But I have not been able to find it there. See Roccus, De Nav. note 51.

cuse the borrower from payment, not even when, by reason of the enumerated perils, the ship shall require repairs greater than her value, is fully borne out by authority. The case of Thomson v. Royal Exch. Assur. Co., 1 Maule & S. 30, is directly in point. That was an insurance upon a bottomry bond; and the ship during her voyage, by tempestuous weather, suffered so much damage as to become totally disabled, and put into an intermediate port to repair; and upon a survey it was found, that the necessary repairs would cost $3,200, and after their completion, the ship would be worth only $2,000. The owners, therefore, caused her to be broken up and sold. Her original value, when she sailed on the voyage, was $4,000. The court held, that there could be no recovery on the policy. Lord Ellenborough, in delivering the opinion of the court, said: "This was not a question, whether such a loss had happened as, in the case of an insurance on the ship, might have entitled the assured to abandon; but whether it was an utter loss within the true intent and meaning of the bottomry bond. The distinction between an insurance upon the one and the other is simple; in the former case, if the voyage be lost, or not worth pursuing, or the ship be reduced to such a state that she cannot proceed without refitting, the expense of which would greatly exceed her value, the assured may abandon and claim as for a total loss; but in the latter case, as nothing short of an actual total loss will discharge the borrower of money upon bottomry, so nothing less will render the insurer liable. Here the thing continued to exist as a ship, her hull and bottom remained, though perhaps in such a state as might make it prudent for the owners to dispose of her. I have had occasion at The Cockpit to state this distinction as established law; that in the case of bottomry nothing short of the total destruction of the ship will constitute an utter loss; if it exists in specie, in the hands of the owner, it will prevent an utter loss." For these reasons, I am of opinion (as I have already stated,) that the bottomry bond did become due, and payable to the holder, upon the breaking up of the voyage, and selling the schooner at Bermuda.

And this conducts us to other very important questions in the case. In the first place to the consideration of the acts of the master, during the course of the voyage, how far they were justifiable and proper under the circumstances, for to that extent, neither he nor the owners can be involved in any responsibility; and how far they were unjustifiable and improper, and might and did involve the owners of the schooner in responsibility therefor. And in the next place, supposing the owners to be involved in any responsibility, to what extent, and under what circumstances, it applies. In respect to the sale of the perishable and damaged fruit at Bermuda, upon the first arrival there, the proceeds of which amounted to $1,029.70, there does not seem any doubt, that it was a justifiable and proper sale. The principal question arising is, whether he had a right to appropriate those proceeds towards the repairs of the ship, and, if he had, then what rights the shippers have over against the owners of the schooner, for compensation and indemnity therefor. In the first place, as to the right of the master to appropriate the proceeds towards the repairs of the ship. It seems to me, that he clearly possessed such a right; for, independently of the sale being of perishable articles, I take it to be clear, that the master has a right to sell a part of the cargo to make repairs, and to furnish necessaries for the completion of the voyage. This was expressly held by Lord Stowell in the case of The Gratitudine, 3 C. Rob. Adm. 240, 259, 263, 264, and the same doctrine was affirmed by this court, in the case of The Packett [Case No. 10,654]. Emerigon, and Valin, and Pothier, affirm the like doctrine; and indeed, it has the sanction of the Consolato del Mare (chapter 105), and of most of the maritime writers, and foreign ordinances. See Emerig. Des Contrats a la Grosse, p. 445, c. 4, § 9, etc.; Stypmannus, Ps. 4, p. 417, c. 5, note 109; Kuricke, 765. But then, in the next place, what is the extent of the liability of the owners, for the property so appropriated? Now, if there were no statute limitation, affecting the present case, but the owners stood before the court upon the general liability created by the Roman, and the English, and the American law, it is plain, that the appropriation being for the use of the ship, and within the scope of the master's authority, the owners would be liable to pay the shippers the full amount of the proceeds so appropriated. Abb. Shipp. (Ed. 1829) pt. 3, c. 5, §§ 1–7. What effect, then, has the statute of Massachusetts? In my judgment, if it applies at all to a case like the present (a point which will come under our consideration hereafter), it has this, and no more, that the liability was before coextensive with the amount appropriated; but it now has the limitation interposed, that it shall not exceed the interest of the owners in the ship and freight; that is to say, they are liable to pay the full sum so appropriated, when it does not exceed the value of the ship and freight; and if it does exceed that value, they are exonerated from all liability, beyond the value of the ship and freight. See The Dundee, 1 Hagg. Adm. 109; Gale v. Laurie, 5 Barn. & C. 156; Morris v. Robinson, 3 Barn. & C. 196. The claim of the shippers is not reduced to a mere lien in rem, although I am satisfied, that the shippers possess such a lien. But it is a personal claim upon the owners pro tanto, with the auxiliary security of the lien on the ship and freight. Precisely the same view is taken of this point by foreign jurists, and es-

pecially by Valin, and Pothier, and Emerigon. Emerig. Des Contrats a la Grosse, p. 445, c. 4, § 9; Valin, Comm. tom. 1, liv. 2, pp. 568, 569, tit. 8, art. 2; Poth. Mar. Cont. notes 34, 72. When does this personal liability and this lien attach to the owners, and to the thing? My answer is, it attaches eo instanti, when the appropriation is made; and consequently, from that moment the obligation becomes positive and unequivocal.

Then arises, in the next place, the farther consideration, whether the liability of the owners in personam is absolute, or is affected with the future fate of the ship on the voyage? Upon this point, the foreign ordinances promulgate different doctrines, and the foreign jurists hold different opinions. See Boulay Paty, Droit Comm. tom. 1, tit. 3 pp. 268–299; Emerig. Traite a la Grosse, c. 4, § 11. The Consolato del Mare (chapter 105) gives the shippers in such a case a lien and privilege only on the ship. The Laws of Oleron (article 25) and the ordinance of Antwerp (article 19) seem to make the payment dependent upon the ultimate arrival of the ship at her port of destination. Emerig. Des Contrats a la Grosse, pp. 446, 447, c. 4, § 9. Emerigon seems to follow the same opinion, and says: "It is then evident, that if the ship perishes, neither the master, nor the owners are subject, on that account, to any personal obligation. It is here a sort of forced loan upon bottomry." Valin is of the opposite opinion, and holds that the owner of the ship ought to pay the value of the goods sold during the voyage, for the necessaries of the ship, without any regard to the future fate of the ship, whether she perishes during the voyage or not, in the same manner, as if, instead of selling the merchandise of the shipper, he had borrowed the money of another person. And he insists, that the interest of the public requires such a decision. Pothier, while he admits, that persons of experience, whom he had consulted, were of opinion, that the owners of the merchandise sold to supply the necessities of a ship could demand nothing, if the ship should afterwards be lost, pointedly holds a different opinion, and insists, with Valin, that in such a case the owners of the ship are personally responsible for the merchandise sold. He deems it to be a sort of forced loan for the necessaries of the ship, which the master has personally contracted to repay to the owner of the merchandise. And he insists, that the master is entitled to have recourse to the owner of the ship, for his own indemnity therefor; and that the owner of the merchandise, as exercising the rights of the master, has a remedy over against the owner of the ship, whether the ship afterwards perishes or not. The ordinance of Wisbuy (title 2, art. 2) adopts the same rule; and it seems approved by Kuricke, and by Cleirac. Emerig. Traite a la Grosse, c. 4, § 9; Kuricke, Jus. Mar. Hanseati, tit. 6, art. 21; Cleirac, Ordin. d'Oleron, p. 88, art. 22, note 2. It seems to me, upon principle, with reference to our law, that the opinions of Valin and Pothier are entitled to very great weight. As has been already suggested, the limitations of the responsibility of the owners of the ship are mere qualifications of the antecedent rule of our law, and do not change the nature of the rule. The owners are, and ought to be held personally bound to pay all the lawful contracts of the master, to the full amount thereof, not exceeding their interest in the ship and freight. And where there are various claims, which have occurred at different times, the just principle would seem to be found in the maxim, "Qui prior est in tempore potior est in jure." In other words, the earliest creditor has a priority or privilege over the others for his prior debt.

Hitherto, the question under consideration has been examined upon the assumption, that the statute regulations of Massachusetts were equally applicable to all cases of contracts made by the master, within the scope of his authority, confided to him by the owners, as well as to all cases where he has exceeded his authority, or is guilty of any tort or misconduct in the course of the voyage. But it may admit of most serious doubt, whether the statute of Massachusetts was designed to apply to any cases of contracts, strictly within the scope of the authority of the master, and in respect to which, he not only had a right to bind the owners, but his acts were justifiable and proper, and indeed throughout a part of his duty, under the circumstances. The language of the statute is, that "no ship-owner shall be answerable beyond the amount of his interest in the ship and freight, for any embezzlement, loss, or detention by the master, or mariners, of any goods, wares, or merchandise, or any property put on board of such ship or vessel, nor for any act, matter, or thing, damage, or forfeiture, done, occasioned, or incurred by the said master or mariners, without the privity or knowledge of such owner." Now, there is not one word in this clause about the contracts of the master lawfully made by him, on account of the owner during the voyage, or any acts done strictly within the line of duty to the owners. The whole language seems exclusively applicable to cases of wrongs, to "embezzlement, loss or destruction," of property, and to "any act, matter, or thing, damage, or forfeiture, done, occasioned, or incurred by the master or mariners," during the voyage; and if we construe the words as meaning to import acts, and matters, and things, ejusdem generis, (which, in such cases, is a general rule of interpretation), there is nothing to lead to the conclusion that the statute, in its policy or objects, had any reference to contracts made by the master in the course of his duty, and for the benefit of the ship, and with the implied consent or authority of the owner; for

the words are added, "without the privity or knowledge of such owner." And there is good reason for the distinction. The owners might otherwise be ruined by the wrongful acts of the master or mariners. But the lawful contracts of the master, within the scope of his duty, are just such as the owners have authorized, and are and can be deemed, in no just sense, wrongful, but are such as fairly are by implication "with the privity and knowledge of the owners." Besides, the statute uses the language, "master or mariners," which plainly evinces, that it was intended to be applied to acts, matters, and things, which might be indifferently done by either of them. Now, the mariners, as such, have no authority whatsoever to enter into contracts in behalf of the owners. There is no case in the Massachusetts Reports, which hints at any applicability of the statute, to any cases of contracts lawfully made by the master, or to any acts done in relation thereto, which are strictly authorized by the owners. I have looked into the English statutes upon the same subject, (from which the Massachusetts statute was apparently borrowed), and I find, that they are solely applicable to cases of torts and malfeasance of the master and mariners. The only decisions, which I have been able to trace in the English books of Reports upon the subject, are cases of tort, and misconduct. Such was the case of The Dundee, 1 Hagg. Adm. 109; Gale v. Laurie, 5 Barn. & C. 156, which was a case of collision by the fault of the master and mariners; and the case of Wilson v. Dickson, 2 Barn. & Ald. 2, which was a case of tort. See, also, Morris v. Robinson, 3 Barn. & C. 196.

Now, in cases like the present, where the ship is in want of repairs or necessaries, no one can doubt, that the borrowing of money or the procurement of supplies for the purposes of the voyage, are strictly contracts authorized by the owner and for his benefit. It is in such cases the duty of the master to borrow the money and procure the supplies; and his acts in so doing are not only reasonable and justifiable, but they are implicitly sanctioned by the owners. See The Aurora, 1 Wheat. [14 U. S.] 96, 102. If the loan is a simple loan—not on bottomry—or the supplies are made upon the general credit of the master or owner, and not solely on the credit of the ship, what ground is there to suggest, that the creditor is to take upon himself the subsequent hazards of the voyage, for which he receives no premium, and to which he has given no consent? If such were understood to be the general law applicable to the subject, so far from promoting public policy or private credit, it would, in all probability, lead to the necessity, in all such cases, of procuring money and supplies upon bottomry, at an onerous premium —a result which the statute could certainly not have intended. In truth, there would be difficulty in saying, under such circumstances, that the master could borrow money at all to supply the necessities of the ship; for by the general maritime law (which is the law of England and America), on this very point, the master has no authority to take up money on bottomry, if he can procure it upon the personal credit of the owner; and he cannot pledge the personal credit of the owner, according to the argument, because he can only bind the owner to the extent of the value of the ship and freight, if the voyage is successfully performed; and if she perishes in the voyage, then the lender loses his money without receiving or having a title to receive any maritime interest for the risk. Under such circumstances, what person of ordinary prudence would lend any money to the master to supply the necessities of the ship? It would be downright folly. The consequence of a doctrine, which should thus restrict the right of the master to borrow money for the necessities of the ship, would in many cases be, that the ship would perish for the want of repairs or the voyage be abandoned. A construction of the statute which should lead to such consequences ought not to be adopted, unless it be inevitable, which certainly cannot be affirmed of the statute under consideration.

There is this additional consideration, which deserves notice. It is, that the remedy by the statute of Massachusetts is not a remedy in rem for the loss sustained or the liability incurred. But the remedy is strictly in personam, and the amount which is recoverable is not to exceed the value of the ship and freight. But at what time is this value to be ascertained and fixed? It must be the value at the time when the right of action against the owners first accrues, and not at any subsequent period. Suppose after the right of action has attached, the ship perishes, that will not affect the right of recovery of the shipper in a case of tort; and a fortiori it will not in a case of contract, made by the master, by and under the authority of the owners. This doctrine is fully sustained by the case of Dobree v. Schroder, 6 Sim. 291, 2 Mylne & C. 489, and Wilson v. Dickson, 2 Barn. & Ald. 2. So that, in this limited view of the matter, the owners would be personally liable for the money advanced, since at the time when it was advanced it did not exceed the value of the ship and freight. I am the more confirmed in this opinion by the article of the marine ordinance of France of 1681, which declares "that the owners of ships shall be responsible for the acts of the master; but they shall be discharged upon abandonment of their ship and the freight." Ord. De la Mar. 1681, liv. 2, tit. 8, art. 2; Valin, Comm. tom. 1, p. 568. Now, in the interpretation of this provision, Valin expressly holds, that it does not apply to the case of money borrowed by the master on the course of the voyage for the necessary repairs and supplies of the ship, unless borrowed on bottomry; and that,

therefore, it is immaterial to the lender whether the ship afterwards perishes or not in the subsequent part of the voyage. Pothier adopts and firmly maintains the same interpretation. I am of opinion (says he), that the owners of the ship cannot avail themselves of the defence in the second article of the title "Des Proprietaires" (Valin, Comm. tom. 1, liv. 2, p. 568, tit. 8, art. 2) which makes them responsible for the acts of the master; but discharges them upon their abandonment of ship and freight, because this provision has no application but to such obligations (contracts) of the master, for which he could not have any recourse against the owners of the ship, to be indemnified by them." I am aware that Emerigon holds the opposite opinion; but I profess myself not satisfied with his reasoning. Emerig. Traite a la Grosse, pp. 453–465, c. 4, § 11. The opinion of Pothier and Valin stand fully confirmed by the modern code of commerce of France which contains a provision similar to that of the ordinance of Louis XIV. of 1681, as to the responsibility of the owners of the ship for the acts of the master, and exempting them from responsibility upon their abandonment of the ship and freight. Code de Comm. art. 214. But the same code makes the master personally liable (article 298) to the shippers for their goods sold by him for the ship's necessities, even if the ship afterwards perishes in the voyage. And Pardessus, in commenting on the code, puts it as clear, that in the case of such a contract, or indeed, of any contract by the master for supplies and repairs for the ship's necessities, without bottomry, the owners are bound to pay for the same ex contractu, notwithstanding the subsequent loss of the ship, because they are bound to indemnify the master in such a case, as he has acted within the scope of his authority. This, it will be at once perceived, is in exact coincidence with the opinion of Pothier and Valin. And Pardessus goes on to distinguish the case of such a contract made by the master, from the case of an act of tort or misconduct of the master; holding that the owners are not bound therefor, if they abandon the ship and freight. Pardessus, Droit Comm. tom. 3, arts. 663, 644, 717. On the other hand, Boulay Paty maintains the opposite opinion, reasoning it out at large, and arrives at the same conclusion as Emerigon. Locre, Esprit de Code de Comm. tom. 2, art. 298, and Comm. pp. 200–203. The council of state and the framers of the code seem, however, to have adopted the opinions of Valin and Pothier. Boulay Paty, Droit. Comm. tom. 1, tit. 3, pp. 293–299.

Now, although the present case is not, strictly speaking, the case of a positive contract made by the master for borrowing the money applied to the repairs, yet it is clearly the case of a quasi contract on behalf of the owners, or what Emerigon and Pothier call a "forced loan." It is a loan, which the maritime law allows the master to make on account of the owners—as resulting from their implied authority, and with their consent. So it was treated in the case of The Gratitudine, 3 C. Rob. Adm. 240, 261, and in the case of The Packet [supra]. Then, it being a careful application of the funds of the shipper, with his consent, for the use and benefit of the owners of the ship, and by their authority and consent, it seems to me, that the case is governed by exactly the same principles as if the money had been borrowed of a third person, and applied to the same purposes; that is, it would have bound the master personally, and the owners personally, and have also created a lien on the ship in rem. From what has been just said, it follows, that the master and the owners, in the present case, are personally responsible for the funds of the shipper, applied towards the repairs of the ship. The shippers are also entitled to a lien therefor on the ship itself. Whether the bottomry bond, being afterwards given, would have been subjected to the priority of this lien on the ship, seeing that the funds went to enhance the value of the ship, when repaired, in favor of the bottomry lenders, if the shippers had insisted on that lien—it is unnecessary to decide, although I incline to the opinion that it would have been so subjected. But we are now at law in a case calling only for the expression of an opinion, whether the owner is personally liable for those funds so applied. And my opinion is, that the owners are so liable in the present suit. Then, in the next place, as to the second sales made at Bermuda on the return of the schooner there, after the second disaster. The sale of the perishable cargo was properly made; and to that no objection can be taken. But the sale of the wines falls or may fall under a different consideration. I agree, that it is not the duty of the master, in all cases of this sort, not to sell, simply because the property is not perishable. That must depend upon circumstances. I agree also, that the master is not bound in all cases to tranship; but that duty again depends on circumstances. What Lord Stowell said in the case of The Gratitudine, 3 C. Rob. Adm. 240, 259, 261, on this point, is very important. "There are other cases" (said he) "also in port, in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed upon her voyage. In such emergencies, the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law, that the cargo should be left to perish without care. What must be done? He must in such case exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or

to sell it. It is admitted in argument that he is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best, in deciding to sell; if he acts unwisely in that decision, still the foreign purchaser will be safe under his acts: If he had not the means of transhipping, he is under an obligation to sell, unless it can be said, that he is under an obligation to let it perish." And again; "it is admitted that though impowered to tranship, he is not bound to tranship. No such obligation exists according to any known rule of the maritime law: and if it did, still he must be affected with the opportunity of transhipment, and with wilful neglect of such opportunity, for wilful neglect shall not be presumed. He may even be restrained from shipment if he has the means, by knowing that insurances were made on the original shipment which might be avoided by such a change. Having the general duty of carrying the cargo to the place of destination imposed upon him, not being obliged to tranship, and it not being shown that he has the opportunity of transhipment, he must be presumed to look out for the means of repairing his ship for the accomplishment of his contract. The first and most obvious fund for raising the money, is the hypothecation of the ship; but the foreign lender has a right to elect his security, for he is not bound to lend at all; he may refuse to lend upon the security of the ship, or on that security alone; it is no injustice on his part; and if he does so refuse, the state of necessity still continues."

In respect to the sale of the fruit, which was then sound, and especially of the wine, so far as it is attempted to be justified as a fit exercise of discretion on the part of the master, I am of opinion that the justification totally fails. The port of Bermuda was near to the United States, and the means of communication with the consignees and the other parties interested, were easy, and capable of being accomplished in a brief space of time. Besides this; the letters from the consignees and insurers, sent to the consignee of the ship (who were the bottomry holders), which were necessarily brought to the notice of the master, were clearly expressive of a strong and earnest desire on their part, that the cargo not in a perishing condition, should be shipped to the United States and not sold at Bermuda. This admonition seems to have been totally lost sight of by the master, and also by the bond-holders. The latter seem to have been absorbed in the consideration of their own interests; and the master either exercised no judgment at all, or was ready to rely on any advice or recommendation, that he could obtain. Under such circumstances—when it was most obvious, that the ship and the cargo would both be sold at a great sacrifice, as in fact they were, I cannot but consider the master guilty of gross and culpable negligence in the latter sale. Indeed, I cannot but think that there was, on the part of the bond-holders and the master, a willingness to make the most of the case for the benefit of the bond-holders. How did it happen that, after the sale, the schooner with some temporary repairs reached Boston, with a part of her original cargo on board, viz: some of the fruit and wines? If the case had been one in which the bottomry bond had been brought before me in this circuit for consideration and decision, I should have watched the whole proceedings, and sifted them with the most scrupulous jealousy, and not without some lurking suspicions, that the transactions were open to much observation and censure.

But the case does not rest upon the general ground, whether the sale by the master was, under all the circumstances, independently of the bottomry bond, an exercise of sound and reasonable discretion. He was in the port where the bottomry factors resided; and they assure us, that they would not have allowed the ship and cargo to have left Bermuda, without the bottomry bond being fully paid. This statement is highly probable. However exorbitant the marine premium was, (and it certainly seems to have been exorbitant), and however open to litigation the claim of the bottomry holders might be, the master was completely subjected to their power, and dependant upon their moderation. Suppose he had refused to pay the bond, the immediate result would have been, proceedings in the admiralty against the ship and cargo, and in all probability an expensive litigation, and an order for the sale of the ship and cargo pending the proceedings; and thus a forced sale—quite as injurious, and possibly much more so—than did take place under the direction and with the consent of the master. Under such circumstances, I think he was excused, if not strictly justified, in selling the schooner and so much of the cargo as was necessary to extinguish the bottomry bond and the incidental expenses. But as to the residue of the cargo, he was utterly without excuse or justification; and he ought to be held liable to the full extent of the sacrifices and losses sustained by the consignees. He had no right to sell the same, unless in a case of necessity, that is, of a moral necessity, to prevent a greater loss to the shippers. No such necessity is established by the evidence in the present case. There is much wholesome doctrine on this subject in the cases of Reid v. Darby, 10 East, 149, of Freeman v. East India Co., 5 Barn. & Ald. 619, and of Morris v. Robinson, 3 Barn. & C. 196, although, perhaps, in some of these cases, it was pushed to an inconvenient extent. See The Sarah Ann [Case No. 12,342]; Hunter v. Parker, 7 Mees. & W. 340, 342; Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. 249; Bryant v. Commonwealth Ins. Co., 6 Pick. 131. But the question is not as to the liability of the master, but as to the liability of the owners of the schooner, to the shippers, for the unjustifiable sale of the master. And here, it seems to me, that the stat-

ute of Massachusetts, limiting the responsibility of the owners, in cases of the misconduct and torts of the master, properly and directly applies. They are liable therefor to the extent of their interest in the schooner and freight, and no farther, at the time of the misconduct and tortious sale. But at that very time, the ship was under a bottomry bond greater than her value, and by the breaking up of the voyage, and the sale of the schooner, the bond (as has been already suggested), became absolutely due to the bond-holders. These were acts of the master, contemporary with the voluntary sale of the cargo, and indeed, they may all be treated as one and the same transaction—constituting parts of the res gestæ—and done, as it were, uno flatu et uno intuitu. So that, at the time, the owners had, in effect, no interest whatsoever in the schooner or freight, but the value of both had been exhausted. The right of the plaintiffs, then, to recover against the owner is thus sapped to its very foundation, and their only remaining remedy is against the master himself, by an action for the proceeds of the sales now in his hands, or for his tortious conversion of the property, or in such other form as the plaintiffs shall be advised. If the ship owners had received the proceeds of the wines, and other sound parts of the cargo, from the master, it might have been deemed either an adoption of his act, or, at least, it would have been a receipt thereof, for the use of the shippers. But the ship owners refused to receive the same from the master, as they had a right to do, and so they are not involved in his unjustifiable acts in the sale of the wines and other sound parts of the cargo. It may be said, that here the acts of the master were done under a contract of shipment, lawfully entered into by the master, and, therefore, it falls within the same predicament as a contract or appropriation of the money of the shippers for repairs of the ship, and the ship owners ought to be held equally liable for the breach of each contract. The distinction between the cases is, I admit, nice; but at the same time it appears to me to be a clear and determinate distinction, sufficient to justify a different conclusion in the one case from that in the other. The conduct of the master in the case of the borrowing of money, and appropriating the funds of the shippers for the repairs of the ship, was a justifiable act throughout. It was done in the line of his duty, and with the implied consent and authority of the owners of the ship. The breach is on their part, in not repaying to the shippers the money so appropriated. In the case of the sale of the sound fruit and the wine, the master acted without the consent or authority of the ship owners, and in violation of his duty; and if they are to be made liable to the shipper, the liability is for his breach of duty, and not for their own breach of duty. The difference lies in this, that they are properly and personally liable for their own wrongful acts in violation of their own contract, to the full amount of the loss to the shippers; but that they are not liable for the wrongful acts of the master in violation of his duty to them and to the shippers, beyond the value of the schooner and her freight.

Then, in the next place, as to the claim for general average. So far as respects the putting into Bermuda for repairs and refitment the first time,—according to our law, the claim of the ship owners for a general average against the shippers of the cargo seems well founded. See 2 Phil. Ins. pp. 114–122, c. 15, § 4. In respect to the return to Bermuda, similar considerations may apply, although the voyage was never resumed, so far as respects the expenses of the return, until the voyage was broken up. But it does not strike me, that any allowance whatsoever for general average can, under the peculiar circumstances, be claimed by the ship owners as a deduction from the amount of the proceeds applied to the ship's use, for which they are liable to the plaintiffs. The reason is, that so far as such an allowance would go, it would amount to so much salvage of the value of the ship, and that it ought, therefore, to be primarily marshalled and applied, as it was in the case of The Packet [supra], in exoneration of the cargo affected by the bottomry bond. So that it is to be deemed as so much to be paid by the ship owners in remuneration of the claim of the bond-holders upon the cargo, and in the nature of a recouper or set-off against the claim of general average.

Upon the whole, my opinion is, that the defendants in the present case are responsible to the plaintiffs for the amount of their money appropriated and applied by the master at Bermuda for the repairs of the ship, before the bottomry bond was given; but not for the wrongful acts of the master subsequently done in the sale of the sound fruit and wine; and that the defendants are not entitled to any claim or set-off for any general average.

Case No. 11,275.

POPE et al. v. The R. B. FORBES.

[1 Cliff. 331.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1859.[2]

COLLISION — VESSELS CLOSE HAULED AND WITH WIND FREE—STEAM AND SAIL.

1. A vessel that has the wind free, or is sailing before or with the wind, must keep out of the way of a vessel that is close hauled, or sailing by or against the wind.

2. The vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences.

3. Steamers are always under obligation to do whatever a sailing vessel going free or with a fair wind would be required to do under similar

[1] [Reported by William Henry Clifford, Esq.]
[2] [Affirming Case No. 11,598.]

circumstances; and their obligation extends still further, because they have a power to avoid collision, not belonging to sailing vessels even with a free wind.

4. As a general rule, when a steamer meets a sailing vessel, whether the latter is close hauled or with the wind free, the sailing vessel has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid a collision.

5. It is the duty of the sailing vessel to keep her course; and if she fails to do it, and a collision ensues, the fault will be attributable to her, and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision, under the unexpected change of course and the other circumstances of the case.

Appeal from the district court in a cause of collision. The libel was entered at a special district court held on the 21st of October, 1856, and thence continued to the 25th of the same month, when, after a full hearing, a preliminary decree was pronounced in favor of libellants and an assessor appointed, whose report was made and filed March 27, 1857, and on the same day a final decree was entered against the steamboat for the sum so reported, and costs. [Case No. 11,598.] The suit was in rem [by William Pope and others against the steamboat R. B. Forbes, Charles Pearson, treasurer, claimant], and the libel alleged that the schooner Eliza, on the 22d of May, 1856, on a voyage from Machias to Boston, in the evening, was beating up towards her port of destination, when the lights of the steamer were first discovered, about one mile distant, and coming from the direction of the city, and being, as nearly as could be judged, abreast the "Castle." At that time she was seen by the master, who was standing at the wheel; by the mate and one of the crew, who were upon the lookout, and in the forward part of the schooner. The steamer had a ship in tow, fastened to her side. When the steamer was first discovered, the schooner was heading about northwest by west, and the wind blowing about north by east. The weather was overcast, and the schooner was sailing close hauled upon the wind, with her starboard tacks aboard, and going about five miles an hour. When the schooner was more than half a mile distant, the master called to the seaman on the lookout to come aft and get a light, and the seaman, taking the light then burning from the binnacle, carried it forward, and standing upon the forward part of the deck load, swung the light backward and forward in plain view of the approaching steamer. As the steamer further approached, the master and some of the crew shouted to the crew of the steamer to keep clear, which they then had time to do. The steamer kept on her course, and ran the vessel she had in tow into, and did serious damage to the schooner, in consequence of which she sank to the water's edge. The libel alleged that the schooner had all sails set except the gaff topsail, and kept steadily on her course from the time the steamer was first seen till the collision. The answer denied that the material facts of the collision were correctly stated in the libel. The R. B. Forbes was hired by the ship Romance of the Seas to tow her from the port of Boston; the steamer was not under the care or direction of her owners, but under that of the owners of the ship, her master, and a branch pilot, to whom at the time the management of both ship and steamer was committed. If the steamer, at the time of the collision, was not sailing in the proper direction, those who had control both of her and the ship should be responsible. Powerful lights were displayed from the ship and steamer, and the steamer's whistle was frequently sounded. The answer, moreover, set up that the schooner, previous to the accident, was going about northwest,—the wind being about north by east,—and was sailing close hauled, and going about five miles an hour; but that just before the accident, she suddenly tacked, and was at the time of the collision heading about north, across the bows of the ship.

C. F. Pike, for libellants.

When a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution to avoid a collision, and if this is not done, prima facie the steamer is chargeable with fault. Oregon v. Rocca, 18 How. [59 U. S.] 391; The R. B. Forbes [Case No. 11,598]. When a sailing vessel is lashed to a steamer, and the sailing vessel is moved entirely by the power of the steamer, the latter is liable for the injury caused to another vessel in collision with the sailing vessel so lashed, in case of negligence. Philadelphia & R. R. Co. v. Derby, 14 How. [55 U. S.] 486; Sproul v. Hemmingway, 14 Pick. 1; Fletcher v. Braddick, 2 Bos. & P. [N. R.] 182. The fact (which is denied) that a pilot had command does not relieve the steamer from liability. Rodrigues v. Melhuish, 28 Eng. Law & Eq. 474; Fletcher v. Braddick, 2 Bos. & P. [N. R.] 182; The Neptune, 1 Dod. 467.

H. F. Durant, for claimant.

The rule that a steamer must, at her peril, keep out of the way of all sailing vessels, does not apply in a dark night, when the sailing vessel is invisible. In such case the only duty of the steamer is to use ordinary care and reasonable precaution to avoid a collision. The Delaware v. The Osprey [Case No. 3,763]. In this case the care was extraordinary, and every precaution that could be employed was used. Four bright lights were forward, and fourteen hands were on the forecastle of the ship as lookouts, and four on the tug. The steam-whistle was constantly sounding, and the steamer and her tow were moving along only three miles an hour, instead of thir-

teen. If either vessel was responsible, it was the ship under the command of a duly licensed pilot. The steamer was not the author or the agent of the injury. The Carolus [Id. 2,424]; The Maria, 1 W. Rob. Adm. 95; The Agricola, 2 W. Rob. Adm. 10. The schooner's carelessness, as a matter of fact, caused the disaster. She had no permanent light, and she changed her course. The showing the binnacle light makes against her, since she was thus left ten or fifteen minutes without a compass to steer by.

CLIFFORD, Circuit Justice. Some of the circumstances and incidents of the disaster, as well as many of those immediately preceding it, are either admitted or so fully proved, that they cannot be regarded as the subjects of dispute. It is certain that a collision took place between the schooner and the ship, and there is no reason to doubt that it occurred at the time and near the place set forth in the libel, probably about midway between the Long Island light and the place where it is alleged that the steamer was when her lights were first discovered by the master, mate, and crew of the schooner. Damage was done to the schooner by the collision, and to such an extent that, within an hour after, she sank to the water's level. She was a topsail schooner of about one hundred and twenty tons, with a full, square, bluff bow, and was heavily laden with lumber. Unlike the schooner, the ship was sharp built, being, according to the testimony of the master, two hundred and forty-one feet long on her deck, and about sixty from the knight heads to the end of the flying jibboom, and measuring more than seventeen hundred tons. Her sails were furled, and the steamer was lashed to her starboard side, and fastened, forward and aft, to the bits of the ship by a line, so that the bows of the steamer reached only to the forerigging of the ship, and they were both moved by the steamer, which was the only motive-power. When the lights of the steamer were first discovered by the master and crew of the schooner, it is clearly proved that the steamer was about a mile distant, and nearly opposite "the Castle," and it is equally well established that the schooner was then sailing close hauled upon the wind, with her starboard tacks aboard, heading probably about northwest by west, and going about five miles an hour. It is alleged in the libel, and admitted in the answer, that the wind was about north by east, and the weight of the evidence clearly shows that the schooner would lay within five or six points of the wind; and Thomas Milans, a seaman on board the schooner, testified that she was then sailing on the wind, about west-northwest, as near as she would lay. Enoch Wasgett testified that a square-rigged vessel will lay within about six points, and that this schooner would lay about as near as a square-rigged vessel. Mathew Hunt testified that a common coasting schooner will stand within five or five and a half points, and many of them will lay within five points. Henry Rose, Jr., was of the opinion that "a blunt, full, flat vessel" would have to haul nearer to the wind, to make her course, than one of a sharp model. Thomas Rogers said, that some vessels would lay within five points of the wind, and some will not lay so near. The mate of the schooner testified that, at the time of the accident, the schooner was close hauled on the wind, as near as she would lay, within about five points, and that she could lay within five points. Both parties agree in the pleadings that the schooner was close hauled, and, as before remarked, that the wind was north by east; and the evidence clearly shows that it was not more eastward. Assuming that the wind was north by east, or north, and that the schooner was sailing up the harbor, close hauled, on the wind, her course must have been, according to the evidence, either northwest by west, or northwest; and whether it was the one or the other, cannot materially affect the merits of the case. In respect to the steamer, it appears, from the testimony of the master, that she was sailing down the harbor, on a course of east by south, or east half south, against the tide, and at the rate of three or four miles an hour, though the pilot, who was standing on the ship, says that some three minutes before the collision, he altered the course a little more to the eastward. How much alteration was made in the course at that time the witness does not state; but it must have been very inconsiderable, as the master of the steamer makes no mention of it at all, and, what is more, the mate, who was at the wheel all the time, testified without any qualification whatever, that they were steering about east by south, and such it is believed was the course of the ship and steamer at the time the collision occurred; and so it is alleged in the answer; and there is nothing in the testimony of any other witness in the case that conflicts in the least with this conclusion, or that furnishes any countenance whatever to the supposition that any material change was made until the moment the collision took place.

Both sides refer to the condition of the schooner after the collision, and rely upon the particulars of the damage done to her, to support their respective theories as to the manner in which the ship and schooner came in contact; and here there is one important circumstance, which, according to the evidence in the case, is placed beyond the reach of doubt, and that is, that the ship first struck the bowsprit of the schooner on the larboard side. That fact is so fully proved, that no theory inconsistent with it can be sustained (unless it can be reconciled, in some way, with that hypothesis), as the

fact is affirmed by several witnesses, and the marks still visible on that side of the bowsprit, tend strongly to verify their statements into absolute certainty.

Another circumstance in the same connection is satisfactorily established. Immediately after the collision, and almost at the same instant, the stern of the schooner swung round to the westward, which brought her alongside of the steamer. Douglas Fugan, one of the lookouts on the ship, says, "She slewed mighty quick," and her stern came round towards the steamer; that when he first saw her, he thought he saw her bows; and the next he saw, after the collision, was her stern slewing round. The mate of the steamer says, "that her stern, after the collision, swung to the westward with the tide, and she came alongside, and the steamer hit her a thump, and broke off a piece of her stanchion, behind the forerigging." When the vessels came together, the larboard side of the bowsprit of the schooner was first struck, and at a point about two feet behind the cap, and the appearance of the indentation, occasioned by the collision, tends strongly to confirm the testimony of the witnesses for the libellants, that the course of the ship must have been at a very acute angle with the line of the bowsprit, as the indentation is deeper on the side next the cap than on the opposite side toward the stern, and it also affords support to the opinion, expressed by several witnesses, that it was a "glancing blow." Many of the particulars of the damage done to the schooner are also clearly shown, and in respect to some of them there does not appear to be any dispute. It is not questioned that the bowsprit was broken off and carried away, but the parties disagree as to the precise manner in which it was done. On the part of the respondents, it is insisted that the ship and schooner came together at nearly right angles, and that it was broken and carried away by the immediate collision. According to the theory of the libellants, the vessels came together nearly head on, and the ship grazed along on the larboard side of the bowsprit, six or eight feet, towards the stern of the schooner, before it was broken off, leaving marks of black paint from the ship or rigging on the side of the bowsprit, and bending down the gasket staples and inclining them over towards the starboard bow of the schooner. Paint marks, such as might be expected from the cause assigned, are still to be seen on the bowsprit, and the gasket staples on its larboard side are bent down and inclined over in the manner described; and if it be assumed that these indicia are the result of the collision, it must be admitted that they tend strongly to establish the libellant's view of the case.

On the merits, the respondents contend, in the first place, that the schooner was in fault, because they say that she changed her course more to the northward or luffed up into the wind before the collision, and at a time when, if she had kept her course, the collision would not have occurred, and that the effect of the change in her course was to bring her across the bows of the ship, so that the vessels came together nearly at right angles; and if the facts are so, the legal consequences deduced from them by the respondents would clearly follow, as will plainly appear from the nautical rules recognized and approved by the supreme court. Those rules, so far as they are applicable to the different aspects of this case, are in substance as follows: A vessel that has the wind free, or sailing before or with the wind, must keep out of the way of the vessel that is close-hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. And the same rule applies to cases where one of the vessels is propelled by steam, with, at least, this difference, that steam vessels are regarded in the light of sailing vessels navigating with a fair wind, and are always under obligation to do whatever a sailing vessel, going free or with a fair wind, would be required to do under similar circumstances; and their obligation extends still further, because they possess a power to avoid collision not belonging to sailing vessels, even with a free wind,—the master having the steamer under his command, both by altering the helm and stopping the engines. As a general rule, therefore, when a steamer meets a sailing vessel, whether the latter is close-hauled or with a free wind, the sailing vessel has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her; and in general it is the duty of the sailing vessel to keep her course, that the steamer may know what measures to adopt in order to avoid the danger; and if the former fails to do this, the fault will be attributable to her, and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision, under the unexpected change of the course and the other circumstances of the case. St. John v. Paine, 10 How. [51 U. S.] 557. Apply the principles to the proposition maintained in behalf of the respondents, and it is clear, if the state of facts assumed as its basis is correct, then the libellants are not entitled to prevail in the suit. Facts, however, to justify or excuse the steamer cannot be presumed without proof. On the contrary, in the absence of proof showing fault on the part of the sailing vessel, the presumption, prima facie, is that the steamer is answerable; and so it has been ruled by the supreme court. The Oregon v. Rocca, 18 How. [59 U. S.] 570. These views lead necessarily to the inquiry, whether the schooner did or did not change her course, or luff up into the wind, as is

supposed by the respondents. Four witnesses, who were on board the schooner, testify in the most positive terms, that she did not. They say she kept her course, and made no change in it whatever, after the steamer was discovered. One of them is the master, who was at the wheel all the time after the steamer hove in view. He says, "She did not change her course"; and asserts, without any qualification, that it was the same course she had been on before the steamer was seen. Another is the mate, who was all the time forward, on the starboard side of the deck-load, except for one or two minutes, when he went on to the knight-heads. He says there was no change whatever, and does not think there was any attempt to make a change, and assigns as a reason for the opinion that, if there had been, they would have sung out to him forward to ease the jib-sheets; and when asked if he knew of his own knowledge that there was no attempt to luff or tack, he answered positively that he knew there was not. Two of the crew also testify, with equal positiveness, that the schooner did not change her course, and one of them says, there was no change made in her sails, to the time of the collision, and, by the bearings of the steamer, she too kept her true course. Those four persons composed the whole of the schooner's company, except the cook, who was below, and had no means of knowledge upon the subject.

Numerous witnesses were introduced by the respondents, and some fourteen or fifteen were examined upon matters bearing directly or indirectly upon the point now under consideration. One observation, however, is applicable to them all, and that is, they had not the same means of knowledge as the witnesses called by the libellants, for the plain reason that they did not see the schooner in season or under circumstances to enable them to ascertain her actual course so well as those on board her, who laid the course and determined her movements; and in respect to several of the witnesses, it is to be observed that their impressions upon the subject are entitled to but little weight when opposed to the positive testimony upon the other side. Thomas Cook, one of the lookouts, when asked what first called his attention to the schooner, answered that it was the schooner herself; and he says he was looking out for vessels ahead, and this one loomed right up under the bows of the ship, whose lights shone down on her deck, and that half a dozen of the men saw her, all at once, and sang right out. He was standing on the starboard side of the top-gallant forecastle of the ship, not far from the cathead. John S. Hilton, another of the lookouts, says that Charles Smith discovered the sail first, and he sung out, "Sail ahead"; the pilot asked where, and he answered, on the starboard bow; the steamboat was then stopped and the wheels reversed. The master of the ship, who was standing, in company with the pilot, the master of the steamer, and his brother, on the ship's house, being asked how far the ship was from the schooner when he first saw her, answered, "that he did not see her until the ship was close aboard of her; she had not struck when he saw her." The master of the steamer, who was standing on the port side of the ship's house, says she was very near the ship when he saw her; that a man on the forecastle sang out, there was a vessel on the starboard bow, and that he went to midships, and then he saw her coming, heading round across the bows of the ship, and he thinks she was about a length off when he saw her, and says she was coming round in a circle, with her topsail flat aback, and was illuminated by the lights on the bows of the ship, and the men forward immediately sang out, "She is coming right into us"; then he heard the pilot say to the man at the wheel, "Starboard the helm," and a few seconds after that they came together. The pilot, who was also standing on the ship's house near the mizzen-mast, when asked how far the steamer was off at the time he first saw her, answered, that he should think the distance was at that time about the length of the ship; but said he could not judge accurately. Charles Smith, the lookout who first discovered the schooner, says when he first saw her she appeared to be coming right head on, and then he could only see her topsail; and he says, when he sang out "Vessel on the lee bow," she appeared to come right up across the bows of the ship, and then he could see her other sails; and he further says, there was plenty of room, as she was going when he first saw her, to pass by the ship, but she changed right up into the wind. He was lying down, and he says he lay so that he might not see the starboard light of the ship. The mate of the steamer, who was in the pilot-house, testified that when he first saw the schooner she was going across the bows of the ship a little distance off; and, on cross-examination, when asked whether the schooner did not appear very suddenly to his sight, he said that she did; that when she shot up into the wind, she appeared all at once, and that was the first he saw of her. Many other witnesses were introduced by the respondents, who state in substance and effect, that they first saw the schooner across the bows of the ship, and several profess to think that she was going in stays, and in fact express the opinion that she must have changed her course.

All the evidence must be considered together, in order to determine which is the true theory as to the manner in which the ship and steamer came in contact; and in this connection, the fact that the ship struck the starboard side of the bowsprit of the schooner cannot be overlooked, as that fact is established by the concurrent testimony of nearly all the witnesses on both sides; and there

does not appear to be any doubt that the marks pointed out and still to be seen on that side of the bowsprit were made at that time; and if so, it would seem that they must have been made by the ship or rigging grazing along on that side several feet before the bowsprit was broken off, and the same remark applies to the peculiar slope of the gasket staples, and this view is also fortified by the appearance of the stern of the schooner, which it is proved was perfectly sound six or eight hours before; and it receives additional confirmation in the fact, which must be admitted, that it was the ship and not the steamer which struck against the starboard bow of the schooner, as it was her larboard side that came in contact with the steamer, when her stern swung round to the westward.

These circumstantial facts all point in the same direction, and indicate very strongly that the witnesses for the libellants are correct when they say that the ship and schooner came together nearly head on.

Assuming this to be the real character of the disaster, then the testimony of all the witnesses on both sides may be reconciled consistently with their integrity; and it is the only basis by which it can be done, as the testimony of those called for the libellants is positive and relates either to their own acts or those within their actual knowledge, and consequently their statements must be true or else the witnesses are false; whereas those called by the respondents, not having seen the schooner until the two vessels were in such close proximity that the danger was imminent, and perhaps a collision inevitable, and then only imperfectly and but for a moment, they may have mistaken, in the surprise and confusion of the occurrence, what was occasioned by the motion and impetus of the ship, or the pressure of her jib-boom upon the spars or rigging of the schooner, for a change of course on the part of the schooner, really supposing, on account of the great length of the ship, that the distance between the two vessels was much greater than it actually was; and the testimony of the master of the steamer, when he says that the schooner appeared to be coming round in a circle, and that of another witness, who says she came round "mighty quick," favors this view of the case. Such must have been the opinion of the district judge, when he said: "The sudden and near approach of the schooner, as testified to by the witnesses for the defence, still further confirms the belief that she was not seen until the projecting jib-boom of the ship had begun to press her round, and give her the appearance of going in stays under the ship's bow"; and that view of the evidence introduced on the part of the respondents is believed to be just and reasonable. It is also insisted that the schooner was in fault because she did not seasonably show a light, and that the one ultimately shown, as matter of fact, was not taken from the binnacle until a collision was inevitable, and when exhibited was feeble and insufficient. Such is understood to be the substance of the defence under this head, as it was presented at the argument. It involves two questions of fact and a question of law of considerable practical importance. Whether the maritime usage of this country absolutely requires merchant vessels to carry a light in the night-time has not been distinctly ruled by the supreme court. That question came up incidentally in the Third circuit, in the case of The Delaware v. The Osprey [Case No. 3,763], and it was there held to the effect that, where a collision occurs between two vessels in the night-time, one having suitable lights and the other having none, it is no more than reasonable, in the absence of any special circumstances affecting the merits of the case, to treat the vessel without lights as the wrongdoer, and liable to make reparation, while at the same time it was admitted that there is no imperative rule upon the subject requiring vessels to carry lights under those circumstances, and that courts of justice have no authority to prescribe a rule and make it binding upon such vessels.

A case not very dissimilar in principle was afterward presented to the supreme court, where the same doctrine is substantially laid down in respect to the removal of a light after it had been shown. According to the statement of facts in that case, the night was dark and rainy, and the wind was blowing fresh. A proper light had been hung in the fore-rigging early in the evening, and kept there till near the time of the collision, which happened about half past eleven o'clock. One of the hands had taken the lamp down to wipe off the water that had collected upon the glass globe, so that it might shine brighter. While he was standing midships wiping the lamp, he heard the approach of the steamer, and immediately placed it on the top of the cook-house, and the collision soon after occurred. On that state of facts the court said: "The fault lies in removing the lamp for a moment from the fore-rigging to midships. If it was not practicable to wipe it in the fore-rigging, another light should have been placed there on its removal. The time of the removal may be, as happened in this case, the instant when the presence of the light was most needed to give warning to the vessel approaching. All the hands examined who were on board the steamer deny that they saw any light at the time on the schooner. We agree, therefore, with the court below, that the schooner was in fault." Rogers v. The St. Charles, 19 How. [60 U. S.] 108.

In Williams v. Hill, 19 How. [60 U. S.] 241, it was held that neither rain, nor the darkness of the night, nor the absence of a light from a sailing vessel, nor the fact that a steamer is well manned and furnished and conducted with caution, will excuse a steamer for coming in collision with a sailing ves-

sel navigating in a thoroughfare out of the usual track of the steam vessel; and the court say that the ruling principle is, that an obligation rests upon all vessels found in the avenues of commerce to employ active diligence to avoid collisions; and add, in effect, that the question, whether the omission of any precautionary measure can or cannot be excused, must depend upon all the circumstances of the case.

The result of the cases seems to be, that while there is no positive rule of law requiring sailing vessels navigating in the nighttime to show a light, yet it is no more than a proper precautionary measure on their part, especially in a dark night, and in harbors or other thoroughfares where they are constantly liable to meet steamers or other sailing vessels; and if a sailing vessel thus navigating in a dark night omits that precaution, and a collision occurs doing damage to the dark vessel, and it appears that the want of a proper light on her part occasioned or contributed to the accident, the vessel which showed a proper light, whether steamer or sailing vessel, is not liable; provided it also appears that she is not otherwise in fault, and used all reasonable exertions to prevent the collision.

It becomes important, therefore, to ascertain more particularly the character of the night, and whether a proper light was seasonably shown by the schooner. The master of the steamer testified that the night was cloudy with stars out; that there was no moon, and that it was a good night to see lights any distance; and when asked whether he knew of anything which could prevent a lookout on the forecastle from observing a schooner with a light up a mile off, he answered that he did not, and added, that there was no trouble that night to see a light one, two, or three miles. The master of the schooner testified that the weather was overcast, a star to be seen here and there; and when asked how far the light on board the schooner could be seen, replied, that it could be seen a mile distant. The master of the ship testified that it was clear, with clouds at intervals, and rather hazy on the water. The mate of the schooner testified that it was a night when a light could be seen a great way, and that there were some stars out; and expressed the opinion that it could be seen a mile and a half or two miles as clear as it was that night.

Several other witnesses were examined to the same point, and discrepancies are observable in their testimony; but having come to the conclusion that those already referred to have given the true character of the night as nearly as it can be described, it is unnecessary to recapitulate the other evidence. Not a doubt is entertained that both the ship and steamer had experienced lookouts. John S. Hilton testified that he was on the top-gallant forecastle of the ship on the lookout, and that there were fourteen or fifteen others, all looking out; and the master of the steamer says that twelve or fourteen men were put there and told to look out; and he further says that the pilot and himself were keeping a lookout, and that the lights over the bows of the ship were not visible on the cabin or poop deck where they stood. The schooner also had good lookouts, who saw the lights of the ship and steamer when a mile distant; and the master of the schooner testified that when the steamer was about a half-mile distant, he took the light out of the binnacle, and had it carried forward by one of the crew, and ordered him to swing it backward and forward, so that the steamer, and of course those on board the ship, might know that the schooner was under weigh and was not at anchor, and it appears, according to his testimony, that the seaman immediately took the light, ran forward, and standing on the forward part of the deck-load, on the starboard side, nearly abreast of the foremast, held the light up as high as he could reach, and moved it backward and forward for several minutes; the seaman who held the light, the mate, and another of the crew shouting for them to keep off; and when the ship approached so near that she appeared to be coming right on to the schooner, the master says he ordered the seaman to take the light to the leeward, in order that the steamer might see it instead of the ship, as she had the moving power, and the order was obeyed. This statement of the master, in every essential particular, is fully confirmed by the mate and the two seamen, who were on the forward part of the schooner; and the mate says as soon as those on board the ship and steamer could hear him, he went forward on to the knightheads, and, when they were about a quarter of a mile distant, commenced to shout to them to keep off, and he, the master, and seaman each called to them three or four times, and continued shouting till the vessels struck. In respect to the character of the light shown by the schooner, the proof is equally full and plenary, that it was a bright light, and such as might be seen on that night at the distance of a mile.

It is no satisfactory answer to the evidence introduced on this point by the libellants, to say that the witnesses called by the respondents have testified that they did not see the light on the schooner till the moment of collision. Such testimony, under the circumstances of this case, only affects the credibility of the witnesses called by the libellants, and cannot avail, for the reasons already given, as well as for others which will presently be stated. Lookouts in sufficient number were placed in the forward part of the ship, where they ought to be, for the reason, among others, which might be given, that the forward view of persons situated near the wheel is liable to

be obstructed by the spars and rigging of the vessel. And the same reason requires that those forward should be so located that they can see ahead and on the respective sides of the vessel to which they are assigned, without any obstruction whatever, either from the lights or any other natural objects connected with the vessel. According to the testimony of the respondents, the ship had two lights, consisting of two large lanterns, one for each bow, and they were hung to the jib-guys, just forward of the sprit-sail yard, and the weight of the evidence clearly shows that, where the lookouts were standing, the lights were directly on the line of view ahead. Some of them say they found it necessary to get down on their knees; and one says he had to lie down to avoid that difficulty. Three lookouts were also stationed on the steamer, two forward and one in the wheel-house, who were men accustomed to that duty, and doubtless performed it as well as they could, in the situation in which they were placed, —the bows of the ship being sixty or eighty feet ahead of the bows of the steamer, and their vision, at least in one direction, seriously obstructed by the light on the starboard guy of the ship to which the steamer was lashed. Blind lookouts cannot fulfil the requirements of law, nor can those who are stationed behind obstructions so that they cannot see, as was substantially the fact with those on board the ship and steamer just before the collision occurred. Lookouts are required for a valuable purpose, and when they are so situated that they cannot accomplish the duty they are expected and required to perform, the case stands as it would if none had been employed; and if there be none such, additional to the helmsman, or if they are not stationed in a proper place or not actually and vigilantly employed in their duty, the supreme court has determined in a case where the omission was on the part of the steamer that it must be regarded as prima facie evidence that the collision was the fault of the steamboat, and that principle is applicable to the present case. The Genesee Chief, 12 How. [53 U. S.] 463; The Catherine, 17 How. [58 U. S.] 177.

It is therefore the opinion of the court that a proper light was seasonably shown by the schooner, and that it was not her fault, or the fault of her master or crew; that it was not seen in time to prevent the collision; and consequently it is not a case where both parties are in fault; and it is equally clear, from all the evidence in the case, that the collision was not the result of inevitable accident.

Steamers are required to exercise the necessary precautions to avoid a collision; and that rule when applied to the facts of this case, as they are found to be, necessarily leads to the conclusion that the libellants are entitled to prevail in the suit, unless the proposition assumed by the respondents, that the ship alone is responsible, can be sustained.

They contend that the ship was wholly under the control of her own master and pilot at the time of the collision, and that the steamer did not, either as principal or agent, cause the damage done to the schooner, and could not have prevented it, and therefore is not liable in this suit; and they also contend that the ship is not liable, because she was under the sole charge and direction of a pilot, duly licensed to act in that capacity by the authorities of the state. Whether or not the ship is liable it is not necessary to consider, as she is not made a party to the suit, and the proposition, so far as it respects the steamer, presents an inquiry of fact, which must depend upon the evidence. It has already appeared that the steamer and ship were made fast together, and that the steamer had the only motive-power. Independently of the steamer, the ship with all her sails furled would have been unmanageble, and incapable of being governed or directed. Her lights were placed by the order of the pilot and the master of the steamer; and the mate of the steamer says that he was in the pilot-house of the steamer steering, and paying attention to orders from her master and pilot; and at the time of the collision he says he had ordered the engine to be reversed, and had put the helm to starboard, before the order was given by the pilot; and the master of the steamer says that he was about to give the order to stop and reverse, and went to the starboard side of the ship for that purpose, but found that it had already been done. On this state of facts, the conclusion must follow that the pilot was under a mistake when he expressed the opinion that the steamer was under his orders. It is clearly shown that it was not so at the time the collision occurred. The mere fact that a pilot was on board assisting in the management of the vessel, and occasionally giving orders, cannot defeat a recovery under the circumstances of this case. Rodrigues v. Melhuish, 28 Eng. Law & Eq. 474; Smith v. Condry, 1 How. [42 U. S.] 28; Beane v. The Mayurka [Case No. 1,175]; Fletcher v. Braddick, 2 Bos. & P. [N. R.] 182; The Neptune, 1 Dod. 467.

I am of opinion, therefore, that the schooner did not change her course after the lights of the approaching vessels were first seen by her master and crew; that she did seasonably show a proper light, and that she was not in fault; but that there was fault on the part of those in charge of the other vessels in this, that the lights were so placed on the ship that they obstructed the vision of the lookouts; and also that the steamer, as the sole motive-power, failed to observe the rule of navigation, which requires steamers meeting sailing vessels to exercise the necessary precautions to avoid

a collision, and consequently that she is liable in this case.

The decree, therefore, of the district court is affirmed, with costs.

Case No. 11,276.

POPE v. The SAPPHIRE.

[Hoff. Op. 504.]

Circuit Court, D. California. Feb. 24, 1869.

SALVAGE—CONTRACT FOR PAYMENT AT ALL EVENTS—AMOUNT OF AWARD—VESSELS IN CONTACT—LIABILITY OF ONE AT FAULT FOR SALVAGE.

[1. A statement, by the master of a vessel to the commander of a tug asked to tow her out of danger, "that the ship would pay," is not sufficient evidence of a contract for payment at all events to bar a libel for salvage.]

[2. A contract for payment of salvors at all events, where the danger is not great and success is reasonably certain, should have little influence on the amount of the award.]

[3. Where two vessels are in contact, causing mutual damage, salvors who separate them should receive from the one at fault salvage upon the total value of the two.]

[4. When the value of the property saved is such as to justify a liberal reward to the salvor, as compared with his ordinary profits, the maximum award has been reached. It should not increase with the value of the property beyond that point.]

[This was a libel by Pope and others against the ship Sapphire for salvage.]

Wm. Barber, for libelant.

McAllister & Bergin, for claimant.

HOFFMAN, District Judge. On the 23d of November last the ship Sapphire drifted from her moorings and came in contact with the French transport Euryale, causing and receiving considerable damage. The situation of the two vessels rendered it in the highest degree expedient that they should be at once detached from each other, and the captain of the Sapphire came on shore to procure assistance. He found the steamtug Sol Thomas lying at a wharf in charge of the mate, engineer and five men. The mate at first hesitated to enter, in the absence of the master, on the service, and inquired who was to pay the tug. Capt. Boyd assured him that the ship would pay, and, after consulting with the engineer, it was determined to start. The tug accordingly proceeded to the vessels, and after some efforts, but with no very great difficulty, succeeded in separating them. He then towed the Euryale to a place of safety.

It is contended by the claimants that the conversation above detailed amounted to an agreement between the parties that the tug should be paid for her efforts or services, in any event, and without reference to her success or failure, and that the existence of such a contract deprives the service of the distinctive character of salvage service and her owners of any right to be remunerated on that basis. It is not denied that whether the service be considered a strictly salvage service, or whether it was deprived of that character by the fact that it was to be paid for in any event, the court has jurisdiction. The Emulous [Case No. 4,480]; Bearse v. Three Hundred and Forty Pigs of Copper [Id. 1,193]; The A. D. Patchin [Id. 87]; The True Blue, 2 W. Rob. 176; The Henry, 2 Eng. Law & Eq. 564. Nor is it contended that services of this kind, even though performed in pursuance of an express contract, do not create a lien in rem. The A. D. Patchin [supra]. In the case of The Independence [Case No. 7,014], the eminent judge [Curtis] held that "a contract to be paid at all events, either a sum certain, or a reasonable sum, for work, labor and the hire of a steamer, in attempting to relieve a vessel in distress, without regard to the success or failure of the efforts thus procured, is inconsistent with a claim for salvage; and when such a contract has been fairly made, it must be held binding by a court of equity, and any claim for salvage disallowed." In noticing this case, the learned author of Parsons' Maritime Law cites it as deciding "that if a vessel be hired to do a stated service, as to tow a dismasted vessel to a place of safety, and no price is named, because the time it may take is not altogether certain, this is a salvage service, and the agreement is of no avail"; and from this doctrine he dissents, because "we are unable to see why the parties may not make a valid contract, leaving the price to be determined on the doctrine of a quantum meruit." 2 Pars. Mar. Law, 629. But the learned author seems to have misapprehended the decision in the case of The Independence [supra]. This is evident from the passage already cited, and also from the following: "When, therefore, the subject matter of the contract is a mere attempt to save property, and the owner or his representative, or both, become personally liable by the contract to pay either an agreed sum, or a quantum meruit, for the labor and service rendered without regard to its results, the parties do not contemplate nor engage in a salvage service, but quite a different service." Pars. Mar. Ins. p. 356. But the case does decide that to bar a claim for salvage where property in distress on the sea has been saved, it is necessary to plead and prove a binding contract, to be paid at all events for the work, labor and service in attempting to save the property, whether the same should be lost or saved. The service being prima facie a salvage service, it is incumbent on those who would change its character by contract to clearly apprise the party with whom they are dealing that they do not wish to engage his vessel in a salvage service, but merely that she should make an effort to find and save the vessel in distress, and that for the work and labor performed a quantum meruit would be paid at all events, whether the ship should be found or not, and whether or not the steamer should be able to do the

work. To make out such an understanding, acted on by both parties, the proofs should be clear and cogent. The Salacia, 2 Hagg. Adm. 265; The William Lushington, 7 Notes Cas. 364; The Susan [Case No. 13,630]. In this case last cited, the court says: "The party who asserts that there was a contract which displaces salvage, assumes the burden of proving affirmatively the existence of such a contract. It is not enough for him to show that there was some contract, he must go farther and prove that it was agreed that the compensation should be absolute and not contingent; otherwise the law will say it was to be contingent on the saving of the property."

In the case at bar the only evidence of a contract to pay absolutely and at all events is the assurance of the master of the Sapphire to the mate and engineer "that the ship would pay." No personal liability was in terms created. It was not stated that the ship would pay whether the efforts of the tug were successful or not; nor is it reasonable to suppose that the mate and engineer (even if they had the authority to do so) intended to enter upon the service on any different terms, or for any rate of compensation, other than those on which steamtugs usually perform such services in this harbor. On comparing the evidence in this case with that in the case of The Independence [supra], the latter will be found far the stronger of the two; and yet it was held by Mr. Justice Curtis insufficient. But the point is in reality of slight importance in the present case. Undoubtedly, the fact that the salvor's services are only to be compensated in case of success is an ingredient of merit, and justly entitles him to a remuneration greater than if he were to be compensated for his efforts whether successful or not. But the degree to which this consideration should influence the award must depend on the circumstances of each case, where the service undertaken is arduous, and must necessarily be protracted, and where it requires the risk of property and the expenditure of money, labor and skill before success can be assured. Where the chances of success are doubtful or desperate, the fact that the right to any compensation was staked upon the event, should justly enhance the amount to be awarded by the court. But where, as in this case, the service must be completed, if at all, in a few hours, where no reasonable doubt of success could be entertained, and the service differed but slightly from the ordinary business of the tug, the circumstance that an agreement was made to pay for the service at all events, as it practically gave no additional certainty of compensation to the salvor, can have little influence upon the award of the court.

The amount to be decreed to the salvors remains to be determined. The service rendered by the tug consisted in hauling away the Euryale from the Sapphire, which had collided with her. In a suit between the two vessels it has been adjudged that the Sapphire was in fault, and she was condemned in damages. The vessels were in contact but a short time, and it is evident that every moment they remained together increased the damages to the Euryale, and the consequent liability of the Sapphire. The court is asked to include in its decree against the Sapphire the amount of a reasonable salvage, which, had the Euryale not been a public vessel, might have been recovered of her, and for which the Sapphire, as the vessel in fault, would have been liable. This claim is resisted on the ground that, the Euryale not being liable for salvage directly, no indirect decree for salvage should be made against her, and the tug should be left to seek a compensation from the bounty or justice of the government to which she belongs.

I think it unnecessary to decide the abstract question whether in this case a reasonable salvage due primarily from the Euryale could, as such, be decreed against the Sapphire. But I see no difficulty in awarding to the tug in this suit full compensation for the service rendered to both vessels. Where two vessels are in contact, causing mutual damage, and no fault is imputable to either, the value of the property salved will be estimated at the sum of the values of the vessels and their cargoes, and the award be contributed for in the proportions these values bear to each other. Such was the ruling of this court in the case of The Duke of Rothsay [unreported]. But where the liability of one of the vessels for the whole damage has been judicially established, I see no reason why the salvors should not, as before, be treated as having saved property of the aggregate value of both vessels, but the salvage reward be decreed to be paid by the vessel in fault. The value of the Sapphire and cargo was $148,000 in gold; that of the Euryale from $15,000 to $20,000,—about $160,000 in all. The service of the tug was rendered at a very early hour in the morning. The means at her disposal rendered it immediately effective, and it does not appear that any other tug could at the moment have been procured to tender such prompt and efficient aid. Some skill was required, but not more than the persons in charge of such vessels are supposed to possess. The wind was violent, and the sea rough, and there was perhaps a slight risk of injury to the tug by being thrown against one or the other of the vessels. But I hardly think that this can enter largely into an estimate of the merits of the service, as it was not great, and could have been avoided by the exercise of due skill. The fact, however, that the tug did sustain some damage (being obliged, on account of the floating spars, etc., to approach the Euryale on the windward side) may perhaps be accepted as proof that the undertaking was not wholly

unattended with danger. That the strain on her was severe, is shown by the fact that she parted a hawser in attempting to detach the vessels from each other. But, except in these particulars, and in the fact that the service was rendered at a very early hour of the morning, and in a gale of wind and heavy sea, it does not materially differ from the ordinary employment of the tug. Its success was reasonably certain, and though the damage to the Sapphire was increasing every moment from the attrition of the Euryale's bows, which were "sawing into her," there seems no reason to believe that either vessel would have been totally lost before aid could have been obtained, even if the tug had declined the enterprise. In the case of The Duke of Rothsay this court had occasion to consider the principles applicable to salvages effected in or at the entrance to harbors by steam tugs. I see no reason to modify the views there expressed. The aim of the court has been to encourage by liberal rewards the maintenance of this class of vessels so essential to the safety of the commerce of our port, and to induce them by the hope of largely increased gains in case their services are required, to hold themselves at all hours of the day and night in readiness to give their aid at a moment's notice. At the same time care must be taken not to permit undue advantage to be taken of distress, nor should compensation be awarded out of all reasonable proportion to the sum for which a similar, or nearly similar, service would be rendered by the tug in the course of her ordinary employment.

In fixing the amount of this compensation, the value of the property in peril cannot, of course, be left wholly out of consideration. But, it seems to me, that when that value is sufficient to enable the court, without subjecting it to too great a burden, to give to the salvor a generous reward for his services, as compared with his ordinary rates of compensation, the maximum allowance has been reached, and it should be substantially the same, though the value of the property in peril was far greater. In other words, that the basis of the allowance should be a consideration of the danger, duration and other circumstances of the service, and of the ordinary rates charged by the vessel for similar services, rather than the allowance of a percentage or proportionate amount of the value of the property salved. In The Duke of Rothsay, the service was of longer duration, and the vessels in perhaps more imminent danger of total loss than in the present case. The value of the vessels and cargoes was far less. In that case $3,000 was awarded, and I think the same sum should be allowed in this. As I have been asked distinctly to pass upon the point, I desire to be understood as awarding this sum as a full compensation for the salvage service rendered to both vessels, and as in full satisfaction of the whole demand of the salvors. But, for the reasons just given, the allowance has not been materially increased by the addition of the value of the Euryale to that of the Sapphire.

[For appeals in the case of The Euryale v. The Sapphire, see 11 Wall. (78 U. S.) 164, and 18 Wall. (85 U. S.) 51.]

POPE (UNITED STATES v.). See Cases Nos. 16,068 and 16,069.

POPE (WHITAKER v.). See Case No. 17,528.

Case No. 11,277.

POPINO v. McALLISTER.

[4 Wash. C. C. 393.] [1]

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

JUDGMENT — MOTION TO SET ASIDE DEFAULT AFTER TERM.

1. A motion to set aside a judgment by default, made after the term is over by petition to a judge, is not within the words or the equity of the eighteenth section of the judiciary act of 1789 [1 Stat. 73].

[Cited in Jenkins v. Eldredge, Case No. 7,269.]

2. A judgment by default against the casual ejector, for want of an appearance and confessing lease entry and ouster, may be set aside at a subsequent session upon good cause shown, where the defendant swears to merits, and a trial has not been lost. The affidavit of the party is sufficient on which to found the motion.

[Cited in Phillips v. Negley, 2 D. C. 248.]

Rule to show cause, why the judgment by default, rendered in this case at the October session of 1822, should not be set aside. The rule was supported upon the petition of the defendant to the presiding judge of this court, at Chambers, presented to him a few days after the adjournment of the court in October last, setting forth, "that the defendant did not receive notice of trial of the cause until the 29th of September, 1822, at which time, and for two or three weeks preceding and following that period, he was confined to his bed by sickness, as were also his wife and many of his children; that he was altogether unable to attend court on the 1st of October, and was, during the period of his confinement, too sick to attend to business of any kind, or to prepare for the trial of the cause. That he is advised that he has a valid ground of defence, and that he, and those under whom he claims, have had sixty years uninterrupted possession of the premises in controversy, and that he expects to be prepared for trial at the ensuing term of the court." To the truth of the facts stated in the petition, an affidavit was annexed. The prayer of the petition was, that the judge would allow the petition to be filed in the clerk's office, under the equity of the eighteenth section of the judiciary act. The judge granted the

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

petition, and at the April session following, the above rule was moved for and granted.

For the defendant it was contended: (1) That the reasons stated in the petition and verified by the oath of the party, were sufficient to induce the court to set aside the judgment by default, which was entered in consequence of the defendant's not performing the condition of the consent rules which had been exchanged, by confessing lease, entry, and ouster. (2) That this is a case clearly within the equity of the eighteenth section of the judiciary act; but if not so, still upon general principles of law, it was a case in which the court possesses the power to set aside a judgment by default entered at a preceding term, upon good cause being shown to excuse the neglect of the party. 1 Burrows, 571, 572. 2 Strange, 823; 4 Burrows, 1996, 2224; Hughs v. Kelly (supreme court of this state); Adams, Ej. 125, 289; 4 Johns. 489; 3 Caines, 133; 1 Caines, 503.

On the other side, it was insisted, that this was not a case within the words or intention, nor can the court construe it to be within the equity of the eighteenth section of the judiciary act; consequently, that the rule ought not to have been granted upon a petition, and that it was incumbent on the defendant to support his motion upon an affidavit, independent of the petition. But that at all events neither the courts of England, nor of this country, had ever been known, after the consent rules were exchanged, and at a subsequent term, to set aside a nonsuit in ejectment for the want of a confession of lease, entry and ouster, and the judgment by default consequent thereupon; and even if such a practice could be supported by precedents, still the rule ought to be supported by the affidavit of some indifferent person taken upon notice, and not upon that of the party himself. It was also insisted, that the petition in this case did not set forth merits. That all the facts stated in the petition were susceptible of proof by persons other than the defendant himself.

Richard Stockton and Mr. Wall, for plaintiff.
Mr. Ewing and H. Stockton, for defendant.

WASHINGTON, Circuit Justice (PENNINGTON, District Judge, absent, from sickness). Unless this rule can be supported upon those general principles of law which regulate the practice of courts in cases like the present, it must be discharged; since it is quite clear to my mind, that it is neither within the words or intention of the eighteenth section of the judiciary law, and that the court has no good ground for considering it to be within the equity of that section. But I am of opinion that according to the English practice, as well as the practice of this state, a judgment by default against the casual ejector, for want of the defendant appearing and confessing lease, entry, and ouster, may be set aside at a subsequent term, upon good cause shown, where the defendant swears to merits, and a trial has not been lost. This is also the practice of the New York courts. It is admitted by the plaintiff's counsel, that in case of a judgment by default, obtained by fraud, or for the want of notice of trial, the court may set aside the judgment on terms, where merits are sworn to. But surely these cannot be the only cases in which the court will relieve the defendant. If his default be caused by too short a notice, or by an act of God, (both of which occur in this case) justice equally requires the interposition of the court; who will not permit the possession to be changed, when it was beyond the power of the defendant to be prepared to defend it, particularly too in a case where the plaintiff has suffered, and can suffer no injury. In this case, the application of the defendant to set aside the judgment was promptly made, although by mistake addressed to the judge out of court. The plaintiff has not lost a trial, since the defendant would undoubtedly have been indulged by the court with a postponement of the trial, could his situation have been made known. The plaintiff can suffer no injury by the defendant being let in to defend his possession, whereas by refusing to set aside the judgment, the latter will be turned out of possession, and may be placed, as to his ultimate success, in a less favourable situation in the character of a plaintiff, than in that of a defendant. The court will certainly not relieve the defendant against a judgment by default, rendered at a preceding term, unless his application is promptly made, merits sworn to, and good cause shown to excuse his non-compliance with the consent rule, to confess lease, entry, and ouster, all which must be satisfactorily proved. Now, in this case, the application for the rule, to set aside the judgment, was made at the next term succeeding that at which the judgment was entered; the plaintiff, as before stated, has not in reality lost a trial, and the defendant swears that he is advised that he has a legal defence; and further, that he and those under whom he claims, have had an uninterrupted possession of the premises in controversy for sixty years. He was not bound to set out, in his affidavit, the whole of his title. But it is insisted that the facts upon which the defendant relies for relief ought to have been stated in an affidavit, and that they should have been proved by some other person than the defendant. The court cannot agree with the counsel in either of these particulars. The facts being stated in the form of a petition, and the truth of them being verified by the oath of the party, they are as satisfactorily proved as if they had been stated in the formal shape of an affidavit. It is possible that the same facts might have been proved by some third person; but, resting in the knowledge of the party himself, it is nearly impossible that they could have been as satisfactorily proved by any other than the defendant. Others might have proved that he was sick, and his attorney might have stated when and how he forwarded to him the notice of trial. But who could so well satisfy the court

as to his ability to prepare for the trial, and the time when the notice was received, as the man who asserts his inability, and the time when he did receive the notice. I am of opinion that the judgment by default ought to be set aside upon the payment of costs.

Case No. 11,278.

POPLESTON v. KITCHEN.

[3 Wash. C. C. 138.] [1]

Circuit Court, D. Pennsylvania. April Term, 1812.

MARINE INSURANCE—SEAWORTHINESS—IMPLIED WARRANTY.

The assured is not bound to communicate the age of the vessel, or where she was built, unless required so to do. It is enough, if he is prepared to vindicate his implied warranty, as to the seaworthiness of the vessel, in case it is questioned.

Actions, on two policies, on vessel and cargo. The defence was—1. That the vessel was built in New-England, and thirteen years of age, which circumstances were not communicated to the underwriters; and 2. That the plaintiff had not shown that the vessel was sufficiently found and manned, although the jury should be satisfied that the body of the vessel was seaworthy for the voyage.

WASHINGTON, Circuit Justice, stated, that the plaintiff was not bound to communicate the age of the vessel, or where built, unless they had been asked of him. It is enough, if he is prepared to vindicate his implied warranty, as to the seaworthiness of the vessel, in case it be questioned. The court left it to the jury to say, whether, upon the evidence, she was seaworthy at the time the voyage commenced, there being very slight evidence, if any, to the contrary. Verdict for plaintiff.

NOTE. Seaworthiness, which includes being sufficiently found and manned, is to be presumed; it is an implied warranty, which must be established, if impeached, but not otherwise. Marshall, Ins. (Condy's Ed.) 159, 165a, note 16.

POPPE (ZEREGA v.). See Case No. 18,213.

Case No. 11,279.

POPPENHUSEN v. FALKE et al.

[2 Fish. Pat. Cas. 181; 4 Blatchf. 493.] [2]

Circuit Court, S. D. New York, June 13, 1861.

PATENTS — INJUNCTION — DEFENDANTS ACTING AS SERVANTS OF CORPORATION — INFRINGEMENT — EXPERIMENT—BUSINESS PURPOSE — COMMISSIONER'S DECISION—REISSUE—DISCLAIMER—ERROR.

1. Where defendants are acting in concert in the infringement of a patent, the fact that, as between themselves, they are connected together as the stockholders, managers, and servants of a corporation, does not exempt them from the restraints of an injunction.

[Cited in American Cotton-Tie Supply Co. v. McCready, Case No. 295; Needham v. Washburn, Id. 10,082; Herman v. Herman, 29 Fed. 93; Cahoone Barnet Manuf'g Co. v. Rubber & Celluloid Harness Co., 45 Fed. 584.]

2. An experiment with a patented article for the sole purpose of gratifying a philosophical taste, or curiosity, or for mere amusement, is not an infringement of the rights of a patentee.

3. But, otherwise, if the experiments are made with a view to adapt the machine or process to use in the prosecution of business.

4. The decision of the commissioner of patents in cases of reissue, is, if not final and conclusive, at least prima facie evidence, that the reissued patent is for the same invention as the original, in all cases where no doubts are raised in the mind of the court, by an examination of the instruments themselves, and no fraud is proved.

5. Inadvertence and error may occur as well in the disclaimer as in the claim; and, whenever the mistake occurs, may be cured by reissue.

6. It matters not how or when the mistake was discovered by the patentee provided it was a mistake. Of that the commissioner of patents decides, in the first instance, and his decision is prima facie evidence of the fact, so far as the good faith of the transaction is concerned, until the contrary is shown.

7. The great question will, after all, be, whether or not the processes or the application of them as described in the new specification, are a part of the invention of the patentee.

8. Where the validity of an original patent has been adjudicated upon and sustained, but it is subsequently reissued, and the reissue covers a wider space than the original, all that lies between the limits fixed by the first and those fixed by the second is disputed territory; and, if the alleged infringement lies wholly in that disputed territory, the defendant will not be concluded, upon a motion for a preliminary injunction, by the adjudication upon the original patent.

[Cited in Brown v. Hinkley, Case No. 2,012.]

9. Whatever difficulty or uncertainty there may be arising out of the difference in the two specifications, is the fault or misfortune of the complainant, and not of the defendant, and should be borne by the former and not the latter.

In equity. This was a motion [by Conrad Poppenhusen] for a preliminary injunction to restrain the defendants from infringing letters patent granted to Otto P. Meyer December 20, 1853 [No. 10,339], and April 4, 1854 [No. 10,741], for improved modes of treating caoutchouc, and other vulcanizable gums. A report of a trial at law, and of a motion for a preliminary injunction, and for an attachment, founded upon those patents, will be found in the cases of Poppenhusen v. New York Gutta Percha Comb Co. [Cases Nos. 11,281, 11,283, and 11,282]. After the decision of the latter case, the patent was reissued, viz: on August 16, 1859 [No. 797], with the following claim: "I claim the mode of operation, or mode of procedure, substantially such as herein described, which said mode of operation consists in the employment of a pliable or flexible envelope, substantially

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

[2] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission.]

such as herein described, or the equivalent thereof, applied by pressure to the hard compound of vulcanizable gum, while in the green or plastic state, so as to insure the contact of such covering with the surface of the compound, and, while thus covered or protected, subjecting it to the vulcanized heat, and when vulcanized stripping off such covering; the whole process being substantially as specified."

George D. Sargent, for complainant.
Abbett & Fuller, for defendants.

SHIPMAN, District Judge. There is no occasion in the present stage of this case to enumerate in detail the allegations of this bill. Its object is to restrain the respondents, by injunction, from infringing the rights of the complainant, alleged to be secured to him by two patents for improved modes of treating caoutchouc and other vulcanizable gums, and for an account. One of the patents, denominated the "grease patent," bears date December 20, 1853. The other, called the "tin foil patent," is dated April 4, 1854, but reissued August 16, 1859. The bill is founded upon the "grease patent," and upon the reissued "tin foil patent."

The title to both patents is in the complainant; and the present motion is for a preliminary injunction to restrain the respondents from infringing both or either of them. A preliminary objection has been suggested to the bill itself, on the alleged ground that it does not charge an infringement by the joint acts of the respondents; and it is urged that, as the answer shows that the respondents are the mere employees of a corporation known as the "New York Gutta Percha and India Rubber Vulcanite Company," and that all the acts alleged against them, if any were done by them, were performed in the capacity of servants of such corporation, they are therefore not the proper parties, or, if the proper parties, that they are improperly joined in the bill. In view of the conceded facts, I do not think these objections are important. The allegation in the bill is, "that the respondents are using," etc., which although it might be more explicit, is sufficient in point of form. The proof supports the allegation, as it shows that whatever the respondents have done, they have done in concert, in the prosecution of the business of a single establishment. Indeed, the answer impliedly admits that whatever is done by the respondents is done by them acting together; but they further aver not on their own account, and only as the employees of a corporation. I think it appears, from the answer and the proofs, that the respondents are acting in concert in the use of the materials and processes which constitute the alleged infringement of the complainant's rights. The fact that, as between themselves, they are connected together as the stockholders, managers, and servants of a corporation, does not exempt them from the restraints of an injunction. This seems in accordance with the view taken by Judge Nelson in the case of Goodyear v. Phelps [Case No. 5,581].

In determining this motion we will consider the "grease patent" first. There seems to be no doubt of its validity, except what may arise out of the suggestion that it is void for want of usefulness. But this has been settled, sufficiently at least for the purposes of this motion. In the case tried before Judge Ingersoll and a jury, the verdict found the patent valid, and in that verdict the judge concurred and issued an injunction restraining the defendants in that case from any use of the invention secured by the "grease patent." In this state of the case, an injunction must issue, if there has been an infringement.

I am satisfied, from a careful examination of the evidence, that the respondents have infringed. It is said, indeed, that the acts of the respondents are not in violation of either patent, because they are mere experiments. I do not think the facts disclosed warrant the conclusion that these were within that class of experiments protected by law. It has been held, and no doubt is now well settled, that an experiment with a patented article for the sole purpose of gratifying a philosophical taste, or curiosity, or for mere amusement, is not an infringement of the rights of the patentee. I do not think, however, that the acts of the respondents come under that head. They are rivals of the complainant in the very business to which his patents relate. They, or most of them, are perfectly familiar with his patents and processes, having formerly been in his employ in manufacturing articles under his patents. The answer alleges that all the defendants have thus far done since the organization of said company, has been done by way of experiment, for the purpose of hereafter working under certain patents, grants, and licenses of their own; of course, these patents, under which they claim to work, are wholly different from those of the complainant; and it can hardly be necessary for the respondents to experiment with the complainant's inventions in order to perfect their own, especially when they are already perfectly familar with the former.

I am of opinion, therefore, that the "grease patent" is valid—that its validity having been judicially settled by a verdict in which the court concurred, it is sufficiently established for the purposes of this motion, as little or no new light has been shed on it thus far in this hearing; and that the respondents have, to some extent, infringed upon the rights of the complainant under it. An injunction must, therefore, issue as to that patent.

But the most important part of this controversy remains to be considered, namely—that which relates to the "tin foil patent." The

original "tin foil patent" was issued to L. Otto P. Meyer April 4, 1854. After having been assigned to the complainant, it was by him surrendered on the ground that it was inoperative by reason of a defective and insufficient specification or description, which errors were alleged to have occurred through inadvertence and mistake, and without any fraudulent intentions; and on August 16, 1859, new letters patent were issued to the complainant.

The respondents resist this motion for a preliminary injunction, so far as this "tin foil patent" is concerned, on three principal grounds, to each of which I shall refer at some length, not for the purpose of definitely settling any questions which more properly belong to another stage of this case, but to avoid misconception as to the ground upon which this motion is disposed of. The three objections urged against the motion are: First. That, on comparing the reissued "tin foil patent" with the original, and reading them both in the light of the obvious facts, and of the history of the previous litigation, it is clearly evident that the reissued patent is not for the same invention as the original, or at least covers more ground than the invention of Meyer. Second. That if this proposition is not clear, from an inspection of the papers, the inquiry involves a question of fact which should go to the jury. Third. That the respondents have not infringed.

I will refer first to the second and third propositions. It is undoubtedly true that the inquiry, whether the reissued patent is for the same invention as the original, involves a question of fact. And if this were a jury trial, that fact would have to be disposed of by the jury. The cases of Battin v. Taggert, 17 How. [58 U. S.] 74, and Carver v. Braintree Manuf'g Co. [Case No. 2,485], cited in support of the claim that this fact in the case now before us should be submitted to the jury, do not, I think, sustain that claim. Those were actions at law, and tried, of course, to the jury. All the controverted facts in each case must or should have been submitted to the jury. But the power or duty of courts of equity to pass upon this, or any other facts that may be put in issue by a bill and answer, is not touched by these cases. If the fact is involved in considerable doubt, that may be a reason why it should be sent to a jury. But so far as I can judge, in the present state of the proofs, I do not think it would be a wise course to send this question to a jury. It is intimately connected with inferences to be drawn from the changes in the specification and claim as presented in the reissue when compared with the original, and the significance of these inferences must depend more or less on the construction to be given to the instrument by the court. I see, therefore, at present no occasion for the intervention of a jury for the purpose of determining the fact of the identity of these inventions, described in the old and new patents. It must be passed upon at final hearing with the other facts in the case, unless it should be left by the proofs in such a state of doubt as ought to lead the court to seek the aid of a verdict.

It is claimed by the complainant that the decision of the commissioner of patents is, if not final and conclusive, at least prima facie evidence that the reissued patent is for the same invention as the original. This is undoubtedly true in all cases where no doubts are raised in the minds of the court by an examination of the instruments themselves, and no fraud is proved. But while in the present case I see no proof of fraud as yet, still, on comparing the new specification with the old one, and with the judicial interpretation given by Judge Ingersoll to the latter, a substantial doubt is raised in my mind as to the question of identity, and especially as to the true construction to be given to the reissued patent. This doubt can only be cleared up by proof, and is, therefore, a proper ground upon which to deny this motion.

On the question whether or not the respondents have infringed the rights which the reissued patent purports to secure, I have no doubt. Whether all the rights it purports to grant are valid, I do not now decide. But if I assumed that the reissued patent was valid to the extent of all it purports to grant, I should have no difficulty, as the evidence now stands, in finding that the respondents had infringed. I make these remarks, as already intimated, to avoid any misconception as to the point upon which the present decision turns. We must look for the true issue. When stripped of all irrelevant matter, it will, I think, be found tolerably simple. The invention of Meyer was a very important one. It may or may not have been fully and accurately described in his first specification. He asserts that it was not, and that, because it was not, the grant to him in his first patent was inoperative to secure to him the fruits of his invention. In the application for the reissue, he claims to have brought out his invention by a more full and accurate description. The invention, as described in the reissue, covers a wider space than that as described in the original. All that lies between the limits fixed by the first, as interpreted by Judge Ingersoll, and those fixed by the second, is now disputed territory; and into that territory, as the evidence now stands, I think it is clear the respondents have entered. The question now is, whether the field which they have thus entered is included within Meyer's invention? Not merely whether it is within the description of his invention contained in the first patent, or within the description of what was intended to be disclaimed in the first patent. But is it a part of his invention? This question I will not now determine; nor do I think it necessary to send it to a jury.

I should also remark here that the respondents deny that they infringe any rights, which even the reissued patent purports to grant, because, they say, they use what Meyer disclaimed in his first patent. They allege that

they pile the sheets and confine them between plates of iron. That they do this, in a certain sense, may be true. That they do it in the sense in which that disclaimer is to be understood, when read in the light of the state of the art at the time of the invention, may be a different question. The argument proceeds upon the idea that nothing can be regarded in the reissue that can be covered by the language of the disclaimer in the original. Without dwelling upon or deciding this question, it may be suggested that inadvertence and error may occur as well in the disclaimer as in the claim, and that whenever the mistake occurs, it may be cured by a reissue. The effect of an erroneous disclaimer upon the right of a patentee to recover damages which accrued before the error was corrected, by a reissue, might be a grave question.

The respondents also insist that they confine their pile between rigid iron plates, and have produced, on the argument, a model of a pile in which the plates are fastened with screw bolts and nuts. I can not regard this model as any part of the evidence in this case. But all that is valuable in Meyer's invention may be placed between iron plates, or any other rigid or flexible material, and still be his. The addition of a useless appendage to a machine, or a useless element to a process, protected by patent, does not defeat the charge of infringement. Indeed, if the argument of the respondents upon this point touching the iron plates, as the evidence now stands, were carried out to its logical conclusion, it would annihilate the Meyer patent. The iron plates would protect them in the use of tin foil, when applied to configurated articles, as well as in the use of any other flexible material applied to plain surfaces; if they add iron plates and pressure, they are within the language of the disclaimer, as they read it, and it is immaterial what substance, or of what thickness that substance is, that they interpose between the sheets of the pile, in this view of the case. I repeat that these remarks relate to the present aspects of this point as it is now presented by the evidence, and the claims of the respondents upon that evidence. What light may be shed upon it hereafter, I, of course, can not now know.

I come now to the most important ground of the defense to this motion, which is, substantially, as I have before stated—"that on comparing the reissued tin foil patent with the original, and reading them both in the light of the obvious facts, and of the history of the previous litigation, it is clearly evident that the reissued patent is not for the same invention as the original, or at least that it covers more ground than Meyer's invention."

Of course, after the intimations I have already made, I shall, in the present stage of this case, neither affirm nor deny this proposition. At the same time, I am of the opinion that the reissued patent, on its face, covers a wider field than any judicial interpretation has given to the original. The controversy now before us is, whether it embraces more than Meyer invented. The extraordinary power of the court is now invoked to restrain the respondent from using what is embraced in this new description, and what was omitted, or imperfectly described in the original. To warrant the exercise of this extraordinary power of the court, in granting a preliminary injunction, the case presented should be free from ambiguity or confusion; especially should this rule be applied to the present case, for whatever difficulty or uncertainty there may be arising out of the difference in the two specifications, it is the fault or misfortune of the complainant (or his assignor the patentee) and not of the respondents, and should be borne by the former and not by the latter. But in denying this motion, it is due to the parties, and especially to the respondents, that I should notice one or two principal objections which they urged against this reissued patent.

The first is that it extends the monopoly of the complainant from tin foil and its equivalent to all kinds of flexible metallic covering. This objection, as I have already intimated, in referring to it in another form, covers, perhaps, the most important ground of this controversy, and its determination should be left till final hearing, when all the evidence bearing upon the state of the art at the time of Meyer's invention, and upon the object and scope of that invention, shall be before the court. It is also insisted that because the new specification is broader in terms than the old one, and more comprehensive than any construction hitherto given to the latter by the courts, it should be declared void. Great stress is laid upon the fact that the last specification gives less prominence to some terms of description, and more to others, than the first one. I discover nothing objectionable in this, provided it is bona fide. The very object of the surrender is always to correct the specification, to make it clearer, fuller, and more exact.

It is objected, too, that the change was made after the complainant had discovered, from the opinion of Judge Ingersoll, that certain processes, or the application of certain processes, to particular forms of material, were not protected by his patent. It matters not, I aprehend, how or when he discovered the mistake, provided it was a mistake, and of that the commissioner of patents has decided in the first instance, and his decision is prima facie evidence of the fact, until the contrary is shown, so far as the good faith of the transaction is concerned. The great question will, after all, I aprehend, be whether or not these processes, or the application of them as described in the new specification, are a part of Meyer's invention. If they are not, then they are not protected by the patent. If they are, I see now no reason why the complainant is not entitled to the benefit of them. The fact that

Meyer was the original and first inventor of the process of applying tin foil and its equivalent to these vulcanizable gums during the process of vulcanization, I regard as well settled, and I have discovered nothing in the affidavits or other evidence, presented on this hearing, which raises a doubt in my mind of the correctness of the verdict of the jury, in the trial before Judge Ingersoll. If I were satisfied that the material, used by the respondents, was either tin foil or its equivalent, in the process or mode of operation, I should grant an injunction, regarding, as I do, the rights of the complainant so far settled by the previous litigation. If the material used by the respondents is not tin foil or its equivalent, then two questions arise, which must be met in final hearing: First. Is the material used by the respondents the pliable, flexible envelope described in the reissued patent? Second. If it is, was it a part of Meyer's invention at the date of his original patent?

These questions I leave for the parties to elucidate hereafter, by such proofs and arguments as they may be able to present. There is one other important point which has been strenuously insisted upon by the respondents, and which I have very carefully considered, without being able to adopt their view of it, and that is substantially—That the invention, as described in the patent of 1854, whether confined to tin foil as the material to be used or not, is limited in its application to embossed, molded, or configurated articles; thus excluding from its protection regular forms and plain surfaces. It is true that irregular forms appear by the specification to have been more prominent in the eye of the inventor than regular ones. In the perfection he was able to give to configurated articles, he evidently saw a difficult, important, and striking result attained by his invention, and naturally described this feature with more fullness than others. But he describes his invention as giving desired forms and shapes and smoothness of surface to the material enveloped in tin foil or its equivalents. He confines himself to no particular forms or shapes. The terms embrace regular as well as irregular figures. A great variety of articles, in the manufacture of which these vulcanized gums are constantly used, are made in both regular and irregular forms, of thick and thin masses, and with plain as well as embossed surfaces; and it is obvious that the invention was one of great utility in producing both styles of articles. The invention is well adapted to give smoothness of surface to any form, and this smoothness of surface is of as much, and often of more, importance on plain sheets or tablets, as on more elaborate forms; and is it to be supposed that, because the inventor has, in his specification, dwelt more fully upon the latter, he intended to exclude the former, when they are within the scope of the general terms by which he has described his invention? The terms "form" and "shape" embrace the contour of every material object, a smooth sheet or simple tablet, as well as those of elaborate and elegant configuration. The invention that should fix and preserve the forms of the latter must, it would seem, necessarily involve the idea of fixing and preserving the forms of the former, almost as certainly as the greater must always include the less. If a knowledge of the art of giving and preserving the forms and surfaces of smooth sheets or tablets, had preceded the invention of Meyer, it must have been known to those familiar with the state of the art at the time of the trial before Judge Ingersoll, and it is incredible that it should not then have been made known during the entire progress of this litigation.

I have carefully examined the construction given to the original patent by Judge Ingersoll, and I do not think there is any thing in that construction which warrants the claim of the respondents on this point.

The motion for a preliminary injunction under this patent is denied, and the case reserved for final hearing, the proofs to be closed on or before the first day of August next.

[NOTE. At the final hearing a perpetual injunction was allowed upon both patents. Case No. 11,280. For other cases involving these patents, see note to Poppenhusen v. New York Gutta Percha Comb Co., Id. 11,283.]

Case No. 11,280.

POPPENHUSEN v. FALKE et al.

[5 Blatchf. 46; 2 Fish. Pat. Cas. 213.] [1]

Circuit Court, S. D. New York. May 14, 1862.

PATENTS—VALIDITY — INFRINGEMENT — SCOPE OF REISSUE—INFRINGEMENT—USELESS ADDITION TO INVENTION.

1. The patent granted to L. Otto P. Meyer, December 20th, 1853 [No. 339], known as the "Grease Patent," is valid and has frequently been sustained by the courts.

2. The use of spirits of turpentine, with a small quantity of rubber dissolved in it, to produce the result attained by the use of the invention claimed in that patent, is an infringement of that patent.

3. The patent granted to L. Otto P. Meyer, April 4th, 1854 [No. 10,741], and reissued August 16th, 1859 [No. 797], known as the "Tin-Foil Patent," is valid.

4. The invention, as described in the original "tin-foil patent," applied as well to flat sheets and plain surfaces, as to those which were moulded or wrought into irregular and configurated forms.

5. The reissued "tin-foil patent" embraces the use and application of all metal plates that are sufficiently flexible to be used in substantially the same way, with substantially the same results, that tin foil could be used, when applied not only to irregular, but to plain flat sheets

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Blatchf. 46, and the statement is from 2 Fish. Pat. Cas. 213.]

of the compound, and covers all plates that are sufficiently flexible to admit of their being rolled upon the compound, substantially in the manner described in the reissued patent, and so firmly united as to expel the air, and secure the adhesion of the plates and compound, through the process of vulcanization, without the necessity of other pressure or force.

6. The original invention of Meyer was co-extensive with such construction of the reissued "tin-foil patent."

7. The charge of infringement will not be avoided by making an unnecessary and useless addition to the invention.

8. It is no objection to the validity of a reissue, that the object of it was to extend the monopoly secured by the patent beyond the limits assigned to it by a judicial decision upon it in its original form.

[9. Cited in Blessing v. John Trageser Steam Copper Works, 34 Fed. 754, to the point that whether an improvement required inventive skill for its production is a question of fact, for the jury.]

[This was a bill in equity filed [by Conrad Poppenhusen] to restrain the defendants [Oscar Falke and others] from infringing the patents granted to L. Otto P. Meyer which are more particularly referred to in the reports of the cases of Poppenhusen v. New York Gutta-Percha Comb Co. [Cases Nos. 11,283, 11,281, and 11,282], and of Poppenhusen v. Falke [Case No. 11,279]. In the last named case, a motion for a provisional injunction was granted upon the "grease patent," and denied upon the "tin-foil patent." This case now came on for final hearing upon both patents and was argued before the full bench.][2]

Charles M. Keller and George D. Sargeant, for plaintiff.

William J. A. Fuller, for defendants.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

SHIPMAN, District Judge. In deciding the controversy between the parties to this suit, we do not feel called upon to discuss in detail the mass of matter which has been introduced into the case. Much of it, if not wholly immaterial, sheds but a feeble light on the main points upon which the rights of the parties must rest, and it is to these points, and the facts and principles directly bearing upon them, that we shall direct what we have to say. Before stating these points, and the conclusions to which we have come, it will be well to refer to the subject matter of the patents in question, and to the litigation which preceded this bill.

In the year 1851, Nelson Goodyear patented the peculiar substance known as the hard compound of India-rubber. He produced this remarkable material by combining sulphur with the native rubber in certain proportions, and subjecting the compound to a high degree of heat. The material produced by this combination, when operated on by the proper degree of heat, proved to be of great value and well adapted to a great variety of uses. It is free from any disagreeable odor, impenetrable to ordinary fluids, hard, like ebony or ivory, susceptible of polish, and with an elasticity similar in kind to that of tempered steel. For many purposes of utility and ornament, its value is proved by its extensive use in the community. But the manufacture of this substance into articles for use was attended with difficulty, as it was both hard and brittle, although the combination of sulphur and native rubber, before the heat, in acting upon them, had fused the mass and evolved the new substance, was soft and plastic. It was obvious, that any contrivance that would impress on the mass, while in its soft and plastic state, the precise or approximate form ultimately desired, and preserve that form through all the stages of induration, until it was rigidly fixed in the new material evolved, would be of great value. It would, in effect, enable the artisan, while working in a soft and yielding substance, to produce any desired form or surface, in a material of a hard and comparatively indestructible character. It was to accomplish this desirable end, that the two inventions set forth in this bill were made. These inventions were made and patented by one L. Otto P. Meyer, and were known as the "Grease Patent," and the "Tin-Foil Patent." The first was issued on the 20th of December, 1853 [No. 10,339]. The second was issued April 4th, 1854 [No. 10,741], and reissued August 16th, 1859 [No. 797]. Subsequently to the original issue of these patents, they were both assigned to the plaintiff in this bill, who now owns them, and who seeks to enjoin the defendants from using what he alleges to be infringements of each.

At the April term of this court, in 1858, before the late Judge Ingersoll and a jury, an action at law, brought by the present plaintiff against the New York Gutta-Percha Comb Company, was heard and determined, which resulted in a verdict for the plaintiff on both patents, sustaining the validity of each. With this verdict the judge who presided was satisfied, and, on the 3d of July, 1858, after a full hearing, on a motion for a preliminary injunction against the same parties who were defendants in the action at law, he enjoined them from any further violation of the rights secured by each of these patents. Poppenhusen v. New York Gutta-Percha Comb Co. [Case No. 11,281]. At the October term of this court, in 1858, a motion was made for an attachment, for an alleged contempt, in violating that injunction. On the 4th of January, 1859, Judge Ingersoll filed his opinion, dismissing the motion, on grounds that will be referred to hereafter. Poppenhusen v. New York Gutta-Percha Comb Co. [Id. 11,282]. There has also been some litigation in the district of New Jersey, to which it is not necessary here to refer. The history of it appears in the proofs

[2] [From 2 Fish. Pat. Cas. 213.]

and exhibits. Subsequent to the filing of Judge Ingersoll's opinion, dismissing the motion for an attachment already referred to, the tin-foil patent was surrendered, and a new one issued on an amended specification. The grease patent has not been reissued. The present bill is brought on the grease patent, and on the reissued tin-foil patent. After the filing of the bill, a motion was made for a provisional injunction, which was granted on the grease patent, but, for reasons set forth in an opinion which appears among the papers in the case, was denied on the tin foil patent. Poppenhusen v. Falke [Id. 11,279].

We come now to the questions involved in the present suit, and we will consider first those which relate to the grease patent. This patent, in its present form, has been sustained by a verdict, in which the court that tried the cause appears to have concurred. Indeed, the defendants in this case do not seriously impugn its validity. The amount of inventive fertility or skill required to conceive and put in practice the ideas involved in it, was certainly not large. But the question whether it required invention or not, was one to be submitted to the jury, on the trial before them. Their verdict sustained the patent, and we see no reason to disturb the conclusion to which they came. The only question, then, left for our decision in the present case, is that of infringement. The invention claimed by Meyer, in this patent, is for "producing smooth and glossy surfaces upon the hard compound of caoutchouc and other vulcanizable gums, by means of the use of oil or other equivalent substance applied to the surface of the prepared gum and the plates of metal or moulds, substantially as therein described." For this purpose, his specification states, that animal or vegetable oils, or concrete fats, may be used. The application of these materials prevents the sticking of the gum or compound to the plates or moulds between or in which it is placed and kept during the process of vulcanization, and aids in the expulsion of air from between the plates and the gum, when they are pressed or rolled into contact. It is obvious, and experience demonstrates, that this application gives a smooth and glossy surface to the compound, which remains when the plates are removed. The defendants insist that they do not use oil or concrete fat, or the equivalent of either. They admit that they use spirits of turpentine, with a small quantity of rubber dissolved in it. We are inclined to the opinion, that this solution, as they term it, is an equivalent for the materials covered by the Meyer patent. For all the purposes for which it is applied to this process, it accomplishes the same results in the same way, and by substantially the same properties of matter, in the material used. A small quantity of rubber might be dissolved and mixed with the liquid product of the castor oil bean or the olive, and accomplish the same result, but would be clearly within the Meyer patent, as we think. Whether the addition of the small quantity of rubber used by the defendants would be an improvement to the oil, we need not stop now to inquire. The turpentine may be an inferior equivalent, and may be improved by the addition of the dissolved rubber, but we think, upon the evidence, that it is shown to be an equivalent, and that its use is an infringement of the Meyer patent. The injunction must, therefore, be made perpetual.

But the most important questions in this controversy relate to the tin-foil patent. This patent, under the original issue, was, as already remarked, the subject of litigation before Judge Ingersoll and a jury. The validity of the patent was sustained, and subsequently the judge who presided at the trial granted, after full hearing, an injunction on this as well as on the grease patent. We discover nothing, in the evidence before us, that leads us to doubt the correctness of that result. The trial before the jury seems to have been full and thorough, and, the judge who presided having approved the verdict, we should hesitate long before we disturb it, unless clear proof was presented that some error had intervened. But we are satisfied, from an examination of the evidence presented in support of this bill, and by the defendants in reply, that Meyer was the first to apply tin foil and its equivalents to the preservation of the forms and shapes of the hard rubber compound during the process of vulcanization. We are clear, also, that the invention, as described in the original patent, applied as well to flat sheets and plain surfaces as to those which were moulded or wrought into irregular and configurated forms. On this point, it is not necessary to enlarge here, but we affirm the views stated in the opinion denying the motion for a preliminary injunction.

After the original tin-foil patent had been sustained by a verdict, and by a provisional injunction immediately following that verdict, a motion was made before Judge Ingersoll for an attachment for an alleged violation of the injunction. This motion was denied, on the ground that it was not proved that the metal plates used by the defendants in that motion were equivalents of tin foil, and within the scope of the injunction. We do not doubt the correctness of Judge Ingersoll's decision of that motion. The litigation, up to that point, had related to the fact of the invention rather than to its scope. The particular subject-matter upon which the attention of the triers appears to have been expended, was the validity of the patent, so far at it secured the exclusive right to use tin foil in the manufacture of embossed or configurated forms. Neither on the trial before the jury, nor on the motion for an injunction, does there appear to have been any effort to fix the limits of the invention, either

by construction or by proof, so far as these limits depended upon the question as to what materials were or were not equivalents of tin foil. In his opinion, Judge Ingersoll remarked: "Since the injunction issued, the defendants have not used or applied tin foil in the process of vulcanization, as above described. They have, however, used sheets of brass and sheets of tin, something like roofing-tin, for that purpose; and it is claimed that the sheets so used are an equivalent for tin foil, and therefore equally to be prohibited to be used by the defendants. It is not claimed that all plates or sheets of tin or other metals are an equivalent for tin foil. The opinion of the court on granting the injunction is against any such claim; for the court say, that it had been common, before the patent to Meyer, to place the material between plates of tin or other metal, so that the material would be in close contact with the plates, to preserve its form. It is admitted, that there is a substantial difference between such plates or sheets of metal and tin foil. But it is claimed, that the sheets of brass and tin used by the defendants are an equivalent for tin foil; that they are substantially like it; that they perform substantially the same office in substantially the same way. They are not rigid. They are somewhat flexible, but not sufficiently flexible to make them an equivalent for tin foil. They cannot be moulded into any desired shape and form, as tin foil can. They are like rigid, plain plates or sheets fitted only for plain surfaces. They cannot be said to be tin foil, or its equivalent; and the defendants were restrained only against the use of tin foil or its equivalent. The plaintiff claims that the patent is for the use and application, not only of tin foil, but also of all sheets of metal that are not rigid. This construction was not put upon the patent, either on the trial at law, or on the application for the injunction. Such construction was not claimed on either of those occasions. The defendants were not restrained from the use and application of tin or other sheets of metal that were not rigid, but only from the use and application of tin foil or its equivalent. Tin foil does not include all sheets of metal that are not rigid. If it is to be claimed that the patent is for the use and application of all sheets of metal that are not rigid, the defendants should, if the patent will bear that construction, have an opportunity to show that the use and application of such sheets was not new when the patent was obtained. As yet, no such construction has been put on the patent." Since the rendition of that opinion, the patent has been reissued; and, according to our construction, it embraces the use and application of all metal plates that are sufficiently flexible to be used in substantially the same way, with substantially the same results, that tin foil could be used, when applied not only to irregular but to plain flat sheets of the compound. It covers, in our judgment, all plates that are sufficiently flexible to admit of their being rolled upon the compound, substantially in the manner described in the reissued Meyer patent, and so firmly united as to expel the air, and secure the adhesion of the plates and compound, through the process of vulcanization, without the necessity of other pressure or force. We are of the opinion that the proofs in the present case fully maintain the claim that the original invention of Meyer was co-extensive with this construction of the reissued patent.

The defendants allege that they use other pressure or force; and that they confine the mass, or series of plates of metal and sheets of compound, between rigid outside plates of iron, held together by means of clamps or screw bolts, and thus compress the pile. But we have searched the evidence in vain, for proof of the necessity or utility of these cutside iron plates. We think that, as the defendants' use them, these iron plates hold between them the soul and body of Meyer's invention. Upon the proofs, we judge them to be neither material nor useful, and cannot see how they relieve the defendants from the charge of infringement.

It was suggested, on the argument, that it would appear, by a comparison of the original and reissued patents, in the light of Judge Ingersoll's opinions, that the object of the reissue was to extend the monopoly secured by the patent beyond the limits assigned to it by those opinions. This may be, and, doubtless, is, true. It is quite likely, too, that the necessity, or at least desirableness, of a reissue, was first suggested by the remarks of Judge Ingersoll, in defining the original patent. But the inference that we are asked to draw from this fact, that the reissue was, therefore, fraudulent and void, is wholly inadmissible. It not unfrequently happens, that a judicial interpretation of the specification or claim of a patent, or of both, discloses to the inventor and patentee, for the first time, the defects in the instrument, and shows him that he has unwittingly restricted his rights within narrower limits than his discovery, or has so inartificially described his invention, that he has failed to secure any substantial advantage by it. Such a disclosure furnishes a proper occasion for a surrender and reissue, when the error was inadvertent, and is clearly within the beneficent design of the statute. The judicial mind gives a legal construction to the language of the instrument, and this construction may reveal the fact that the terms used fail to cover the invention. To hold that the inventor should not be allowed to restate his claims by the use of new terms, would defeat the object of the law, and abridge or strangle the inventor's rights, by reason of the imperfect language in which he had attempted to clothe his discovery.

It is hardly necessary to add, that we dis-

cover no evidence of fraud, tending to invalidate the reissued tin-foil patent. A perpetual injunction must, therefore, issue.

[For other cases involving these patents, see note to Poppenhusen v. New York Gutta-Percha Comb Co., Case No. 11,283.]

Case No. 11,281.

POPPENHUSEN v. NEW YORK GUTTA PERCHA COMB CO.

[2 Fish. Pat. Cas. 74; 4 Blatchf. 184.] [1]

Circuit Court, S. D. New York. July 3, 1858.

INJUNCTION—FACTS FOUND BY JURY IN SUIT BETWEEN SAME PARTIES—INFRINGEMENT OF PATENT—EFFECT OF VERDICT.

1. Where a verdict has been rendered in a suit at law between two parties, and a motion for an injunction is subsequently made in a suit in equity between the same parties, the facts found by the jury will be considered as established beyond controversy, so far as may be necessary for the purposes of the motion.

2. The writ of injunction is a remedial writ, in the nature of a prohibition. The object of such injunction is to prevent the commission of injuries in future, not to redress injuries that are past.

3. It is not necessary, before a writ to prevent a wrong, issue, that the wrong should actually have been committed. When the rights of a party under a patent have been clearly and distinctly established, and an infringement of such rights is threatened; or where they have been infringed, and the party has good reason to believe they will continue to be infringed, an injunction will issue.

[Cited in White v. Heath, 10 Fed. 294; Sherman v. Nutt, 35 Fed. 150.]

4. Where a trial at law has been had, resulting in a verdict in favor of the patentee, in which the right to the improvement patented has been fully established to the satisfaction of the court, and the infringement of right made clear, such trial, resulting in such a verdict, is sufficient, without any other proof, to authorize the court to grant an injunction to prevent any future violation of right.

[Cited in Poppenhusen v. Falke, Case No. 11,280.]

In equity. This was an application for a provisional injunction, to restrain the infringement of two letters patent, granted to L. Otto P. Meyer, one dated December 20th, 1853, [No. 339,] for an "improvement in processes for vulcanizing caoutchouc compounds," and the other dated April 4th, 1854, [No. 10,741,] for an "improvement in treating caoutchouc and other vulcanizable gums." The bill averred, that the patents had been assigned to the plaintiff [Conrad Poppenhusen] by Meyer, on the 9th of September, 1856; that the plaintiff, on the 10th of December, 1857, brought an action at law against the defendants, in this court, for a violation of the patents; that that suit came to trial before a jury, at the April term of the court, in 1858; that the originality of the inventions was put in issue and contested; that a verdict was rendered in favor of the plaintiff, on the 31st of May, 1858, on both of the patents, by which their validity, the plaintiff's right to them, and the violation by the defendants, were established [Case No. 11,282], that, since the verdict of the jury, the defendants had violated the plaintiff's rights; and that they would in future continue to violate such rights, unless they were restrained by injunction.

Francis B. Cutting and Charles M. Keller, for plaintiff.

Edwin W. Stoughton and George Gifford, for defendants.

INGERSOLL, District Judge. The allegations of the bill, if true, entitle the plaintiff to relief by injunction, as prayed for. Most of the facts set forth in the bill have not been controverted. Indeed, most of them could not be controverted, for they have been established by the verdict of a jury, upon an issue joined between the parties now before the court, which verdict was in accordance with the views entertained by the court upon the trial. The only allegation concerning the truth of which there is any serious denial by the defendants, in the affidavits which they have presented, is the allegation, that the defendants have, since the verdict was rendered, violated the rights secured to the plaintiff. They insist that the mode which they have adopted, since the 31st of May, 1858, the day on which the verdict was rendered, of vulcanizing caoutchouc compounds, is different from the mode secured by either of the Meyer patents, though they are silent upon the point as to whether, since that time, they have sold or used any of such compounds, which had, previously thereto, been vulcanized by them according to the modes patented to Meyer. The first question, then, presented is, whether, if the allegation of a violation since the verdict was rendered, were stricken from the bill, it would be sufficient to authorize the injunction prayed for. If it would, then it will be unnecessary for the court to trouble itself about the question of fact, whether or not the defendants have, since the 31st of May, 1858, been guilty of a violation of the plaintiff's rights.

The writ of injunction is a remedial writ, in the nature of a prohibition. The object of the present motion for an injunction is, to prevent the commission of injuries in future, not to redress injuries that are past. The writ prayed for is to act as a remedy against a threatened wrong, by preventing the commission of such wrong; and it is not necessary, before a writ to prevent a wrong can issue, that the wrong should actually have been committed. If it were, the remedy by injunction would be a very inadequate one. If the rights of a party, under a patent,

[1] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 2 Fish. Pat. Cas. 74, and the statement is from 4 Blatchf. 184.]

have been fully and clearly established, and an infringement of such rights is threatened, or, if, when they have been infringed, the party has good reason to believe they will continue to be infringed, an injunction will issue. It issues for the reason that there is good ground to believe that in future they will be infringed. Where a trial at law has been had, resulting in a verdict in favor of the patentee, and the right to the improvement patented has been fully established, to the satisfaction of the court, and the infringement of right made clear, such a trial, resulting in such a verdict, is sufficient, without any other proof, to authorize the court to grant an injunction to prevent any future violation of right. Such a trial, with such a result, affords sufficient proof, that, in future, there will be an infringement, unless such infringement is restrained by injunction. It is, under such circumstances, almost a matter of course, that the injunction should be allowed. Neilson v. Harford, Webst. Pat. Cas. 373. Such a trial at law, resulting in such a verdict, to the entire satisfaction of the court, has taken place between the parties to this suit.

In addition to this, to the charge contained in the bill, that the defendants will, in future, violate, as they have heretofore done, the rights secured by the two patents, so established on the trial in the action at law, unless they are restrained by injunction, the defendants, (particularly so far as respects the patent of the 4th of April, 1854,) have given no satisfactory answer. To that charge, their answer is, that what they have done since the verdict of the jury was rendered, has not been in violation of the plaintiff's rights; and that, since that time, they have done only what they had a right to do. Upon the trial at law, a legal construction was put upon the patents. That construction was explicit, distinct, and easy to be understood. There is no ambiguity about it. From it, it clearly appears what rights were granted by the patents. To meet that charge, the defendants should have distinctly stated that they did not intend, in future, to do the specific things which the court determined they had no right to do.

The charges contained in the bill, and either admitted, not denied, or sustained by proof, are, therefore, irrespective of the question, whether or not the defendants have, since the 31st of May, 1858, the time when the verdict of the jury was rendered, violated the rights of the plaintiff, sufficient to authorize the court to grant the injunction prayed for. There is, therefore, no necessity to decide that question of fact, on this motion. Whenever, in the course of future proceedings, it shall become the duty of the court to decide that question of fact, and the proper proof is adduced to determine it, that duty will be promptly performed. To determine it correctly, it will be necessary for the court to see the material which the defendants use. A specimen of it has not as yet been produced.

Upon the trial at law, a construction was given by the court to both patents. As it regards the patent of the 4th of April, 1854, it was held, that the nature and object of it was, to preserve the form and shape given to the material commonly known as the hard compound of vulcanizable caoutchouc or gutta-percha, in its green, unvulcanized, and plastic state, by heating, hardening, and curing the material, while it is covered by, and in contact with, tin-foil, or similar sheets of other metals, and while it is subject to no other pressure, with nothing but the tin-foil, or a similar sheet of other metal, to preserve the form and shape given to the material, while it is being subjected to the heating and hardening process—to preserve entire the form and shape given to the stamped or pressed material, in its green state, during the process of hardening, by means of the covering of the tin-foil, and by no other means, by no other pressure. It was held, that the patent did not grant to the patentee the exclusive right to vulcanize the hard compound, whenever it was covered by, and in contact with, metallic surfaces. The patent of the 20th of December, 1853, shows, on the face of it, that it was common to place the material between plates, or in moulds, of tin or other metal, so that the material would be in close contact with the plates, or moulds, of tin or other metal, to preserve its form. It was held, also, that the patent of April 4th, 1854, did not grant the exclusive right to vulcanize the compound, when the series of sheets were piled upon one another, with interposed sheets of flexible material, when the pile was confined between iron plates. It was held, however, that the patent did grant the exclusive right to the use and application of tin-foil, or its equivalents, to the hard compound of india-rubber and gutta-percha, during the process of vulcanization, in the manner described, to preserve and retain, during the process of heating and hardening, the forms and shapes given to the material before the heating process commenced, without any other pressure or mould. That is the grant of right contained in the patent; and, as the jury found, that neither tin-foil, nor any other flexible, pliable material or substance, performing substantially the same office, (to preserve and retain the form and shape,) in substantially the same way, had, previously to the invention of the patentee, been used or applied as a covering to the hard compound of india-rubber or gutta-percha, substantially in the manner described in the patent, to preserve and retain during the process of heating and hardening, without any other pressure, the form and shape given to the material to be vulcanized, before the heating process commenced, that grant of right is a valid grant of right. Therefore, the defendants have no right to the use and ap-

plication of tin-foil, (or its equivalents,) to the hard compound of india-rubber and gutta-percha, during the process of vulcanization, in the manner described, to preserve and retain, during the process of heating and hardening, the form and shape given to the material, before the heating process commences, without any other pressure or mould; and to prevent, in future, such use and application, an injunction must issue. Every mode of operation, the exclusive right to which is not granted by this patent, or by the patent of December 20th, 1853. the defendants have a right to adopt.

The nature of the invention secured by the patent of the 20th of December, 1853, consists in producing, by means of oil and other fatty substances, smooth and glossy surfaces upon the material commonly known as the hard compound of vulcanized caoutchouc or gutta-percha, or other vulcanizable gums, which may be manufactured according to the patents granted to Charles Goodyear and to Nelson Goodyear; and what was granted was, the use of oil, or other equivalent substance, applied to the surface of the prepared gum, and between the gum and the plates of metal or the moulds, substantially as described in the specification, to produce such surfaces by such means. An injunction must issue, to prevent such use.

[NOTE. For a motion for an attachment against the defendants for contempt in violating the injunction granted in this case, see Case No. 11,282.]

[For other cases involving these patents, see note to Case No. 11,283.]

Case No. 11,282.

POPPENHUSEN v. NEW YORK GUTTA PERCHA COMB CO.

[4 Blatchf. 253; 2 Fish. Pat. Cas. 80.] [1]

Circuit Court, S. D. New York. Jan. 4, 1859.

PATENTS—INFRINGEMENT—EQUIVALENT.

Where a defendant in a patent suit was enjoined from the application of tin-foil or its equivalents, during the process of vulcanizing india-rubber, to preserve the form of the material, and subsequently used for that purpose sheets of tin something like roofing tin: *Held*, that such sheets were not tin-foil or its equivalent.

[This was a motion for an attachment against the defendants, for contempt, in violating the injunction granted in the case of Poppenhusen v. New York Gutta Percha Comb Co. [Case No. 11,281]. The defendants had substituted thin sheets of brass for the sheets of tin-foil previously used, and it was insisted by the complainant [Conrad Poppenhusen] that this was but an equivalent for the latter substance.] [2]

C. M. Keller and F. B. Cutting, for complainant.

George Gifford and E. W. Stoughton, for defendants.

INGERSOLL, District Judge. In order to determine whether this injunction has been violated, it is necessary to determine what the defendants have been restrained from doing. That is determined by a reference to the opinion of the court [Case No. 11,281] in this suit, on which the injunction was ordered to issue. Previous to that suit, there had been an action at law tried, in which the court put a construction upon a certain patent owned by the plaintiff, and called the Meyer patent, and in which the jury decided that the defendants had infringed upon the rights of the plaintiff secured by that patent. The patent is for the use of tin-foil and its equivalents, and the vulcanization of india-rubber and other vulcanizable gums. The specification of the patent shows that the nature and object of the invention of Meyer was, to give desired forms and shapes to the material commonly known as the hard compound of vulcanizable caoutchouc, by heating, hardening and curing the material, while it is covered by, and in contact with, tin-foil, or similar sheets of other metals. In the specification, the essential means are pointed out by which the patentee obtains this object. He takes a piece of the prepared compound in its green state, and covers it with tin-foil. He then stamps or presses the plastic material into the form desired, stamping or pressing at the same time the sheet of tin-foil, so that it will completely cover, and be in contact with, the gum, and then subjects it to the heating process. It was held upon that trial at law, that the patent granted to the patentee the exclusive right to the use and application of tin-foil, or its equivalents, to the hard compound of india-rubber and gutta-percha, during the process of vulcanization, in the manner described, to preserve and retain, during the process of heating and hardening, the forms and shapes given to the material before the heating process commences, without any other pressure or mould. What was used by the defendants in the infringement complained of, was tin-foil, and nothing else; and the jury found a verdict for the plaintiff. Subsequently, an injunction was issued, to restrain the defendants from the use and application of tin-foil, or its equivalents, to the hard compound of india-rubber and gutta-percha, during the process of vulcanization, in the manner described, to preserve and retain, during the process of heating and hardening, the forms and shapes given to the material before the heating process commen-

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[2] [From 2 Fish. Pat. Cas. 80.]

ces, without any other pressure or mould. The injunction was for nothing else.

Since the injunction issued, the defendants have not used or applied tin-foil in the process of vulcanization, as above described. They have, however, used sheets of brass and sheets of tin, something like roofing tin, for that purpose; and it is claimed that the sheets so used are an equivalent for tin-foil, and therefore equally prohibited to be used by the defendants. It is not claimed that all plates or sheets of tin or other metal are an equivalent for tin-foil. The opinion of the court on granting the injunction is against any such claim; for the court say that it had been common, before the patent to Meyer, to place the material between plates of tin or other metal, so that the material would be in close contact with the plates, to preserve its form. It is admitted, that there is a substantial difference between such plates or sheets of metal and tin-foil. But it is claimed that the sheets of brass and tin used by the defendants are an equivalent for tin-foil; that they are substantially like it; that they perform substantially the same office in substantially the same way. They are not rigid. They are somewhat flexible, but not sufficiently flexible to make them an equivalent for tin-foil. They cannot be moulded into any desired shape and form, as tin-foil can. They are like rigid, plain plates or sheets fitted only for plain surfaces. They cannot be said to be tin-foil, or its equivalent; and the defendants were restrained only against the use of tin-foil or its equivalent.

The plaintiff claims that the patent is for the use and application, not only of tin-foil, but also of all sheets of metal which are not rigid. This construction was not put upon the patent, either on the trial at law, or on the application for the injunction. Such construction was not claimed on either of those occasions. The defendants were not restrained from the use and application of tin or other sheets of metal that were not rigid, but only from the use and application of tin-foil or its equivalent. Tin-foil does not include all sheets of metal that are not rigid. If it is to be claimed that the patent is for the use and application of all sheets of metal that are not rigid, the defendants should, if the patent will bear that construction, have an opportunity to show that the use and application of such sheets was not new when the patent was obtained. As yet, no such construction has been put on the patent. To dispose of the motion now before the court, the only proper enquiry is—have the defendants, since the injunction was served upon them, used or applied tin-foil, or its equivalents, in the way they were ordered not to use or apply it?

From the best consideration I have been able to give to the subject, I am not satisfied that the defendants have used either tin-foil or its equivalents. Consequently, they have not violated the injunction. The motion must, therefore, be denied.

[For other cases involving this patent see note to case No. 11,283.]

Case No. 11,283.

POPPENHUSEN v. NEW YORK GUTTA PERCHA COMB CO.

[2 Fish. Pat. Cas. 62.][1]

Circuit Court, S. D. New York. May, 1858.

PATENTS — CONSTRUCTION — TIN FOIL PATENT — GREASE PATENT — EVIDENCE OF INVENTION — UTILITY — VALIDITY — INFRINGEMENT EXPERIMENT — ACT OF SERVANT OF CORPORATION — DAMAGES.

1. The "tin foil patent," granted to L. Otto P. Meyer, April 4, 1854, purports to grant the exclusive right to the use and application of tin foil, or its equivalents, to the hard compound of India rubber and gutta percha, during the process of vulcanization, in the manner described, to preserve and retain, during the process of heating and hardening, the forms and shapes given to the material, before the heating process commences, without any other pressure or molds.

2. The "grease patent," granted to L. Otto P. Meyer, December 20, 1853, purports to grant the use of oil or other equivalent substance applied to the surface of the prepared gum and between the gum and the plates of metal, or the molds substantially as described in the specification.

3. The patent, when produced in evidence, is prima facie evidence that the patentee was the inventor; that the thing patented was new and useful; and that in the specification there is contained a description in such full, clear, and exact terms as will enable any one skilled in the art to which it appertains to put it in practice from such description.

4. It is not whether a man conceived the idea that the thing patented could be done; to deprive the patentee of the right which the patent grants, he must have put his idea into practice.

5. The patent is prima facie evidence that it is different from any patent previously issued to any other person, and different from any description in the specification of such patent.

6. If the invention was useful when the patent issued, the patent is valid. If it has become useless since, by the discovery of some other method which dispenses with it, that would give no right to the defendants to use it.

7. Where experiments are performed as a matter of business, when the product of the experiment is thrown into the market to compete with the product of the patentee, although it may be called an experiment, it is, nevertheless, an infringement of the patent.

8. When one in the employ of a corporation, in the business of his employment, does an act for their benefit, which they adopt, approve, and take advantage of, they will be deemed to have authorized the act, and will be as much bound by it as if expressly authorized.

9. The act of violation is proof that the plaintiff is entitled to some damages; and when the amount of damages is not proved, the rule is that the jury give nominal damages, and, if the plaintiff intends to claim more than nominal damages, he, being entitled to recover his actual

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

damages, must satisfy the jury what his actual damages are.

This was an action on the case tried by Judge Ingersoll and a jury, for the alleged infringement of two letters patent granted to L. Otto P. Meyer, one dated December 20, 1853 [No. 10,339], for "an improvement in processes of vulcanizing caoutchouc compounds," and the other dated April 4, 1854 [No. 10,741], for "an improvement in treating caoutchouc, and other vulcanizable gums," both of which had been assigned to plaintiff, [Conrad Poppenhusen.] The invention described in the first patent consisted in producing, by means of oil or other fatty substance, smooth and glossy surfaces upon the material commonly known as the hard compound of vulcanized caoutchouc, or gutta percha, or other similar gums, which might be manufactured according to the processes described in letters patent, granted to Charles Goodyear, June 15, 1844 [No. 3,633], and Nelson Goodyear, May 6, 1851, [No. 8,075]. The claim was as follows: "The producing of smooth and glossy surfaces upon the hard compounds of caoutchouc and other vulcanizable gums, by means of the use of oil, or other equivalent substance, applied to the surface of the prepared gum, and between the gum and the plates of metal, or the molds." The invention described in the second patent consisted in covering the surface of what is known as the hard compound of caoutchouc with tin foil or other equivalent substances to preserve the form previously given by embossing or molding. The contact of the tin foil during the curing process having the effect to preserve the form and the surface without pressure or molds.

C. M. Keller and F. B. Cutting, for plaintiff.
George Gifford and E. W. Stoughton, for defendants.

INGERSOLL, District Judge. The suit, gentlemen, is upon two patents; one issued in December, 1853, which, I believe, is denominated here as the "Grease Patent;" and the other issued in April, 1854, which has been denominated the "Tin Foil Patent." They were issued to one Meyer, as the inventor; and subsequently Mr. Meyer transferred all right and title which he had to both of them to the plaintiff. So that, from the time of the transfer up to the present period, the plaintiff has had, and now has, all the rights which Meyer, at the time of the issue of the patents, had to them.

It is important, in a case of this kind, where you are to determine the rights between parties, that you should ascertain, in the first place, what is in controversy; and, to enable you justly to determine this case, there are three principal questions which are to be considered by you, and which should be kept distinct in your minds. And it is necessary that you should consider them distinctly when you retire to your room to compare opinions in regard to the verdict that you shall render.

These three questions, gentlemen, are: First, what do these patents purport to grant? And having ascertained what these patents purport to grant, the next question is: Are the rights which the patents purport to grant, valid grants of right? And if they are, then, in the third place, have these defendants infringed upon any of the valid grants of rights which the patents have conferred? And if they have, then it will follow as a necessary consequence, that the plaintiff is entitled to recover some damages.

I will, in the first place, turn your attention, gentlemen, to the patent known as the "Tin Foil Patent." It is the duty of the court to determine what the patent purports to grant. The patent of April 4, 1854, purports to be for a new and useful improvement in the manufacture of caoutchouc and other vulcanizable gums. As gutta percha is a vulcanizable gum, the patent comprehends that as well as India rubber. The patent does not purport to grant the exclusive right to vulcanize the hard compound, in contact with metallic surfaces; or to vulcanize this compound when the series of sheets are piled upon one another with interposed sheets of flexible material, when the pile is confined between iron plates; or generally to give form or shape to such compound by pressure; or to preserve, during the process of vulcanization, the form previously imparted by pressure to the hard compound.

The nature and object of this patent was to give desired forms and shapes to the material commonly known as the hard compound of vulcanizable caoutchouc, or gutta percha (which material may be manufactured according to the process described in the letters patent granted to Charles Goodyear, of the date of June 15, 1844; and to Nelson Goodyear, of the date of May 6, 1851), by heating, hardening, and curing the material while it is covered by, and in contact with, the tin foil, or similar sheets of other metals. The nature and object of the invention was to give desired form and shape to such vulcanized hard compound, while it was so covered and in such contact. The patentee, in his specification to his patent, specifies and sets forth the essential means by which this object is accomplished.

He takes a sheet, mass, or piece of the prepared compound, in its green, unvulcanized, and plastic state; he covers it with tin foil, which he prefers to any other metal; he then stamps or presses the plastic material into the shape or form desired, stamping or pressing at the same time the sheet of tin foil so that it shall completely cover and be in contact with the gum, which can be easily done on account of the thinness and flexibility of the metal. This is all that is done preparatory to the heating process.

The material thus formed, thus shaped, thus covered with the tin foil—with nothing but

the tin foil—to preserve the form and shape, he then subjects to the heating process without further care or preparation. Upon the completion of the heating process, when the hard compound is completely vulcanized, the form and shape given to the stamped or pressed material before it was subjected to the heating process, is preserved entire, by reason of the covering of the tin foil, and by no other means; and the surface of the material, which has been in contact with the flexible metal, is smooth as the surface of the metal. The contact of the tin foil with the material to be cured has the effect, during the curing process, to preserve the form and shape of the material, in the form and shape which it was in before being submitted to the heating process, without any other pressure, and without molds. By means of the tin foil, or other equivalent, so used and applied, and by no other means, this desired and, as the plaintiff claims, useful effect or result is produced.

And the patent purports to grant to the patentee the exclusive right to the use and application of tin foil, or its equivalents, to the hard compound of India rubber and gutta percha during the process of vulcanization, in the manner described, to preserve and retain, during the process of heating and hardening, the forms and shapes given to the material, before the heating process commences, without any other pressure or molds.

This, gentlemen, is the whole that the patent purports to grant. It purports to grant nothing else; it purports to grant the whole of this. And that you may understand it more perfectly, I will repeat what I have already said: The patent purports to grant to the patentee the exclusive right to the use and application of tin foil or its equivalents, to the hard compound of India rubber and gutta percha during the process of vulcanization, in the manner described, to preserve and retain, during the process of heating and hardening, the forms and shapes given to the material, before the heating process commences, without any other pressure or molds. This is what is patented; and this construction of the patent must govern you in considering the case. This is the grant of right, which the patent purports to make. And this grant of right, which the patent purports to make, is a valid grant of right, giving to the patentee as good title to it as you have to any property which you may own, and entitled to equal protection, provided, at the time of the application, the patentee was: In the first place, the inventor of the thing patented. In the second place, that the thing patented was new. In the third place, that it was useful. And provided, further, in the fourth place, that the invention or thing patented in the specification, is described in such full, clear, and exact terms as will enable any one skilled in the art to which it appertains, to put it in practice from the description in the specification contained.

And the law is, that the patent, when produced in evidence, is prima facie evidence that the patentee was the inventor; that the thing patented was new and useful; and that in the specification, there is contained a description in such full, clear, and exact terms as will enable any one skilled in the art to which it appertains, to put it in practice from the description contained in the specification. Which prima facie evidence must control you in your determination, unless such prima facie evidence is rebutted by countervailing evidence introduced during the progress of the trial.

The question, then, gentlemen, to be submitted to you is: Has this prima facie evidence been rebutted by sufficient countervailing evidence introduced in the case? If it has not been, then it will follow that the grant of right in the patent contained, is a valid grant of right.

Was, then, the thing patented, new? The counsel on the part of the defense have relied upon evidence which they have introduced to you to prove that it was not new; that it was patented by a French patent, and described in the specification to that patent, which has been read from a French publication; that it was patented to either one or both of the Hancocks, and described in the specification to the patent of Goodyear; and that it is the same as the mode adopted in the manufacture of gaskets.

If, before the invention of the patentee (provided the thing patented was his invention), tin foil or any other flexible, pliable material or substance, performing substantially the same office, which office is to preserve and retain the forms and shapes, in substantially the same way, was, either by the French patent or by either of the Hancock patents, or by any mode described in either of the specifications, or by the mode of making gaskets, used and applied as a covering to the hard compound of India rubber or gutta percha, substantially in the manner described in the patent of Meyer, to preserve and retain, during the process of heating and hardening, without any other pressure, the forms and shapes given to the material to be vulcanized, before the heating process commenced, then the invention of the patentee was not new, and the grant of right which the patent purported to make was inoperative, and conveyed no valid right to the patentee.

But although, gentlemen, tin foil or other material may have been used in some way, in some one of these patents, if it was not, or if any other flexible or pliable material, substantially performing the same office in substantially the same way, was not used to preserve and retain, during the process of heating and hardening, without any other pressure, the forms and shapes given to the material to be vulcanized, before the heating process commenced, then there is nothing in any of these claimed inventions, or patents,

that would make the patent to Meyer inoperative, or would deprive him of the right which the patent purports to grant.

Or if, gentlemen, before the invention of Meyer, either Goodyear, or any one else at Roxbury, did invent the same thing, and put the same in practice—I lay emphasis on that—put the same in practice—in such an event the right granted to Meyer was void. It is not whether a man conceived the idea that it could be done. To deprive the patentee of the right which the patent grants, he must have put his idea in practice. And it is claimed on the part of the plaintiff, that no one has been proved to you to have had any idea of this kind, of giving this form and shape to the material to be vulcanized, without any other pressure than that applied by the tin foil, or other equivalent substance; and not only that, but, if there was any such idea, it was never put in practice by any one else.

And in relation to this patent to Goodyear, of April 4, 1854, which was issued at the same time as the patent to Meyer, the patent issued to Meyer is prima facie evidence that it was different from that issued to Goodyear, and different from any description which Goodyear gave in his specification.

The next question, gentlemen, is: Was it useful? And I do not think this will occupy much of your time. It dispenses, among other things, with the molds or plates; and it is claimed that it preserves the forms better than in the old molds. And, gentlemen, there is one species of evidence that must have struck you, and that, when it is introduced, always goes, to my mind, to convince me very strongly, that it is useful, and that is, the use by the defendants; for the answer is: If it is not useful, why did they use it? Men are not apt, gentlemen, to use useless things when they are endeavoring to make a profit. But I submit the question to you, whether it is useful.

Mr. Stoughton: We have not suggested that the use of tin foil is not useful; it is the grease we say that is not useful.

Court: Then, gentlemen, it is not claimed that this invention, such as I have described to you, is not useful.

The next question is: Was the patentee the inventor? He must have been the inventor to give him the right which the patent purports to grant. The patent is prima facie evidence that he was the inventor. But it is said, in addition to what I have already stated, that if the invention was not fully described in some of the publications or patents I have referred to, to wit, the French patent, and the patent to the Hancocks, there was so much described, so nearly allied to this, that it required no invention to produce this, and that there was nothing to contrive; and it is said that after what was done by the Hancocks, it required no genius, no effort, to come to the conclusion that this could be done which the patent purports to grant to Meyer.

As I have already said, the patent is prima facie evidence that the patentee was the inventor; and the defendants, to remove that prima facie evidence, must satisfy you that it required no invention. An expert has been introduced to you to say that, in his opinion, it did not. Another one says that in his judgment, it did. But after all, you, gentlemen, are the best judges to determine whether it required invention—whether it required any contrivance; and if, in your opinion, it required invention, and he is the inventor, then the patent can not be successfully attacked on that ground.

The next question is: Was it sufficiently described so that any one skilled in the art could understand it? The patent, as I said before, is prima facie evidence that it was. Mr. Edward S. Renwick says that, from looking at the patent, he does not think he could determine what was to be done. The rule is, gentlemen, that one skilled in the art shall be able to determine; but it appears that Mr. Renwick was not skilled in the art. It seems to me that the great difficulty in Mr. Renwick's mind, in determining this was, that he did not understand what was granted. Because, when you understand what was granted, you can understand very well whether the description in this specification is sufficient to enable any one skilled in the art to bring about that which is granted. As I have already told you, that which was granted was the use of tin foil and its equivalents to preserve the form and shape of the compound without any other pressure. The doubt on Mr. Renwick's mind was, whether it was to be used with plates or molds. But the rule of law is, that this patent grants that which I have stated to you. And then, gentlemen, the question is: Would there be any doubt in the mind of any man that when the law is that the patent grants to the patentee the use and application of tin foil and its equivalents to the hard compound of India rubber or gutta percha, during the process of vulcanization, in the manner described, to preserve and retain during the process of heating and hardening the forms and shapes given to the material, before the heating process commences, without any other pressure or molds? Whether any one would not understand when the patentee (that being the patent) tells them that he covers it with tin foil, then "stamps or presses the plastic material into the shape or form desired, stamping or pressing at the same time the sheet of tin foil so that it shall completely cover and be in contact with the gum, which is easily done because of the thinness and flexibility of the metal," and that he then subjects to the heating process that which is thus prepared? Whether, when it is thus specified, and you understand what was granted, not only men skilled in the art, but men of ordinary intelligence, would not understand what was to be done? And if

they understand what was to be done, then the patent can not be attacked on this ground.

The next question is: Have the defendants infringed? They use plates covered with tin foil, to preserve the shapes and forms, not only of the plain material, but of that which has sometimes been denominated as the quill-back, molded in that way. And you can readily determine from the evidence, taking what I have told you was the grant of right, whether there has been an infringement or not. So much, gentlemen, for the tin foil patent.

I will now say a few words on what is called the "Grease Patent." What does that patent purport to grant? It is simple, gentlemen; you will have it before you; and it purports to grant to Meyer the use of oil, or other equivalent substance, applied to the surface of the prepared gum, and between the gum and the plates of metal, or the molds, substantially as described in the specification to that patent. That is what it purports to grant.

Was it new? Why, it is said, gentlemen, that it has been described in one of the Hancock patents. If it has been described there, or in the French patent, substantially as he describes it in his specification, then the patent is not valid. But if it has not been described substantially so that any one could understand it, as he has described it, then it is not to be attacked on this ground.

Was it useful? It is not claimed that it was not useful, so far as India rubber is concerned. But it is said, that so far as respects gutta percha, it was useless. And, as the defendants have used nothing but gutta percha, if it was useless, as to gutta percha, although it might be useful as to India rubber, the plaintiff would not have suffered any injury from the use, because, if useless, it is not good as to gutta percha.

The question, then, is submitted to you, gentlemen, whether it is useless as to gutta percha—whether it was, at the time the patent was granted, useless? And the degree of use is not a matter of consideration. If it was useful at the time, the patent was a valid one. If it has become useless since, by the discovery of some other method which dispenses with it, why, that would give no right to the defendants to use it. But if it is useless, as applied to gutta percha, then the defendants can not be made liable for using it the short time they did use it. If this was new and useful, as to gutta percha, and the patentee was the inventor, and it has been sufficiently described in this specification: in such an event, the grant of right contained in it was a valid grant of right.

The next question, gentlemen, is: Has there been a violation or infringement? It is said, gentlemen, that there has not been, for the reason that whatever use was made of it was an experimental use—a use merely for experiment, and not with a view to profit; and when there has been no profit and no sale, it will not make a party liable, because the patentee would not be injured by it. But where, gentlemen, it is done as a matter of business, where the product of that experiment has been thrown into the market, to compete with the products of the plaintiff, although he may call it an experiment, yet, if it is a matter of business, and thrown into the market for the purpose of being sold, and is sold with his other products, why, that will be such a use as will make the party liable. But it is said that it was used by some one in the establishment without the authority of the defendants. The defendants are a corporation, as I understand it. I judge them to be a corporation from the name given them. A corporation can act only by their agents. It can act only by those who are in their employ. And when one in the employ of a corporation, in the business of his employment, does an act for their benefit, and which they adopt, and approve, and take advantage of, they will be deemed to have authorized the act, and will be as much bound by it as though expressly authorized. You are here to determine, gentlemen, whether these articles, manufactured by their agent, he being in the employment of the corporation, whether he did it in the business or employment of the corporation, whether it was for their benefit; and if they adopted and approved of it, by selling it in the market, and thereby took advantage of it, they will be deemed to have authorized the act, and will be bound by it.

This is all I deem it necessary to say to you in reference to this case, except a word in reference to damages. When a patent has been violated, it necessarily follows, that the plaintiff is entitled to some damages. The act of violation is proof that he is entitled to some damages: and when the amount of damages is not proved, the rule is, that the jury give nominal damages; and if the plaintiff intends to claim more than nominal damages, he, being entitled to recover his actual damages, must satisfy the jury what his actual damages are.

Evidence has been introduced to you, gentlemen, by which the plaintiff claims that he has been damnified to a certain amount. You will look at this if you come to the question of damages, and determine what the actual damages are. Actual damage is the amount to be rendered in favor of the plaintiff. I do not go much into this subject, gentlemen, for, from what I see of the case, I do not think that it is of as much consequence as to determine the question of right. To be sure, the plaintiff wishes the damages which he has sustained; but the great point is, has he a right to these patents? That is the important question for you to determine. The question of damages is of secondary importance, as I view it.

You will now take the case, gentlemen, and dispose of it as you think the evidence warrants.

The jury found a verdict for the plaintiff, assessing damages on the letters patent, bearing

date December 20, 1853, at six cents; and upon the letters patent, bearing date April 4, 1854, at $100.

[For reports of bills in equity, founded upon these patents, see Cases Nos. 11,281, 11,282, 11,279, and 11,280.]

[NOTE. Very soon after the trial of this case the plaintiff filed his bill in equity against the defendants, charging violations of the plaintiff's patent rights, occurring since this trial. The case was first heard upon motion for a preliminary injunction, which was granted. Case No. 11,281. In a few months thereafter the plaintiff moved for an attachment for violation of this injunction. The attachment was refused. Id. 11,282. The plaintiff also filed a bill against Oscar Falke, Edward Simon, and others, employés of the New York Gutta Percha & India Rubber Vulcanite Company, alleging infringement of his patent of December 20, 1853, known as the "Grease Patent," and of his patent of April 4, 1854, known as the "Tin Foil Patent," reissued August 16, 1859. The case was first heard upon motion for provisional injunction, allowed upon the "grease patent," but denied as to the reissued "tin foil patent." Id. 11,279. Upon final hearing perpetual injunctions were granted upon both patents. Id. 11,280.]

Case No. 11,284.

The PORPOISE.

[2 Curt. 307.][1]

Circuit Court, D. Massachusetts. May Term, 1855.

SLAVE TRADE—FORFEITURE—ACT OF MAY 10, 1800—VESSEL EMPLOYED AS TENDER TO SLAVERS.

1. Under the act of May 10, 1800 (2 Stat. 70), if the master has knowledge that two slaves have been brought on board his vessel by the supercargo, on the coast of Africa, for the purpose of being transported to Brazil, and they are so transported, the vessel is forfeited.

[Cited in The John Perkins, Case No. 7,360.]

2. Semble, such transportation works a forfeiture, though the master did not know or believe these persons to be slaves.

3. If a vessel be employed as a tender to slavers, which obtain and carry cargoes of slaves from Africa to Brazil, it is employed in the transportation of slaves, within the meaning of this act, though no slaves were taken on board the tender.

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

In admiralty.

Mr. Hallett, Dist. Atty., for the United States.

Mr. Lunt, contra.

CURTIS, Circuit Justice. This is an appeal from the district court, on a libel of information against the brig Porpoise, Richardson, claimant. The libel is founded on the first section of the act of May 10, 1800 (2 Stat. 70), which provides, "that it shall be unlawful for any citizen of the United States, or other person residing within the United States, directly or indirectly to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another, and any right or property belonging as aforesaid, shall be forfeited, and may be libelled and condemned for the use of the person who shall sue for the same."

It appears in evidence that the Porpoise, being owned by the claimant, a resident citizen of the state of Maine, arrived at Rio de Janeiro, in June, 1843, under the command of Cyrus Libby, also a citizen of the state of Maine, the owner being on board. On the fourteenth day of June, 1843, the brig was chartered by the master, to Manuel Pinto de Fonseca, a resident of Rio, by a written charter-party, for one year, or until the termination of any voyage in which she might be engaged at the end of the year. The master was to victual and man the vessel. The charterer had the right to put on board any lawful merchandise, and any free persons as passengers, and to send the vessel to any port, the voyage being lawful. Under this charter-party the brig made three voyages from Rio to the coast of Africa. The first was to St. Thomas, in the Gulf of Guinea; the second was to Cabindka Bay and the Congo river on the west coast; the third was to different points on the east coast. On her return from the last-mentioned voyage, in January, 1845, the brig was seized by the commander of the Raritan, a public armed vessel of the United States, and in July, 1845, the libel in this case was filed. The suit remained in the district court until December, 1848, when it was brought to this court by appeal from a decree dismissing the libel, said to have been made without a formal hearing, and here it has remained, until this term of the court, without any action of the court thereon being invoked by either party, save that at the last term, the district-attorney endeavored to obtain a hearing, but the case was continued by order of the court on cause shown. The cause of this great delay is said to have been that some deposition had been mislaid by Mr. Rantoul, while district-attorney, and only recently found. I have thought it proper to advert to this extraordinary delay, which is so much out of the usual course of the court, for the purpose of saying that it is in no degree attributable to the court, while held by my predecessor, or by myself, and not to declare that any blame is justly to be attributed to any law-officer of the government who has formerly been charged with this prosecution; a matter, as to which the court is not informed.

It is proved to my entire satisfaction, by direct and positive evidence, which is in accordance with many circumstances, that one Paulo, a Brazilian, in the employment of Fonseca, and who sailed in the brig, from Rio, on her last voyage, as supercargo, purchased, at two of the Portuguese settlements on the east coast of Africa, among many other slaves, two boys, named by him, or some former master Pedro, and Guillaume.

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

These boys had been reduced to slavery by being made captives in war, and they were sold by their owners to Paulo. They were brought in the brig to Rio; and on the passage waited on Paulo and performed some other services about the table at which the passengers took their meals. If these boys were slaves and were actually transported from Africa to Brazil, then this brig was made use of by her supercargo in the transportation of slaves from one foreign country to another, and the case is brought directly within the terms of the act of congress. But it is insisted by the claimant, that though purchased by Paulo as slaves, they were emancipated before they came on board, and Captain Libby's deposition and the papers produced by him are relied on to support this allegation. The substance of Captain Libby's statement in regard to Pedro is, that when the supercargo brought him on board he told him he was free, and that he, Libby, could go to the governor of the place and get his free papers and passports; that he did go, and received from the governor the papers which he produces. These purport to be a notarial certificate declaring that one Avelino Xavier de Minares, had emancipated his slave Peter, of the Landine nation, in consideration of the good services he had rendered him; and also a petition by Peter de Souya, a free black, a native of Lourenya Margues, of the nation of Landine, declaring that he wishes to make a voyage to Rio, for his interest, in the Porpoise, and an answer of the governor that he is permitted to do so. In respect to these papers, it must be observed, that there is nothing tending to prove that the person, named in the notarial certificate as emancipated, was the same Pedro brought to Rio; and there is not a little proof that he was not the same. Paulo brought him and held him as a slave; and there is no pretence that he emancipated him. The person named in the certificate, as the owner, is Avelino Xavier de Minares. If, therefore, this Pedro, who came to Rio in the Porpoise, was emancipated as shown by this certificate, by De Minares, how came he to be sold to Paulo as a slave, and to be held by him as such until brought on board the vessel? Pedro himself has been examined, and seems to be a reliable witness. He testifies he was Paulo's slave, never emancipated, and brought away from Africa in the Porpoise against his will. In substance, the same facts are proved concerning the other boy, Guillaume. I am not satisfied that the allegation that they had been made free by emancipation, is made out in proof.

But it is urged that Captain Libby had reason to believe, and did believe, they were free persons; and that the vessel cannot be condemned, if the master, by mistake, transported slaves, believing them to be freemen. I am not called on to decide whether a cause of forfeiture can be made out, under this act of congress, if it should be proved there was no intentional concurrence, by an owner, or master, in the illegal employment of the vessel. It is by no means clear that the act requires such concurrence. There are many cases in which the vessel is treated as the offending thing, and is forfeited, wholly irrespective of the guilt of the owners, or the master. The Malek Adhel, 2 How. [43 U. S.] 233. The terms of the act do not require the transportation of slaves should be with the knowledge or consent of the master; any more than with the knowledge or consent of the supercargo. And therefore, if it were needful to decide the question, I should hesitate to impose on the government, the burden of proving the consent of the master, or to extend to the claimant, an exemption, upon the ground of mistake by the master, which is not provided for in the act. But I am convinced that Captain Libby is affected with notice of the actual condition of these boys. In the first place, as will be more fully stated presently, the Porpoise was, in fact, for months previous to the time when the boys came on board, acting as a tender to slave vessels, belonging to, or in the employment of Fonseca, the charterer of the Porpoise. Her supercargo, who brought these boys on board, was the agent of Fonseca, to purchase cargoes of slaves for their slavers; and did so purchase and ship them, with the knowledge of Captain Libby. How he could have supposed Paulo, this slave-trader, came into possession of these two negro boys except by buying them as slaves, and for what lawful purpose, or by what authority he could have thought they were to be transported from their native country to Brazil, he does not explain in his deposition, and certainly it is not easy to conjecture. He says he went to the governor and obtained Pedro's passport. This passport purports to be granted, upon a petition in writing by Pedro de Souya, declaring his desire to make the voyage for the benefit of his interest. Who presented that petition? Pedro swears he was brought away against his will. There is no reason to suppose he petitioned, or authorized any one to do so. Did Captain Libby present it? He says he went to the government and got the passport. Did he take the preliminary step to get it? If so, by what authority? He gives no account of this. Nor does he pretend that when these negro boys were brought on board by the slave-dealer, who had just sent to sea two cargoes of slaves, he made any inquiries of either of them whether they had come on board of their own free-will, or desired to go to Brazil under the protection of Paulo. It is proved also, that on at least two occasions, when cruisers were in sight, the boys were concealed; and that on one of these occasions, the captain interposed to cause one of them to go below into the run. I am not convinced that Captain Libby believed these boys were free on the coast, and would remain so when landed in Brazil, in the custody of a man known to him as a slave-trader. But I think this case may, and should,

be rested on another ground. It was held by Mr. Justice Story in The Alexander [Case No. 165], that the actual transportation of slaves was not necessary to induce a forfeiture under this act; it being sufficient that the vessel was employed in the business of transporting slaves. A similar decision was made under the second section of the act, by the supreme court, in U. S. v. Morris, 14 Pet. [39 U. S.] 464. Under this construction of the act, the question is, whether this vessel, even if no slaves were actually carried by her, was not engaged in the business of transporting slaves between Africa and Brazil.

Without undertaking to detail the evidence or to give a history of all the movements of this vessel, or of the course of these criminal enterprises, it may be said, that about the period in question, the slave-trade was carried on by residents of Brazil, by making contracts to purchase American vessels, deliverable on the coast of Africa at some designated point, where it was expected a cargo of slaves would be ready to be placed on board. The American vessel, commanded by a citizen of the United States, and manned in part at least by our citizens, and registered as a vessel of the United States, sailed under our flag to the coast of Africa; and when the time arrived for the cargo of slaves to be put on board, the American master and crew left the vessel, took away the American papers, she was delivered to a Brazilian commander and crew, and with or without papers, took her departure from the coast. It is quite apparent, that to the successful conduct of such voyages, some other vessel or vessels besides those sent over to bring back the slaves, were, if not absolutely necessary, undoubtedly useful and desirable. They were needed to carry to the coast, the merchandise to be used to purchase the slaves,—to transport the agent of the slave merchant who was to sell on the coast this merchandise, and with it, or its proceeds, buy the slaves; and also to receive on board, as passengers, the American masters and crews who navigated the slave-ships to Africa, and there left them, when the cargoes of slaves were brought on board. Now it clearly appears that this brig served this purpose throughout her last voyage. There was carried in her to the east coast of Africa a cargo of merchandise, intended to be used to buy slaves, to be transported to Brazil. This cargo was used for this purpose. Paulo, the supercargo, had, under the charter-party, the power to order the vessel to go to and remain at any port, to suit the purposes of this traffic. He actually exercised this power; and two cargoes of slaves were bought by him, with the cargo of this vessel or its proceeds, and shipped in full view of the master of the Porpoise. The American master and crew of one of these vessels were received on board the Porpoise, when the cargo of slaves was carried on board the slaver; and the American master of the slaver went from the slaver to the Porpoise, and from the Porpoise to the slaver, carrying his ship's papers, and the flag of the United States, as the fear of the cruiser of one nation or another might seem to render expedient. The Porpoise also aided one of these slavers, going in company with her into a barred harbor on the coast, to get over the bar, by relieving her of part of her cargo; and there is evidence tending to show that Paulo, the supercargo of the Porpoise, who controlled her movements, actually gave orders for the manœuvring of one of these slave vessels, while on the deck of the Porpoise; and that the two went to sea in company, after the slaves were shipped, the Porpoise manœuvring so as to attract the attention of any cruiser which might be in the neighborhood. It is also proved that the course of this voyage and its purposes and objects, were substantially the same as of the next preceding voyage; though there was not then such open and active participation in the trade. The master of the Porpoise, and probably others interested in her movements, seem to have acted on the belief, that so long as they did not have slaves on board the vessel, the vessel was not made use of in the transportation of slaves. I think otherwise. In my opinion Fonseca, the Brazilian slave-trader, who chartered this vessel, made use of her in the business of transporting slaves from Africa to Brazil, where he employed her as a tender to his slave-ships, to accompany them from port to port; to aid them in their navigation, or in eluding cruisers; to deliver cargo to buy their slaves; to carry his agent who had the general conduct of the business; to receive on board the officers and crews of the slavers, when their ownership was changed; and thus to take an active, needful, and open part in the general conduct of these enterprises. And if I were satisfied this vessel had never had a slave on her deck, I should still be of opinion that she had been engaged in the business of transporting slaves, as much as if she had been captured with a slave deck, extra water casks, provisions and irons, before a slave had been brought on board, as in the cases of The Alexander [supra], and U. S. v. Morris, 14 Pet. [39 U. S.] 464, already referred to.

Let a decree be entered reversing the decree of the district court, and pronouncing for the forfeiture.

After the proceeds of the vessel had been paid into the registry, a question was made whether they should be distributed by a decree of the court, or be paid into the treasury of the United States, to be distributed under the direction of the secretary of the navy, as in case of prize money, as is required by the act of March 3, 1849, § 8 (9 Stat. 378).

This question having been briefly argued by Hallett, district-attorney, the following opinion was given.

CURTIS, Circuit Justice. The question is raised whether the proceeds of the sale of this vessel are to be distributed by an order of this court, among those entitled thereto, or paid into the treasury of the United States to be

distributed under the direction of the secretary of the navy. The act of March 3, 1819, § 1 (3 Stat. 532), provides that the proceeds of vessels seized by public vessels of the United States, and condemned for the violation of any law prohibiting the slave-trade, shall be equally divided between the United States and the officers and men making the seizure; "and the same shall be distributed in like manner as is provided by law for the distribution of prizes taken from an enemy." The sixth section of the act of April 23, 1800 (2 Stat. 52), enacted, "that the prize money belonging to the officers and men shall be distributed in the following manner." Then follows a specification of the share or proportion to be assigned to each officer and man. The act of 1819, referred to this, then existing law, concerning the distribution of prizes simply for a rule of distribution. Its purpose was, to ascertain the share or proportion which should be assigned to each officer and man. It had no reference to the mode of making sales of the vessel seized, nor to the custody of the proceeds, nor to the authority under whose direction the distribution should be made. These things are otherwise provided for by law. The vessel having been seized is required to be brought within the United States, and there proceeded against by a libel of information in the proper district court. This being done, the marshal, under a warrant from the court takes possession, and if no claimant takes the vessel on bail, and a condemnation follows, the court orders the vessel to be sold. This order the marshal executes, acting under a warrant from the court, and he pays the proceeds into the registry. If the vessel be bailed, the stipulation is in place of the property, and after a condemnation the court compels the claimant or his sureties to pay into the registry of the court the amount at which the vessel was valued, with or without interest according to circumstances. This is the settled and uniform course of proceeding, and there is no sufficient reason to suppose congress intended to change it, or did interfere with it by the eighth section of the act of March 3, 1849 (9 Stat. 378). The purpose of that section was to repeal the then existing laws concerning prize agents, and to have the marshal make all sales of prize property, and deposit the proceeds in the treasury of the United States, where that part of the proceeds to which the officers and men should be entitled, was to be distributed under the direction of the secretary of the navy. In other words this law does relate, exclusively, to the mode of making sales of prize property, the custody of the proceeds, and the authority under which distribution should be made. It has no reference to what the act of 1800 calls, and the act of 1819 refers to, as "the manner" of the distribution; that is, the shares or proportions in which the proceeds are to be distributed. If therefore the act of 1819, which adopts the manner of distribution of prizes, were construed to refer not only to the then existing laws on that subject, but to all laws which might from time to time be passed, concerning the manner of distribution of prizes, a construction not consistent with its language, I should still be of opinion that the law of 1849 has no effect on this case, for it has made no change in that manner of distribution which is adopted by the act of 1819.

PORTAGE COUNTY (PREBLE v.). See Case No. 11,380.

PORTE (UNITED STATES v.). See Case No. 16,070.

Case No. 11,285.

The PORTER.

[2 Dill. 146.] [1]

Circuit Court, E. D. Missouri. 1873.

ADMIRALTY—COLLISION—FOG SIGNALS.

1. A boat moored in the channel of the river near a large city, and at a place where vessels in making a landing would naturally come, was *held* to be in fault, because, during a heavy fog and snow storm, in which it was impossible to see but a short distance, it failed to give the usual fog signals.

2. The duty of vessels navigating the river during a heavy fog and snow storm, as respects speed, signals, &c. considered.

This is an appeal in admiralty, from a decree of the district court for the Eastern district of Missouri, dismissing the libel. [Case unreported.] The libellants are the owners of the steamboat Southern Belle, and filed in the district court a libel, which charged upon the steamboat Porter the fault of a collision which happened in the Mississippi river opposite the upper portion of the city of St. Louis, on the 19th day of October, 1869. The Grafton Stone and Transportation Company, as claimants, appeared and filed an answer admitting the collision, but denying the faults imputed to the Porter, and asserting that the accident was caused wholly by the fault of the vessel of the libellants.

M. L. Gray, for libellants.
Rankin & Hayden, for respondent.

DILLON, Circuit Judge. I have carefully gone over the pleadings and the 680 pages of testimony in this cause, and am of opinion that the decree pronounced below is correct. The material facts may be briefly stated: The libellants are the owners of the steamer Southern Belle and her barge, the Gertrude; the claimants are the owners of the steamer Porter and her barges. The collision occurred about 10 o'clock in the day time on the 19th day of October, 1869, in the Mississippi river, near the upper portion of the city of St. Louis, at a point in the river nearly opposite the block between Bogy and Le Beaume streets The libel-

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

lants' vessel, the Southern Belle and her barge Gertrude, at the time of the collision were lying near the middle of the river, and were anchored there in the manner presently to be stated. The Southern Belle is what is termed a "sand-boat," that is, she was engaged at the time in elevating sand from the bottom of the river by means of machinery adapted to that purpose. The sand is dredged from the bar or bottom of the stream, and is brought up in buckets on an endless chain, something like the mode of elevating flour in mills, and deposited in the barge. The machinery is located on the steamer, and is propelled by steam. On the morning in question the Southern Belle, with her barge beside her, was lying near the middle of the river, but perhaps somewhat nearer to the Missouri than the Illinois shore. The river at this point is about a mile wide. The Southern Belle was headed up stream, and was kept stationary by being pinioned by four pieces of timber (two at the bow and two at the stern) driven down through the hull into the bottom of the river. At the same time the steamer Kate Hart, which is also a sand boat similar to the Southern Belle, with her barge attached, was also lying in the river, nearly abreast the libellants' vessel, and about one hundred to one hundred and fifty feet further toward the Illinois shore. Both boats were engaged in elevating sand. The barge of each boat was on the east side, that is, on the Illinois side of the respective steamers.

The steamer Porter was used by the claimants as a tow-boat, that is, to tow barges laden with stone obtained at Grafton, in Illinois, some miles above St. Louis. At the time of the collision the Porter had in tow five barges or boats filled with stone, intended for the bridge which was being built across the river at St. Louis. Two of these barges were on either side of the Porter and the other nearly in front, and with these the Porter was descending the river bound for St. Louis. She had left Grafton early in the morning of the day on which the accident happened.

On the same morning, probably about seven o'clock, the Southern Belle and the Kate Hart left their landings at St. Louis, and went out into the river for sand, and had been at the place above described elevating sand about two hours when the collision, which is the subject of inquiry here, occurred. The water where the Southern Belle was anchored was eleven feet deep, and it was no shallower at any place in the vicinity. At this place, in low water, there is what is termed a sand bar, or a deposit of sand in the bottom of the stream, making the water shallower than it is on either side of it. The river at the time of the accident was in a good stage, there being at least eleven feet of water over what is termed this bar, and a much greater depth on either side of it, and above and below it. There was nothing to prevent vessels running in any part of the stream, as there were no obstructions in the river, and the water was sufficiently deep. The Porter drew less than four, and the largest barge did not draw to exceed five feet. At the place where the Southern Belle was stationed when she was injured, the water was deep enough to float any boat navigating the Missouri or Upper Mississippi, and it was near the place where boats descending the Illinois shore and intending to make a landing in the upper part of the city of St. Louis would naturally, and in fact, often did come. The Southern Belle and the Hart had been engaged in getting sand from the same bar, as it is termed, for some time, quite constantly during the whole month of October, making one and sometimes two trips a day, each trip occupying two or three hours. They did not, however, take the sand from precisely the same place each time, but from the same neighborhood, being guided on each trip by the soundings, they seeking of course the shallowest water. So during the same time, the Porter was making almost daily trips to Grafton for stone, usually going up on the Missouri side of the middle of the stream, and descending on the Illinois side some hundreds of feet east of where the sand boats were accustomed to be stationed, and in a general way, the business in which these boats were engaged was known to the officers on board of the other.

On the day in question it had been snowing lightly and had been a little foggy all the morning, but not so much that those on board of the boats could not see the banks of the river one-third to one-half mile distant, until about the time of the accident. When the Porter on her way down had reached Venice Ferry, or a short distance below, the snow seemed suddenly to have increased in severity, and the air became so thick that the officers on the Porter could not see the banks on either side, or a distance exceeding fifty or one hundred yards. The testimony establishes the fact that thereupon the pilot rang the slow bells, that the speed of the boat was checked, and that she proceeded on her course at a rate of speed but little faster than the current of the river (which is about four or five miles per hour), and only fast enough to give her steerage way or to keep control of her movements. During this time also, the Porter gave the usual fog signals every two minutes or oftener. One of these signals was heard and answered by a ferryboat in the river at the time, but none of these signals seem to have been heard on either the Belle or the Hart. And it is argued, and I must say, with much force, that the reason why these signals were not heard by those on board of the sand boats was, that the noise made by the working of the chains and machinery used in raising the sand, prevented it. It is an undisputed fact that no fog sig-

nals whatever were given either by the Belle or the Hart.

While the Porter was proceeding under slow bells and making the fog signals in the manner above described, the pilot signalled the engineer to land, and thereupon the boat commenced to turn quartering across the stream towards the Missouri shore. She had not gone far in this direction before the pilot and others on board of the Porter saw the Southern Belle not more than one hundred yards distant, whereupon the pilot gave the signal to stop and back strong, which was done, but this did not avail to prevent a collision with the Belle and her barge, doing them damage claimed to amount to several thousand dollars. Those on board of the Southern Belle did not perceive the Porter until she was within fifty or one hundred yards of them. And the question is, whether the Porter is to blame for the accident, and ought to pay the damage sustained by the libellants, or share the damages with them. And I observe, first, that the fault of the Belle in not giving any signals is, under the circumstances, most palpable. She was lying stationary and helpless in the middle of the river, or near the middle, opposite a large city. She was where boats had a right to be, and in the neighborhood where they were constantly coming and going. She was firmly fastened there, so that she could do nothing to avoid a collision should one be about to occur. The evidence shows that it required nearly a half hour to unfasten the boat thus pinned down, and get her in motion. She was in eleven feet of water, more than twice as much as steamers ordinarily need. I need not go so far as to say she was in fault for being there; but that she was in fault when surrounded by the noise of her machinery, and when enveloped in fog and snow, for not giving any warning of her presence or location. Who can say that if she had given the usual fog signals, that the injury of which she complains would have happened? Being thus in fault, the burden of proving an actionable or culpable fault in the Porter is clearly devolved upon the libellants.

The libellants insist on the testimony of the Porter's own officers, that the snow and fog were so thick that they could not see the banks, nor see a distance exceeding fifty or one hundred yards in advance; that the Porter ought to have landed, and that she is to blame for proceeding under such circumstances towards the harbor of the city. There would be more ground for the objection, if the testimony did not establish that the character of the banks on each side was such that a landing could not be safely effected, or would be attended with so much peril, as to make it unreasonable to require it as a duty which, under the circumstances, devolved upon the respondent. There is no proof that the upper portion of the landing or levee of the city, where the Porter designed to land, was so crowded with vessels, or the river in that vicinity so filled with them, as to make the course adopted by the Porter one of any considerable peril to herself or others.

The libellants complain, also, that the Porter was in fault because, "although a snow-storm was then prevailing, the Southern Belle could easily have been seen from the Porter, if the latter had kept a good lookout, at least five hundred yards, and in time to have enabled her to avoid collision." The testimony shows that neither boat was actually seen by persons on the other, until they were within about one hundred yards apart, and tends very strongly to show that just at that time it was quite impossible to see them at any greater distance. There were no lookouts on either the Porter or the Belle such as the law requires.

But the captain, the pilot, and the mate of the Porter were outside, or at their respective posts on duty, and the mate testifies that at and before the collision he was specially engaged in looking ahead and listening to hear the sound of other boats; and it seems quite clear from the evidence that the absence of a special lookout was of no consequence. Certain it is, that in respect to lookouts, the Belle appears to have been more at fault than the Porter, and the officers of the latter saw the Belle a little before her officers saw the Porter. On the whole, it seems reasonably clear that no omission of duty on the part of the Porter with respect to lookouts, either caused or contributed to the injury. The Belle was seen as soon as in the storm and fog she could have been, and she had given no signal, and so none could have been heard, had there been ever so many lookouts on duty listening for them.

The libellants also complain that the Porter is in fault because she knew, or had reason to believe, that these sand-boats would be stationed thereon, or near the bar, and that she could or ought to have avoided them by keeping in the usual track of boats, some hundreds of feet east. The so-called bar (being in or near the middle of the river, and covered by at least eleven feet of water) is, at the then stage of the river, a misnomer. All vessels had a right, using due care to avoid injury to boats moored or anchored there, to pass along that portion of the river, and are not in fault merely for doing so. But in the storm then prevailing, the Porter did not know precisely where she herself was, nor could she know that the sand-boats would be in the course she had taken to make a landing at the city.

If the Porter had known that the sand-boats were there, or if she had reason to believe that they were there, and if she had control of her own movements and course, and unnecessarily put them in peril, the case would be very different from the one presented by this record.

The complaint that the Porter was carry-

ing a heavier tow that she was capable of managing, and the other complaint that she was running at an improper rate of speed, are both negatived by the evidence, which, on those subjects, is substantially all one way.

Nor is there any ground to claim that the mismanagement of the Porter and her tow, after the Belle was discovered, either caused the collision or increased the extent of the damages. She at once reversed her engine and commenced to back, and if she had been handled differently, it is not improbable that she might have swung around and injured or sunk the Kate Hart, which was lying within one hundred or one hundred and fifty feet of the Southern Belle.

Nor can it be claimed on the proofs that the Porter was in fault for not anchoring in the stream until the storm was over and her way was plain. She was going under slow bells, giving signals, and hearing none she had a right to suppose that there was nothing in danger from her movements, and the river is not so crowded with boats as under the circumstances to have made it the duty of the Porter to have subjected herself to the peril of attempting to anchor, even if it were practicable.

The decree below is affirmed. Affirmed.

NOTE. Bearing upon and supporting the decision in this case, see Strout v. Foster (The Louisville) 1 How. [42 U. S.] 89; The New York v. Rea, 18 How. [59 U. S.] 223; Culbertson v. Shaw (The Southern Belle) Id. 584; The Indiana [Case No. 7,020]; The Northern Indiana [Id. 10,320]; The Bay State [Id. 1,148], on appeal, 18 How. [59 U. S.] 89; The Scioto [Case No. 12,508]; Bazin v. Steamship Co. [Id. 1,152]; The Rocket [Id. 11,975].

Case No. 11,286.

PORTER v. AETNA INS. CO.

[2 Flip. 100; [1] 6 Ins. Law J. 928.]

Circuit Court, W. D. Michigan. Nov. 7, 1877.

INSURANCE — INTEREST OF ASSURED IN PROPERTY COVERED BY THE POLICY.

Insurance was in the name of P., describing the property as "his." Policy provided that "if the interest or property insured be leasehold, or that of mortgage, or any other interest not absolute," it must be made known and expressed in the policy. The property was purchased under a mechanic's lien sale by V., who placed it in the name of P., and procured the insurance as the agent of P. V. subsequently procured another title through a sheriff's deed under an execution sale. The mechanic's lien proceedings were void through want of jurisdiction. The court decided that P. had neither a legal nor equitable ownership to the extent represented in the policy and could not recover.

Insurance was effected in July, September and October, 1874, on the Vaughn house at East Rapids, Michigan. The policy was taken in the name of Benjamin Porter, the property being described as "his three-story brick hotel," etc. This hotel was built by an incorporated company, Morgan Vaughn being president thereof. In May, 1874, the hotel was, under mechanic's lien proceedings, sold. Vaughn bought this title and placed it in Porter's name. Vaughn afterwards acquired a title under an execution sale of the property. As president of the company he confessed the cause of action. Was agent of four insurance companies, and placed, as agent, some of the insurance himself, though he was not agent of the defendant. Fire occurred in the building in October, 1874. It was not occupied as a hotel at the time.

I. M. Crane, M. V. Montgomery, and Hughes, O'Brien & Smiley, for plaintiff.

Norris & Uhl, for defendant.

WITHEY, District Judge. Some questions have been discussed which I shall not now dispose of, or review the positions taken by counsel in reference to them. There are two questions beyond the one disposed of yesterday, which I deem material, to which I shall allude. The policy, in paragraph number six, under "Conditions of Insurance," uses this language: "If the interest of property insured be leasehold, or that of mortgage, or any other interest not absolute, such must be made known to this company, and expressed in the policy." The risk is written, "on his three-story brick hotel building."

Now I understand the conceded facts are, that at time of writing the insurance the insured did not make known that his interest was other than absolute. If, then, his interest was not an absolute one in the property, the plaintiff cannot recover.

We have had discussion this morning upon this topic: What was the interest and title of the plaintiff Porter? Under the view which we took yesterday, that the mechanic's lien proceeding was absolutely void, because the court obtained no jurisdiction, and, as Porter claimed, under nothing but that lien proceeding, he had a mere possession at best. It may be questionable whether it can properly be said that he had even possession, in view of the testimony of Mr. Vaughn, and Vaughn's previous relations to the property.

Vaughn, as president of the company that built the hotel, had been managing the property for it, and while thus acting, of his own motion he makes what he calls a purchase under the lien proceeding in the name of Porter, constituting himself the agent of Porter for the purchase, advancing the purchase money, and then making himself the agent of Porter to take possession of the property.

But assuming that Porter had a mere naked possession, and that that was his title and interest, the question occurs whether it was an absolute interest. This naked possession is the lowest degree of title, and arises where one disseizes another. In this instance

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

it would seem to be the view to take, that it was a disseizin by intrusion.

If Porter obtained no right under the lien proceeding, then his possession was a usurpation and intrusion—an exercise of the powers and privileges of ownership against the rightful owner, whoever that might be, or the rightful possessor. There can be, however, no disseizin without entry and an actual dispossession of the rightful party. But, as we say, assuming that Porter had a mere possession, so far as possession is an interest insurable, it was an absolute interest, because it was not conditional or dependent upon condition.

An absolute estate is one that is free from all manner of condition or incumbrance. Now we suppose a party in actual possession, and having no other title than mere naked possession, may be said, so far as his right goes, to have an absolute interest.

The terms of the policy, as we have said, are, "if the interest or property insured be not absolute." We should, therefore, be disposed to say, that whatever interest or whatever property he had, was not conditional but absolute. We do not mean that he had an absolute property in the building, for that implies the exclusive right and possession.

But when we turn to the other question, whether there was an insurable interest, we find it is a principle in insurance that the underwriter is entitled to know in whom the interest insured is; for he is entitled to know how far the person insured is interested in guarding the property from loss.

If in law and in fact Porter had no interest other than mere naked possession, and the real interest was in another, had he the interest in the property that was insured? The interest insured was the hotel property. It was not a special or partial interest. There is a distinction between having an interest and having the property.

A man may have an interest because he may have a mere right less than the entire property. But if he has the property, he has the entire property interest and not a partial interest in the property; he has ownership. A lien would give an interest, but it would not necessarily carry the right to the property, as would ownership.

The interest insured, then, was the property, and was it Porter's property? Was the hotel owned by him? Not unless naked possession with property in another makes ownership. The company insured "his three-story brick hotel building," in the language of the policy. Was it his hotel building when his greatest interest was a mere possession, without right of possession, and without right of property?

The company was not informed that Porter was not the owner of the property. So far as the case at present appears, they were not informed that his interest was not the entire property; they were not informed in whom the interest insured was. What did the company insure? They insured the hotel property.

Now, if the company were not informed in whom the interest insured was, and if it was not in Porter, can the policy be sustained, or this suit be sustained upon the policy by Porter? If the company insured to Porter the entire interest in this hotel property, it insured to him an interest which he did not own in the present condition of the case.

The nature of Porter's interest should have been communicated to the company; if it was not, the contract of indemnity should not be held valid. And while it may be true that naked possession, so far as it gives an interest, is an absolute interest, still we are of opinion that Porter did not own the property or interest which was insured, according to the testimony of this case. He had, at best, a nominal interest.

If a party who has a mere possession is answerable over to the party who is entitled to the rightful possession of the property, in case the building upon the property should be destroyed by fire, then it might be said that the party who has the mere possession has an insurable interest to the extent of the value of the property; but such is not the law.

Porter, if he was a mere trespasser or disseizor of that property, and it should burn while it was in his possession, unless it was by his fault or negligence or by some act of his, would not be responsible for the value of the building, and therefore could not be said to have an insurable interest to the extent of the value of the property.

His insurable interest, then, was merely the nominal possessory interest, which was liable to be defeated at any moment. The insurance is but a contract of indemnity; the indemnity can go no further than the interest of the party who is indemnified, and if that interest is partial and not entire, the indemnity does not cover a value incident to ownership.

We think as the case stands there was neither legal nor equitable ownership in Porter of this hotel property, to the extent which he was represented to have, or to the extent which is insured, to-wit: "His three-story brick hotel building." He was not the owner of the entire property, or of any part or interest in it, save a mere naked possession, and that was not such an interest as was insured. If there is no different phase to this case to be shown by further evidence, we hold that the plaintiff cannot recover.

[Subsequently the defendant's counsel announced to the court that there was no different phase to the case to be shown by further evidence, and that they did not see how they could better the situation of the matter. Whereupon the court instructed the jury that their verdict should be, "No cause of action," and their verdict was taken accordingly. Plaintiff thereupon submitted to a non-suit in the four remaining cases against

the Franklin of Phila., Ins. Co. of North Amer. of Phila., Hartford, Conn., and North British & Mercantile.] [2]

PORTER (CENTENNIAL CATALOGUE CO. v.). See Case No. 2,546.

PORTER v. The FRIENDSHIP. See Case No. 10,783.

PORTER (GEORGETOWN v.). See Case No. 5,346.

PORTER (HOFFMAN v.). See Case No. 6,577.

PORTER (JACKSON v.). See Case No. 7,143.

PORTER (JASPER v.). See Case No. 7,229.

PORTER (JENKINS v.). See Case No. 7,274.

Case No. 11,287.

PORTER v. MARSTELLER.

[1 Cranch, C. C. 129.] [1]

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

OFFICE JUDGMENT—MOTION TO SET ASIDE.

On motion to set aside an office judgment upon an injunction bond, the court will not suffer the defendant to plead that the obligee was dead at the time of the execution of the bond.

Motion to set aside office judgment, and file certain pleas, in an action of debt for the penalty of an injunction bond. All the pleas were admitted except the second, which was that the obligee was dead before the execution of the bond, and so the bond void. This plea was refused, on the ground that the obligor had received the full benefit of his injunction upon the bond, and ought not now to be permitted, ex gratia, to avoid it by such a plea.

Case No. 11,288.

PORTER v. RAPINE.

[2 Cranch, C. C. 47.] [1]

Circuit Court, District of Columbia. June Term, 1812.

JUSTICE OF THE PEACE—JURISDICTION—AMOUNT.

A creditor may give a credit upon his account so as to give jurisdiction to a justice of the peace.

Appeal from a justice of the peace. Rapine had a demand on Porter for $26.85. He gave credit for $6.85 and warranted Porter for $20, and obtained judgment for $20 and costs. Porter appealed and contended that Rapine had no right to release part of the debt so as to give jurisdiction to a justice of the peace. It did not appear that he objected to the credit before the justice.

THE COURT (FITZHUGH, Circuit Judge, absent) affirmed the judgment.

[2] [From 6 Ins. Law J. 928.]

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

Case No. 11,289.

PORTER et al. v. The SEA WITCH.

[3 Woods, 75.] [1]

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

MARITIME LIENS—PILOTAGE AND TOWAGE—CLAIMS ARISING FROM DIFFERENT VOYAGES—PRIORITY.

1. Pilotage and towage into port stand in the same rank of maritime liens with necessary supplies and repairs.

2. But a claim for towage furnished in one voyage has a lien superior to a claim for supplies furnished on a previous voyage.

[Cited in The Lillie Laurie, 50 Fed. 221.]

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

The Sea Witch was a foreign vessel which sailed from Belize, Honduras, on a coasting voyage, about September 16, 1876. She left Ruatan on Nov. 1, 1876, and reached the port of New Orleans, where she was seized and sold under process in this case. The claim of the libelant J. H. Porter was for a sail furnished the Sea Witch at Pensacola, Florida, on June 24, 1876. E. C. Lyle, an intervener, claimed for supplies furnished at Mobile, on December 1, 1875. The Ocean Tow Boat Company intervened upon a claim for towage due for towing the Sea Witch from the mouth of the Mississippi river to New Orleans upon her last voyage at the close of which she was seized in this case. The proceeds of the sale of the vessel were not sufficient to pay all the maritime liens, and a question arose between the Ocean Tow Boat Company and the other two creditors above mentioned, whether the claims of the former were entitled to priority of payment.

C. B. Singleton and R. H. Browne, for libelants.

Jos. P. Hornor, W. S. Benedict, and E. D. Craig, for interveners.

WOODS, Circuit Judge. There can be no serious question that pilotage and towage into port, etc., stand in the same rank with necessary supplies and repairs when furnished for the same voyage: The Emily Souder, 17 Wall. [84 U. S.] 666. But the contention here is, that as the towage was furnished on the last voyage of the schooner, and the claims of Porter and Lyle were for supplies furnished on previous voyages, the claim for towage is entitled to priority of payment. This claim seems to be sustained by the adjudged cases.

In The Paragon [Case No. 10,708], Judge Ware remarks: "The priority of the privilege for seaman's wages stands upon a principle affecting all privileged debts, that is, that among these creditors he shall be preferred who has contributed most immediately to the preservation of the thing. 2 Valin, Comm. 12, liv. 3, tit. 5, art. 10. It is upon this principle that the last bottomry bond is

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

preferred to those of older date, and that repairs and supplies furnished a vessel on her last voyage take precedence of those furnished in a prior voyage, and that the wages of the crew are preferred to all other claims, because it is by their labors that the common pledge of all these debts has been preserved and brought to a place of safety." The same principle is recognized in The Trimountain [Case No. 14,175].

In the case of The Hope, reported in 1 Asp. 563, it was held that maritime liens are entitled to rank against the fund in the inverse order of their attachment upon the res, or that the later in time is the earlier in payment. In that case, it was also decided that the master's wages, which, by the merchants' shipping act of 1854, had been placed on the same footing as seamen's wages, were inferior in rank to a bottomry bond given upon the vessel on a voyage subsequent to that on which the wages were earned.

These and other authorities which might be cited show that wages earned and supplies furnished for the later voyage take rank as to priority of payment over wages and supplies earned or furnished for a former voyage. Whether this rule should apply to the short and frequent trips of river steamers, it is not necessary now to decide. As the pilotage was earned on the last voyage of the Sea Witch, and the supplies of libelant and intervener were furnished for former voyages, I am of opinion that the Ocean Tow Boat Company should be paid first out of the proceeds of the sale; that the residue of the fund, if any, should be applied first to the payment of the claim of Porter; and then to the payment of the claim of Lyle. Decree accordingly.

Case No. 11,290.

PORTER ads. UNITED STATES.

[2 Paine, 313.] [1]

Circuit Court, S. D. New York.[2]

TREASURY WARRANT OF DISTRESS—RELIEF—ACT OF MAY 15, 1820—POWER OF COURT—INJUNCTION—FINAL DECREE—APPEAL.

1. The 4th section of the act of congress of May 15, 1820 [3 Stat. 595], prescribing the mode of relief against a treasury warrant of distress, confers a power upon the court, and not upon the judge as an individual.

[Cited in U. S. v. Bolton, Case No. 14,623.]

2. The provisions in the act authorizing the person aggrieved, by the refusing or dissolving of an injunction to appeal, were designed to vary the rule of chancery practice in this respect, so as to place the party in the same situation as if a final judgment had been rendered against him.

3. The decision of the district judge, awarding a perpetual injunction against a treasury warrant of distress, is a final decree within the act of congress of March 3, 1803 [2 Stat. 244], which allows an appeal from all final judgments or decrees of a district court to the circuit court.

4. The act of congress of April 9, 1814 [3 Stat. 120], dividing the state of New York into two districts, intended that the two courts should stand in relation to the circuit court precisely as the single one had previously stood. Consequently, the district court of the Northern district is placed in the same relation to the circuit court as that of the Southern district, and an appeal lies from it to this court to the same extent.

[This was a proceeding by the United States against Peter B. Porter.]

BETTS, District Judge. The fourth section of the act of May 15, 1820, presenting the mode of relief against a treasury warrant of distress, authorizes the party aggrieved "to prefer a bill of complaint to any district judge of the United States," and the judge "thereupon" to grant an injunction. It is intended that the authorization in this respect is to the judge as an individual, and not a power conferred upon the court. I think that interpretation will not satisfy all the provisions of the act. Manifestly, an act of the court is contemplated, in awarding judgment against the complainant, and the adding of damages to the amount claimed by the United States. The fifth section, in empowering the judge to issue or dissolve the injunction in or out of court, implies that other doings in relation to the matter must necessarily be acts of the court. So the further provision in the fourth section, that "the same proceedings shall be had on such injunction as in other cases," except as to the answer, imports that the matter then becomes a suit in court, subject to the regulations and directions of the court. The sixth section more explicitly evinces the understanding of the legislature upon this point. After an appeal allowed, it says: "The same proceedings shall be had in the circuit court as are prescribed in the district court." No language can more distinctly denote that congress intended the legislation for the district court, and not for the judge as a commissioner.

It is not an unusual use of language, in the statutes, to put the judge for the court, and to make provisions for him to execute which can only be executed in court. Thus the district judge may adjourn the circuit and district courts, in cases of contagious sickness. Act Sept. 24, 1789 [1 Stat. 73].

The provisions in the act authorizing the "person aggrieved" by refusing or dissolving the injunction to appeal, is supposed to deny, by implication, the right of appeal to the United States. It appears to me to have a different bearing.[3]

[1] [Reported by Hon. Elijah Paine, Jr., District Judge.]

[2] [Date not given. 2 Paine includes cases from 1827 to 1840.]

[3] It is a constitutional right of the citizen to have his case at law or in equity reviewed by a court of error. Ringgold's Case, 1 Bland, 7, 12. A writ of error was, at common law, demand-

Granting and dissolving injunctions are interlocutory orders. No final decree is rendered upon such order. According to the principles of chancery practice, therefore, a party denied that species of relief could not have his case reviewed, as all the remedy he could have in case of a warrant of distress, would be thus cut off. Congress varied the rules of practice so as to meet the exigency of this new equity, and place the

able of right, in all civil cases; and the proceedings in the court below were stayed by a writ of supersedeas. Id. The range of a writ of error limited to certain errors in fact, or to errors in law apparent upon the record; and could be brought only upon a final judgment, not rendered by default or by consent, or where the matter rested in the mere discretion of the court. Id. 8. The right of appeal is a statutory right, and where a party has failed to comply with the provisions of the statute within the time prescribed, the court will not allow a reentry of the decree to enable him to appeal. Weed v. Lyon, Walk. (Mich.) 77. The cases in which an appeal was allowed, and the mode of prosecuting such appeals, from the colonial courts to the king in council. The Chancellor's Case, 1 Bland, 608, note. A person having no interest in the subject-matter of a suit, or whose interest has ceased since the commencement thereof, cannot bring an appeal. Reid v. Vanderheyden, 5 Cow. 719. An administrator de bonis non may appeal from a decree of the judge of probate, allowing the administration accounts of the original executor or administrator. Wiggin v. Swett, 6 Metc. [Mass.] 194. A testator bequeathed money to trustees, to be managed as an accumulating fund for the term of sixty years, and then to be paid by them to the town of N. or its duly appointed agents, for the purpose of purchasing land within the town for a pattern farm, to be so improved in practical details as to become a model to farmers generally. Held, that the town was entitled to appeal from a decree of the judge of probate respecting the testator's will. Inhabitants of Northampton v. Smith, 11 Metc. [Mass.] 390. An appellate court has no power to review its own decisions. Ex parte Sibbald, 12 Pet. [37 U. S.] 488. No court can reverse or annul its own final decree or judgment for errors of fact or law after the term in which it has been rendered, unless for clerical mistakes, or to reinstate a case dismissed by mistake. Id. Bills of review are exceptions to the rule. Id. The court for the correction of errors of the state of New York will not, after a decree made by them, upon the merits of a case, review their decision upon the cause coming up again a second time, on appeal, although when the first decree was made, the principal question presented for adjudication was the custody of the funds during the litigation: still, the merits having, on that occasion, been discussed by counsel, and passed upon by the court, the decision will be deemed final and conclusive upon the parties. Hosack v. Rogers, 25 Wend. 313. A decree is final, which, after establishing the rights of the party, only leaves other questions open which are requisite to carry the decree into effect. Patterson v. Gaines, 6 How. [47 U. S.] 585. An appeal will not lie upon a decree of the court of chancery upon a question of practice addressed to the discretion of that court. Fort v. Bard, 1 Comst. [1 N. Y.] 43. So, where a defendant has suffered a bill to be taken pro confesso against him, and a motion to set aside the default, on affidavits of excuse, and purporting to show a good defence, on the merits, having been denied by the chancellor, an appeal from his decision was dismissed. Fort v. Bard, 1 Comst. [1 N. Y.] 43; Schermerhorn v. Mohawk Bank, Id. 125. An appeal lies from a decretal order of the chancellor refusing to open the sale of mortgaged premises sold under a decree of foreclosure, and grant a resale on the application of a defendant, although the defendant has permitted the bill to be taken pro confesso. Tripp v. Cook, 26 Wend. 143. So, injunctions and decisions touching them, though falling within the definition of practice and proceedings, are governed by judicial discretion, and are often not final, yet are subject to appeal. Verplanck, Senator, Id. 152. A defendant, against whom the bill had been taken pro confesso, is not allowed to come in for the purpose of taking an appeal. Hoye v. Penn, 1 Bland, 35. A defendant in chancery, in a bill to foreclose a mortgage, who suffers the bill to be taken pro confesso, and permits a decree of sale to be made without opposition, is not entitled to prosecute an appeal; and an appeal prosecuted by him will be dismissed on motion. Murphy v. American Life Ins. & Trust Co., 25 Wend. 249. An appeal lies from a decree in chancery taken by consent. Brewer v. State of Connecticut, 9 Ohio, 189. In Georgia, the right of appeal from a special jury to a hearing before another special jury, exists in equity. Pool v. Barnett, Dud. [Ga.] 8. Whether an appeal will be to the court for the correction of errors from a decision of the chancellor, resting in mere discretion, refusing to open a decree by default, and to let the defendant in to defend the suit, quære? Anderson v. White, 10 Paige, 575. An appeal does not lie to reverse an ex parte order of a vice-chancellor, which is merely irregular. The proper remedy of the party against whom such ex parte order has been made, is to apply to the vice-chancellor to vacate or modify it. Gibson v. Martin, 8 Paige, 481. A party who is aggrieved by an erroneous decree or order of a vice-chancellor, may appeal thereupon to the chancellor, although he did not appear to argue the case in the court below; except where the order or decree of the vice-chancellor is irregularly obtained, so that it can be set aside on that ground, upon a proper application for that purpose. Hyslop v. Powers, 9 Paige, 322. An appeal lies to the chancellor from an order of a vice-chancellor, made subsequent to a final decree in a cause. Tripp v. Vincent, 8 Paige, 176. In Massachusetts, under the statute of 1838 (page 163, section 4,) an appeal from a decision of a judge of probate, or master in chancery, rejecting a claim against the estate of an insolvent debtor, cannot be taken to the supreme court, unless the debt demanded exceeds the sum of $300 on the day of the first publication of notice by the messenger, that a warrant has issued against the debtor. Whiting v. Gray, 9 Metc. [Mass.] 291. No appeal lies from an interlocutory order, viz.: such as does not put a final end to the case, or establish any principle which will finally affect the merits of the case, or deprive the party of any benefit he may have at the final hearing. Robertson v. Bingley, 1 McCord, Eq. 333, 351; Berryhill v. M'Kee, 3 Yerg. 157; Gibson v. Randolph, 2 Munf. 310; Allen v. Belches, 2 Hen. & M. 595; Danels v. Taggart's Adm'r, 1 Gill & J. 311; Hagthrop v. Hook's Adm'rs, Id. 270; Richardson v. Jones, 3 Gill & J. 163; Roberts v. Salisbury, Id. 425. Contra, Gover v. Hall, 3 Har. & J. 43. An appeal will not, in general, lie from an interlocutory order in chancery, yet if such an order will finally affect the merits of the case, or deprive the party complaining of it of any benefit he may have at the final hearing, an appeal is allowable. Kennedy's Heirs v. Kennedy's Heirs, 3 Ala. 434. Vide 4 Paige, 473; Id. 450; 2 Rand. [Va.] 247; 2 Wend. 225; 1 Bland, 5; Id. 270. The right of appeal in equity is limited to final decrees, or to orders involving the merits; it does not extend to such orders as are merely interlocutory, or to decrees by consent or default. Slye v. Llewellin,

party in the same situation as if a final judgment had been rendered against him.

Further, if the act is susceptible of the construction that the power conferred on the district judge is one which he may exercise in all respects, as a commissioner and out of court, yet it also clearly empowers him to proceed upon the matter in court, and whatever is thus done must become an act of court. The statute renders the plead-

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1 Bland, 18, note; McKim v. Thompson, Id. 150. No appeal allowed in the inferior federal courts, but from a final decree. Id. 16. An appeal may be taken from an interlocutory order which decides the right to the property in dispute, not, however, in the U. S. courts. Fargay v. Conrad, 6 How. [47 U. S.] 205. Where a plaintiff in equity is entitled to a judgment pro confesso, and the court below refuses to grant his motion to that effect, this is such an interlocutory order as the judge may permit him to appeal from. Governor v. Raleigh & G. R. Co., 3 Ired. Eq. 471. An order of a surrogate, vacating a sale of real estate made by an administrator, under a previous order of such surrogate, is an order from which the purchaser at such sale, who has complied with the terms of the sale, or any other person aggrieved thereby, may appeal to the court of chancery. Delaplaine v. Lawrence, 10 Paige, 602. If an appearance before the surrogate, upon the application to confirm the sale, is necessary, on the part of the purchaser, to give him the right to appeal from an order vacating the sale, the appearance of the administrator in behalf of himself and such purchaser, is a sufficient appearance to give the latter such right. Id. In sales made by masters, under decrees and orders of the court of chancery, the purchaser who bids off the property and complies with the terms of sale, is considered as having an inchoate right, which entitles him to a hearing upon the question whether the sale shall be set aside. And if the court errs, by setting aside the sale improperly, the purchaser has the right to appeal to a higher tribunal. Id. The court of appeals has no jurisdiction to grant appeals from interlocutory decrees. Gibson v. Randolph, 2 Munf. 310; Allen v. Belches, 2 Hen. & M. 595; Id. 615. The chancellor may grant an appeal from his own decree during the term, allowing the appellant time to give security after the expiration of the term. Stealy v. Jackson, 1 Rand. [Va.] 413. Appeal from an interlocutory decree in chancery denied, because the party asking it might, and more properly ought, to apply to the chancellor to suspend the effect of the decree under the act of 1827–28, c. 25, § 4. Graves v. Graves, 1 Leigh, 34. Chancery cannot grant appeals from interlocutory decrees in vacation, but in court only. William & Mary College v. Hodgson, 2 Hen. & M. 557; Dawney v. Wright, Id. 12. No person is authorized to appeal from a decree or order of the vice-chancellor unless he is injured or aggrieved by it. And a party who is aggrieved by one part of a decree only, cannot by appeal call in question another part of the decree in which he is not interested. Cuyler v. Moreland, 6 Paige, 273. If a party to a suit before the vice-chancellor is misled by any mistake or neglect of the clerk, as to the time of the entry of the final decree, whereby he does not perfect his appeal until after the expiration of the time for appealing, it would be a sufficient ground for an application to the vice-chancellor to have the decree re-entered so as to give him an opportunity of appealing within the time allowed by law. Barclay v. Brown, 7 Paige, 245. But the court has no power to extend the time of appealing from a final or interlocutory decree, upon the mere mistake of the party himself. Id. An appeal will lie from an order of the chancellor overruling a motion to dissolve an injunction, where the motion has been overruled, on the ground that the plaintiff is entitled to relief on the merits, and fixing a principle on which the cause depends, or where it is necessary to avoid expense and delay. Lomax v. Picot, 2 Rand. [Va.] 247. Neither consent nor long acquiescence can give the court of appeals jurisdiction. An appeal, therefore, having been improvidently granted, was dismissed on motion five years after it was entered on the docket. Clarke v. Conn, 1 Munf. 160; Blakey v. West, 3 Munf. 75; M'Call v. Peachy, 1 Call, 55; Grymes v. Pendleton, Id. 55. An order or decree in chancery, entered by consent, is not the subject of an appeal or re-hearing. Atkinson v. Manks, 1 Cow. 691. The declaration or order of a surrogate, on making a decree establishing a will, that each party shall pay his own costs, is not the subject of appeal: 1. Because this is not a decree in form. 2. Because a surrogate having no power in such case to award costs, a decree in form for costs, is coram non judice, and void, without reversal by appeal. Id. By the act of 1808, a party has the right to appeal "from any order or decree of any judge presiding on the circuit," whether it be interlocutory or final. Price v. Nesbit, 1 Hill, Eq. 453. No appeal lies from a temporary order of the court of chancery, awarding an injunction; and such an order having expired, the appeal was dismissed. Trustees of Huntington v. Nicoll, 3 Johns. 566. An appeal lies from an order of the court of chancery, refusing to dissolve an injunction, and awarding costs against the defendant. McVickar v. Wolcott, 4 Johns. 510. No appeal lies to this court from an order of the court of chancery for an attachment to bring up a party to answer interrogatories, for a contempt in disobeying a writ of injunction issued in a cause. Buel v. Street, 9 Johns. 443. An appeal will lie from an order of the court of chancery, refusing to open proofs in a cause for the purpose of re-examining a witness, who, since his examination, has disclosed facts material and pertinent to the issue depending in chancery, which he did not disclose when on examination; such order of the court of chancery affecting the merits of the cause. Beach v. Fulton Bank, 2 Wend. 225. It lies when the order appealed from materially affects the merits of the cause; or is of such a character that the party may be aggrieved by it. Id. Although the order appealed from was made by the court of chancery in the exercise of its discretionary powers, or touching the mode of its proceedings, an appeal will be entertained, if not of an equivocal character. It does not, however, follow that no appeal will be dismissed which does in fact or may by possibility affect the merits of the cause. Id. 226. If a bill of review, showing just cause, be offered, and refused by the chancellor, an appeal lies to the court of appeals. Lee v. Braxton, 5 Call, 459. A party aggrieved by one branch of a decree, does not thereby acquire a right to call in question another portion thereof, which has no bearing or effect upon his rights or interests. He can appeal only from such parts of the decree as affect him. Idley v. Bowen, 11 Wend. 227. The right of appeal in equity is limited to final decrees or to orders involving the merits. It does not extend to such orders as are merely interlocutory, or to decrees by consent or default. Ringgold's Case, 1 Bland, 5, 12; Slye v. Llewellin, Id. 18, note; McKim v. Thompson, Id. 150. Where an appeal is taken from an interlocutory decree of the county court to the court of chancery, and that court affirms the decree, and an appeal is taken to the court of appeals, the decree of the chancery will be considered as interlocutory. Fretwell v. Wayt, 1 Rand. [Va.] 415. A decree directing the conveyance of land by deed is a final decree, and may be appealed; but no appeal lies from the

ings perfect without any answer to the bill; but, with that variation, the same proceedings as in other cases are to be had; which must mean that the matter then becomes a suit which may be carried on in court, as if instituted in the ordinary course of practice.

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decision of the court, on an attachment to enforce the execution of the deed. Watson v. Thomas, Litt. Sel. Cas. 248. It seems that in an appeal from a final decree made in a suit before a vice-chancellor, the merits of an interlocutory decree made in such suit cannot be inquired into. Bank of Orange County v. Fink, 7 Paige, 87. Especially where the time for appealing from the interlocutory decree has expired. Id. Decrees in chancery for money, do not bear twelve and a half per cent. interest per annum, from the time of rendition in the court below, until their affirmance in the supreme court. Trainer v. Skein, 10 Yerg. 369. A decree ordering an account is not such a final decree or determination of the cause as will authorize an appeal from it. Berryhill v. M'Kee, 3 Yerg. 157. No appeal lies from a mere initiatory order, as for an attachment to bring a party into court to answer for an alleged contempt; but if the order for an attachment contain a final determination or adjudication that the defendant is in contempt, he may appeal therefrom. M'Credie v. Senior, 4 Paige, 378. An appeal lies from an order of the court of chancery, directing a suit to stand revived against the representatives of the deceased party, if the rights of the appellant are in any way affected by such revival of the suit. Rogers v. Paterson, 4 Paige, 450. Where a party has released all his interest in a suit, he has no right to an appeal from an order made therein which cannot prejudice him, although it may be wrong as against other parties. Steele v. White, 2 Paige, 478. A party who is aggrieved by a part of a decree only, cannot by his appeal call in question other parts of the decree in which he has no interest; although the appeal is broad enough to embrace them. Hone v. Van Schaick, 7 Paige, 221. An error in an interlocutory decree, where a final decree has been subsequently made, without such error being urged, is no ground of appeal or reversal. Bullitt v. Tharp, 1 A. K. Marsh. 604. Where the court of appeals reversed a decree of the court of chancery, and directed that the defendants account with the complainant, and that the chancellor have the account stated by the auditor, &c., which having been done, and a decree passed for payment of the sum stated to be due from the defendants to the complainant, an appeal lies from such a decree to the court of appeals. Gover v. Hall, 3 Har. & J. 43. A decree directing the surveyor to make partition of a tract of land and to make report is not final, and cannot be appealed from. Young v. Skipwith, 2 Wash. [Va.] 300. An order directing an issue is a proper subject of appeal. Drayton v. Logan, Harp. Eq. 67. A party cannot appeal on a mere question of costs. Lewis v. Wilson, 1 M'Cord, Eq. 210; M'Milan v. Eldridge, Harp. Eq. 260; Ashby v. Kiger, 3 Rand. [Va.] 165; Lyles v. Lyles, 1 Hill, Eq. 76, 92. The Revised Statutes of New York authorize an appeal from a decree as to the general costs in a cause, provided the appeal is entered within fifteen days after notice of the decree. Winslow v. Collins, 3 Paige, 88; S. P. Lain v. Lain, 10 Paige, 191. In analogy to the law in relation to appeals from decrees of courts of chancery in relation to costs, an appeal lies to the chancellor from a decision of a surrogate, in relation to the general costs of a suit or proceeding before him to call an executor or administrator to account. Id. A mere interest in the costs gives no right of appeal in respect to any other matter. Reid v. Vanderheyden, 5 Cow. 719. The refusal of the chancellor to grant a feigned issue in a proper case, when directly applied for, and where in the exercise of a sound discretion an issue should have been directed, is good ground of appeal. Townsend v. Graves, 3 Paige, 453. It seems that a party who has not asked for an issue in the court below, cannot sustain an appeal on the ground that such issue would have been proper. Id. The omission of the court below to award an issue to settle a disputed claim of right between the parties, is not a ground of appeal, if neither party asked for such issue on the hearing of the cause. Belknap v. Trimble, Id. 577. A rejection by the legislature of a claim against the state, is no bar; but the creditor may, notwithstanding, apply to the auditor, and if refused, appeal to the courts. Com. v. Beaumarchais, 3 Call. 122. Causes in equity cannot be removed by writ of error from a circuit court for re-examination in the supreme court of the United States. The appropriate mode of removing such causes is by appeal. The San Pedro, 2 Wheat. [15 U. S.] 132. It seems that an award respecting an allotment of lands between joint owners might be reviewed in chancery, where the allotments were so disproportioned in value, as to strike the senses at once as a matter of injustice, or showing positive injustice in the arbitrators. Bumpass v. Webb, 4 Port. [Ala.] 65. The supreme court has no jurisdiction of a case brought up by writ of error, for reversing an order of the circuit court exercising chancery jurisdiction, dissolving an injunction, and the proper mode of bringing up such a case is by appeal from the order of dissolution. Russell v. Peirce, 7 Port. [Ala.] 276. An appeal ought not to be allowed from a dismission of a bill of injunction under the act of assembly, the injunction having been dissolved and no cause shown against such dismission at the next term. Anderson v. Ellington, 2 Hen. & M. 16. In such case, if the complainant wishes to appeal, he should carry on his suit in the usual course of the court to a final hearing; and it seems that his intention to appeal, declared by his counsel, would be sufficient to prevent the dismission, and authorize his carrying on the suit. If he fails to do this at the time of the dismission, he may move at the next term, upon notice of the adverse party, to set it aside, when it may be done if it appear reasonable. Id. An appeal ought to be allowed by the court of appeals from an order of a superior court of chancery, rejecting a motion to allow a bill of review where the right of property had been decided, and a writ of habere facias possessionem awarded; but an account remained to be taken, and the commissioner's report had not come in, such report being interlocutory only. Bowyer v. Lewis, 1 Hen. & M. 554. An appeal cannot be sustained by a person who cannot be injured by the alleged error of the judge a quo, unless he is the legal representative of a party who may be injured thereby. Id. An appeal granted becomes a nullity upon failure to give the appeal bond as required, and will not be considered in this court. Wickliffe v. Clay, 1 Dana, 589. Quære? If an appeal can be taken from a decree dissolving an injunction with costs? Davenport v. Mason, 2 Wash. [Va.] 201. There is no saving in the act limiting appeals in favor of persons non compos mentis. Owing's Case, 1 Bland, 408. The incompetency of a witness is no ground of appeal, if he were not objected to at the hearing. Henshaw v. Robertson, Bailey, Eq. 311. That the evidence upon questions of fact is involved in much doubt, constitutes, perhaps, the best reason why the court of appeals should not review the chancellor's decision in relation to it. Lord v. Lowry, Id. 510. A complainant who has parted with all his interest in the subject of litigation, pendente lite, cannot appeal from a decision which injuriously affected such interest. Card v. Bird, 10 Paige, 426. Nor can a party appeal from those parts of a decree which do not affect his interest. Id.

So it was understood by the judge of the Northern district.

The record brought up to this court exhibits all the features of a regular suit. Proofs are taken, orders are entered, commissions issued, full argument is heard, and a final decree is pronounced. By the act of March 3, 1803, an appeal from all final judgments or decrees of a district court is allowed to the circuit court; and, as this is a final decree, the case comes within the statute, unless there is something in the organization of the district court of the Northern district which prevents the application of the act to it. The act of April 9, 1814, divided the state of New York into two districts. There would have been no ground, upon the general language of the act, to doubt that congress intended the two courts to stand, in relation to the circuit court, precisely as the single one had stood. The judge of the Southern district was directed to hold the northern court, in case of the absence or inability of the judge of the Northern district. The 3d section is, however, calculated to create some question as to the extent of the appellate jurisdiction of the circuit court; for it is provided "that writs of error shall lie from decisions therein to the circuit court," without any mention of appeals. There is, accordingly, great force in the inference that, by the special provision for writs of error, congress intended to exclude cases of appeal, and that, under the act organizing the court of the Northern district, the decisions in admiralty and equity cases made in that court would be final. This was clearly an accidental omission in penning the act. By the act of March 3, 1823 [3 Stat. 774], appeals were given from final decrees or judgments of that court to this court. The act of May 22, 1826 [4 Stat. 192], gives an appeal or writ of error directly to the supreme court from the decisions of that court sitting as a circuit. It accordingly follows that the district court of the Northern district is placed upon the same relation to the circuit court as that of the Southern district, and an appeal lies from it to this court to the same extent.

The question now presented appears to have been before the circuit court of the Sixth circuit and that of the District of Columbia, and directly opposing decisions have been made upon the point by those courts. The views taken by those courts of this subject are not furnished us, and as they stand in conflict, neither can be urged as an authority upon this court.

I am of opinion that the decision of the district judge is a final decree of the district court, from which an appeal lies to this court.

PORTER (UNITED STATES v.). See Cases Nos. 16,071–16,074.

Case No. 11,291.

PORTER et al. v. VIETS.

[1 Biss. 177.][1]

Circuit Court, N. D. Illinois. Aug. Term, 1857.

CONTRACT FOR FUTURE DELIVERY—NOT A WAGER—INTENTION TO SETTLE "DIFFERENCE" CANNOT BE SHOWN.

1. A contract for the sale and delivery of grain which the party did not have nor expect to have, is nevertheless valid.

[Cited in Clarke v. Foss, Case No. 2,852; Gilbert v. Gaugar, Id. 5,412; Jackson v. Foote, 12 Fed. 41.]

2. Such a contract is on its face strictly legal, and is not a wager, and the defendant cannot be permitted to show that the intention of both parties was, that no grain should actually be delivered, but that the "difference" should be settled between them in cash.

[Cited in Hentz v. Jewell, 20 Fed. 593.]

3. Although it is true that by a settlement of the "difference" the same result is reached as in a wager, that circumstance does not make the original contract the same.

4. The defendant, in order to establish the illegality of the written contract, cannot establish orally a simultaneous contract alleged to be illegal.

On the third of April, 1857, the defendant, Viets, entered into a contract in writing with the plaintiffs, by which he sold them fifteen thousand bushels of corn at forty-eight cents a bushel, deliverable free on board, during the last half of June. The plaintiffs were to pay for the corn on delivery. Both parties executed the contract. The corn not being delivered, suit was brought on the contract. At the time the corn was to have been delivered, it had risen to sixty-three cents a bushel, so that the "difference" was over two thousand dollars. The defendant set up in defense that at the time of making the contract he was not possessed of the corn, nor had he entered into any contract for the purchase of the same, nor had he any expectation of obtaining the corn; that it was not intended by the parties that the corn should be delivered, but that it was a contract for the payment of the "difference" between the price mentioned, and its market value at the time of delivery; in fine, that it was nothing more than a wager between the parties as to the price of corn at the time fixed on, and that the contract was only a cover to the real intent of the parties, which was merely a bet and no more. Plaintiffs demurred to plea.

S. W. Fuller, for plaintiffs.

Mr. Stuart, for defendant.

DRUMMOND, District Judge. Whatever doubts may have formerly existed, it must now be considered the settled law, both in England and in this country, that the mere fact that a man may not have in his

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

possession, and has not attempted to acquire possession of, a particular commodity, which he undertakes to sell, deliverable at a future time, will not render illegal a contract made by him to sell and deliver the article. He is bound by his contract, nevertheless, and must deliver the property or be subject to the consequences of a non-delivery. It is an agreement to sell and deliver at a future day, and to release a party from such a contract, because he did not at the time possess the property, would interfere too much with commercial contracts. People might differ about the propriety of a man making such a contract who did not know certainly where he was to acquire the property, but having made it, the courts will compel him to abide by it.

Stock contracts have in some of the states been placed under certain restrictions by the legislature, but there has been no legislation touching such contracts as this before the court. If corn had fallen fifteen cents a bushel, Viets would of course have insisted on Warren Porter & Co., complying with their contract.

Both parties entered into it with full knowledge of the risk they run, and the court will not help one of them because his judgment was unsound or because something occurred that he did not foresee. If it be said that it causes personal or combined efforts to be made to affect the price of the article, of that also the parties were fully aware before they made the contract. In this respect they stood on terms of equality.

It is not necessary to decide in this case whether a wager between these parties as to the price of corn at a particular time was valid or not. The defendant now insists that he did not make such a contract as is presented to the court by the pleadings in the case, but that it was an agreement to pay the difference between the price of corn as stated, and the price at a future day—in other words, he wishes to prove what the law determines is ordinarily the measure of damages for the non-performance of his contract. The rule is well settled that when two men make a contract, and reduce it to writing, and sign it that it is the contract between them. It cannot be shown verbally that something different was intended at the time from what appears in the writing.

It is a rule resting upon the soundest principles, and one of uniform application. Here no fraud is pretended. The contract is free from doubt or ambiguity. It is to deliver a certain quantity of corn at a certain time for a certain price, all set forth in writing. The defendant says he wishes to show that the intention of the parties at the time was to make a wager as to the price of corn during the last half of June, and that the amount of the wager and the party that was to win or lose was to depend upon the market price of the corn. Now it may be true that the result is precisely the same—that is, the one party loses and the other gains the same amount as in a wager. So it is in any case of this kind, when a party does not perform his contract. But that circumstance does not make the contract the same. In the case of a wager on the price, when a man pays the "difference," he performs his contract, but he does not fulfill this contract by paying the difference. He meets the penalty the law imposes for a breach of it. Here this defendant wishes to establish orally that another contract was made at the time not in writing and which he alleges was illegal, in order to make out the illegality of the written contract. This cannot be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove verbally, that another contract (in itself illegal) existed, and so get rid of a written contract on its face unexceptionable. Demurrer sustained and judgment for plaintiffs.

NOTE. A contract for the sale of goods at a fixed price, to be delivered at a future day, the vendor not having the goods nor any means of acquiring them except by purchase, is not a gambling contract. Stanton v. Small, 3 Sandf. 230; McIlvaine v. Egerton, 2 Rob. [N. Y.] 422.

PORTER (WILSON v.). See Case No. 17,827.

PORTER (YOUNG v.). See Case No. 18,171.

PORTER, The CLARA M. See Case No. 2,792.

Case No. 11,292.

PORTEVANT v. The BELLA DONNA.

OWNERS OF THE LOUISA v. The BELLA DONNA.

[4 Newb. 510.][1]

District Court, E. D. Louisiana. April, 1855.

COLLISION—VESSEL AT ANCHOR—PRESUMPTION AS TO WHICH OF TWO VESSELS CAUSED THE INJURY.

1. Where it appears that a steamboat was moored at the bank of the river in her proper place and out of the track of vessels ascending and descending the stream, and she is injured by a collision with one of two boats ascending, her owner is entitled to damages; and the only question for the decision of the court is, from which of the boats is he entitled to recover?

2. Where two steamboats are ascending the river side by side, and a collision occurs, a very clear case should be made out to justify the court in giving judgment against the boat running next to the shore, when it is shown that she was as near thereto as prudence would dictate.

3. In such a case the outer boat having the whole width of the river for a channel, must show beyond a reasonable doubt that, as the swifter boat of the two, she took all proper precautions to pass the other at a suitable distance; otherwise she will be responsible for the damage arising from a collision with a steamboat moored at the shore.

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

[These were libels by William J. Portevant, owner of the steamboat Ruby, and by the owners of the schooner Louisa against the steamboat Bella Donna, for damages sustained by collision.]

Mr. Van Matrie, for libelant.
Wolfe & Singleton, for the Bella Donna.
J. W. Price, for the Louisa.

McCALEB, District Judge. The libelant in this case claims damages for injuries sustained by his steamboat called the Ruby, in a collision with the Bella Donna on the 16th November last. The owners of the latter boat on the other hand, alleged, that the collision was caused by the steamboat Louisa, which was ascending the river with the Bella Donna at the time of the occurrence. No possible blame can be imputed to the Ruby, which, at the time of the collision, was moored at the bank of the river between Sixth and Seventh streets in the Fourth district of this city. She was in a proper place, out of the track of vessels ascending and descending the river. Her owner is undoubtedly entitled to indemnity for the damages he has sustained, and the only question for the decision of the court is whether he shall have a decree against the Bella Donna or the Louisa. These boats were ascending the river on their usual voyages, having previously left their places at the wharf about the same time—the Louisa a few minutes before the Bella Donna. The latter, however, being superior in speed, very soon overtook the former and passed her on her larboard. Before she passed her entirely, however, her starboard quarter, ten feet from her rudder, came in contact with the larboard side of the bow of the Louisa. The force of the collision had the effect of throwing the bows of both boats in towards the shore. The Louisa was thrown with considerable violence against the ship Garrick, at that time moored at the shore, and the Bella Donna was driven against the Ruby. I am satisfied that the Louisa did not run against the Ruby at all, although there is testimony to that effect. If she did, it is certain that she caused no injury, inasmuch as the whole force of her speed was broken by her coming in contact with the anchor chains of the Garrick. My first impression was that the Bella Donna and the Louisa were engaged in a race at the time the collision occurred; but further examination of the evidence, has led me to a different conclusion. The testimony of the witnesses is my only guide; and where that concurs, the court can have no hesitation in following it. Upon this point all the witnesses agree that they were running at their usual speed. In reference to other facts, however, it is not so easy to arrive at a satisfactory conclusion, by reason of the usual conflict of evidence. The witnesses Dennett and Mure, should undoubtedly be regarded as entitled to full credit; but I am satisfied they were not in a position to notice with accuracy all that occurred in the management of the two boats. We find in the first place, that Dennett was mistaken in a most essential particular. He testifies that the Louisa ran into the Ruby, and he is most clearly shown to be in error, both by the testimony of the pilot of the Louisa, and of the man who had charge of the Ruby, and was on board of her at the time of the collision. In the next place, he could not see the changes in the course of the boats; it should be borne in mind, that the Louisa was running next to the shore, and it was her duty to keep at a safe distance from the shipping along the left bank of the river. The evidence shows that she was as near as prudence would dictate. The Bella Donna passed her on the outside, and had the whole width of the river for a channel; she was evidently the stronger, larger and speedier boat of the two, and could easily have gained the position in the river for which she was evidently striving, after she had gone ahead; in passing the Louisa, I am satisfied that she did not run at a sufficient distance from the latter, and that in attempting to regain her position near the shore or the shipping, she was guilty of imprudence and want of skill in steering too soon and too suddenly across the bow of the Louisa. The testimony of the passenger on board the Louisa has mainly brought my mind to this conclusion. He was evidently in a most favorable position to watch the movements of the two boats, and seems to be a man of experience.

In my judgment, a very clear case should be made out to justify a court in giving judgment against the boat running next to the shore, when it is clearly shown, as in this instance, that she was as near thereto as prudence would dictate. It is the duty of the Bella Donna to show beyond a reasonable doubt, that as the stronger and swifter boat, she took all needful and necessary precautions in passing the other boat. When it is so perfectly apparent, that, from her superior capacity to stem the current of the river, she could easily have taken the lead of the Louisa, it should be clearly shown, that she was prevented from accomplishing her object, by some overruling necessity, or by some manifest violation of the rules of navigation, on the part of the other boat. The proof, in my judgment, is not sufficient to exculpate her from blame. On the contrary, I think she is justly chargeable with the damages sustained by the Ruby and the Louisa, notwithstanding the positive but most unsatisfactory testimony of Dennett. It is quite impossible that from his position on shore, while the two boats were nearly opposite to where he was standing, he could discern with any degree of accuracy, the deviations in the course of either boat. The "wild steering" alluded to by the witness Mure, may be accounted for by the fact spoken of by the pilot of the Louisa, that it became necessary to deviate from her course at one time, to avoid a scow. As a general rule, I am not disposed to rely

upon the testimony of pilots who may be called to testify in justification of their own conduct; but in this instance I find the testimony of the pilot of the Louisa so far sustained by that of the passenger before referred to, as to entitle it to full credit.

I therefore pronounce for the damages in this case, and decree that the libelant recover the amount thereof from the Bella Donna as the guilty boat. I also decree that the owners of the Louisa recover the amount actually expended in repairing the injuries sustained by their boat in consequence of the collision. And I now order that the case be referred to the commissioner, R. M. Lasher, Esq., to ascertain the amount of damage.

Case No. 11,293.

In re PORT HURON DRY DOCK CO.

[14 N. B. R. 253.] [1]

District Court, E. D. Michigan. May 25, 1876.

BANKRUPTCY—PROOF OF CLAIM BY DEPOSITION.

Depositions to prove claims in bankruptcy are inadmissible unless they contain the averments required by section 5077 of the Revised Statutes of the United States. They must also be made by a party authorized by the statute; and conform substantially to the forms prescribed by the statute and the general orders.

The questions arise upon the offer of a deposition of John E. Miller, cashier of the First National Bank of Port Huron, to prove a debt claimed by said bank to be due from the Port Huron Dry Dock Company. The deposition not being satisfactory to the register, he declined to file it, and the attorney for the creditor insisting upon its sufficiency, it was certified into court for determination by the district judge.

By HOVEY K. CLARKE, Register:

The claim of the bank consists, first, of an open account, claiming a balance of three hundred and thirty-nine dollars and fourteen cents. Second, three promissory notes made by George Morrison and indorsed by the bankrupt: one for four hundred and fifty-nine dollars, one for five hundred and forty-eight dollars and sixty cents, and one for two hundred and eighty-seven dollars and thirteen cents. Third, a note made by the bankrupt for the sum of three thousand one hundred dollars.

First. The question whether a consideration is shown as required by law (section 5077, Rev. St. U. S.) applies with more or less force to all of the items set up by the claimant. This objection—insufficient statement of consideration—against the item stated as on account, I regard as sufficient for its rejection. No attempt is made in the body of the deposition to state the consideration at all, except by reference to the "annexed account," and the account shows nothing except dates and amounts. The subject-matter of the account nowhere appears. The fact that the claimant is a moneyed corporation renders it probable, indeed, that the subject of the account was money or currency—a probability no stronger, however, than that every merchant's account is for goods sold, which has never yet been relied upon to excuse them from stating, on oath, the consideration of their demands. There is also an item in this account for interest which cannot be allowed under the provisions of general order 34, concerning interest upon open accounts. By this the proof is required to "state when the account became or will become due; and if it consists of items maturing at different dates, the average due date shall be stated." The amount of interest to which a claimant is entitled is not to be determined by himself. The rate is a matter of law or agreement under the law; and the period is to be fixed, either by agreement, or by the law, which declares what may be added to overdue claims. The fact of maturity may be fixed by the oath of the claimant, if the contract be not written; and if he desires interest to be added, the general order requires him to state and swear to it. The computation of the amount is the duty of the register, answering to a computation by a clerk of a common-law court on an assessment. In this case the cashier assesses the damages of his bank by swearing that the "interest is calculated in accordance with a custom of said bank, well known to the officers of" the bankrupt corporation. The amount of interest for the period to which the bank would be entitled, supposing each sum stated in the account was due at the date there given, would be not far from thirty-five dollars. The item claimed is sixty-two dollars and seventy-six cents, which shows the wisdom of the rule by which the court commits to its own officers the computation of interest, the data being furnished by the oath of the claimant. There is another objection to the account as sworn to. The transactions are all stated as occurring from nine to eleven months after the proceedings in bankruptcy were commenced. I think it quite possible that this is a clerical error. But in its present form it is inadmissible for this cause alone.

Second. The second item of the claim of the bank, grouping the Morrison notes as one item, amounts to one thousand two hundred and ninety-four dollars and seventy-three cents. The objection to these, as proved, is that the bankrupts are parties to the notes only as indorsers, and there is no legal proof that their liability as such has ever been fixed by demand and notice. The cashier avers in his deposition "that said notes were regularly protested upon the indorser," a phrase which seems to have been introduced with something of the purpose of an averment in a pleading, but certainly it does not state a fact. The notaries' certificates

[1] [Reprinted by permission.]

are not evidence, for want of conformity to the statute of the state which makes a notary's certificate evidence in the courts of the state, and therefore in this court, of the facts therein stated only when "under his hand and seal of office." One of these certificates has no seal at all, and each of the other two has a part only of a seal, revealing perhaps enough to suggest that it was the seal of some other notary borrowed for the occasion; but certainly not enough to show that it was the seal of the notary who employed it, and therefore not within the statute which makes the certificate evidence for any purpose whatever; nor within the ruling of this court in Re Nebe [Case No. 10,073].

Third. The third of the items is a note for three thousand one hundred dollars made by the bankrupt corporation, and, as stated in the proof, discounted by the claimant only four days before the note was due, and twenty days after the proceedings in bankruptcy were commenced. I am quite sure that justice to the other creditors of this bankrupt corporation, the complications of which with the business houses of Port Huron have been presented to me in many forms, requires a fuller statement of this transaction than that contained herein; not a deposition reduced to writing by or under the direction of the officer who takes it, but an affidavit, drawn up by the attorney of the claimant, and which discloses nothing but that the note "was discounted by the said bank in its regular course of business on or before July 3, 1874, for the sum of three thousand and ninety-five dollars and forty-five cents." The holders of commercial paper, acquired before maturity, and in good faith, are held by this court entitled to prove such claims against a bankrupt's estate, even though without consideration to the bankrupt. In re Lake Superior Ship Canal Railroad & Iron Co. [Case No. 7,998]. This is a construction of the bankrupt act which requires the showing of a consideration of "the demand," in favor of such paper, reached with some difficulty over the express terms of the act, in order to disturb as little as possible the usages of the law-merchant. And, therefore, when the holder of such paper is allowed to prove it against a bankrupt's estate, notwithstanding it may be entirely wanting in an original consideration, by showing a consideration paid by him in good faith, he ought not to esteem it a hardship if he is called to show something more, from which his good faith may be inferred, than a bare assertion that he has discounted it for a specified sum. For these reasons I think the proof in the form presented ought not to be filed.

I deem this a proper occasion to state, briefly, the principles which, in my judgment, should be applied to determine what proofs are admissible to establish claims in bankruptcy. Form No. 22 furnishes a precedent so far as one can be printed for general use. It must be filled up so as to be sworn to by the party in person, unless absent from the United States or prevented by good cause from testifying; it must state what the demand is; what the consideration is; whether any and what securities are held. These are required by the express terms of the statute. General order No. 34 has added these further particulars: that depositions must be correctly entitled; when made on behalf of a partnership or a corporation, the character of the deponent, as a member of the firm, or officer of the corporation, must be expressly shown on oath; when made by an agent, the reason must be stated why not made by the claimant in person; if the claim be on open account, the existence of any note or judgment for the same sum must be denied. All these I regard as directions having the force of law, which the register is not permitted to disregard in determining what proofs are admissible. The function of the register in examining proofs of debt for admission, as I understand it, is not only that of a judicial officer, who is to decide all the questions arising in the discharge of his duty, according to law, and the general orders having the force of law, but sitting also as an administrative officer, in the interest and service of all the creditors of each estate, he is to take care that defective or insufficient proofs are not allowed to pass through, partiality to any creditor, or inattention, which would produce all the mischievous effects of partiality.

I am thus particular in presenting these views of a register's duty to the court for an authoritative decision thereon, because, since the change in the law, which allows notaries to take proofs of debt, the number of defective proofs offered to be filed has greatly increased, and greatly to the annoyance of attorneys through whom they are sent. I certainly do not wish to incumber the practice in bankruptcy with any unnecessary routine; but I have not been able to accept the view of my duty which has been occasionally presented, namely, that I have no "duty" of supervision concerning such proofs, and if no creditor objects, I must, or at any rate may, file every proof offered. I think I state the fact as exactly as is possible, upon a subject which is so much a matter of conjecture, when I say that of all the proofs offered to me in the course of my service as a register, not one-tenth of one per cent. of the whole number has ever encountered any objection from any creditor. Section 5076, which expressly makes proofs taken elsewhere "subject to revision by the register of the court," suggests a more positive view of a register's duties; a view which I think the interests of all creditors require to be maintained. This duty of revision is not an agreeable one. The exercise of it is treated by some officers, whose careless performance of their own duty makes corrections necessary, with petulance, and sometimes with discourtesy. I shall find no difficulty, I think,

in applying the rules of law to all proofs as offered. I shall find less in filing every proof that is offered, irrespective of its form or conformity to law, that is not met with an objection by a creditor. But I shall find infinite difficulty in devising a rule between these two. I respectfully submit, therefore, the whole subject to the determination of the district judge.

BROWN, District Judge. Approved by consent.

Case No. 11,294.

In re PORTINGTON et al.

[8 Ben. 175.] [1]

District Court, S. D. New York. June, 1875.

FIXING REGISTER'S FEES ON COMPOSITION—REPAYMENT OF EXCESSIVE FEES.

When a surrender of property has been made to a register by bankrupts who subsequently effect a composition with their creditors, which is approved by the court, and thereupon the property is returned to the bankrupts, the compensation to be received by the register for his fees and services must be fixed by the court, and not taxed by the clerk of the court. If a register, under such circumstances, has received more than lawful compensation, he can, under general order No. 30, be compelled by the court to pay the excess into court.

The register certified to the court, that, in this case, which was one of voluntary bankruptcy, a surrender of property was made to him by the bankrupts [Robert C. Portington and Francis Portington], which property remained in his custody until a composition was made by the bankrupts with their creditors, whereupon, by order of court, the property was surrendered again to the bankrupts; that the amount to be paid to the register for his fees in the matter had been estimated, agreed upon with the attorney of the bankrupts, and paid to him, and he had certified thereupon that his fees, costs and expenses had been paid, whereupon the order approving the composition had been made, and the property surrendered to the bankrupts; and that subsequently an order had been made, referring it to the clerk of the court, under general order No. 30, to tax the register's bill of fees and charges. And the register submitted to the court, that such order should be vacated, on several grounds, the second of which was, that the taxation by the clerk "would not be within the provisions of the rule which provides that the 'clerk shall tax each fee-bill, allowing none but such as are provided for by these rules,' for the matters in question are outside all such provisions;" but, he added, that, if the court wished, he would be happy to certify to it his services and disbursements in the matter.

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

BLATCHFORD, District Judge. I think the order must be vacated for the reason secondly assigned by the register. The matter of the compensation is for the court to adjust, and not for the clerk to tax as fees. But, I think that if the register has received any money, in excess of lawful compensation, he can, under general order No. 30, be ordered by the judge to pay it into court. In this view, the services and disbursements should be certified by the register, as he suggests.

PORTLAND (BAKER v.). See Case No. 777.

PORTLAND (BRAGG v.). See Case No. 1,802.

PORTLAND (COULSON v.). See Case No. 3,275.

PORTLAND (LOWNSDALE v.). See Cases Nos. 8,578 and 8,579.

PORTLAND, The (LOWRY v.). See Case No. 8,583.

PORTLAND (MERRILL v.). See Case No. 9,470.

PORTLAND & K. R. CO. (SULLIVAN v.). See Case No. 13,596.

PORTLAND MANUF'G CO. (WEBB v.). See Case No. 17,322.

Case No. 11,295.

The PORTSMOUTH.

[2 Bish. 56; [1] 1 Chi. Leg. News, 65.]

District Court, N. D. Illinois. Nov. Term, 1868.[2]

ENTERING HARBOR—JETTISON.

1. The captain of a propeller having run more than a day without accurate means of determining his position, supposed that the port of Waukegan, which he reached during the night in a fog, was Chicago, his destination. In attempting to enter, at ordinary speed, he grounded, and jettisoned part of the cargo. There was no necessity on account of either sea or wind to make the harbor at once. No effort was made to get lighters. *Held*: The captain was guilty of negligence: 1st—In attempting to enter the harbor until certain of his location. 2d—In not advancing slowly and with the utmost skill and caution. 3d—In not attempting to save the cargo.

2. The owner of the cargo has a right to insist that the captain shall not with his vessel take the chance of entering a harbor of which he is not certain, and without necessity.

3. Mariners must be held to the exercise of all reasonable skill and prudence.

4. After a vessel is stranded, the captain is bound to take all possible care of the cargo.

Libel by the Salt Company of Onondaga for a quantity of salt jettisoned while the propeller was aground at the harbor of Waukegan.

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

[2] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 9 Wall. (76 U. S.) 682.]

Waite & Clarke, for libellant.
Rae & Mitchell, for respondents.

DRUMMOND, District Judge. The facts of this case are briefly these: The libellant, on the fourth day of October, 1866, shipped, at Buffalo, on board of the propeller Portsmouth, then bound for Chicago, two thousand barrels of salt, under a bill of lading in the usual form, and which declared that the dangers of lake navigation only were excepted.

The propeller, shortly after, left Buffalo, and, on the 9th day of October, arrived at the Fox Islands, in Lake Michigan, discharged some portion of the cargo there, took in additional cargo, and, on that evening, at about seven o'clock, left the islands, bound direct for Chicago, there being, at the time, a northeast wind, with considerable sea. The propeller kept her course that night and all the next day, the fog still continuing until about six o'clock in the evening, when, the fog lifting a little, a church steeple was discovered on the west shore of the lake, and what seemed to be a house. The captain supposed that this was Racine, in Wisconsin, and continued on his course up the lake upon that supposition.

Between two and three o'clock on the morning of the 11th, a light was discovered, and the sound of a whistle, which was supposed to be that of a tug, was heard, and the movement of cars upon the shore. It was concluded that this was Chicago. The propeller had passed by, and to the south of, the supposed port and turned round to the north with a view of entering the harbor. The fog still continued. They could not see their way before them. All that they saw was the light, and all that they heard was the sound of the whistle and the movement of the cars.

Upon this evidence they acted, and attempted to enter the port upon the presumption that it was Chicago. As they entered, the mate, who was forward—as they came very close to the pier—discovered that it was not the pier at the Chicago harbor, and gave immediate notice to the captain, who was on the pilot house. The propeller was backed, but, in a short time, struck upon the bottom; and it proved to be, not the port of Chicago, but that of Waukegan.

The clerk was immediately sent ashore, and dispatched to Chicago for a tug, which arrived at Waukegan in the afternoon of the 11th, the captain having, in the meantime, jettisoned a portion of a cargo and, among the rest, a quantity of salt belonging to the libellant—the propeller not having been removed from her position prior to the arrival of the tug. They were unable to get the propeller off until the following morning, when she proceeded on her voyage to Chicago, less that portion of the cargo which had been thrown overboard.

The rule upon this subject is this: If the loss happened by a peril of the lake, and it could have been avoided by the exercise of any reasonable skill or diligence at the time, the carrier shall not be excused, but shall be held liable. Ang. Carr. 167 et seq. The subject is very fully discussed by the supreme court of the United States, in the case of The Niagara v. Cordes, 21 How. [62 U. S.] 7, in which that court says, that losses arising from the dangers of navigation, within the exception ordinarily contained in bills of lading, such as in this case, are not those that are in any degree produced from the intervention of man: they are such as happen in spite of human exertion, and which cannot be prevented by human skill and prudence.

The question is, whether under the circumstances of this case the captain of the propeller acted with all the skill and prudence necessary. While admitting that the case is not entirely free from difficulty, I do not think that he did. It will be recollected that the only means the captain had to determine his position on the 10th, when they caught a glimpse of land, were the speed of the propeller and the land. At that time, the observation which was made was confessedly indefinite and indistinct. The captain supposed that it was Racine, because he thought that the propeller had made that progress during the day and the preceding night; not because there was anything in the aspect of the church spire or house that he saw to give character to the locality.

It may be doubted whether there was enough in the case to warrant the conclusion that the propeller had sailed that distance; as it is clear, from subsequent circumstances, she had not. But, without insisting on great strictness as to the actual progress the propeller had made in the meantime, from the Fox Islands up to six o'clock on the evening of the 10th, still, it is clear that there was not enough in the observation which had been made, together with the doubtful conclusion derived from the progress of the vessel, to justify those on board, absolutely, in the conviction that there was before them any particular place. The most that could be said was, that it was a matter of doubt; and in point of fact, the mistake that was made in the progress of the vessel must have been from thirty to forty miles; that is to say, they supposed they were thirty or forty miles nearer Chicago, on the evening of the 10th, than they actually were.

The time that they arrived at and were about to enter the supposed harbor of Chicago, was not far from three o'clock in the morning. The fog was still thick. The evidence they had that this was the port of Chicago, was confessedly vague and indefinite. There was nothing to justify them, absolutely, in the conclusion that it was Chicago. It is clear that those on board the propeller, although they thought they were entering the port of Chicago, still, were not certain that they were so doing. The question is, whether they were justified, under the circumstan-

ces, in taking the chances and acting upon the presumption that it was the port of Chicago.

As I have already said, I think that, under the circumstances of the case, with the evidence before them as to where they were, the hour of the morning and the state of the weather, they ought to have remained until the approach of light or the lifting of the fog rendered it certain where they were.

It is to be observed that there was no imperative necessity, either in the sea or the state of the wind, for their making the harbor. There was no great risk, either to the propeller or to the cargo, in remaining off the port where they were until it could be ascertained with certainty what their situation actually was.

Again, admitting that the captain was justified, under the circumstances, in attempting to enter the harbor on the suspicion that it was Chicago, I think that proper precautions were not taken. If they were justified in entering the harbor at all, the utmost caution and skill should have been used. They should have felt every step of the way. They should have advanced only with sufficient speed to give adequate and proper steerage way to the propeller. The engineer says that they were entering with the usual speed. The witnesses do not all agree upon this point; but I think it is manifest that they were advancing too rapidly at the time; and, it is apparent that, if they had exercised more caution, the risk to the vessel and cargo, even if they had struck, would not have been nearly so great as it ultimately proved to be. So that, on both grounds, I think there was not that degree of skill and prudence exercised that there ought to have been under the circumstances of the case.

It is true that something ought to be allowed to the opinion of the responsible party, whose duty it was to decide at the time—the captain of the propeller; but, while this is true, it must not be forgotten that there is also something due to the owner of the cargo, and that it is not just or right that the captain, in the exercise of the responsibility which devolved upon him, under circumstances like these, should take the chances which then, it was apparent, existed. There was a chance that it was the harbor of Chicago; there was a chance that it was not; the captain was not justified in taking this last chance.

I think it is the duty of the courts to hold mariners, under circumstances like these, to the exercise of all reasonable skill and prudence. Therefore it is that I hold the propeller accountable for the loss which occurred in this case. We excuse them if the loss happened from dangers of lake navigation; but it must be clear that the loss has happened in consequence of such danger. If it appears that the exercise of proper skill and prudence might have prevented the loss, then the carrier must be held responsible.

Again, I am not satisfied with the conduct of the captain after the vessel was stranded. The rule laid down by the supreme court of the United States in the case already referred to, is that, after the vessel is stranded, the master is bound to take all possible care of the cargo. When the vessel went ashore, the captain sent for a tug. No effort was made to get lighters. No attempt was made to save the cargo; but the cargo, or a portion of it, including the salt of the plaintiff, was thrown overboard and piled up upon the bottom, so that many of the barrels rose above the surface of the water, and were subsequently saved by parties, residents of Waukegan. There was a heedlessness, even a recklessness, on the part of the captain, in regard to the jettison of a portion of the cargo, which I hardly think, under the circumstances, can be justified.

But, inasmuch as some of the witnesses examined think that the captain was justified in the jettison that was made, I do not place the decree upon this ground. But my opinion is, that if proper exertion had been made, a part, if not the whole, of the cargo might have been saved. The vessel was not more than fifty feet from the pier; lighters might have been obtained, and certainly a portion of the cargo saved. And it will be recollected that the wind was subsiding and the sea falling.

Decree for libellant for the value of the salt, belonging to the libellant, which was thrown overboard.

NOTE. This case was then appealed to the circuit court, and Judge Davis, of the supreme court, sitting as circuit judge, adopted fully the opinion of Judge Drummond. [Case unreported.] The supreme court again affirmed the decision in 9 Wall. [76 U. S.] 682, q. v.

PORTSMOUTH (SANFORD v.). See Case No. 12,315.

Case No. 11,296.

PORTSMOUTH SAV. BANK v. YELLOW HEAD.

[3 Biss. 474; 5 Chi. Leg. News, 374; 7 Am. Law Rev. 751.] [1]

Circuit Court, N. D. Illinois. Feb. 6, 1873.

MUNICIPAL BONDS—ESTOPPEL—RESCISSION OF AUTHORITY—RATIFICATION BY LEGISLATURE.

1. As against a bona fide holder of bonds bearing upon their face the recital that they were issued according to law, it is not a sufficient defense that certain conditions have not been complied with. The town is estopped by the recitals.

2. Nor is it a valid defense that after a meeting of the town electors at which a donation was authorized, but before it was formally accepted by the railroad company, the action of the first meeting was rescinded by the town.

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. 7 Am. Law Rev. 751, contains only a partial report.]

3. It is competent for the legislature to ratify and confirm issues of bonds previously made, and, it seems, to authorize town authorities to issue bonds without a vote of the people.

Assumpsit on thirty-six coupons issued by the town of Yellow Head, Kankakee county, Illinois, to aid in the construction of the Chicago, Danville and Vincennes Railroad, a corporation organized under a special charter granted by the legislature of Illinois. 2 Priv. Laws 1865, p. 140. The declaration contained simply the common counts for money lent and advanced, goods sold and delivered, etc., but upon the back of the declaration was indorsed notice that the plaintiff's sole and only claim under the declaration would be made on thirty-six coupons or interest warrants, numbered from one to thirty-six, inclusive, of which the following is a copy: "Yellow Head Township. Railroad Bond. $50. No. (1 to 36.) Interest Warrant. On the first day of March, 1872, the township of Yellow Head, Kankakee county, state of Illinois, will pay to the bearer fifty dollars, at the Mechanics' National Bank of the City of Chicago, being one year's interest on bond, numbered as above." The bonds offered in evidence read as follows: "Know all men by these presents, that the township of Yellow Head, in the county of Kankakee and state of Illinois, acknowledges itself to owe and be indebted in the sum of five hundred dollars, lawful money of the United States of America, which sum of money the said township of Yellow Head promises to pay to the bearer, ——, at the office of the county treasurer of said county, on the first day of March, in the year one thousand eight hundred and ——, with interest thereon at the rate of ten per cent. per annum, which interest shall be payable yearly on the first day of March in each year, at the Mechanics' National Bank, in the city of Chicago, upon presentation and delivery of the warrants or coupons, severally hereto annexed, until the payment of the said principal sum. This bond is issued under and by virtue of a law of the state of Illinois entitled, 'An act to authorize cities and towns, or townships, lying within certain limits, to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes Railroad,' approved March 7th, 1867. Also, under and by virtue of a law of said state entitled, 'An act to legalize certain aids heretofore voted and granted to aid in the construction of the Chicago, Danville and Vincennes Railroad,' approved February 26th, 1869, and in accordance with the vote of the electors of said township, at a special election held June 8th, 1868, in accordance with said act; and the faith of said township of Yellow Head is hereby pledged for the payment of said principal sum and interest as aforesaid."

Wilson, Perry & Sturges, for plaintiff.

Monroe, Bisbee & Gibbs, for defendant, cited the following authorities: Dill. Mun. Corp. p. 149, § 228; Pendleton Co. v. Cary, 13 Wall. [80 U. S.] 304; Marshall Co. v. Cook, 38 Ill. 44; Moran v. Commissioners of Miami Co., 2 Black [67 U. S.] 722; Starin v. Town of Genoa, 23 N. Y. 439; Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; Aspinwall v. Commissioners of Jo Davies Co., 22 How. [63 U. S.] 364; Stoddard v. Gilman, 22 Vt. 568; Pond v. Negus, 3 Mass. 230; Stine v. Supervisors, 47 Ill. 256; Beckwith v. English, 51 Ill. 147; People v. Dutcher, 56 Ill. 144.

BLODGETT, District Judge. The defense interposed to a recovery on this bond is the want of compliance on the part of the town, with the conditions precedent, which authorize a town, county, or city, to issue bonds of this description. The statute of March 7, 1867 (2 Priv. Laws Ill. p. 842), of this state, referred to in the bond, provides in substance, that before any town on the line of said railroad shall issue bonds to aid in the construction thereof, the question of whether such aid shall be given, the amount, and the manner in which it shall be given, shall be submitted to the legal voters of the town, either at a regular or special election, of which due notice shall be given.

The evidence in this case shows that a meeting was duly called to be held in the town of Yellow Head on the 8th of June, 1868, for the purpose of voting upon the question of contributing the sum of eighteen thousand dollars to aid in the construction of the Chicago, Danville and Vincennes Railroad, and also in regard to donating the right of way for said railroad through said town.

The election was held in pursuance of this call, at which a large majority of the votes cast were in favor of the donation asked for, and also of donating the right of way. It also appears that subsequent to this meeting or election another town meeting was called and held on the 18th of July of the same year, and while the proceedings of this meeting seem to have been somewhat irregular, and the record does not show very definitely what the objects or intentions thereof were, the purpose evidently was to rescind, so far as they could be rescinded, the proceedings of the meeting of the 8th of June, and to vote a donation of twenty thousand dollars in lieu of the eighteen thousand dollars and the right of way voted on the 8th of June, and the result of the meeting was a rescinding of the vote of June 8th, and a donation of twenty thousand dollars without the right of way, and also limiting that donation to a certain time, and the establishment of a depot at a certain point.

On the 26th of February, 1869, the legislature of this state passed an act in regard

to the town aid for the railroad in question, the first section of which act is as follows: "Section 1. Be it enacted, etc., that the taxes, aids and appropriations heretofore voted by towns, townships, or cities, along the proposed route of the Chicago, Danville and Vincennes Railroad, or in the vicinity of said railroad, be, and the same are hereby legalized, ratified and confirmed, and the appropriation so made by the township of Yellow Head, in the county of Kankakee, on the 8th day of June, 1868, is hereby legalized and made valid; provided, said road shall run through said township of Yellow Head." 3 Priv. Laws Ill. p. 355.

The bonds were issued, duly signed by the supervisor and town clerk, and prior to the issue of the bonds the auditing board of the town audited the claim in favor of the Chicago, Danville and Vincennes Railroad for the sum of eighteen thousand dollars, and directed the issue of the bonds.

The evidence in the case also shows the fact that these bonds were put upon the market and bought by plaintiff for full value by the present owners. It also appears that said railroad was built through said town.

It is contended on the part of the defendant in this case that inasmuch as this donation had not been formally accepted by the railroad company at the time of the meeting of July 18th, it was in the power of the voters of the town to revoke the action of the 8th of June, and thereby invalidate the proceedings of the first meeting; that until the offer of these bonds had been formally accepted, or the railroad company had done something which showed that they accepted the offer of this assistance, the act was revocable.

It is urged with a great deal of force and ability on the part of the defendant's counsel, that this action of the 8th of June having been rescinded by the meeting of the 18th of July, the bonds were therefore issued without the performance of the preliminary conditions; that the case stands, so far as the records of the town are concerned, precisely as though the meeting of the 8th of June had not been held, and that, therefore, the bonds were issued without a compliance with the conditions precedent, which authorize a township to bind itself in this form.

Without going into a careful analysis of the numerous cases and authorities which have been cited, the law is abundantly settled, as it seems to me, that where the bonds of a municipal corporation have passed into circulation, and into the hands of bona fide holders for value, and such bonds bear upon their face the assertion that the pre-requisites have been complied with, the town is estopped from asserting or pleading a denial of the performance of such pre-requisites.

It seems to me this defense cannot be heard; that after these bonds have passed into circulation and have been sold in the market for value, the town cannot be permitted to question the truth of the assertion, solemnly made upon the face of the bonds, by the grantors who put them into circulation. The bonds show unequivocally that they are issued in conformity with the act of the legislature of March 7th, 1867, and of the act of February 26th, 1869, and of the township meeting of June 8th, 1868. So much as to the recital in the bond.

There is still another view to be taken of the question, which, I think, is not less cogent. The law of February 26th, 1869, provides that, "the appropriation so made" —that is, made to the Chicago, Danville and Vincennes Railroad—"by the township of Yellow Head, in the county of Kankakee, on the 8th day of June, 1868, is hereby legalized and made valid."

Now, it is competent for the legislature to delegate to these municipal corporations any powers which they see fit for the management of their local affairs. The legislature might authorize the town authorities of the town of Yellow Head to issue bonds in aid of any public enterprise without the vote of the people. Under the constitution in force at the time the act of February 26th, 1869, was passed, the legislature could authorize these municipal corporations to incur debt ad libitum, and issue bonds for their payment.

It is purely a question of power on the part of the town authorities, and if the legislature, by a special act, sees fit to waive the condition which applies generally and authorize the incurring of indebtedness for any special object, the power is complete.

Now, this language of the act of 1869 is very significant, and it seems to me it is tantamount to saying that no matter what the people of the town might have done afterwards, the legislature intends to authorize the town authorities to issue the bonds voted by the town meeting of the 8th of June, 1868. The law must have been so understood by the town authorities, and I think such is its true interpretation.

The view which I take of this case, of course, makes it unnecessary for me to go into any careful analysis of the cases cited. These bonds bear upon their face an assertion that the prerequisites, which would make them legal and binding, had been complied with; they were put in circulation, and as the court must presume, were negotiated on the faith of that statement. They must, therefore, be held valid.

The court finds the issues for the plaintiff, and assesses the damages at nineteen hundred dollars, being the amount of the coupons and interest at six per cent. since maturity.

NOTE. For a further discussion of the various questions arising on municipal bonds, consult Mygatt v. Green Bay [Case No. 9,998]; Luling v. City of Racine [Id. 8,603]; Schenck

v. Marshall Co. [Id. 12,449]; Goedgen v. Manitowoc Co. [Id. 5,501]; Nugent v. Putnam Co. [Id. 10,377]; and numerous authorities in those cases cited.

Case No. 11,297.

In re PORTSMOUTH SAV. FUND SOC.

[2 Hughes, 238.] [1]

District Court, E. D. Virginia. May, 1874.

BANKRUPTCY—ELECTION OF ASSIGNEE—APPOINTMENT BY COURT.

Where a majority of resident creditors who had been represented in a first creditors' meeting, and who had proved their claims by attorney, had voted for one person as assignee, and a majority of creditors who had proved in person had voted for another person as assignee in bankruptcy, *held*, that there was no election, and that the court was at liberty to appoint an assignee;—which was accordingly done, of a person equally acceptable to both parties and not concerned in the strife.

This cause was argued at length by Gayle and Holladay against the confirmation of the election of the Bains as assignees, and by W. H. C. Ellis for the election. J. G. Bain had been appointed attorney in fact by a majority in number, representing a majority in amount of the creditors. These creditors, except in one or two instances, had not proved their claims by taking the oath in person, as required by the 22d section of the bankrupt law [of 1867 (14 Stat. 527)], but the oaths had been taken by Bain as their attorney. The question was, whether the proof of the claims of creditors who resided in the district could be made by attorney.

HUGHES, District Judge. An agent cannot, by his own oath, prove a debt for a creditor who is resident in the United States, unless he shows that the creditor is prevented "by some good cause" from making the oath himself, in which case the agent must show his own "means of knowing" the facts to which he makes oath. The oath which the 22d section requires of a creditor, in proving his claim, is such that it cannot be taken by proxy, and the 22d section of the bankrupt act dispenses with personal oath only where the creditor is "absent from the United States," or is prevented by "some good cause" from taking it in person. It must be shown affirmatively that the creditor was prevented by "some good cause" from proving his claim in person, before proof by an agent can be admitted. In this case there is not only no proof that the creditors represented by J. G. Bain were (except in one case) non-resident in the United States, or were prevented from making oath themselves; but it is evident, from all the papers, that they were resident in the district and could have made proof of their claims in person. Not having proved their claims according to law, the votes cast for these creditors by attorney were, therefore, illegal, and the election effected by these votes was void. The court, therefore, disapproved the election of R. T. Bain and George M. Bain, Jr., and set the same aside. But the court held that it did not follow, because the Bains were not duly elected, that Gale and Murdaugh, who received the votes of the minority of creditors who had duly proved their claims, had been elected. Exercising the unrestricted power given to the judge by the fourth clause of section seven of the bankrupt law, of approval or disapproval, the court adjudged that there had been no choice of assignees. The judge intimated a purpose of appointing Mr. L. Harmanson as assignee, but withheld the appointment for a day or two in the expectation that all parties would acquiesce in this selection. This was done, and Mr. Harmanson appointed.

[NOTE. For an application on the part of the counsel of the bankrupt to be allowed compensation for services, see Case No. 11,298.]

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

Case No. 11,298.

In re PORTSMOUTH SAV. FUND SOC.

Ex parte MURDAUGH et al.

[2 Hughes (1877) 239; 11 N. B. R. (1895) 303.] [1]

District Court, E. D. Virginia.

Circuit Court, E. D. Virginia.

BANKRUPTCY—COUNSEL FEES—DEBTOR'S COUNSEL.

1. In involuntary bankruptcy, where there has been contested litigation of the question whether acts of bankruptcy had been committed, and whether the debtor should be adjudicated a bankrupt, the debtor's counsel in such litigation should be allowed a fee out of the assets in bankruptcy. Per Hughes, District Judge.

2. The creditors having allowed the counsel for the petitioning creditor a fee for prosecuting the petition, the debtor's counsel should be allowed the same fee by the court.

3. This order of the district court must be reversed. Per Bond, Circuit Judge.

[In bankruptcy. For prior proceeding in this litigation, see Case No. 11,297.]

HUGHES, District Judge. This is a petition of C. W. Murdaugh, John H. Gayle, and James G. Holladay, praying to be allowed a fee as counsel in resisting the petition in bankruptcy which was for two years prosecuted in this case against the Portsmouth Savings Fund Society. On the 17th June, 1872, one of the creditors of that society filed a petition in this court charging acts of bankruptcy, and praying that the society might be adjudicated a bankrupt. It seems that the board of directors of the corporation were divided on the question of supporting or opposing this petition. The board was composed of John N. Ashton,

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

president, John Cocke, Leigh R. Watts, George M. Bain, Jr., and George S. Neville. Another member, N. G. Forbes, had also been duly elected, but it is claimed that he never acted. I see no evidence of his having taken part in any action of members of the board, except in uniting in an affidavit with George M. Bain, Jr., and George S. Neville, on the 2d July, 1872, which was on that day filed in this cause. There was long and warmly contested litigation, Ashton, president, Cocke, and Watts taking part against the petitioning creditor, and Neville and Bain siding with him. In 1870, C. W. Murdaugh had been elected the general attorney of the society, succeeding in that office his father, who had been the attorney before him and had died. He was still the society's attorney in June, 1872, when the petitioning creditor's petition in bankruptcy was filed. Owing to the presence of four members of the board being necessary to a quorum, and to the division of sentiment in the board in regard to the petition, no action could be taken, or was taken by the board as a body, on the subject of the petition. But the president, Ashton, Watts, and Cocke, united in giving directions to the society's general attorney, Mr. Murdaugh, vigorously to oppose the petition (see their affidavits filed September 3d, 1872, two papers), and "to take such steps as were necessary to defend the society from the charges preferred." From their affidavit, filed 24th November, 1874, it appears that they also joined James G. Holladay and John H. Gayle, attorneys, with Mr. Murdaugh in the conduct of this defence.

The prosecution of the proceedings in bankruptcy was vigorously conducted by the petitioning creditor and his attorney, and was vigorously resisted by these counsel for the defence during the whole period between the filing of the petition in June, 1872, and the final order of adjudication made on the 9th April, 1874. The order of adjudication made by the district court was on the 8th November, 1872. From this order there was an appeal to the supervisory power of the circuit court. That court made an order on the 11th October, 1873, affirming the order of adjudication. There was an application for a rehearing made to the circuit court, which was granted. The rehearing was at Richmond, on the 9th April; and then a final order was made confirming the original order of adjudication, and remanding the case here for regular proceedings in bankruptcy. The questions of law were difficult and important; the amount involved in the litigation was from seventy thousand to one hundred thousand dollars; most of the proceedings occurred in Baltimore (the residence of the circuit judge), Alexandria, or Richmond, requiring expensive trips by counsel, both in the matter of time and pecuniary outlay. The counsel for the defence called into requisition the eminent legal services of Tazewell Taylor, Esq., in the arguments which were made at the distant places. Whether Messrs. Murdaugh, Holladay, and Gayle, and the majority of the board of directors were legally authorized to resist the proceedings in bankruptcy is a question which it is not for me now to consider. That question was raised in the beginning of this proceeding, and it was practically decided by both the district and circuit courts at that stage of it. They were heard at various times for two years; they were heard by the district court before the first adjudication; they were heard on appeal by the circuit court, and they were heard before the final order of the circuit court confirming both the preceding orders of adjudication. These services of counsel have been recognized by the district and circuit courts for two years, and have been performed. True, the services were unavailing to defeat the adjudication of bankruptcy; but they were none the less arduous, protracted, and expensive for that reason.

The only questions open for my decision are: Shall the services be paid for out of the assets in bankruptcy, and what shall be the compensation? The effect of an adjudication in voluntary bankruptcy is to take from the bankrupt the whole of his estate, into the control and disposal of the court. The control is retroactive, and reaches back from the day of adjudication to the day of the commencement of the proceedings; invalidating every intermediate transfer of property or payment of offset by the bankrupt. It strips the bankrupt of all his means, and all control over his means; entirely disabling him to compensate counsel for making defence against the proceeding of the petitioning creditor. Yet the law clearly contemplates a defence on the debtor's part and carefully provides for him the methods of making it. There is a special section (the 39th) of the bankrupt law [of 1867 (14 Stat. 536)], throwing safeguards around a debtor who is sought by creditors, against his will, to be put into bankruptcy, and deprived of the control of his property. In such a case the law requires the petition to be presented to the judge of the court (and not the register); it gives leave and opportunity to the debtor to answer the petition; it provides for trial, upon evidence and argument, of the allegations of the petition; and it allows this trial to be held, if the debtor so demand, before a jury of his countrymen. But all these provisions of the 39th section would be a mockery, if the court before which these important proceedings were had—the court which may already have taken control of the entire effects of the debtor—were disabled to pay out of these effects the costs of the defence. The right of the court to pay these costs is so clear as to need no argument. The reasons and decisions are given and cited by Bump, Bankr. (6th Ed.) pp. 221, 222. Are not the fees of

counsel a proper part of these costs? Equality of right between citizens is a constitutional guarantee. To secure it, equal laws are enacted, and, for the administration of these laws, independent courts are established, and trial by jury provided in all proper cases. But the difficulty of applying the law in each case is such that it would be a mockery to require each citizen to represent himself in a court of justice. In that case the learned and the ignorant suitor would be on an unequal footing. The man skilful in the law would have great advantage over him who had devoted his attention to other subjects. The rich and powerful would have greater ability to prosecute expensive litigation than the poor and humble. An independent bar, composed of learned and honorable lawyers, is as necessary to securing an equality of right among suitors, as even an independent judiciary or a jury of twelve impartial men.

The law and the courts equally recognize the value and necessity of legal services; and the latter are never slow to provide a proper compensation for them. The assistance of counsel is indispensable to the courts in ascertaining and defining the law on the subject litigated. I feel bound in this case to allow a proper fee to the counsel for the bankrupt, in whose defence they were engaged during the protracted litigation which I have described. My only embarrassment is as to the amount of the allowance. When the counsel for the petitioning creditor made a similar application, I referred his petition and bill to the creditors. A majority in number and in value of these recommended the payment of the amount of his bill. As these creditors knew far more of the history and the facts of the litigation which has been had than I could have known of a matter which transpired before I was commissioned, I was glad to defer to their recommendation; and I directed the bill of the petitioning creditor's counsel, thus approved by creditors, to be paid by the assignee. A like recommendation for the payment of a like fee comes from a large and respectable number (though a minority) of creditors in behalf of the counsel on the other side.[2] It seems to me that the action of the majority of creditors in fixing the compensation of counsel on one side virtually fixes it on the other. I assume from the tenor and character of the proceedings, that the resistance of the proceedings in bankruptcy was made in good faith. The hesitation of each of the two courts in deciding the points of law on which the adjudication depended shows that the legal questions involved were difficult and doubtful. I do not feel it my duty, and I cannot consent, by my action on the present petition of the bankrupt's counsel, to pass censure by implication upon the course of the minority of the stockholders of the Portsmouth Savings Fund Society, or their counsel, in defending this bankruptcy. I shall therefore make an order directing the payment of the same fee to the counsel for the defence as was allowed to the counsel for the petitioning creditor by the majority in number and interest of the creditors.

On appeal from the decree of the district court rendered in accordance with this decision, the decree was reversed on the following grounds:

BOND, Circuit Judge. This is an application on the part of counsel of the bankrupt to be allowed compensation for services rendered his client in resisting the adjudication in bankruptcy. The Portsmouth Savings Society by a unanimous vote of its board finding itself insolvent, resolved to make an assignment. The deed of assignment was prepared by its counsel, but its execution was prevented by the refusal of the proper officers to sign it. There is no dispute that at the time of making this assignment the society was totally insolvent. Some twenty days afterward a petition was filed by a creditor in the district court alleging the bankruptcy of the society, and after a long litigation, lasting for about two years, upon appeal to the supervisory jurisdiction of the circuit court the bankruptcy was established. After this prolonged litigation, which arose from no dispute as to the necessity of making distribution of its assets among its creditors, but respected only the persons who should so distribute them, that is, whether or not an assignee appointed by the creditors under the bankrupt law or a trustee selected by the corporation, the creditors who have been kept out of their money merely because they asked distribution in the manner provided by statute are asked to pay the expenses of the parties who caused the delay. To state this proposition is to make it unnecessary to argue it. If it could be shown that any advantage had come to the creditors by reason of the services of the counsel, or that it was doubtful whether or not the society was bankrupt in fact, there might be some reason why the creditors should compensate those who served them, but there was no such condition of facts. It was a bold attempt on the part of the society to make distribution itself through its own appointees, and to defeat that provision of the bankrupt law which provides that the creditors may make selection of an assignee for that purpose.

To confirm the allowance of $5,000 out of the funds devoted to the payment of the claims of creditors for those purposes cannot be justified and is refused.

[2] The statement of counsel who argued the appeal in the circuit court was, that there was no objection to the principle of the decision below, but the objection was that in this case, it resulted in paying too large a portion of the fund away as counsel's fees.

Case No. 11,299.

POST v. CORBIN.

[5 N. B. R. (1871) 11.] [1]

Circuit Court, D. Michigan.

BANKRUPTCY—CONVEYANCE WITHIN FOUR MONTHS—CONSIDERATION—PERSONAL PROPERTY—REMEDY AT LAW—ACCOUNTING.

1. Where a bill was filed to recover certain real estate and personal property alleged to have been conveyed and transferred by the bankrupt within four months next before the filing of the petition against him for adjudication of bankruptcy in fraud of the bankrupt act [of 1867 (14 Stat. 517)], and the bill is based on two alternative theories,—1st. That the transfers were without consideration and made to hinder, delay and defraud the bankrupt's creditors, or 2d. If there was a consideration it was a previous indebtedness and the transfers were made with a view to give the defendant a preference, he having reasonable cause to believe the bankrupt insolvent,—*held*, actual possession under the agreement and performance of it clearly takes the case out of the statute requiring the agreement to be in writing. And as to its vagueness and uncertainty in the particulars specified, the agreement having been executed by the actual making of the conveyance, the court will now look into the agreement only for the purpose of ascertaining whether the consideration for the conveyance was such as a court of equity will sustain as against the creditors of the grantor. Looking into the agreement for that purpose I find that full and adequate compensation had been made by defendant under an agreement between him and the bankrupt, made while the latter was amply solvent, and when he had a perfect right as against all the world to make the same, and hence the conveyance of the one hundred and seven acre tract ought to be sustained.

[Cited in Napier v. Server, Case No. 10,010.]

2. As to the personal property it was objected at the hearing that the assignee has a complete remedy at law, and therefore cannot recover for the same by bill in equity. This objection comes too late. It was not taken by demurrer nor by way of answer, but was first made at the hearing. A court of equity will not refuse to take jurisdiction of a cause merely on the ground that complainant has a complete remedy at law where, as in this case, the parties have submitted their rights to the jurisdiction of the court without objection, especially where proofs have been taken and a hearing upon the merits has been entered upon.

3. Decreed that defendant account to complainant for all personal property received by him from the bankrupt at any time within four months immediately preceding commencement of bankruptcy proceedings. Decree for plaintiffs for land not included in agreement, for payment for the personal property, and for costs, and dismissal of bill as to the Butterfield farm of one hundred and seven acres.

[This was a bill in equity by H. Post, assignee, against S. I. Corbin.]

LONGYEAR, District Judge. The bill was filed to recover certain real estate and personal property alleged to have been conveyed and transferred to defendant by the bankrupt within four months next before the filing of the petition against him for adjudication of bankruptcy, in fraud of the bankrupt act. The bill is based upon two alternative theories: First, that the transfers were without consideration, and were made with the intent to hinder, delay, and defraud the creditors of the bankrupt; or, second, if there was a consideration it was a previous indebtedness, and the transfers were made with a view to give the defendant a preference, he having reasonable cause to believe that the bankrupt was insolvent. The real estate consists of two parcels, one of one hundred and seven acres on section twenty-eight in the township of Armada, in the county of Macomb, known as the "Butterfield Farm," and the other of twenty acres on section fifteen in the same township. These parcels do not adjoin, but lie some two miles distant from each other. The answer admits the conveyance of the real estate, but denies the transfer of personal property as alleged in the bill—denies the intent to defraud, and knowledge or belief, and reasonable cause for belief, of the insolvency of the bankrupt. As to the Butterfield farm, the answer alleges that when the same was purchased by the bankrupt it was so purchased for the defendant, and was conveyed to him under and in pursuance of an agreement between them, at or about the time of the purchase, for the support of the three minor daughters of the bankrupt by the defendant, and the avails of the products of the farm over and above what should be necessary for the support of defendant's family, and such other payments as defendant could make, until such support of said minor children, avails of products and other payments should amount to a fair compensation for said farm, which agreement, it is alleged, had been fully performed by the defendant when said conveyance was made to him. And as to the twenty acres, it is alleged that the same was included in the deed of conveyance because it had been used in connection with and as a part of said farm.

The agreement and the performance of it by defendant are satisfactorily proven substantially as alleged in the answer; and, in fact, the theory of the bill, that the conveyance was without consideration, was abandoned by complainant at the hearing. It was contended, however, that the agreement not being in writing, and being vague and uncertain in some of its material provisions, such as the price to be paid and the time within which the agreement was to be performed, it was not such an agreement as a court of equity would have decreed the specific performance of, and that, therefore, what the bankrupt had received from defendant constituted an indebtedness merely, and that the conveyance must be held to have been in satisfaction of such indebtedness, thus bringing the case under the second theory of the bill. Actual possession under the agreement and performance of it clearly takes the case out of the statute requiring the agreement to be in writing. And as to its vagueness and uncertainty in the particulars specified, the agreement having been executed by the actual making of the

[1] [Reprinted by permission.]

conveyance, the court will now look into the agreement only for the purpose of ascertaining whether the consideration for the conveyance was such as a court of equity will sustain as against the creditors of the grantor. Looking into the agreement for that purpose I find that full and adequate compensation had been made by defendant under an agreement between him and the bankrupt, made while the latter was amply solvent, and when he had a perfect right as against all the world to make the same, and hence that the conveyance ought to be sustained. This, however, relates to the one hundred and seven acre tract only. The twenty acre tract stands upon entirely different grounds. It was not included in the original or any subsequent agreement. And as to its being in payment of any indebtedness of the bankrupt to the defendant, it is clear to my mind, from the proofs in the case, that the idea of debtor and creditor, as between these two, never existed. The son, the defendant here, was to have the Butterfield farm, and, in turn, was to support and maintain the three minor children, his sisters, have the support of himself and family out of the proceeds of the farm, and the bankrupt was to have the rest. Defendant may have done for and paid his father more than the land was actually worth in the encumbered condition in which the title was made over to him, but so long as that arrangement was allowed to continue and remain open between them, their transactions must be referred to it except in cases where it clearly appears that such was not the intent. No books of account were kept between them, and at the time of the conveyance no settlement was had, no computation of how much had been paid by defendant to his father, and no claim made of any balance due him; but it is evident from the whole transaction between them, down to and including the giving of the deed as detailed by the proofs, that it was a sort of lumping transaction, so to speak, and that the conveyance of the farm was all defendant ever expected from his father for past transactions, and that it was received by him in full satisfaction. But as between the defendant and his father's creditors, the one hundred and seven acre tract is all he had any right to expect or receive, and therefore the twenty acre tract must be held to belong to the assets of the bankrupt's estate.

As to the personal property it was objected at the hearing that the assignee had a complete remedy at law, and therefore cannot recover for the same by bill in equity. This objection comes too late. It was not taken by demurrer nor by way of answer, but was first made at the hearing. A court of equity will not refuse to take jurisdiction of a cause merely on the ground that complainant has a complete remedy at law where, as in this case, the parties have submitted their rights to the jurisdiction of the court without objection, especially where proofs have been taken and a hearing upon the merits has been entered upon. See 6 N. Y. 147; 4 Cow. 727; 11 Paige, 569; 4 Johns. Ch. 399; 2 Caines, Cas. 57; 1 Atk. 126. If, as has been before intimated, the relation of debtor and creditor did not exist between the defendant and his father, then there was no consideration for the transfer of any of the personal property to defendant, any further than as such transfers were accompanied by a then present consideration passing from defendant. But even allowing that the relation of debtor and creditor did exist between them, (which, however, I understood to be disclaimed at the hearing), and that such property was received by defendant on account, I think he is not entitled to hold the same as against his father's creditors, for the reason that he had reasonable cause to believe that his father was insolvent. His father's insolvency seems to have become quite notorious in that community, and defendant himself testifies that he had "heard stories" about his father's embarrassments, and one of the creditors testifies to a conversation with defendant about his debt, in which he told him he should sue if it was not paid.

Upon the whole, therefore, the defendant must be decreed to account to complainant for all personal property received by him from the bankrupt at any time within four months next previous to the filing of the petition for adjudication of bankruptcy. Let a decree be entered in favor of complainant for the twenty acres of land, for the payment of six hundred and five dollars and fifty cents, for the personal property, and for costs, and dismissing the bill as to the one hundred and seven acres of land known as the "Butterfield Farm."

POST v. HUGHES. See Case No. 8,609.

Case No. 11,300.

POST v. ROUSE.

[1 Wkly. Notes Cas. 39.]

Circuit Court, D. Missouri. Oct. 21, 1874.

COURTS—JURISDICTION OF UNITED STATES CIRCUIT COURT.

This was a suit by an assignee in bankruptcy for the district of Missouri against a citizen of Pennsylvania, alleging a preference. Plea, that the circuit court had no jurisdiction, the district court having exclusive jurisdiction, under the bankrupt act, except in the district where the assignee was appointed. Demurrer to plea.

Dickson & Platt, for plaintiff.
Mr. Hanna, for defendant.

THE COURT held that defendant must answer over, the circuit court having jurisdiction by reason of the citizenship of the parties, under the judiciary act of 1789 [1 Stat. 73].

Case No. 11,301.

POST et al. v. SARMIENTO.

[2 Wash. C. C. 198.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

RULE TO SHOW CAUSE OF ACTION—ANOTHER SUIT PENDING.

Where, on a rule to show their cause of action, the plaintiffs have produced a positive affidavit of debt, the defendant cannot give evidence, that a suit for the same cause of action has been instituted in another court.

Rule upon the plaintiff to show his cause of action. The plaintiff produced a positive affidavit of debt, due for goods taken and sold by the defendant. The defendant was proceeding to state, that a certain M'Connichie, the agent of the plaintiff, in respect to this claim, had issued a writ against the defendant, for the same cause of action, in the supreme court, or court of common pleas, of this state; when the court referring to the standing rules of the court, said, that the inquiry contemplated by the defendant, could not be gone into.

Dallas & Ingersoll, for defendant, cited the case of Conframp v. Bunel [Case No. 3,098], and 2 East, 454.

Mr. Tilghman, for plaintiff.

There was no affidavit at all in the case of Conframp v. Bunel; and, in the case from 2 East, it appeared that the action, depending in the other court, was the same as that in which the motion was made.

BY THE COURT. It is impossible to decide whether the action, said to be depending in the supreme court of this state, is for the same cause of action, and is at the suit of the plaintiff in this cause, without deciding a point, upon which probably the whole merits of the cause depend. The rule of the court is imperative, and ought to be adhered to. Rule discharged.

Case No. 11,302.

POST et al. v. TAYLOR COUNTY.

[2 Flip. 518.] [2]

Circuit Court, D. Kentucky. Nov. 21, 1879.

BONDS ISSUED BY COUNTY IN AID OF A RAILROAD — JURISDICTION — PRIVITY — COLLECTION OF TAXES—THE COURT WILL MAKE ALL SUCH ORDERS AS MAY BE NECESSARY TO ATTAIN THIS END —PRACTICE—OTHER PROPERTY HOLDERS—HOW MADE PARTIES — ANCILLARY PETITION — JUDGMENT AND OTHER PROCESS.

1. Bonds issued in aid of a railroad by a county court, authorized so to do by law, are binding obligations, and while there is no such privity between the purchasers of said bonds and the tax debtors as would authorize a suit at law, such a case comes within well-established equity jurisdiction.

2. If no one can be found able and willing to collect the taxes, when loaned by the county court to pay creditors who have obtained a decree on interest coupons, on bill filed this court will entertain jurisdiction.

3. In such case the court will direct the payment of taxes so assessed into the registry, to be applied in satisfaction of complainants' decree; and against each defendant debtor, who shall not so pay within the time specified in the order, an execution will issue.

4. Should the property of parties, made defendants, be not sufficient to pay the amount due complainants, on application therefor, a receiver will be appointed, authorized to collect taxes assessed for the purpose against other property holders, not parties to this cause. And should they not pay within a reasonable time, the receiver will be instructed to bring them before the court by ancillary petition.

5. In such case a decree will be entered against them for the amount so owing and for costs, and payment will be coerced by such other further appropriate decrees and process as may seem proper and necessary.

At law.

Henry C. Pindell, for complainants.
Barnett & Noble, for defendants.

BAXTER, Circuit Judge. It appears from the pleadings in the case that the defendant, Taylor county, issued its coupon bonds to aid in the construction of the Cumberland & Ohio Railroad. These bonds were put upon the market and sold. By the terms of the act under which they were issued the county court of that county was authorized and required, from time to time, to assess and collect taxes, to be applied in payment of the interest on said bonds as the same matured. But this legal duty thus imposed by law was not performed. The interest not having been paid, the complainants, who were the holders of some of said bonds, brought suit and recovered judgment therefor in this court. On this judgment execution was issued and duly returned nulla bona. The county owned no property on which a levy could be made. Thereupon, and upon proper application by complainants, writs of mandamus, nisi and peremptory, were issued, commanding the county court, charged with the duty, to assess taxes for the payment of complainants' judgment; and in obedience to the mandate of this court it made and reported said assessment. But the county officers, in answer to said mandate, averred "that, after sincere and diligent effort, it (the county court) was unable to find any qualified person who would accept the office of collector, give the bond required by law, and undertake to collect said tax."

The court then, as we understand from the statement of the facts made in argument, appointed a receiver, vested with authority and charged with the duty of collect-

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

[2] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

ing said tax. But soon after entering upon the execution of his office he was induced by threats of violence to resign his position.

Complainants thereupon filed this bill, to which Taylor county and several of the more prominent tax-debtors thereof were made defendants. Copy of the assessment, as made, is exhibited with, and made a part of the bill, showing the amount assessed against each property holder. Complainants' prayer is that the said several tax-debtors, assessed as aforesaid, be required, by appropriate orders and decrees, to be made by this court in this case, to pay the amounts so severally assessed against them, into court in discharge of their said judgment.

Defendants answer and fully admit the allegations and equity of the bill. This admission is followed by a very frank and manly avowal on the part of the tax-debtors brought before the court, that they are all able, ready and willing to pay the amounts so assessed against them, provided there is some competent person to whom the payments can be legally made. But they go on to suggest and rely upon quite a number of legal barriers, which as they are advised, prevent them from doing so. They insist:

First. That the assessment was not made at the time and in pursuance of the laws providing for the assessment of taxes by the county court.

Second. If the assessment was valid, there is no privity between them and complainants, and hence they deny that, "by reason or virtue of said assessment or levy, or both, they became indebted to said county in the sum so levied, or in any other sum," for complainants' use or benefit.

Third. They contend that by law none but a collector duly appointed, who shall execute bond, etc., is authorized to receive and execute receipts for such taxes; and,

Fourth. They say "that by and under the provisions of the charter of said railroad company," each and every tax-payer "is, upon the payment of such tax, a conditional stockholder of the capital stock of said company to the amount of the tax so paid; that before any such tax-payer is under any legal obligation under said charter to pay any such tax, the collector of such tax shall tender to him a receipt for the amount thereof, and upon such payment said tax-payer can legally demand, and is entitled to receive from said railroad company, on surrender of such receipt, certificates of stock in said company equal in amount to the tax paid for which a receipt is surrendered; and no tax-payer is under any legal obligation to pay such tax unless thereby he is, by the collection of said tax, armed with the means therefor of becoming a stockholder in said company; and that no collector attempted to be appointed by this court for such purpose could furnish the tax-payer with a receipt therefor, which would entitle him to demand and receive stock in said company."

These defenses are supplemented by repeated and very earnest denials of the power of this court to give a remedy in the premises. The avowed willingness of the defendants to pay is heartily commended. The justice and validity of complainants' demands are explicitly admitted. The bonds were issued in pursuance of law, at the request and for the benefit of the people of the county. The money realized from the sale of these bonds was applied to the construction of a great public enterprise from which they expect to derive pecuniary and other advantages. Of course they are, as they ought to be, ready and willing to pay, and are only restrained from paying because there is, as they are advised, no one legally competent to receive the taxes admitted to be due from them. Their case calls for commiseration. A breach of plighted public faith is a calamity to any community. While it does injustice to the creditor, it dishonors the delinquents. If persisted in it will —slowly it may be, but certainly—contaminate the public morals, and superinduce untold pecuniary and social evils. The willingness, therefore, of defendants to pay, is dictated as well by a sagacious regard for their own interest as by a love of justice and an honest desire to pay their creditors, and they will, I know, be gratified at the announcement that, in the opinion of this court, the legal difficulties, which they by their answer suggest as being in the way of a prompt payment of the taxes assessed against them, are more fanciful than real. The bonds from which the coupons were taken, constituting the foundation of the decree rendered by this court, are valid obligations; at least it has been so adjudicated, and it is now too late for inquiry into that question. The taxes sued for were levied in obedience to the mandate of this court, and this question is res adjudicata also. By the terms of the law under which they were issued it is the duty of the county court to levy and collect a tax from the property of the citizens of the county and apply the same to the payment of the interest, for which complainants have judgment. This was the contract. The pleadings show that the officers of the county sincerely and in good faith endeavored to discharge the duty thus enjoined upon them. But they have been unable to do so. No one competent will give bond and undertake the collection. It is rather an anomaly that, in a community "able, ready and willing" to pay taxes to meet its public obligations, no one can be found who is competent and willing, for a just compensation, to collect and apply the same. But such we see, from the record in this case, is the existing condition of things in Taylor county. They would if they could, but they cannot. This court undertook to lift them out of their embarrassment by the appointment of a receiver to do what the county court was, for the reasons stated, unable to do. But by threats of violence he was deterred from performing his duties. As a der-

nier ressort, complainants filed this bill, in which they brought some of the tax-debtors of the county personally before the court. The case made brings it within well-established equity jurisdiction. Equity regards the substance of things, and eschews the technicalities of the common law. There is no such privity between complainants and the defendant tax-debtors as would authorize a suit at law. No such privity is necessary to the maintenance of this suit. Under the law it is the legal duty of the county court to assess the taxes and apply the same in payment of the interest as it accrued on the county bonds. This legal duty imposed on that tribunal a trust for the benefit of the county creditors. But for the reasons stated it could not execute the trust.

Upon this admitted state of the case the complainants have a clear equity to come into this court and invoke its assistance to force the tax-debtors to pay the county, to the end that the county may pay complainants. Such is the theory upon which complainants' equity rests, and which gives jurisdiction to this court. Having on this ground obtained jurisdiction, the court is bound to do full justice, and will, in the exercise of its judicial authority, direct the payment of the taxes so assessed into the registry of the court, to be applied in satisfaction of complainants' decree. Parties thus paying will be acquitted and fully discharged from all further liability on that account. There is not the slightest danger that they, or any of them, will ever be called upon to repay the same; and payment thus made will insure to the payers the same interest in the capital stock of the railroad company, conferred on them by the charter thereof, as if made to one acting as county collector. Without pursuing the discussion further, we are of the opinion that the several defenses pleaded and relied on in the answer are untenable and immaterial. They are impertinent, and complainants' exception thereto will be sustained. A decree will be entered authorizing and requiring each tax-debtor to be made a defendant in this case, to pay to the clerk of this court, within ninety (90) days, the amount of tax assessed against him as shown by the copy of the assessment roll filed, and in the event he fails to do so an execution will issue for the same.

If it shall turn out, as it is manifest it will, that the amount due from the defendants is inadequate to pay complainants' decree, and complainants ask for it, another receiver will be appointed and authorized to collect the taxes assessed for the purpose against other property holders of the county, not parties to this cause. They will be allowed reasonable time in which to pay. If they shall not, within reasonable time, pay the sums severally assessed against them, the receiver will be instructed to bring them all before the court by an ancillary petition to be filed in this cause, when a decree will be rendered against each of them for the amount so owing by them, with costs, and collection will be coerced by such further appropriate decrees and process as may seem to the court proper and necessary.

This, we think, may be done by attachment for contempt, or by execution to the marshal for the collection of the same.

It may not be improper to say that this court feels bound, if necessary, to exhaust all its powers in the enforcement of its lawful decrees, and it will not hesitate to exert them.

Case No. 11,303.

The POSTBOY.

[10 N. Y. Leg. Obs. 65.]

District Court, S. D. New York. 1851.[1]

COLLISION—STEAM AND SAIL—CHANGE OF COURSE—PROOF AT VARIANCE WITH LIBEL.

1. Where a steamboat with a vessel in tow and a vessel under sail, with the wind free, were approaching from opposite directions, and each on a course which, if pursued, would carry them clear of each other, the steamboat was not liable for damages to the latter by a collision caused by an improper change in her course across the bow of the steamboat.

2. The steamboat exonerated herself from blame by using the means within her power to avoid a collision, when ascertaining that the sailing-vessel was crossing her course.

3. Proofs on the part of the libellant will not be allowed to contradict the allegation of the libel.

4. Facts tending to fix the relative position of vessels by those on board allowed more weight than the opinion of lookers-on, although the latter outnumbered the former.

In admiralty.

Barnard & Parsons, for libellant.

W. J. Haskett and W. Q. Morton, for the Postboy.

BETTS, District Judge. The sloop Joseph C. Griggs and steamboat Postboy, at about midnight on the 14th of October last, came in collision a few rods off pier No. 2 or 3, on the North river side, in this harbor. They were running in opposite directions. The sloop, on a flood-tide, with a very light wind from the S. W., sufficient to work her, was seeking a berth at pier No. 4, and the steamer, with a barque in tow, was running for the East river, and struck the shrouds of the sloop on the larboard bow, near the quarter-deck, doing her considerable damage, and also causing injury by leakage to a part of her cargo of wheat. The two vessels met twelve or twenty rods west of the piers. The libel charges that the sloop, from Castle Garden up, had held a straight course parallel with the docks inside the steamer, which was coming down further west from the docks, and was hailed to stop or keep off, instead of which she bore in towards the pier,

[1] [Affirmed by circuit court; case unreported.]

and ran upon the larboard side of the sloop. The answer denies this statement, and avers that the steamer kept a course directly down the river parallel with the docks, the sloop, when first seen, being one quarter of a mile off, and far enough to the west of the steamer to leave ample room for the latter to pass safely between her and the docks; that the sloop was apparently going up the river, and, had she continued her course, would have run entirely clear of the steamer, but that, when within 100 or 150 feet, she suddenly changed her course towards the docks and across the bow of the steamer, and though every effort was then made, the sloop was too near to enable the steamer to avoid the collision. So far as the opinions and judgments of witnesses observing the transaction may be entitled to guide the decision of the court, there is a preponderance of numbers who throw the blame wholly on the steamboat. In so far, however, as facts are given, fixing the relative positions of the vessels and their movements, they conduce most strongly to the support of the answer and the contradiction of the libel.

The case made by the libel is that the sloop was running a direct course north, without deviation, in front of the docks, inside of the steamer, and that the latter sheered and pressed in upon her from the west, attempting to go between her and the docks, and in that manner came upon her larboard bow. Witnesses Wesley and McGinnis, who saw the collision from their small boat, place the two vessels approaching substantially on the same line, as do also the Littlefields, in effect, for they considered the sloop to be running directly north; and Dodge, the man on board the sloop, in his direct examination, concurs in substance in that view, for he says, when near pier No. 1, he first saw the steamer, and that the sloop was then heading northward and eastward, and that the steamer was coming right for them, the sloop being eight or ten rods from the pier. On his cross-examination he says, when he first saw the steamer she was heading along shore, then eight or ten rods off, and straight for the sloop, which was heading towards the docks. The stern of the sloop was to the westward of the steamer. When struck, she was steering so that her bowsprit and mast were east of the barque in tow, and her stern west, when the latter came upon her. The three Littlefields did not observe the steamer until at the moment of the collision. Her course was up and down the river, but they then noticed her stern was towards the dock and her head bearing out into the river; and they, and all the witnesses except Dodge, estimate the distance she was running off the docks to have been about twenty rods. The Littlefields state the collision to have been on the starboard bow of the sloop. This is against the representation of the libel and the evidence of the witnesses Dodge, Clarkson, Sleigh and Baldwin. It must accordingly be taken as a fact in the cause that the sloop received her injury on her larboard side.

Proceeding upon that fact, it must be established, in order to fix the fault on the steamer, that she bore in shore upon the sloop, or did not use the means at command to avoid her, when it was ascertained she was coming round into her berth. The entire evidence is that the steamer was not further off from the docks than the sloop when the two were first seen or approaching, and there is no evidence contradicting the testimony of the captain of the barque and of the captain and pilot of the steamer that the sloop was then on a course so far outside the steamer as to leave a safe passage to the latter between her and the docks. The evidence of these witnesses that the sloop changed her course suddenly across the bows of the steamer is confirmed by that of the witness Dodge giving her position when she received the blow. It is proved that the engine of the steamer was stopped the moment it was observed the sloop stood across her, and reversed, and her helm "put a-port" to change her course outside the sloop; but that the two vessels were in such near proximity that those exertions were fruitless. I am bound to hold upon the facts proved that the libel is not supported, and no want of precaution or blamable conduct is established against the steamer, and accordingly the decree must be for the dismissal of the libel against her, with costs.

NOTE. The above case having been appealed to the circuit court of the United States, the decree of the district court was affirmed, with costs, by the Hon. Samuel Nelson, Circuit Judge, at the October term, 1851. [Case unreported.]

Case No. 11,304.

POSTLEY et al. v. HIGGENS.

[2 McLean, 493.] [1]

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

BAIL BOND—MOTION TO QUASH—AFFIDAVIT—SUFFICIENCY—FACT SWORN TO—PRESUMPTION.

1. A motion to quash the bail bond, under the statute of Illinois, may be made at any time during the return term, as well after as before judgment.

2. An affidavit which states positively, as to the indebtment, without detailing the source of the knowledge, is sufficient.

3. A presumption can not be drawn against the existence of a fact positively sworn to. The taking of the affidavit to hold to bail is an ex parte proceeding.

[This was a proceeding by Postley & Postley against Ebenezer Higgens.]

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

Mr. Beaumont, for plaintiffs.
Mr. Logan, for defendant.

McLEAN, Circuit Justice. In this case a judgment by default having been entered, a motion is made by Mr. Logan to quash the bail bond taken by the marshal, on the ground of the insufficiency of the affidavit on which bail was required. It is objected that the motion, not having been made until after judgment, comes too late. The statute provides that the motion shall be made at the return term. This is the return term, and no reason is perceived why the motion should not be made at any time during the term, as well after as before the rendition of judgment. The following is the affidavit:

"Personally, before the undersigned, &c., A. C. Beaumont, attorney for plaintiffs, who, being duly sworn, states, that Ebenezer Higgens is justly indebted to the said plaintiffs, in the sum of five hundred thirty eight dollars and eighty-eight cents, upon a certain bond made 31st January, 1830, by the said Higgens, in the penal sum of one thousand dollars, &c." The objection to this affidavit is, that the affiant does not state how he knows of the indebtment. And the case of Wright v. Cogswell [Case No. 18,074] is referred to as sustaining the objection. In that case the affidavit stated, "that he was informed, and verily believes, the defendant was justly indebted, &c." And this, the court say, is no more than any one could say from the legal import of the obligation. That the statute required something more than the belief of the affiant.

Now, the affidavit under consideration states the indebtment in positive terms. The affiant says the defendant is justly indebted to the plaintiffs in the sum specified. Is it necessary to state how he came by this knowledge? It would seem to me not. He swears to the fact, and he could not do so without a personal knowledge of the fact. And can it be presumed, against his statement, that he has not a knowledge of the fact. This would be in violation of all known rules of construction, and especially in giving a construction to an affidavit. This was an ex parte proceeding. No notice was necessary, and of course there could be no cross-examination. And what the witness has sworn to must be taken as true, and it seems to me that the affidavit is as full and as positive as the statute requires. I am, therefore, in favor of overruling the motion. The district judge differed in his construction of the affidavit under the statute, but the court being divided the motion failed.

Case No. 11,305.

POSTMASTER GENERAL v. APPLEBACK et al.

[The case reported in 16 Haz. Reg. Pa. 18, under above title is the same as Case No. 11,312.]

Case No. 11,306.

POSTMASTER GENERAL v. CROSS et al.

[4 Wash. C. C. 326.] [1]

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

JURISDICTION—SUIT ON BOND—AMOUNT OF PENALTY AS COMPARED WITH AMOUNT CLAIMED — SPECIAL FINDING BY JURY — ARREST OF JUDGMENT.

1. Debt on a post office bond against the sureties, for $1,000, the penalty, and no breaches laid. The jury found a special verdict. On error to the circuit court it was decided that though, from the papers in the record, it appeared that less than fifty dollars was due, yet the penalty was the debt claimed, and therefore there was no objection to the jurisdiction.

[Cited in brief in Healy v. Prevost, Case No. 6,297. Cited in Cabot v. McMaster, 61 Fed. 132.]

2. Pleas, non est factum and payment. The jury found against the defendant on the first plea, and a number of facts which were all inapplicable to the second plea. Judgment was arrested for want of breaches being assigned; and a venire facias was awarded for this defect in the verdict.

This was a writ of error from the district court, in an action of debt by the plaintiff in error, against the defendants [Cross and Wonder], as sureties of ——, a deputy postmaster, on his official bond, for $1000, penalty. Plea, non est factum and payment. Special verdict finding it to be the deed of the defendants, and a number of facts tending to tax the plaintiff with neglect in not suing the bond whilst the principal was able to pay, and omission to give the sureties notice of the defaults of the principal.

Chauncey, for the defendants, moved to dismiss the writ of error, upon the ground of want of jurisdiction in this court to entertain the cause, the subject in dispute appearing to be under $50. He cited U. S. v. M'Dowell, 4 Cranch [8 U. S.] 316.

The district attorney produced the account as settled by the postmaster general, by which it appeared that the sum claimed, as being really due by the principal in the official bond, was upwards of $400, and he relied upon the twenty-ninth, thirtieth, and thirty-fifth sections of the post office laws.

WASHINGTON, Circuit Justice. The matter in dispute, in this case, appears by the record, to be the penalty of the bond, the declaration containing no breach, showing that a smaller sum was claimed, as was the case of the United States v. M'Dowell [supra]. If the verdict had been for a smaller sum than $50, that would have been the matter in dispute, and this court could not have entertained the writ of error. The judgment must be reversed, and a venire de novo awarded, there being no breaches assigned in the dec-

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

laration or replication; and also because the verdict does not respond to the plea or payment, but states matters irrelevant to that issue; but which, I presume, were subjects of discussion at the trial. If these be the grounds of defence, they must be presented to the court by proper pleadings.

Case No. 11,307.

POSTMASTER GENERAL v. FENNELL et al.

[1 McLean, 217.] [1]

Circuit Court, D. Kentucky. May Term, 1834.

POST OFFICE BOND — SUIT AGAINST SURETIES — LIMITATIONS—WHEN STATUTE BEGINS TO RUN.

1. Suit must be brought against the sureties of a post master, within two years from the time the post master made default, or the statute bars the action against them.

[Cited in Roddy v. United States, Case No. 11,990.]

2. The defalcation is to be counted from the time the law requires the moneys to be paid over, viz. at the end of every three months; and not from the time the post master shall fail to pay the draft of the department.

[This was a writ of error from the district court, in an action of debt by the plaintiff against Nimrod F. Fennell and others, as sureties for Richard J. Jackson.]

The District Attorney, for plaintiff.

Mr. Crittenden, for defendants.

OPINION OF THE COURT. This action was commenced in the district court to recover a balance due by Richard J. Jackson, late post master at Georgetown, Kentucky, for whose faithful performance of his duties the defendants Fennell and Warren were sureties. The sureties pleaded the statute of limitations, which requires suits to be brought against the sureties of a post master within two years from the time the defalcation occurs. Under the instructions of the district court the plea was sustained, and a judgment was rendered for the defendants. To reverse this judgment the writ of error in this court is prosecuted. On the trial it appeared that Jackson had been removed from office on the last of August, 1830. The last items, charged in the account were for the receipts of postage for the quarter ending on the last of June, 1830, and the two months of the succeeding quarter, up to the time of removal.

On the part of the plaintiff, instructions to Jackson the post master, were given in evidence, in which he was directed to retain the money in his hands until drawn for by the department. And the draft for the last item was drawn within less than two years after the defalcation; and the suit was commenced in a short time afterwards. So that two years had not elapsed from the refusal of the post master to pay the last order, before suit. And it is contended that the last item on which default was made, is to fix the time at which the statute begins to run. The statute was adopted for the benefit of securities and to excite the utmost degree of vigilance in the department. No very strong reason is perceived why, on general principles, all statutes of limitations should not run against the government in case of securities. The rule, it is true, seems to be well established that the government cannot be guilty of laches in this respect. For it is said, if the government by the laspe of time, should be barred, of just claims, great injury would result to the public, through the negligence or inattention of public officers. This may be admitted, and in answer it may be asked whether in every other respect the public does not suffer, and is not continually liable to suffer injury, from the inattention of officers. And why should not the statute of limitations, which is founded in sound policy, and is productive of salutary effects in society, at least where sureties are concerned, operate against the government. In almost all offices involving heavy pecuniary responsibility, the incumbents are required to give security; and these officers are required by law to pay over moneys as they shall come into their hands. Now if they shall fail to do this, and the proper officers shall fail to enforce the law and coerce the payment by suit, or remove the defaulter, the sureties on every principle of sound policy should be exonerated. They rely upon the faithful execution of his duties by the person for whom they have become responsible; and they have a right to rely upon the vigilance and faithfulness of the superior officers whose duty it is to see that the law is faithfully executed. Many cases of extreme hardship to sureties have occurred from the negligence of superior officers and the unfaithfulness of others. Bonds have been enforced against securities, after the lapse of ten or twenty years, when the principal at the time of the defalcation was responsible, but afterwards became insolvent.

Congress in the post office law, have, in opposition to the general policy on this subject provided, that the sureties of a post master shall not be held liable, unless prosecuted within two years from the time the defalcation took place. And the enquiry in the case under consideration is, whether the defalcation occurred at the time the last draft was presented to the post master and not paid or at some other time. The act provides that if any post master or other person authorized to receive the postage of letters and packets shall neglect or refuse to render his accounts, and pay over to the post master general the balance by him due, at the end of every three months, it shall be the duty of the post master general to cause a suit to be commenced against the person or persons so neglecting

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

or refusing. And it is further provided that if a post master shall fail for one month to make his return, he shall forfeit double the value of the postages, &c. Now this provision that the post master shall make his return and pay over the moneys received for postages in his hands at the end of every three months, is imperative, and cannot be dispensed with by any instructions of the post master general. The law requires the post master to pay over the moneys at the end of every three months—the post master general therefore cannot instruct him that he need not pay the money at the end of three months, but at some other time when a draft from the department shall be presented to him. He may, with propriety, instruct the post master not to deposite the funds in his hands, but hold them to meet the drafts of the department; but these drafts must be drawn when the payment, by the law, is required to be made. And if not so drawn the defalcation which occurs must be counted, under the statute, from the time the law requires the payment to be made, and not from the time the post master failed to pay the draft of the department. More than two years elapsed from the time the post master was removed from office until this suit was commenced; so that the statute bars the action, as against the sureties, if it began to run, at the time the law required the payment to be made. No doubt is entertained on this question, and the judgment of the district court, is, therefore, affirmed.

Case No. 11,308.

POSTMASTER GENERAL v. FURBER et al.

SAME v. LATHROP et al.

[4 Mason, 333.] [1]

Circuit Court, D. Maine. May Term, 1827.

POST OFFICE ACCOUNTS—HOW CREDITS ARE TO BE APPLIED—OLDEST DEBITS—RUNNING ACCOUNTS.

Where there are items of debt and credit, in a running account between the postmaster general and the deputy postmasters, in the absence of any specific appropriation by either party, the credits are to be applied to the discharge of the debits antecedently due, in the order of the account.

[Followed in U. S. v. Wardwell, Case No. 16,640. Cited in Boody v. U. S., Id. 1,636; U. S. v. Bradbury, Id. 14,635; Schuelenburg v. Martin, 2 Fed. 750.]

[Cited in Chapman v. Com., 25 Grat. 744, 746; Conduitt v. Ryan, 3 Ind. App. 9, 29 N. E. 160; Crompton v. Pratt, 105 Mass. 256; State v. Sooy, 39 N. J. Law, 549. Cited in brief in Wilson v. Burfoot, 2 Grat. 144.]

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

These were actions of debt, brought officially by the postmaster general upon bonds given for the faithful performance of his duties, by one Benjamin Whittier, late postmaster at Belfast, Maine, who is since deceased. The bonds were in the usual form, with condition, that, if Whittier "shall well and truly execute the duties of his said office, and faithfully, once in three months, and oftener, if thereto required, render accounts of his receipts and expenditures, as postmaster, to the general postoffice, in the manner and form prescribed by the postmaster general in his several instructions to postmasters, and shall pay all moneys that shall come to his hands for the postages of whatever is by law chargeable with postage, to the postmaster general of the United States for the time being, deducting only the commission and allowances made by law for his care, trouble, and charges, in managing the said office, and shall also faithfully do and perform, as agent for the general post-office, all such acts and things as may be required of him by the postmaster general, and moreover shall faithfully account with said postmaster general for all moneys, bills, bonds, notes, receipts, and other vouchers, which he, as agent as aforesaid, shall receive for the use and benefit of said general post-office, then the above obligation shall be void and of no effect." The defendants [William Furber and another and Ansel Lathrop and another] moved by counsel to dismiss the suits for want of jurisdiction, and the district court sustained the motion; and the causes were, upon this dismissal, brought by writ of error to this court at the last term, and now remained for argument.

Mr. Shepley, for the United States.
Orr & Greenleaf, for defendants.

STORY, Circuit Justice. The question, as to the jurisdiction of the court, has been disposed of by the decision of the supreme court, at the last January term, in the case of Postmaster General v. Earley, 12 Wheat. [25 U. S.] 136. That case was stronger than the present, for it affirmed the jurisdiction of the circuit court, and the language conferring jurisdiction on the district court by the act of 1815, c. 252 [3 Stat. 244, c. 101], is far more direct and cogent. The words of the act are, "that the district court of the United States shall have cognizance concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority of an act of congress, shall sue, although the debt, claim, or other matters in dispute, shall not amount to one hundred dollars." The court decided, that the postmaster general had a right, under the acts of congress, to take bonds, like the present, and to sue thereon. So that the point, intended to be raised at the argument here, has been definitively disposed of. The judgment must therefore be reversed, and the cause tried at the bar of this court.

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

Afterwards it appeared, that the first bond was given by Whittier, and by Furber and another as his sureties, in May, 1813, in the penal sum of $500. In August, 1818, upon the requisition of the postmaster general, an additional bond was given by Whittier, with Ansel Lathrop and another as sureties, in the penal sum of $1,000, with a like condition. At the time when the second bond was given there was a balance due to the general post-office for postages received, and the sum now due for postages since received, exceeded that balance by $209.98. In the intervening time sundry sums had been paid to the general post-office on account, which, if applied for the purpose, would extinguish the balance due at the time of giving the second bond. The real contest, therefore, was between the sureties to the first and second bonds; and the only question made by them and presented for the consideration of the court was, whether the payments so made generally on account, after the giving of the second bond, should be applied to extinguish the prior balance, or were to be applied in discharge of the balance of postages received since the second bond was given.

STORY, Circuit Justice. The sums paid by the principal, since the second bond was given, having been paid upon account generally, are to be applied to extinguish the balance antecedently due. Such I understand to be the general rule, where there is a running account, composed of successive items of debt and credit on each side. In such case the payments are to be applied to extinguish antecedent items on the debit side, there being no specific appropriation by either party. It is the first item on the debit side of the account, that is discharged or reduced by the first item on the credit side. This doctrine was very deliberately settled by the master of the rolls in Clayton's Case, 1 Mer. 604, etc.; and it appears to me entirely consonant to equity and good sense, and the fair presumptions of intention as to appropriation, deducible from the nature of such transactions. The case of U. S. v. January, 7 Cranch [11 U. S.] 572, does not, according to my apprehension of it, inculcate a different doctrine. It is indeed somewhat difficult, from the facts of the case, as reported, to give a very definite interpretation of the opinion of the court. I confess myself never to have supposed, that it meant to go further than to reverse the erroneous opinions of the court below, upon the points ruled by it. The case of Manning v. Westerne, 2 Vern. 606, as explained in Mr. Raithby's note, appears to me to be in entire consonance with my own. It appears to me, that if, in the absence of any other distinct appropriation, the rule be, as I suppose it to be, there can be no difference, whether the case respects a principal or a surety. The rule supposes, that payments generally made are to be applied to extinguish or reduce antecedent debits, according to the order of time, and when extinguished or reduced as to the principal, they are necessarily so as to all other persons. The case of Perris v. Roberts, 1 Vern. 34, 1 Eq. Cas. Abr. 147, 2 Ch. Cas. 83, is distinguishable. It turned upon the point of a presumed application of a payment, made generally to both items of an adjusted account, and has no bearing on payments made generally on running account.

POSTMASTER GENERAL v. LATHROP. See Case No. 11,308.

POSTMASTER GENERAL (LOCKE v.). See Case No. 8,441.

Case No. 11,309.

POSTMASTER GENERAL v. MUNGER et al.

[2 Paine, 189.] [1]

Circuit Court, S. D. New York.[2]

POSTMASTER'S BOND — SECOND BOND WITH NEW SURETIES — JOINT LIABILITY OF SURETIES — EFFECT OF ACT INCREASING RATES OF POSTAGE.

1. The defendant gave a bond as surety for a postmaster, conditioned for the faithful discharge of his duties, and that he should pay over all moneys which should come to his hands for postages to the postmaster general. Afterwards, the postmaster continuing in office, another bond, with different sureties, was taken with the same condition. At the time of the taking of the second bond, a balance was due from the postmaster for postages; but payments were subsequently made by him, and credited in his general account, sufficient to extinguish it. In an action against the sureties on the first bond for postages not paid over, it was held that their liability did not cease upon the giving of the second bond for defaults thereafter incurred. That the second bond was not a substitute for or extinguishment of the first, but additional security; and that equity would consider the two sets of sureties as jointly responsible for defaults occurring after the giving of the second bond.

2. Acts of congress had been passed subsequently to the giving of the bond increasing the rates of postage, and, consequently, the responsibility of the sureties. But it was held, that as the undertaking of the sureties was general that all postages should be paid over, and referred to no particular act explaining or limiting the rate of postage, and was not taken under any law defining its extent and operation, the sureties were not discharged. It would have been otherwise had the acts of congress enlarged the powers of the postmaster, or superadded any new duties whereby he was made the receiver of other moneys than for postages.

[Cited in U. S. v. Gaussen, Case No. 15,192; U. S. v. M'Cartney, 1 Fed. 107; Chadwick v. U. S. 3 Fed. 756.]

[Error to the district court of the United States for the Southern district of New York.]

The action in the district court was founded on a bond bearing date the 12th of February, 1812, in the penalty of $500, conditioned for the faithful discharge of the duties of

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Date not given. 2 Paine includes cases from 1827 to 1840.]

postmaster by David Nott, and to pay over to the postmaster-general all moneys that should come to his hands for postages, deducting his commissions and such other allowances as by law he was entitled to receive. The breach assigned and relied upon at the trial was, that Nott had neglected and refused to pay over large sums of money which he had received as postmaster; and upon the trial it was shown, that upon the settlement of his accounts, a balance exceeding the penalty of the bond was found due from him.

The principal point in question upon the trial was, as to the effect and operation of a subsequent bond given by Nott, with other sureties, upon the liability of the sureties in the bond now in question.[3] This second bond bears date the 25th of December, 1818, and is in the penalty of $1,500, with a condition in all respects like the former. Nott continued in office until December, 1820. When the second bond was given, there was a balance of about $772 due from Nott; but by subsequent payments made by him and credited on his general account, if applied, as the defendants contend they ought to be, to this balance, there is no breach of the condition of the bond shown, provided the responsibility of the defendants ceased with the giving of the new bond; and whether it did or not, is the only real question now to be considered.

Upon the trial, the judge charged the jury: "That the taking by the postmaster-general of the second bond, was, under the circum-

[3] The third obligor's taking a bond of indemnity and a mortgage from the first signers of the bond, has no effect on his liability. Rutledge v. Greenwood, 2 Desaus. Eq. 389. The circumstance of one obligor in a bond making payment, and being resorted to by the creditor, raised a strong presumption that he was a principal in the bond; while the circumstance of another obligor not making payments, and not being called upon for them, raises a presumption that he was only a surety. Doughty v. Bacot, 2 Desaus. Eq. 546. A. is indebted to D., F. & Co. by bond. A. dies, and at the sale of his estate by his executors, F., the acting partner of D., F. & Co., buys a slave. The amount of the purchase for the slave was held a good discount against the bond. Rose v. Murchie, 2 Call. 409. Where a bond given to one man is for the benefit of another, without being assigned to him, although the obligor has notice of the fact, he is not bound to pay any other than the obligee, unless he shall be indemnified for so doing; and payments made to the obligee are good. Morton's Adm'r. v. Fox, 4 Bibb, 392. A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is, by operation of law, a release of the other partner, and an extenuation of the simple contract debt at law and in equity. Id. Where N. sells out a newspaper establishment to W. and T., and by bond and covenant stipulates not to set up another paper within a certain time and distance, and N. afterwards buys T.'s moiety, and becomes joint proprietor with W., the remedy at law against N. upon the bond and covenant is gone. Noah v. Webb, 1 Edw. Ch. 604. General indulgence given by the creditor to the first signer in the bond will not release the other obligors, even if they were mere sureties. Rutledge v. Greenwood, 2 Desaus. Eq. 389. Indeed, there must be a new agreement varying the terms of the contract, and extending the time of payment to work the effect of releasing the surety. A demand of the surety to sue the principal shall not release the surety if the creditor offers to sue all the obligors, and the surety declines that. Id. A bond given by trustees to execute a marriage settlement was held to be avoided by a defeasance made at the same time by the trustees, the wife being ignorant of it, though it appeared that the inducement to the husband's executing the bond after marriage, was to avoid the confiscation laws. Wilson v. Wilson, 1 Desaus. Eq. 219. A bill was filed to set up a bond and mortgage alleged to have been lost by the obligee in his lifetime. Defendant admitted their execution, but insisted they were not given for a valuable consideration, but to cover his property from his creditors, of which the obligee had given him an acknowledgment which he had lost. The weight of evidence was in support of this, and also of the obligee's declarations to the same effect. The court applied the maxim, "melior est conditio possidentis," and would set up the bond and mortgage. Lequeux v. Oliver, 3 Desaus. Eq. 535. If a bond is given without any consideration, but to be used as an article of traffic, to raise money, the bona fide purchaser thereof, though at a large discount, without notice of the purpose for which it was executed, is entitled to recover the full amount. Hansbrough v. Baylor, 2 Munf. 36. A bond securing a provision for a woman who had been seduced by the obligor, given after cohabitation determined, is good, although the obligor was married when the connection commenced. Barb. Dig. [Ky.] 282. A bond may be sold for much less than its nominal amount, and such sale will be enforced in equity as well as at law, if no fraud or usury appear in the transaction. Kenner v. Hord, 2 Hen. & M. 14; Hansbrough v. Baylor, 2 Munf. 36. If the vendee of land discover a paramount title, and, without conviction or suit, obtain the bond of his vendor for an agreed sum as an indemnity for the anticipated loss, the consideration is sufficient to uphold the bond. Butler v. Triplett, 1 Dana, 154. The penalty of a bond conditioned for the payment of money, is to secure payment of the whole of the condition; and any part of it remaining unpaid is a forfeiture of the penalty. Therefore, the obligee may recover the balance of the condition with interest, although that sum, when added to payments previously made, would exceed the penalty. Smith v. Macon, 1 Hill [S. C.] 339. Upon a money bond given by a principal debtor, the obligor is both legally and equitably liable for the whole amount of the principal and interest secured by the condition of the bond, although such amount exceeds the penalty of the bond. Mower v. Kip, 6 Paige, 88. If a husband and wife enter into a bond (not stipulating to pay out of the wife's separate estate) for the payment of the wife's debt, while she has a separate estate by antenuptial agreement, chancery will subject such separate estate to the payment of the bond. Forrest v. Robinson, 4 Port. [Ala.] 44. If a claimant give bond for the trial of the right to property levied on, and the issue is decided against him, he has a right to surrender the property in discharge of his bond; and if, during the pendency of such issue, the property be taken out of his hands by an older execution, this operates as a discharge of his bond, and chancery will enjoin the plaintiffs in the junior execution, from enforcing their judgment at law, obtained against the claimant on the trial of the right of property. Ferriday v. Selcer, Freem. Ch. [Miss.] 208. Where an ordinary appointed a guardian of an infant, and took a guardianship bond, with two sureties, and P., one of the sureties, afterwards applied to be released, and the ordinary, at the instance of P., and the guardian, but without the knowledge or consent of the other surety, ran his pen through P.'s signature to the bond, and permitted a third person, as P.'s substitute, to sign and seal it; held, that neither P. nor his co-surety was discharged in

stances above stated, a waiver in law of all right to proceed on the first bond for postages which accrued and were received by said Nott subsequent to the date of the second bond. That the sureties in the first bond ceased to be liable, from that date, for any defalcation or neglect of duty on the part of Nott after that date." To this opinion of the court, a bill of exceptions was duly taken, and the cause is brought here by writ of error.

Upon the argument of this writ of error, the discussion on the part of the defendants was directed principally to an examination of the true import of the direction given by the court to the jury: whether the opinion of the judge was that the legal effect and operation of the second bond was, per se, a discharge of the sureties in the first bond from all responsibility, for defaults of the postmaster, incurred after the giving of the second bond; or whether the particular circumstances in evidence in this case did not show that the postmaster-general had, in point of fact, waived all claim upon the sureties in the first bond for such default. The latter is the construction of the charge contended for on the part of the defendants; and the correctness of the former, although not expressly abandoned, was not much insisted upon.

THOMPSON, Circuit Justice. I cannot concur with the defendants' counsel in his

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equity, from his liability to the infant, and that P.'s substitute was not liable. Hill v. Calvert, 1 Rich. Eq. 56. A mere nominal obligee has no authority, as obligee, to destroy the interests of the true owner of the bond. Id. If a bond be lost, whether the acceptance of a negotiable instrument under seal from the principal obligor, expressly in payment of it, be a satisfaction in law or not, the obligee cannot recover in equity on the lost bond against the principal obligor or his surety, contrary to his agreement. Smitherman v. Kidd, 1 Ired. Eq. 86. If a vendor receive, in payment for the sale of land, the bond of a third person, made payable to himself, which is afterwards altered by his assent, so as to destroy it at law, he cannot have relief in equity against the obligor, although he was ignorant of the legal effect of altering the bond. Nor can he, or his assignee, who purchased the bond with full knowledge of the legal objections to it, have any relief in equity against the vendee who gave it payment, though the latter made the alteration in the bond and represented it to be good. Ryan v. Parker, 1 Ired. Eq. 89. The liability of the obligors in a bond of indemnity, arises exclusively out of the contract set forth in the bond, and its extent is thereby determined. Where a bond, therefore, was conditioned to indemnify J. M. B., his heirs, &c., "from all loss and injury, damages, costs and charges that shall, or may at any time hereafter occur to him, or be incurred by him, his heirs, &c.," by reason of his liability on certain promissory notes, it was holden by the court, that he was not entitled to any remedy, either at law or in equity, until the contingency had happened on which his right of action was to accrue, until, according to the terms of the bond, he had sustained some injury, incurred some loss, or been damnified by the payment of costs and charges, on account of the obligor's failure to discharge the debts specified. Hoy v. Hansborough, Freem. Ch. [Miss.] 533. A covenant to indemnify against a debt is not necessarily a covenant to pay it. The obligors may take up and cancel the original evidence of debt by which the obligee is bound, and substitute new liabilities, or may interpose some legal defence to the suit of the creditor, and defeat a recovery. In either of these cases the condition of the bond would be fully complied with. Id. To recover on a mere bond of indemnity, actual damage must be shown. If the indemnity be against the payment of money, actual payment must, in general, be proved; mere legal liability to pay is not sufficient. The rule would be different if the covenant were against a liability to pay. Id. Where the purchase of land is the alleged consideration of several bonds, the contract is so entire that if the consideration be shown to be insufficient by any one defendant, such defence will enure to the benefit of all the others, even as against whom the bill might otherwise have been taken pro confesso. Walsh v. Smyth, 3 Bland, 16. But where there is a ground of relief available, by all the plaintiff's obligors, any of them may waive the benefit of it without affecting the others. Id. 25. Where the heir being bound by bond in respect of assets descended, pays the debt, he may be reimbursed out of the personal estate. Tessier v. Wyse, 3 Bland, 41. A bond creditor, the heir being bound, may at his election sue either the heir or executor at law, even although there may be a sufficiency of personalty. Id. 40. On a sale under a decree, the bonds taken for the purchase-money may be assigned, in satisfaction to those entitled to the proceeds of the sale. Kilty v. Quynn, 3 Bland, 213, note. Where a man by writing, under seal, binds himself and his heirs for the payment of money, his real estate, in the hands of his heirs, is liable at common law to be taken in execution. Coombs v. Jordan, 3 Bland, 301. If the consideration of a bond be against law, the obligor may make that defence at law, and can have no claim on that account for the interposition of a court of equity. Moore v. Anderson, 1 Ired. Eq. 411. The time specified for the payment of a bond may be enlarged by parol. Vanhouten v. McCarty, 4 N. J. Eq. 141. If a bond be executed pursuant to the direction of a feme covert, by her trustee, in his own name, her separate estate may be charged with the money due on the bond. Leaycraft v. Hedden, Id. 512. And if the trust be surrendered, and her separate estate held with her general property, so that no means of distinguishing it is afforded to the court, a general decree will be made against her for the payment of the money due on the bond. Id. Bonds taken by a trustee under a decree, may be ordered to be assigned to those who are entitled to so much of the proceeds. Ex parte Boone, 2 Bland, 321, note; McMullin v. Burris, Id. 357, note. A bond taken by a creditor of an heir, will not operate as a relinquishment of such creditor's preference as against the estate descended. Hindman v. Clayton, 2 Bland, 337, note. An appeal bond, on the decree being affirmed, becomes thereby an additional security for the debt. Andrews v. Scotton, 2 Bland, 669. The surety on a forthcoming bond is not liable where the property levied on cannot be taken in execution. Long v. U. S. Bank, Freem. Ch. [Miss.] 375. The obligation of the surety is not that he will pay the debt, but that the property taken in execution shall be forthcoming. Id. The obligor of a bond by asking and procuring indulgence, payment of interest and other circumstances, held to have waived his equity, as against the assignee, to be relieved from the payment of the bond. Van Lew v. Parr, 2 Rich. Eq. 321. Where the condition of a penal bond has been submitted to a jury, under the act of 1792 [1 Stat. 275], the determination is final, and concludes the jurisdiction of the court of equity to relieve against the penalty. Henderson v. Mitchell, Bailey, Eq. 113.

construction of the import of the judge's charge, but consider it as expressing an opinion that, as matter of law, the liability of the sureties in the first bond ceased upon the giving of the second bond for all defaults thereafter incurred. If the circumstances in evidence were such as to warrant the conclusion, as matter of fact, that there was a waiver of the continued responsibility of the first sureties, it was for the jury, and not for the court, to weigh these circumstances, and draw conclusions from them; and I cannot but think the manner in which the case would have been submitted to the jury would have been very different, if the question had been considered by the court as a question of fact. That it was not so considered by the defendants' counsel, on the trial of the cause, is evident from the manner in which the bill of exceptions states the question to have been put to the court, viz.: the counsel for the defendants insisted to the court, that the taking of said last-mentioned bond by the postmaster-general was a waiver in law of all right to proceed on the first bond for postages received subsequent to the date of the second bond; that the sureties in the first bond ceased to be liable at and from that date for any defalcation or neglect of duty of the postmaster. No circumstances are referred to and relied upon from which a waiver could be inferred as matter of fact; but that the second bond was such waiver, resulted as a conclusion of law from the mere fact of accepting the bond. And I the more readily conclude that such was the understanding of the question upon the trial, as I cannot discover, from the bill of exceptions, any circumstances tending to warrant a conclusion of any waiver in point of fact.

How far mere parol evidence of a waiver would be admissible and available, is a point that does not arise here. The only question is, as to the legal operation of the second bond upon the liability of the sureties in the first; and I am unable to discover any principle upon which it can be considered as exonerating them from their responsibility. There is no limitation as to time in the bond, the breaches assigned and proved are within the condition of the bond, and Nott, the postmaster, continued in office under the same appointment originally given him. It certainly cannot be pretended that the taking of a second bond could, in any sense whatever, be considered a new appointment. The second bond does not purport to be a substitute for the first; nor is there anything tending to show that such was the intention or understanding of the parties; and it can be viewed in no other light than as additional security, to the taking of which no possible objection could exist—it was for the benefit and not to the prejudice of the first sureties. As to the defaults incurred before the taking of the second bond, the defendants were alone responsible; and for those afterwards incurred, equity would probably consider the two sets of sureties as jointly responsible.

The second bond was not taken for any antecedent default, and was not, therefore, for any existing debt or claim; and if it had been, it would not have operated as a discharge or extinguishment of the first. A new security, of an equal or inferior degree, is not an extinguishment of a prior debt. This is a principle too familiar to require any authority in its support. The cases, however, here referred to, may serve to illustrate and show the extent and application of the principle. 8 Johns. 54; 11 Johns. 512; 13 Johns. 240; 14 Johns. 404; Cro. Car. 86; Cro. Eliz. 716, 727; 1 Burrows, 9. And these cases also show, that if the second bond had been plead as a discharge of the first, the plea would have been bad on demurrer. The omission of the postmaster-general to remove Nott from office, did not draw after it a discharge of the sureties. The doctrine of the supreme court, in the cases of U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720, and U. S. v. Van Zant, 11 Wheat. [24 U. S.] 184, is entirely applicable, and settles this question. Although it might have been the duty of the postmaster-general to remove Nott, yet his neglect did not operate as a removal; this provision is only directory to the postmaster-general, and intended for the security and protection of the government, by insuring punctuality and responsibility, but forms no part of the contract with the surety. So long as the officer remains in the legal exercise of the powers and duties of the office, the responsibilty of the sureties continues.

The case of U. S. v. Nicoll, 12 Wheat. [25 U. S.] 505, decided at the last term of the supreme court, has a strong bearing upon this case. In that case, an act of congress had required new sureties to be given by the officer, by a certain day therein mentioned. None were, however, given; and the responsibility of the old sureties was held to continue. The court say, the act nowhere directs the principals to be discharged from office, upon failure to give new sureties; and if the act had so directed, they would have remained in office until actually removed. The law does not in terms declare the existing sureties shall be discharged after that day; it would require a very strained construction of the statute to discharge them by implication, while their principals were permitted to remain in office. Such construction would be against the manifest intention of the legislature.

It was urged on the argument that the defendants were discharged from their responsibility, by reason of the increase of the rate of postages subsequent to their having become sureties, and acts of congress were referred to for the purpose of showing such increase. It is not perceived how this can be made a question here; it does not arise upon the bill

of exceptions, nor is it in any shape or manner whatever presented by the record. But was it properly before this court? It appears to me that it forms no objection to the right of recovery against the sureties. The undertaking of the sureties is general, that Nott shall pay over to the postmaster-general all moneys that shall come to his hand for the postages of whatever is by law chargeable with postage. It refers to no particular act explaining or limiting the rate of postage; and all moneys received as postage come as well within the letter as the spirit and intention of the bond. Nor was the bond taken under any particular law defining its extent and operation; and must, therefore, be construed according to the fair and reasonable import of the language employed by the parties. The undertaking of the sureties is, from its nature, prospective, and is limited only by the terms of the bond, that the money for which they are called upon to account, must have been received by their principal, as postages established by law. Had the acts of congress referred to, enlarged the powers of the postmaster, or superadded any new duties, whereby he was made the receiver of other moneys than for postages, the sureties in this bond would not have been responsible therefor. The defendants' counsel has supposed that the case of U. S. v. Kirkpatrick [supra], sustains this objection. But in this I think he is mistaken. The court then considered the bond in question to have been given in reference to the objects of a particular act of congress, and that the condition of the bond referred principally to assessment of direct taxes; and that the subsequent acts of congress laying internal duties, contained provisions enlarging the authority of the collectors; and that the sureties did not undertake for the faithful execution of such enlarged powers. The court say there is nothing in the original act under which the appointment was made, which contemplates a permanent and continuing liability for all duties under all laws which might be subsequently passed; that the condition of the bond, in its terms as expounded by the other parts of the act, had a principal reference to the assessment of direct taxes. But there is nothing in this case to warrant a conclusion, that if the subsequent acts of congress referred to, had simply increased this direct tax, the sureties would not have been held responsible.

Upon the whole. I think the district court erred, in the opinion given to the jury, as to the legal effect and operation of the second bond upon the liability of the sureties in the first.[4] The judgment must, accordingly, be reversed, and a venire de novo issued returnable in this court.

[4] As to effect of misdirection of the court upon point of law, see 2 Grah. & W. New Trials, p. 768 et seq.

Case No. 11,310.

POSTMASTER GENERAL v. NORVELL.

[Gilp. 106.][1]

District Court, E. D. Pennsylvania. Nov. 17, 1829.

POSTMASTER'S BOND — APPROVAL AND ACCEPTANCE — EVIDENCE OF — RETURN FOR ADDITIONAL SURETY — SEVERAL BONDS WITH DIFFERENT SURETIES — APPLICATION OF PAYMENT TO ONE OF SEVERAL ACCOUNTS.

1. A bond given by a postmaster, with sureties, for the performance of his official duties, does not constitute a binding contract, until approved and accepted by the postmaster general.

2. The reception and detention of an official bond, by the postmaster general, for a considerable time, without objection, is sufficient evidence of its acceptance.

[Cited in Broome v. U. S., 15 How. (56 U. S.) 155.]

[Cited in Meyer v. Morgan, 51 Miss. 21.]

3. The return of an official bond to the principal obligor, by the postmaster general, for the purpose of obtaining an additional surety, affords no proof that it had not been accepted; nor does it amount either to a surrender or cancelling of it.

4. Where a debtor, indebted on several accounts, makes a payment, he may apply it to either account; if he does not, the creditor may do so; if neither does, the law will appropriate it according to the justice of the case, provided there are no other parties interested.

5. A debtor cannot appropriate a payment, in such manner as to affect the relative liability or rights of his different sureties, without their assent.

[Cited in Pickering v. Day, 3 Houst. 539. Cited in brief in Porter v. Stanley, 47 Me. 518.]

6. Where a public officer has given successive official bonds with different sureties, moneys received subsequent to the execution of the latter, cannot, before it is discharged, be applied to the payment of the former.

[Cited in Ornville v. Pearson, 61 Me. 555; Paw Paw v. Eggleston, 25 Mich. 40; Pickering v. Day, 3 Houst. 539.]

7. Where a public officer has given different bonds with different sureties, his payments must be so appropriated as to give each bond credits for the moneys respectively due, collected, and paid under it.

8. The law which limits suits by the postmaster general against sureties, to two years after a default of the principal, does not operate in cases of balances unpaid at the end of a quarter, which are subsequently liquidated by the receipts of a succeeding one.

[Cited in Jones v. U. S., 7 How. (48 U. S.) 692; U. S. v. Kershner, Case No. 15,527.]

[Cited in Frost v. Mixsell, 38 N. J. Eq. 601.]

[9. Cited in Allen v. State, 61 Ind. 275, and Ohning v. City of Evansville, 66 Ind. 63, to the point that new sureties are not responsible for prior defalcations unless the condition of the new obligation shall embrace them.]

On the 7th June, 1825, the postmaster general addressed a letter to Richard Bache, then postmaster at Philadelphia, in which he stated, as follows: "Some weeks since I directed a bond to be sent to you as postmaster, that you might have it executed under the post office laws, passed at the last session of

[1] [Reported by Henry D. Gilpin, Esq.]

congress. This measure has become necessary by reason of the decision of Judge Johnson, who lately decided that bonds given by a deputy postmaster, under the law lately repealed, could not be enforced. Although I believe this decision to be erroneous, and that the supreme court will reverse it, yet, it becomes my duty to guard the public interest, by taking the precautionary step of renewing the bonds of all postmasters which were executed under the late law. I will thank you to inform me whether you have received the bond transmitted to you. If you have not another shall be sent." On the 15th of June, Mr. Bache acknowledged the receipt of this letter, and said that the delay in returning the bond had been occasioned by one of the gentlemen, whom he wished as his surety, being out of the city, but that it should be executed and sent in the course of the week. On the 1st of July, the usual quarterly settlement of his accounts as postmaster was made, and it appeared that the debits against Mr. Bache, on that day, exceeded his credits or payments by the sum of twenty-six thousand nine hundred and forty-nine dollars and nineteen cents, leaving him indebted to the United States in that sum at that time. On the 8th July, Mr. Bache, together with William Milnor, Jr., and John Norvell, executed a joint and several bond to the postmaster general in the penal sum of thirty thousand dollars; being the same which was referred to by that officer in his letter of the 7th June. The condition of the bond set forth that Richard Bache was then postmaster at Philadelphia, and it provided, "that if the said Richard Bache should well and truly execute the duties of the said office, and faithfully, once in three months and oftener if thereto required, render accounts of his receipts and expenditures as postmaster to the general post office, in the manner and form prescribed by the postmaster general, in his several instructions to postmasters, and should pay all moneys that should come to his hands, for the postages of whatever is by law chargeable with postage, to the postmaster general of the United States for the time being, deducting only the commission and allowances made by law for his care, trouble, and charges in managing the said office; and should also faithfully do and perform, as agent of the general post office, all such acts and things as might be required of him by the postmaster general; and moreover should faithfully account with the said postmaster general, for all moneys, bills, bonds, notes, receipts, and other vouchers, which he as agent as aforesaid should receive for the use and benefit of said general post office," then the bond was to be void. On the back of the bond was a certificate of the same date, by an alderman of the city of Philadelphia, that "in his opinion the sureties therein were sufficient." This bond was transmitted to the post office department; on what day is not ascertained, but probably about that on which it bears date. On the 15th September, another settlement of Mr. Bache's accounts as postmaster took place, by which it appeared that from the 8th July, the date of his bond, to that day, he had paid the sum of twenty-nine thousand seven hundred and forty-six dollars and sixteen cents, extinguishing the balance due on the previous quarter, and leaving a credit in his favour of two thousand seven hundred and ninety-six dollars and ninety-seven cents. On the 21st September, the bond was returned to Mr. Bache by the postmaster general, inclosed in a letter in which he stated, as follows: "I am informed that William Milnor, Jr., whose signature is placed to the inclosed bond, as one of your sureties, possesses little or no property. As two sureties are required by the rule of the department, it is proper that they should both be in such circumstances as to property as to make their responsibility safe for the public. If the fact be as above stated as to Mr. Milnor, it will be necessary for you to procure another signature to your bond. I have purposely delayed returning this bond, until after you had paid the late requisition of the department, in order that its return might not embarrass you. As you have more than complied with the requisition, and reduced your balance to a small sum, I presume you will have no difficulty in complying with this request." On the 15th December, Mr. Bache wrote to the postmaster general that he would attend to the surety the following week, "when he hoped to forward one that would meet his approbation." On the 12th June, 1826, the postmaster general wrote to Mr. Bache, that "his bond yet remained to be perfected." On the 14th March, 1828, the assistant postmaster general wrote to Mr. Bache reminding him of the assurances given in his letters to the department, and asking his immediate attention to the return of his bond with the additional surety required on the 21st September, 1825. On the 7th April, the postmaster general himself addressed a letter to Mr. Bache, in which he stated as follows: "Col. Gardner informs me that you have not returned your bond as postmaster with the additional surety necessary. I regret that this subject has not been attended to by you before, and hope you will lose no time in procuring an additional name to your bond, which may be good for the amount of the penalty; at least, the whole number should be considered good for that sum. I was not aware until a few days since, that the bond had not been returned." On the 14th April, Mr. Bache informed the postmaster general, in reply, that he would "give him a definitive answer in the course of the next day respecting his bond, after seeing some of his friends." On the 20th April, Mr. Bache was superseded as postmaster; and on the 13th May, the bond in question was deposited with the attorney of the United States, "to be retained until it

was decided who had a just claim to it; as it was claimed both by the postmaster general and the sureties." On a settlement of the accounts of Mr. Bache, it was found there was a balance due by him of twenty-two thousand two hundred and thirty-five dollars and fifty cents; thereupon separate suits were instituted, in this court, against him as principal obligor, and Mr. Milnor and Mr. Norvell, each of the sureties in the bond. The declaration in the present action against John Norvell is for the amount of the penalty in the bond. It sets out the condition at length, as above stated, and then avers the non performance thereof by the postmaster, Richard Bache, in all particulars, but especially "in not paying the said sum of twenty-two thousand two hundred and thirty-five dollars and fifty cents, being money that had come to his hands for postages." To this the defendant pleads: 1. That the bond was not accepted by the postmaster general, and so was not delivered by the defendant John Norvell, and that it is not his deed. 2. That Richard Bache did, during the time he was in office, after the date of the bond, truly execute the duties of his office, and that he did not make default by not paying the said sum or any other sum of money whatever.

On the 17th November, 1829, the case came on for trial before Judge HOPKINSON and a special jury. It was argued by Dallas, district attorney, for the postmaster general, and Swift & Randall for the defendant.

Mr. Dallas, for the postmaster general.

The defendant has voluntarily entered into a contract with the United States, which, however its existence may be regretted, it becomes a plain duty of the court to enforce. Such contracts are necessary by law, and it is a loose and dangerous morality which would set them aside, merely because they may ultimately bear hard on those who have made them. This is an action to recover a debt due upon a bond in consequence of an alleged breach of the condition. The sum claimed is the amount to which the United States say they have been injured by that breach. This bond has been produced and given in evidence; it is in all its requisites apparently complete; it has parties, with their signatures and seals duly attested by subscribing witnesses; in all these incidents nothing has been alleged to affect its validity. The condition of the bond is distinct and legal; and, if it has been broken in any of its particulars, the penalty is incurred and the damage has been produced. That it has been appears by the account of Mr. Bache, the postmaster at Philadelphia and the principal obligor in the bond. The account, as given in evidence, is a transcript authenticated according to law; a running account of receipts and payments taken from the books; a reckoning between the government and its agent. It shows the moneys that were received by the postmaster from postages between the date of the bond, when the obligation of the defendant commenced, and the time this suit was brought. It proves conclusively that all the money received during this period was not paid when the balance was finally struck. This is a breach of the condition of the defendant's obligation and makes him liable on his own contract. 3 Story's Laws, 1996. No facts given in evidence impair the validity of the defendant's obligation under the bond. It was entered into by express authority of law. It was transmitted to the postmaster general after it had been duly executed at his own request. It was received and retained by him as a legally executed instrument. The purposes for which it was sent back did not relate to Mr. Norvell, the defendant. There was no objection whatever to him. His name was not to be taken from the bond. Whatever objection there was related to Mr. Milnor alone. Nor was it sent back for any cause affecting its validity; but merely to increase its security. 3 Story's Laws, 1986; Smith v. Bank of Washington, 5 Serg. & R. 318; North v. Turner, 9 Serg. & R. 244. Nor were any facts given in evidence to controvert the correctness of the account. It is clear that there was a balance in favour of Mr. Bache, of two thousand seven hundred and ninety-six dollars and ninety-seven cents on the 15th September, 1825, and a balance against him of twenty-two thousand two hundred and thirty-five dollars and fifty cents, when he was superseded; showing that, after the date of the bond, he had received moneys to the amount claimed, which he had not paid over. In settling the account, the postmaster general had a right to appropriate the intermediate payments by Mr. Bache to the extinguishment of his debt, in such order as he deemed best. When a man is indebted on several accounts and makes a payment he may direct its appropriation; if he does not the receiver may; if neither does, the law will appropriate it justly and equitably. It is just and equitable that payments should be appropriated to extinguish debts according to their order of time. Applying this rule, Mr. Bache became in arrear during the last quarter. The account shows a superabundance of payments, in each quarter, to pay what was due on the antecedent quarter. The settlements were made and the balances struck quarterly; and the United States have applied the money paid during each quarter, to any arrears that might be due at its commencement. This they had a clear right to do, especially as Mr. Bache made no appropriation. The account, therefore, being unimpeached as to the correctness of its items, shows that the balance was due when suit was brought, that it is chargeable to the last quarter, and that it is for postages received and not paid. 3 Story's Laws, 1996 [4 Stat. 112]; Mayor of Alexandria v. Patten, 4 Cranch [8 U. S.] 317; Field v. Holland, 6 Cranch [10 U. S.] 8; U. S. v.

January, 7 Cranch [11 U. S.] 572; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; U. S. v. Vanzandt, 11 Wheat. [24 U. S.] 184; U. S. v. Nicholl, 12 Wheat. [25 U. S.] 505; Dox v. Postmaster General, 1 Pet. [26 U. S.] 318; Postmaster General v. Reeder [Case No. 11,311]; Cremer v. Higginson [Id. 3,383]; Locke v. Postmaster General [Id. 8,441].

Swift & Randall, for defendant.

This is a contract between the postmaster general and the defendant. He is the officer who is authorised by law to make it, and the United States, in conferring on him the power, become bound by his acts in the exercise of it. He must do his duty properly; if he neglects or errs in it they are to suffer. His actions are their actions, and if the surety derives a benefit from them, it would be the height of injustice to deprive him of it, on the plea that no laches can be imputed to the government. Hodgson v. Dexter, 1 Cranch [5 U. S.] 345; Bainbridge v. Downie, 6 Mass. 253; Walker v. Swartwout, 12 Johns. 444; Macbeath v. Haldimand, 1 Durn. & E. [1 Term R.] 172.

We are to ascertain, therefore, whether there is now any existing contract between the postmaster general and Mr. Norvell, and if so, whether this contract binds him to pay the sum of money demanded.

I. There is no such contract now existing, because the bond was not a valid instrument at the time the suit was brought. It is true it was signed and sealed by the defendant, but that is not enough; an unqualified, unconditional delivery of it by him is equally necessary, and also an unqualified unconditional acceptance by the postmaster general. There is no positive evidence that this bond was ever sent to Washington; but supposing that it was, this is not a case in which mere possession will prove either its delivery or acceptance. That might be enough in an ordinary case, but not where the approbation of a public officer is made essential to its validity. Until that is given the instrument is imperfect and incomplete. The only evidence of his approbation is his acceptance of it; without acceptance there can be no delivery; in fact there is a refusal to receive, so far as the interests of a surety are involved. In this case there is no proof of the postmaster general's approbation; on the contrary, he returned the bond as insufficient; in his own words he required it to be "perfected." On the most obvious principles of law, therefore, there is not now, and indeed never was, a perfect or binding contract made by this defendant with him. 3 Story's Laws, 1986, 1995 [4 Stat. 103, 111]; 1 Shep. Touch. 57; Whelpdale's Case, 5 Coke, 119; Chamberlain v. Stanton, Cro. Eliz. 122; Jackson v. Phipps, 12 Johns. 418. But even if approved at first, it was afterwards returned by the postmaster general, as insufficient, an act clearly within his legitimate power. He is by law expressly directed to superintend all the duties of his department; he is required to take from postmasters security which is good and approved, and of course, to reject what he believes or discovers to be inadequate. As he can have but one bond at the same time from one officer, to deliver it up for the purpose of obtaining a better, is clearly within the scope of his authority. That he meant to do so here is evident. His letter states, that it is returned, because it is insufficient. It is allowed to remain for nearly three years in the possession of the obligor, and it has now become evidence only because it has been placed in the possession of the attorney of the United States, for the purposes of this suit, but not so as to affect the rights of the sureties. 3 Story's Laws, 1985, 1986; Shep. Touch. 70; 2 Bl. Comm. 307, 309. It cannot be said that it was returned for the purpose of being altered; of having another name inserted in the same instrument of writing; for that would be illegal. Such an alteration without the consent of the defendant would completely invalidate it; it is immaterial whether the object be to increase or decrease the liability of any party. Whether it does injury or not to the obligor; whether the change be trifling or material; whether the motive be good or bad; it is sufficient that the identity of the instrument is changed. Speake v. U. S., 9 Cranch [13 U. S.] 28; Moore v. Bickham, 4 Bin. 1; Stephens v. Graham, 7 Serg. & R. 505; Marshall v. Gougler, 10 Serg. & R. 167; Barrington v. Bank of Washington, 14 Serg. & R. 405; Homer v. Wallis, 11 Mass. 309; Jackson v. Dunlap, 1 Johns. Cas. 114; Pigot's Case, 11 Coke, 27; Master v. Miller, 4 Durn. & E. [4 Term R.] 320; Johnson v. Baker, 4 Barn. & A. 440.

II. But even if this bond had been completely executed; if it had been delivered, accepted, approved and retained by the postmaster general; if it were now an existing contract between him and the defendant, he is not bound by it to pay the sum of money above demanded, because the debt has not in fact accrued since the bond was given. The balance is not created by a neglect to pay over the moneys received, but by the act of the postmaster general himself, in appropriating improperly the payments of Mr. Bache. No doubt where a debtor, having several accounts, makes a payment to his creditor without any specific direction, it may be appropriated at the pleasure of the latter, where they are the only parties. But this cannot be done where the interests of a third party are affected. In such a case the right of appropriation does not apply, and this is one. There was a balance of twenty-six thousand nine hundred and forty-nine dollars and nineteen cents, due by Mr. Bache at the time this bond was executed; for the payment of this the postmaster general ought to have looked to the previous security, but he has paid it by applying the money received subsequently. Mr. Norvell is not security for that debt, yet money collected whilst

he is security, is taken to pay it. and he is then called on to make good the deficiency. This is in effect charging him as surety for a default which occurred before he gave bond. The amount with which he is thus charged exceeds that now demanded; consequently if he is improperly charged with it, there is no default which has accrued since he became responsible. U. S. v. January, 7 Cranch [11 U. S.] 572; U. S. v. Wardwell [Case No. 16,640]; Armstrong v. U. S. [Id. 549].

On another ground, the postmaster general cannot recover this balance from the defendant. The act of congress declares, that when a postmaster makes default, the postmaster general must institute suit against him and his sureties, within two years after such default, or the sureties shall not be held liable. Mr. Bache has been a defaulter at every quarterly settlement since the 1st October, 1825, sometimes to the amount of twenty-nine thousand, never for less than fourteen thousand dollars. As no suit was instituted till 1st July, 1828, the parties have ceased to be liable. It was due to them that suit should be brought as soon as a default was discovered. This provision was for their benefit; they are favoured by the law; to deprive them of it would be to turn the plainest principles of the law against them. 3 Story's Laws, 1986 [4 Stat. 103]; Miller v. Stewart, 9 Wheat. [22 U. S.] 680; Com. v. West, 1 Rawle, 31.

Mr. Dallas, for the postmaster general, in reply.

I. The first ground on which the defendant resists the claim which the United States have acquired by his breach of his own contract, is by alleging that he in fact has made no such contract; that the paper produced is not his deed; in other words, that although it has form, shape, and features, it wants the life imparted by delivery and acceptance. Such an allegation will fall before an examination of the case. That the bond was actually delivered for the purpose it expresses, to the postmaster general, is incontrovertible; that he received it is equally so; all, therefore, that the defendant had to do was done. Against him, it remained a valid instrument; at all events until the 21st September, 1825. On that day it is said the postmaster general did what in effect cancelled it, by showing he had not accepted it. That he received and retained it for more than two months is beyond question; but, because, after thus retaining it, he doubts its sufficiency, it is alleged that he never accepted it. As the evidence stands, the question whether he did so or not, is purely one of law, to be resolved by written documents. These will show at once what the postmaster general meant, as well as what he did; his object, as well as the mode by which he attained it. His object certainly was neither the relinquishment nor destruction of the existing bond, nor the substitution of another for it; it was simply to obtain additional security, a desire which indeed, ex vi termini, imports an acceptance, pro tanto, of the security already given. It has indeed been said that this object was inconsistent with the legal existence of the bond; whether it was so or not, is really irrelevant to the present argument, since no additional surety was obtained, no change was made in the parties. But it was not so; on the contrary, the object of the postmaster general, had it been attained, was perfectly consistent with the legal validity of the bond. The cases cited are all cases of erasure, interlineation, substitution, addition, or alteration, without consent of the parties, affecting the rights of some of them, and material. This would have been a case of addition, with consent of all the parties, and beneficial to all. The bond being several, an additional signature would not have affected the defendant in his relation to the United States, and would have been beneficial to him in contribution.

The object of the postmaster general therefore being simply to procure additional security, an object perfectly consistent with the legal existence of the bond, it remains to show there was nothing in the mode adopted by him, to obtain this additional security, which affected the rights of the United States, or the liability of the defendant. It is true he parted with the temporary possession of the bond, but that possession is neither necessary to preserve the rights of the United States, nor to destroy the liability of Mr. Norvell; the right, the control, the legal possession, was never given up; it was sent away for a specific purpose, its return was required, its detention was in disobedience of the directions of the postmaster general, and therefore never could defeat his rights. To review the cases cited, of conditional deliveries and acceptances, is unnecessary; because this bond was sent to the postmaster general without condition, not casually, but with the knowledge of all parties, and deliberately received and retained by him. To argue that, after becoming thus unconditionally possessed of it, his sending it to Mr. Bache for the sole purpose of obtaining another signature, was a refusal to accept it, is to presume a deliberate intention on his part to relinquish what he required to be returned, to destroy what he wished to strengthen. As far as deliberate intention is involved, it is absurd to suppose that he foresaw and desired to do any thing inconsistent with the legal existence of the bond. But if he really had such a desire, he intended to do what was not legally within his power. If the laches of a public officer will not affect the interests of the United States, neither will an intentional departure from authority. The idea that a public officer, because he is at the head of a particular department, or has the general superintendence of its business, possesses an unlimited control over the property or interests of the United States connected with that department, cannot be tolerated for a moment. His power is deducible from law alone, and is always compatible with an object contem-

plated by law; if the mode of exercising it be prescribed, he must pursue it and no other; if no mode is specifically directed, a discretion may indeed be implied, but not one inconsistent with, or destructive to, the object of law. The postmaster general, as superintendent of his department, is bound to exact security from an officer, before he permits him to act, and when obtained, although he may change it for equally good or better, he cannot relinquish or destroy it altogether. The principles, indeed, which regulate or restrain him, as a public agent, are the same as those relating to a private one; acts within the scope of his authority bind the principal; beyond it, they affect neither his rights nor interest.

The results then of the whole argument, relative to the delivery and acceptance of this bond, to the object of the postmaster general in returning it, and to his whole conduct in regard to it, are these: that no express acceptance is necessary in receiving such an instrument from a postmaster for the United States; that if necessary, it was fully given, when, in asking additional security, he necessarily accepted, pro tanto, what he had received; that its implied acceptance is apparent from its detention, its return for a specific purpose, and its repeated demand; that once given, and received, it belongs to the United States, and cannot be relinquished by their officer, without equal or better security; and that, never having been relinquished, it remains the valid evidence of a contract of the defendant with the United States. Hodgson v. Dexter, 1 Cranch [5 U. S.] 345; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; Bainbridge v. Downie, 6 Mass. 253; Walker v. Swartwout, 12 Johns. 444; Macbeath v. Haldimand, 1 Durn. & E. [1 Term R.] 172.

II. The second ground on which the defendant resists the claim of the United States, is, that admitting the due execution, delivery, and acceptance of his bond, he is yet protected from suit by an express provision of law. The act of congress does indeed provide, that the defendant cannot be sued if there was a default by Mr. Bache, if it continued for two years, and if the postmaster general did not institute his suit during those two years. But it is not enough to say Mr. Bache was tardy in his payments, and in arrear at every quarterly settlement; if the arrears were paid off within two years, and fresh default made, it is not the same in time or amount. Now the account shows that there was no default which remained unpaid for six months, much less two years; it was settled quarterly, and each debit is for the postage of an entire quarter, though the credits are at various times; if at the end of the quarter these credits fell short of the amount of postages then debited, the next payment was of course applied to extinguish that arrear. Such is the usual way of keeping a running account; it is exactly that which exists between a landlord and tenant, who would certainly apply what he might receive in the middle of a quarter, to extinguish the unpaid rent of a previous one. As to what has been said in regard to the appropriation of payments made by Mr. Bache, it is to be recollected that the government, no more than a landlord, knows whence the money comes with which the payments are made; whether the collections of a postmaster are on a prior or current quarter, any more than whether the rent paid is the product of tillage in this season or the last. It is not bound, either by principle or practice, to delve into the modes of financing, by its debtor, in order to ascertain the sources of his payments. The mode in which the postmaster general has appropriated the payments made to him, has been objected to; but his right to do so has been clearly shown by the various adjudged cases heretofore cited; and the practice is established, if it is not conceded. An examination of this account shows that, with the exception of the first quarter, the sums debited to any one quarter are never paid in until a month or two, or more, after they are due; on the 1st January, 1825, we find a balance against the postmaster of three thousand one hundred and fifty-seven dollars, while on the 15th September, following, having been urged in the mean time to make payments, he has overpaid, by that of two thousand seven hundred and ninety-six dollars. If this examination be carried down on these principles, the correctness of which cannot be doubted, it will be seen that no default occurs until on and after the 1st January, 1828, a period not only within that when the clear responsibility of the defendant as a surety exists, but also long within the two years previous to the commencement of this suit.

The result, therefore, of this inquiry is, that the defendant has failed to establish any thing in the mode of appropriating the receipts of Mr. Bache, adopted by the postmaster general, or in the time and manner of bringing this suit, which will relieve him from the liability he has incurred on the bond, already shown to be duly executed and accepted.

HOPKINSON, District Judge (charging jury). The bond on which this suit is brought, the condition, and the breach, are all admitted; that is, the signing and sealing of the bond, the terms of the condition, and the breach as laid in the declaration. The present defendant was not the principal in the bond, but one of the sureties of Richard Bache. He signed and sealed it, but contends that he is not liable to any responsibility under it, on several grounds, some of law, some of fact.

I. He says this bond was never delivered, in the sense of the law, because it was never accepted, without which the delivery is not complete. It is not denied that the defend-

ant had done all required of him; he had signed, sealed, and delivered it so far as it depended on him. Was an acceptance necessary? I think it was; not only on general principles, but peculiarly so in this case. It was to be approved by the postmaster general; he was to judge of its sufficiency; and until it was approved and accepted, it was no contract between the parties; it could not be a contract on one side only. Whether an acceptance was necessary, is a question of law; and I clearly think it was. Then was this bond accepted? This is a fact for your decision. If the question of acceptance depended on written evidence, or documents alone, it would be for the court, with whom the construction of such evidence is entrusted; but when it depends altogether on parol evidence, or partly on that, and partly on written testimony, it is for the jury, from a view of both, to decide the fact. In this case the acceptance is asserted on the one side, and denied on the other, not only from the written correspondence between the parties, but also from facts and circumstances, such as the time that elapsed between the receipt of the bond by the postmaster general and the return of it, a conversation held with me, and some other matters, which are enough to make it a mixed question of evidence, partly written and partly parol. But it is the duty of the court to give you some instruction as to the law on the subject. An acceptance of this bond by the postmaster general need not be proved by direct or express evidence. It is not necessary he should write, acknowledging the receipt, and accepting the security. It is probable this is never done. But receiving the bond, and detaining it for a considerable time, without objection, will be sufficient evidence of acceptance to complete the delivery; especially when the exception is taken by the party who had done all he could do to complete it. This accords with common sense and justice. In the ordinary case of an account, sent by one merchant to another, no objection being made in a reasonable time is a presumed acquiescence, and binds him. This is a much stronger case. If, therefore, you would not allow the postmaster general to deny his acceptance of this bond, after all he has written or done about it, you will not allow the defendant to do so.

Now, as to the time the bond was kept. This is not exactly ascertained, but we may make a reasonable presumption. It is dated 8th July, 1825, and one of the counsel for the defendant thinks it must have been sent about the same time. It is probable he is right. Why should it not be? Even then the delay, after the requisition made, had been long; and although this might have been occasioned by difficulty in getting sureties, yet, after they were got, why should Mr. Bache delay to send it, especially as he was hardly pressed for it by the postmaster general? On the 7th June, 1825, the postmaster general writes to Mr. Bache: "Some weeks since I directed a bond to be sent to you, that you might have it executed." The bond must therefore have been sent at least early in May. On the 15th June, Mr. Bache answers, and says, that the delay had been occasioned by one of his sureties being out of the city, and, after his return, occupied by his own business; he adds, "It shall be executed, and sent to you in the course of next week." At this time Mr. Bache was at West Point. On the 8th July the bond was executed in this city, and, under all circumstances, the reasonable presumption seems to be, that it was sent to the postmaster general about the same time. From then, say the 15th July, to the 21st September, 1825, the postmaster general keeps the bond, without an intimation of hesitation or objection to its sufficiency, but with the means to inquire into it, had he thought necessary, in twenty-four hours. Can it be presumed he kept it under consideration all this time, when he does not appear to have made any inquiry to satisfy himself, or to have had any doubt? Did he leave the public interest for more than two months without any security, while he was hesitating, and would neither accept nor reject the bond, nor take a step to satisfy himself? You will judge; but it would be most unwarrantable neglect, and such as should not be supposed, without clear proof, against an officer of high reputation for a vigilant attention to his duty. Would it be in his mouth, after more than two months silent acquiescence, to say he had never accepted this bond? Had he kept an account current for half this time, could he deny his admission of it, at least prima facie?

On the 21st September, 1825, the bond was returned to Mr. Bache, with a letter. Now, the mere fact of sending it back does not prove that he had not accepted it. He might have fully accepted it for a week, or a year, and then, on finding the security was not sufficient, he might require either a new bond to be substituted, or an addition of security to be made to that he had. The sufficiency of the security is at all times under the direction of the postmaster general. The mere act then of returning this bond affords no proof that it had not been accepted. If the act, per se, affords no such proof, was it accompanied by any declarations by the postmaster general, showing such an understanding on his part? I reply, that he nowhere denies the acceptance expressly; and that it is not to be inferred from what he has written. In the letter of 21st September, 1825, in which the bond was enclosed, he says he is informed Mr. Milnor, one of the sureties, possesses little or no property. As this information was the cause or inducement to write this letter, we may presume it was recent. Will you not infer from this, that until he got this information, he was satisfied with the bond; and, being satisfied, had accepted it? He

says that the rule of the department requires two sureties; he considers Mr. Milnor as standing for nothing "if the fact be so;" leaving it to Mr. Bache to prove the property of Mr. Milnor if he could. But, if the fact be so, what is to be done? Another signature is to be procured. Is there any thing here to show an understanding on the part of the postmaster general that he had not accepted this bond; that he was not entitled to all the security it offered, although he requires something more? The matter remains in this situation, without any communication from the postmaster general, until the 12th June following, about nine months, when the postmaster general writes, "your bond yet remains to be perfected." Can we suppose the postmaster general believes himself all this time without any security? Yet this would have been the case, if he had never accepted the bond, as far as it went. Remember the intention and acts of the postmaster general are to decide this question; for the defendant had done every thing on his part to complete the delivery of the bond. On the 7th April, 1828, the bond is not returned, but remains with Mr. Bache. Two years and a half elapsed, and there is no security. What does the postmaster general now write: "Col. Gardner informs me you have not returned your bond, with the additional security." He hopes he will lose no time in procuring the additional name. In all other respects the bond was to remain, and be returned as it was originally received. On the 14th March, 1828, a letter was written by Col. Gardner to Mr. Bache: "I am directed by the postmaster general to ask your immediate attention to the return of your bond, with the additional security required." We have here all that the postmaster general has done and written on this subject. Take it all together and decide whether, from it, you can infer that he understood or intended not to accept this bond; for on his intention and acts it depends. How did Mr. Bache himself understand the matter? On the 15th December, 1825, he writes: "I shall attend to the surety next week, when I hope to forward one that will meet your approbation." On the 14th April, 1828, he says: "I shall endeavour to give you a definitive answer, in the course of to-morrow or the next day, respecting my bond, after seeing my friends." Under this evidence, and the remarks I have made to aid your consideration of it, the question of acceptance is left to you. If the bond was never accepted, there is an end of the case.

II. If accepted, did the return of the bond amount to a surrender of it, to annulling, or cancelling it? This depends on the intention of it. That it was sent to Mr. Bache does not show it, but it depends on the purpose for which it was sent. If he had abused the confidence put in him, kept the bond, destroyed it, or would now turn his possession of it to a use never intended, it can avail nothing. It is of the same force and validity as if it remained with the postmaster general at Washington. There is nothing by which this intention is to be judged but the correspondence, and this makes it a question of law. It is clear that there was no intention to cancel or annul the bond, or to substitute another, but only to strengthen the same bond by an additional surety. When such surety was procured, it was to be returned, not a new one executed. This is the language of both of the parties, clearly, and expressly. The question whether the bond was cancelled by the return of it, is different from the question, whether it was accepted or not. The argument and authorities to show that any alteration in a deed will avoid it, might have been important, if the intended addition had been made to it; but as this was not done, the bond remains now just as it was when executed, and its identity cannot be doubted. If, therefore, you shall be of opinion, that this bond was accepted, then as it is clear it never has been cancelled, it remains in full force, and the question of the liability of the defendant to all, or any part of the claim, is to be examined by you.

III. It is said that at the time this bond was executed, and long before, a large balance was due from Richard Bache to the government, and that moneys collected and paid by him, after the execution of this bond, have been applied to the payment of that antecedent balance. It is urged that this is, in effect, to charge these sureties with a default which occurred before they became so; that the moneys which should have been applied to the credit of their responsibility, have gone to the relief of sureties in an antecedent bond. Before we examine to what extent the facts sustain this objection, we will look to the law for our guide, in deciding upon them; and this will necessarily lead us into an inquiry into the doctrine of the appropriations of payments, which seems to be well settled, and with no material variation, through a long course of decisions and years. We need not go further than to the cases decided in the supreme court of the United States. The general doctrine certainly is, that where a debtor makes a payment, and is indebted to the creditor on several accounts, he may direct to which debt or account, the payment shall be applied. If he gives no such direction, the creditor receiving the money may apply it at his pleasure. If both omit it, the law will apply it according to the justice of the case. There can be no objection to this doctrine where no party is concerned but the debtor and creditor. But how is it in a case like the present? Here a public officer, in the receipt of public money, has given sureties for the faithful performance of his duties, and for the accounting for and payment of all the moneys which shall come to his hands. These sureties remain for several years, and then a new bond, with new sureties, is given; at which time there is a large sum of money actually due to the public,

and for which the sureties on the first bond were liable; that is to say, the penalty of the first bond was actually forfeited, and the amount of the defalcation due, and recoverable from the sureties in it. Can the government, for whose security both bonds were given, apply the moneys collected by the officer after and under the second bond, and on the responsibility of the sureties in the second bond, to the payment or credit of the balance due on moneys collected, and which ought to have been paid, by and under the first bond? Can the burden actually resting upon the first sureties, can the forfeiture actually incurred by them, be shifted by the process of appropriation, without the consent or knowledge of the second surety, from the shoulders of the first, and be put upon the second? I am of opinion, most clearly, that it cannot; that each set of sureties must answer for its own defaults, and is entitled to be credited with its own payments. If authority can be required to sustain a principle of such obvious justice, it will be found in the case of U. S. v. January, 7 Cranch [11 U. S.] 572, which is a much stronger case than the present. In that case a collector of revenue had given two bonds at different periods, for his official conduct; and the second bond undertook not only for the future, but also for the past, fidelity of the officer. The supervisor had promised to apply all the payments he should receive to the discharge of the first bond, before he carried any of them to the credit of the second; he keeping but one general account against the collector. At the time of the trial, the general balance against the collector was upwards of sixteen thousand dollars, but at the time when the second bond was given, it was but six thousand dollars and upwards. The payments,if all applied to the first bond, would have discharged it. The principal question in the case was, whether this promise of the supervisor was an appropriation of the money binding on the United States without some act appropriating it, as entries in the books, for this was the question brought up from the court below. The supreme court first state the law on the appropriation of payments generally, as I have stated it, and then proceed in declaring their opinion, "that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is, where the receiver is a public officer not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted," they say, "that moneys arising, due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first, without manifest injury to the surety in the second bond; and, vice versa, justice between the different sureties can only be done by reference to the collector's books; and the evidence which they contain may be supported by parol testimony." How is justice to be done between the different sureties by a reference to the collector's books? Certainly by seeing when the payments were made, and applying them accordingly to the first or second bond. The reference to be made to the books is for this purpose; and not to adopt as conclusive the appropriation then made by the officer, which was contended for by the district attorney. To ascertain how far this principle will go to the relief of the defendant in this case, we must turn to the account, which is a copy from the books, and see how much of the defendant's money, if I may call it so, has been applied to the relief of the prior sureties; because if it shall appear that the prior sureties have been paid by other moneys, in part or in whole, than those which were due and collected under the second bond, it is manifest the second sureties have no ground of complaint, further than their money has been taken for this purpose. On the other hand, there must be deducted from the final balance, now charged against the defendant, so much of the postages received since 8th July, 1825, as has been diverted from them, and applied to the first bond. This must be ascertained, as far as it can, by an examination of the account which I shall willingly refer to you; believing you will have to leave something to conjecture.

I will, however, direct your attention to some points of inquiry. The bond under which the defendant is liable, is dated on 8th July, 1825. On the supposition that it was sent at once to Washington and accepted, we may presume the contract was completed on or about 10th July, 1825, and then had reference back to the date of the bond, at which time the liability of defendant for the conduct of Mr. Bache commenced, to wit, on 8th July, 1825. It appears by the account, that on the quarter ending the 1st July, 1825, the debits against Mr. Bache exceeded his credits or payments by the sum of twenty-six thousand nine hundred and forty-nine dollars and nineteen cents. By payments made between that date and the 15th September, this balance was paid, and overpaid, leaving a balance in his favour of two thousand seven hundred and ninety-six dollars and ninety-seven cents, and had it been discharged by payments made before 1st July, the defendant would have nothing to do with it, but would have entered upon his suretyship on a clear field, and have been answerable for all subsequent delinquency. You will remark, however, that this is taking the debit to 1st July, and bringing the credits or payments to 15th September, two months and a half later. Between the postmaster general and Mr. Bache, this is of no importance; but as regards the sureties, where the inquiry is, whether these payments have been appropriated or not to their injury, the question is different. After the 1st July, and indeed on and after the date of the bond and of the commencement of

the defendant's suretyship, there were paid twenty-nine thousand seven hundred and forty-six dollars and sixteen cents. Did the whole of this consist of moneys received under the second bond? If it did, then it is a greater amount than the whole balance now due; and of course if this amount of their money has been paid to make up the deficiencies of an antecedent suretyship, and must now be restored to their credit, nothing is due from them. In other words, if the balance of twenty-six thousand nine hundred and forty-nine dollars and nineteen cents which Mr. Bache owed on 1st July, 1825, has been paid with postages afterwards received, it is clear that if those payments had been applied to the subsequent debits of this account, nothing would be due, but there would be a balance in favour of the second bond. I mean to say, suppose the account had been closed on 1st July, 1825, Mr. Bache and his then sureties would have been debtors for twenty-six thousand nine hundred and forty-nine dollars and nineteen cents; and if a new account had been opened with the second bond, there would have been no default under it, provided the payment which, in September, 1825, extinguished the above balance, was made by moneys received for postages paid under the second bond. This then is the matter of fact for you to ascertain from the account: how much of defendant's money has been applied to pay the antecedent debt. At the first view, we see that the whole of these payments made between 1st July and 15th September, could not have been from moneys received for postages between those periods. The payments made were twenty-nine thousand seven hundred and forty-six dollars and sixteen cents; the whole postages charged to Mr. Bache, for the quarter, from 1st July to 1st October, were seventeen thousand four hundred and fifty-six dollars and forty-nine cents; the payments, therefore, exceeded the whole receipts for the whole quarter by the sum of twelve thousand two hundred and eighty-nine dollars and sixty-seven cents, which, therefore, Mr. Bache must have obtained either from antecedent postages not before collected and paid, or from other resources. This sum did not come from the receipts after and under the second bond, or from the funds equitably claimed by the defendant. On this view the accounts would stand as follows:

From the whole payments of.....	$29,746	16
Deduct money not under the second bond	12,289	67
Taken of receipts under second bond	$17,456	49
Deduct probable postages from 1st July, to 8th July, belonging to first bond, say.....	2,000	00
Money of second bond, applied to the first	$15,456	49
Whole deficiency now claimed.....	22,235	50
Chargeable to second bond.....	$ 6,779	01

The principle of law is, that you shall not take the moneys due and collected subsequently to the execution of the second bond, and apply them to the discharge of the first bond; and when you have ascertained how much of the money, which became due and was collected under the second bond, has been applied to the discharge of arrears due under the first, you will deduct that amount from the whole default claimed at the conclusion of the account.

We must go one step further in this analysis. The payments stop on the 15th September, 1825, and, of course, no part of them could have been derived from postages between that date and the 1st October. If these are estimated at two thousand five hundred dollars that sum should be added to the liability of the second bond, or, which is the same thing, taken from the credit we have given to it; which would leave the sureties in this bond now chargeable with nine thousand two hundred and seventy-nine dollars and one cent; and they will then have full credit against the general balance, for all the money that was taken from them for the payment of the debt, which was due before they became sureties. Of consequence, they will be charged with no defaults but such as occurred after their liability began, and full justice will be done to them. Indeed, if we knew certainly where Mr. Bache got the funds, with which he made the payments from the 8th July to the 15th September; that is, if we knew that all of them were derived from antecedent postages, the present sureties would be properly chargeable with the overpayment of two thousand seven hundred and ninety-six dollars and ninety-seven cents, which has gone to their credit, but came not from their funds, and belonged to the sureties of the first bond. You must not forget that justice is also due to them. A suit is now depending against them in this court; and they must answer for all that is not recoverable here. You should consider that you are settling the account between the two sets of sureties, rather than between the United States, and either of them; and your object should be to give to each bond credit for the moneys respectively due, collected, and paid under it. This is the true justice of the case. After all the payments that have been made, on closing the account, twenty-two thousand two hundred and thirty-five dollars and fifty cents are found due to the United States, from one or both of different sureties. You should give to the present defendant all the benefit of all the payments made with moneys due, collected and paid to the postmaster general under his bond; and you should, in like manner, give to the sureties in the first bond, credit for all the payments made with moneys due, collected, and paid, under their bonds, and the result will show how the remaining debt should be apportioned between them.

IV. The defendant has offered another ground, which goes to the whole right of re-

covery. By the third section of the act of congress of March, 1825 [4 Stat. 103], it is enacted, "that if default shall be made by a postmaster, at any time, and the postmaster general shall fail to institute suit against such postmaster, and his sureties, for two years from and after such default shall be made, then, and in that case, the said sureties shall not be held liable to the United States, nor shall suit be instituted against them." It is alleged by the counsel for the defendant, that if the postmaster has been in default at the end of every quarter for two years, antecedent to the suit, the sureties are discharged; and that in this case large balances were due from the postmaster, at the end of every quarter, for more than two years before suit brought. The district attorney contends, that at the end of various quarters, within that period, balances were in favour of the postmaster, and that this suit is not brought for any default of two years standing, but, in fact, for a default which accrued in the last quarter; all antecedent suits having been discharged by payments appropriated to them, in a manner warranted by law and usage. I confess I cannot see any difficulty in this question. It must be borne in mind, that the right of appropriating payments stands on a very different footing here, from that which it had on the question between two sets of sureties in two different bonds. Each is liable for defaults of two distinct periods. To apply the money received, during one of these periods, to discharge a responsibility incurred in the other, is manifestly unjust, and therefore, in such case, the general right of a receiver of money, to appropriate it, when the payer does not, was restrained by the clearest principles of justice. He was bound to credit the party with the payment, who was interested in the fund from which it was derived, or he would make a surety responsible for a default for which he never undertook. But the case is altogether different where the parties interested in the payments are the same, and are equally answerable for all. In such cases the right of appropriation has been repeatedly decided and recognised in its full force and extent. By the act of congress, the sureties of a postmaster are not to be sued for a default of their principal, if the postmaster general shall fail to institute a suit for such default, for two years after it shall be made. Is this suit instituted for a default made two years before it was instituted? The suit was brought on the 1st July, 1828, to recover the sum of twenty-two thousand two hundred and thirty-five dollars and fifty cents. Was this default made two years before; that is, on 1st July, 1826? On that day the whole amount received by Mr. Bache was seventy-five thousand three hundred and seventy-eight dollars and twenty-three cents; his payments were fifty-six thousand seven hundred and ninety-six dollars and ninety-seven cents; on that day, therefore, eighteen thousand five hundred and eighty-one dollars and twenty-six cents, was the amount of his debt or default; and if the account had then stopped, and no further payments had been made, certainly the defendant would have had the benefit of the limitation of the act. But the account goes on, debits are charged, payments are credited, the balances vary and fluctuate, sometimes being in favour of the postmaster, until at the final close he stands indebted in twenty-two thousand two hundred and thirty-five dollars and fifty cents. But it is said that this has been effected by the postmaster general, who has improperly applied the payment of moneys received after the termination of a quarter, to the balance then due; or that the moneys paid in a subsequent quarter, were applied to pay what remained due on the antecedent one. Assuredly he had a right to do so, and had he not done so, the court would have done it for him. But it is clear he has so appropriated these payments.

The case of rent is put by the district attorney. So of three promissory notes, of one hundred dollars, payable annually; no payment is made the first year; in the second year, before the second note is due, or even after, one hundred dollars are paid; so also in the third year, without any direction by the payer. The receiver applies the first payment to the first note, and the second to the second, leaving the third unsatisfied. He sues on the third note. Can the debtor say it is more than six years since the first note was due, and deny the right to apply his payments to the second and third? If there could be any doubt in a matter so plain, it is put at rest by the decision of the supreme court of the United States, in Kirkpatrick's Case, 9 Wheat. [22 U. S.] 737. The language of the court is: "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may; if both omit it, the law will apply the payments, according to its own notions of justice. Neither party can claim the right, after the controversy has arisen; and, a fortiori, at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances otherwise adjusted than for the mere purpose of making rests, we are of opinion, that payments ought to be applied to extinguish the debts, according to the priority of time; so that the credits are to be deemed payments, pro tanto, of the debts antecedently due." In our case the postmaster general has clearly appropriated the payments made, from time to time, by Mr. Bache, who gave no direction concerning them, but made them without any discrimination of the fund, from which they were derived, and left them to be applied, according to the pleasure of the postmaster

general, and the usage of his office; and the appropriation thus made is precisely that which the supreme court has declared to be according to justice, and such as the court would direct, if neither of the parties had done so. The application, therefore, of the moneys received in a subsequent quarter, to the payment of the debt or balance antecedently due, being perfectly correct and lawful, it follows, that no part of the default, for which suit is brought, accrued two years before; on the contrary, all the balances antecedent to the last quarter were extinguished by the successive payments, and the final debt or balance falls on the final quarter. I am entirely clear that the limitation of the time of bringing suit, provided in the third section of the act of March, 1825, cannot avail the defendant.

The case then stands before you on these points: (1) Was the bond accepted; and of this you will judge. (2) If accepted, was it afterwards cancelled, and its obligation annulled. This is matter of law; and I am of opinion it was not. (3) The moneys arising, due, and collected under the second bond, cannot be applied to the discharge of the first bond. You will ascertain how much money, if any, has been thus applied, and deduct it from the amount claimed as finally due, on the whole account. (4) The suit has been brought in good time, and is not barred by the limitation of two years in the act referred to.

The jury found a verdict for the defendant.

Case No. 11,311.

POSTMASTER GENERAL v. REEDER.

[4 Wash. C. C. 678.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1827.

DEPUTY POSTMASTER GENERAL'S BOND—OMISSION TO SUE—DISCHARGE OF SURETY—GIVING NEW BOND — FRAUD ACTUAL AND CONSTRUCTIVE — PLEA IN BAR—SPECIAL DEMURRER.

1. The official bonds taken by the postmaster general from his deputies are valid, and the omission to bring suits on such bonds for the defaults of the principal in those bonds, does not discharge the sureties.

[Cited in U. S. v. Sowers, Case No. 16,363; U. S. v. Wright, Id. 16,776.]

2. A plea which professes to be in bar of the whole demand, and yet is so only to a part, is bad on special demurrer.

[Cited in Grafflin v. Jackson, 40 N. J. Law, 444.]

3. Fraud is actual or constructive. The definition of each. The former is generally a question of fact; the latter of law, after the facts are found.

4. The mere omission to bring suits on the official bond of the deputy postmaster, or to communicate his defaults to the sureties, is not, per se, evidence of fraud.

5. The giving a new official bond by the postmaster does not discharge his sureties under the old bond for the past or subsequent defaults of the principal.

[Cited in brief in Beyerle v. Hain, 61 Pa. St. 229.]

6. The order of the postmaster general to the postmaster, not to remit the money he may receive, but to retain it to answer his drafts, does not discharge the sureties.

7. If the defendant plead in bar a matter which is no defence at all, and it be found for him, still he cannot have judgment, but the court will give judgment for the plaintiff, non obstante veredicto; provided the defect in the plea is not in the form, but in the matter of it. If it be in the form, or can be made better by other pleadings, a repleader will be awarded. The rule is the same if the facts stated in a demurrer to evidence maintain such a plea.

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

This cause was argued at the last session of the court, and was taken under advisement.

L. Q. C. Elmir, for plaintiff.

Mr. Wall and L. H. Stockton, for defendant.

WASHINGTON, Circuit Justice. This case comes before the court upon a writ of error to the district court. It was an action of debt, brought in that court in the name of the postmaster general of the United States against the defendant, as one of the sureties of Charles Rice, postmaster at Trenton. The bond bears date the 28th of November, 1803, and is in the penalty of $2000, with condition that the said Rice, who had been duly appointed postmaster at Trenton, should well and truly execute the duties of said office, and should faithfully, once in every three months, and oftener, if required, render accounts of his receipts and expenditures as postmaster to the general post office, in the manner and form which should be prescribed by the postmaster general, in his several instructions to postmasters, and should pay all moneys that should come to his hands for postage of whatever is by law chargeable with postage, to the postmaster general of the United States for the time being, deducting only the commissions and allowances made by law for his care and trouble and charges in managing the said office. The breach assigned in the declaration is, that the said Rice had received as postmaster, from the date of the bond to the 2d of April, 1821, postages for such things as during that time were chargeable with postage, after deducting his commissions, &c. the sum of $2559.63, which he had neglected and refused to pay to the postmaster general of the United States for the time being, and still refuses, &c.

To this declaration there are ten distinct pleas in bar filed. To the first, third, and sixth pleas, and to the rejoinder to the replication to the second plea, there are general demurrers, and to the eighth plea, there is a special demurrer. The questions present-

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

ed by the general demurrers were stated and considered by the counsel as being: (1) Whether the postmaster general had authority to take the bond upon which this action is brought; and whether the same is valid in law, upon which an action can be maintained in the courts of the United States? (2) Whether the omission of the postmaster general to cause suits to be commenced against Rice at the periods prescribed by law, for his defaults in not paying over the balances due at the end of every three months, and the consequent injury alleged to have resulted to the defendant, as his surety, on account of the subsequent insolvency of his principal, discharged the defendant from his liability upon his bond.

1. The first question was decided at the last session of the supreme court of the United States, in the case of Postmaster General of United States v. Early, 12 Wheat. [25 U. S.] 136, which turned upon the validity of these official bonds, and upon the jurisdiction of the circuit courts of the United States to take cognizance of actions brought upon them in the name of the postmaster general of the United States. The decision of the court fully established the validity of those bonds, as well as the jurisdiction of the court; and is therefore conclusive as to this question.

2. The principles decided by that court in the case of U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; and in that of U. S. v. Vanzandt, 11 Wheat. [24 U. S.] 184, apply strictly to the second question, and must govern it. The first was an action upon the bond of a collector of direct taxes and internal duties against his surety, and the latter upon a paymaster's bond against his surety. In the former, it was contended that the surety was discharged in consequence of the neglect of the comptroller of the treasury to pursue the remedy which the law authorised and required him to do against the collector, upon his failing to render his accounts, or to pay over quarterly the moneys by him collected. The same argument was urged in the latter case, upon the ground of laches in not recalling the paymaster upon his failure to render his vouchers to the paymaster general for settlement of his accounts, for more than six months after his having received funds. In both cases it was decided, that the neglect imputed to the comptroller in the one, and to the paymaster general in the other case, did not discharge the sureties. It is true, that in those cases, the suits were in the name of the United States, and in this, the postmaster general is the plaintiff; but that can make no difference whatever, since, according to the decision in the before mentioned case (Postmaster General of United States v. Early [supra]), the United States are as much the real parties in this case, as they were in the two which have been mentioned. Neither can the personal liability of the postmaster general to pay the balances due by his deputies, which is fixed upon him by the acts of congress as a penalty for his neglect to cause suits to be commenced against these deputies for such balances, distinguish this from the above cases; since that liability cannot operate to discharge either the postmaster or his sureties, from the obligation, but is provided by law merely as an additional security of the United States. As to the special demurrer to the eighth plea, the court below was perfectly correct in deciding the plea to be insufficient. It professes to be in bar of the whole demand, and yet avers payment of only such of the postages as came to the hands of the postmaster prior to the 26th of March, 1819, and makes no answer to those which were received between that period and the 2d of March, 1821, when the postmaster was removed from office, although the breach in the declaration covers the receipts during the whole period. See 1 Chit. Pl. 509.

The questions arising out of the issues in fact upon the fourth and fifth pleas, are, whether the omissions of the postmaster general to cause suits to be commenced against Rice for the balances in his hands, were fraudulent or not, in point of fact, and whether he fraudulently concealed from the defendant the defaults of his principal. The seventh plea, upon which an issue in fact was also taken, alleges that Rice did, on the 2d of March, 1821, pay to the postmaster general of the United States all the moneys that came to his hands for postages, &c. (following the terms of his condition,) during the period that the defendant was his surety. The ninth plea is substantially as follows, viz. "that the plaintiff ought not to have, or maintain his said action as to so much of the moneys as came to the hands of Rice for postages, &c. after the 26th of March, 1819, or for any arrearages or defaults after that time; because, he says, that, on the 2d of May, 1818, the postmaster general of the United States, by letter of that date, required of the said Rice a renewal of his bond as postmaster at Trenton, and the said Rice, in pursuance thereof, did, on the 26th of March, 1819, together with two persons by name, as his sureties, execute a bond to the postmaster general of the United States of America, in the sum of $2500, with the condition that Rice should well and truly execute the duties of postmaster at Trenton, and should once in every three months, or oftener if required, render accounts, &c. (following the condition of the old bond,) and should also do and perform, as agent for the general post office, such acts as might be required of him by the postmaster general of the United States, and faithfully account with him for all moneys, bills, &c. which, as agent aforesaid, he should receive for the use of the general post office, which said bond was executed by said Rice, and his sureties, as a renewal of the postmaster's bond of said Rice, in conformity with said request; and avers

that the postmaster general of the United States on the said 26th of March, 1819, did receive the said bond as a renewal of the postmaster's bond of said Rice, and the same still remains in force, &c. and this he is ready to verify, &c. and prays judgment if plaintiff ought to have, &c. his action, &c. for moneys that came to the hands of Rice for postages, &c. after the said 26th of March, 1819, or for any arrears or defaults of said Rice after that time. To this plea, the plaintiff replied, that the postmaster general of the United States did not, on the said 26th of March, 1819, or at any other time, accept and receive the writing obligatory in the plea mentioned as a renewal of said Rice's bond as postmaster at Trenton, as stated in said plea, on which replication issue was taken. The tenth plea states in substance that, after the making of the bond in the declaration mentioned, viz. on the 1st of April, 1810, the postmaster general of the United States, without the defendant's knowledge, did, by a letter to Rice of that date, direct him not to pay to the postmaster general of the United States whatever monies came or should come to his hands for postages, &c. but to retain the same, and to pay it from time to time to the order of the postmaster general of the United States; contrary to the condition of the said bond, and to the provisions of the act of congress; and avers that the postmaster general of the United States did not draw orders on the said Rice, for the balances which remained in his hands for postages aforesaid, at the end of every three months, but wilfully suffered them to accumulate and remain in his hands to the prejudice of the defendants, insomuch as said Rice has become insolvent since said directions, &c. whereby the defendant was discharged from his liability, &c. On this plea an issue was taken.

Upon the trial of the above five issues in fact, the defendant gave in evidence, that Rice was a man of fair character, and in good credit for many years prior to his insolvency and removal from office in March, 1821. That Rice remitted to the postmaster general the balances due the two first quarters after his appointment, and that before the end of the third quarter, he received a letter from the postmaster general which directed him, in future, to keep the balances in his hands until he should draw for them, for the purpose of paying the cross mails, and to avoid the danger which attended the making of remittances in money by mail; in consequence of which letter, the said Rice remitted no more monies to the post office department, nor was he afterwards requested to do so. That two drafts were afterwards made upon him which he did not pay in consequence of one of them being drawn for too much, and the holder of the other refusing to allow the usual days of grace. That he paid a third draft for $1100, and deposited in one of the banks in Philadelphia, another sum to the amount of $1000 to the credit of the postmaster general, and was ordered by that officer, in October, 1820, to pay all the balances due by him in future into the bank of the United States. That Rice renewed his bond on the 26th of March, 1819, and transmitted it, as he was directed, to the general post office department, in the same year, which renewal was given in consequence of a letter from that department requiring the same to be done, and indorsing a blank bond for the purpose to be filled up with the names of the sureties, and the date when executed. The letter states, that from various causes it appeared proper to request a renewal of all postmasters' bonds which had been made three years or more. The bond, which is set out in the record, corresponds with that stated in the ninth plea. The defendant further gave in evidence the account of Rice with the general post office, making a balance against him on the 25th of March, 1819, of $2737.74, and on the 2d of March, 1821, when he was removed from office, a balance of $2559.63; and also receipts for payments by him on postages between those periods, exclusive of his commissions, &c. to the amount of more than the balance due by him at the first mentioned period.

Upon a demurrer to this evidence, which was joined by the defendant, the district court gave judgment that the defendant had not shown in evidence sufficient matter to maintain the issues upon the matters contained in the replications to the fourth, fifth, and seventh pleas, and that he has shown in evidence sufficient matter to maintain the issues on the matters contained in the replications to the ninth and tenth pleas, "but since it seems to the court that the matters contained in the said ninth and tenth pleas are not sufficient in law to bar the plaintiff, the plaintiff ought to recover his debt aforesaid and damages." A venire was accordingly awarded for a jury to inquire of the truth of the breaches of said bond in the declaration alleged, and to assess the damages. A jury being accordingly impannelled to inquire, &c. and to assess, &c. found that the plaintiff had sustained damage by breach of the condition of the bond, besides costs and charges of suit, to the amount of $2000, for which, and also for the costs, &c. judgment was entered for the plaintiff. The two questions raised by the issues on the fourth and fifth pleas may be considered together; as they both turn upon the allegations of fraud which constitutes the gist of those issues. The counsel for the plaintiff has candidly admitted that, as the demurring party, he stands exposed to every conclusion of fact which the jury might fairly have drawn from the evidence stated in the demurrer, which conduced to prove the charge of fraud averred in the pleas. Fraud is either actual, or such as is so considered in law; and is termed legal or constructive. The former always implies design in the party charged with it to deceive, or to overreach

another to his injury, by false suggestions, or by suppression of facts, the disclosure of which he knows or believes to be material. The latter may consist with perfect moral rectitude, and derives its character from the nature and consequences of the act in relation to others, independent of any moral turpitude in the person doing the act. Thus the concealment of a fact from an underwriter, which is known by the assured, and not by the underwriter, and which the former believes to be material to the risk, would be of the former description. But if not known, or believed by him to be material, still if the law consider it to be so, the concealment would avoid the policy upon the ground of what the law construes to be a fraud. Generally speaking, actual or moral fraud, depending always upon the mind of the person practising it, is a question of fact, and proper for the decision of the jury. Constructive fraud, on the other hand, is always a question of law, after the facts are agreed, or are found by the jury.

Now, what part of the evidence is it which in this case conduces to prove any fact from which the jury could fairly have inferred a fraudulent omission in the postmaster general to do his duty, on a fraudulent concealment from the defendant, either actual or constructive? The only facts which the evidence conduces to prove are, that Rice was a man of fair character, and in good credit, and regularly, at the end of every three months, reported to the general post office department his accounts of monies received and disbursed by him. That he remitted the balances due by him to that department, until he was directed to retain them in his hands to answer the drafts which might be made upon him; and that those drafts, when they were made, were always paid, except in two instances. Nevertheless, the balances as they became due were not drawn for, or demanded, so that he was generally in arrear up to the time of his dismission, when his debt amounted to the sum sought to be recovered in this action. Let it be admitted that the jury might, from this evidence, have inferred that the postmaster general had been misled by the good character and credit of Rice to practice a forbearance towards him beyond what his duty to the public, and his legal obligations, warranted; yet it surely would not follow that they could, with propriety, have concluded from those facts, and without other evidence, from which to judge of the motives which influenced the conduct of that officer, that this forbearance was induced by a fraudulent design to deceive and to injure either the defendant or the government. The comptroller in one of the cases before alluded to, disobeyed the injunctions of law, in not instituting against the collector the proceedings which the acts of congress had provided for the defaults of that officer; and the paymaster general equally violated his duty, by not recalling the delinquent paymaster in the other case. A loss to the public, and an injury to the sureties, resulted from those omissions in both cases. Yet it never entered into the mind of the supreme court, or even of the counsel who argued those causes, that those omissions were necessarily characterised by fraud, actual or legal. So far from it, the inference of fraud from the mere laches of a public officer is entirely repudiated by the principles laid down by the court in those cases, and upon which they were decided. Those principles are, that laches in a public agent are not imputable to the government, and that mere laches, "unaccompanied with fraud," (showing that laches do not, per se, imply fraud) form no discharge of a contract of the nature of that under consideration, even between private individuals.

Upon the subject of fraudulent concealment from the defendant of the defaults of his principal, it cannot be pretended that even negligence or breach of public duty, much less fraud, is imputable to the postmaster general; since he was not required, either by the law of the land, or by the dictates of morality, to communicate those defaults to the sureties. When they entered into this contract they trusted in the integrity and fidelity of their principal, and he was, in all fairness, bound, at all times, to satisfy their inquiries in relation to his official conduct. What might have been the legal consequence of a refusal by the postmaster general to afford information to the sureties upon this subject, in case it had been asked for; or to institute suits against the postmaster for his defaults, if this had been demanded; need not be decided in this case; since there is no evidence tending to prove that such request or demand had ever been made by the defendant, or by his co-surety. I conclude, therefore, that the court below was correct, in deciding that the issues upon the fourth and fifth pleas were not supported by the evidence stated in the demurrer. That court was equally correct in giving a similar decision as to the issue on the seventh plea, the demurrer to evidence stating, that on the 2d of March, 1821, when Rice was dismissed from office, there was a balance of $2559.63, due by him for postages for which he was liable.

The question growing out of the defence made by the ninth plea is, whether the responsibility of the defendant, as surety, ceased on the 26th of March, 1819, when a new official bond was given by the postmaster? Upon the demurrer to evidence, I must say, as the court below has decided, that the evidence fully supports the issue on the part of the defendant on this plea, as well as the issue on his part on the tenth plea. But the question to be decided is, whether, admitting the truth of the plea, in matter of fact, it forms any legal defence to this action? It was insisted by the defendant's counsel, that the demand and acceptance by the postmaster general of the new bond executed by Rice, terminated the responsibility of his sureties in the first bond. But no prin-

ciple of law, much less was any authority referred to to countenance this position. It cannot be maintained upon the ground of satisfaction, because it is well settled that the acceptance of one bond, although in satisfaction of another, cannot be plead in bar to an action upon the first. Maynard v. Crick, Cro. Car. 86; Cro. Eliz. 716, 727; 1 Burrows, 9. Besides, if the new bond could be considered as a satisfaction of the first, it would amount to a discharge of the defendant, not merely from his future responsibility, but from any responsibility incurred, and existing at the time the new bond was given; which is more than the counsel for the defendant contends for; and is, besides, a different defence from that made by the plea. Nor can the acceptance of the new bond be a defence to the action, upon the ground of its giving time to the principal, or changing the contract of the surety without his consent; since the condition of the two bonds, so far as it respects the duties of the principal, as postmaster, are precisely the same; and the addition of new stipulations, which are clearly not obligatory on the sureties in the old bond, cannot be said to vary the terms of their contract, particularly when the new bond was given after a forfeiture under the old had been incurred. And even if such could be the operation of the new bond, it would be to discharge the surety altogether; which is not contended for in argument, nor is that the matter insisted upon by the plea. In short, I can imagine no legal principle upon which this defence can be maintained, unless it could be made out that the demand and acceptance of the new bond operated virtually to terminate the commission under which the postmaster had theretofore acted; co-extensive with which I hold the guaranty of his sureties to have been. But I am acquainted with no authority or principle of law which can render a new official bond, either identical in form with a former bond, or which superadds to it new duties, equivalent to a new commission, the two things being in themselves totally distinct in their nature, operation, and design. If the commission of Rice terminated on the 26th of March, 1819, he ceased from that day to be postmaster; unless a new commission was granted to him which is not alleged in the plea. A new commission might possibly be considered as terminating the old one, if clearly so intended, without a formal removal of the party from his office; but a new official bond, with new sureties, cannot possibly produce this effect. But I do not consider this point as being altogether new, and now to be decided for the first time; the principle upon which it rests having been decided, as I conceive, in the case of U. S. v. Nicoll, 12 Wheat. [25 U. S.] 505. The suit in that case was brought against the surety of Swartwout, on an official bond given by Swartwout, as navy agent, with the usual condition annexed. The breach laid in the declaration was, that Swartwout's accounts had been settled by the proper accounting officers, upon which settlement a large balance was found against him which he had refused to pay. The bond bore date on the 22d of February, 1819, and one of the questions which arose in the cause was, whether the defendant, the surety, was, or was not responsible for any defalcation that took place on the part of Swartwout as navy agent, subsequent to the 30th of September, 1820, when, by the act of congress of the 15th of May, 1820 [3 Stat. 582], new sureties were required to be given by the said Swartwout?

The supreme court decided that the design of the above act in requiring new sureties to be given by the 30th of September, 1820, was to put it in the power of the treasury department to pursue the speedy remedy provided by the act against the principal and his sureties in the new bond, if it should be deemed necessary to do so. "But," says the court, "the act no where directs the principals to be discharged from office upon failure to give new sureties; and if the act had so directed, they would have remained in office until they were actually removed. The law does not in terms declare that the existing sureties shall be discharged from and after the 30th of September, 1820; and it would require a very constrained construction of the statute to discharge them by implication, while their principals were permitted to remain in office." This opinion clearly establishes the two following principles. 1. That the giving of new sureties does not amount to a discharge of the principal from office, or of his sureties from future responsibility for his acts; unless the law which requires the taking of new sureties, declares, in terms, or by just construction, that they shall be so discharged. And 2. That the liability of the sureties continues, as long as the principal continues in office under the appointment or commission which placed him in office at the time the bond was given, and until its legal termination. I am, therefore, of opinion that the acceptance of the new bond is no defence whatever to this action, and that the liability of the defendant, as surety for Rice, continued until the latter was removed from office.

I feel no difficulty whatever as to the defence set up by the tenth plea. The condition of the bond is not that the postmaster shall pay the balances due by him to the postmaster general, at any particular place, or time, or in any particular manner. It is, that he shall account every three months, &c. and shall pay over all moneys that shall come to his hands for postages, (after making certain deductions,) to the postmaster general. The law which requires the postmaster general to cause suits to be brought against his deputies for their defaults in not paying over the balances in their hands at the end of every three months, is merely directory to him, and it is at his peril if he grants indulgences after such faults have been committed. But no part of the post office law forbids the postmaster general to require payment of those balances at the place where the postmaster resides, or else-

where, according to the orders which the former may give for that purpose. It has been seen that the forbearance of the postmaster general to demand payment for any length of time does not, per se, discharge the sureties of the deputy. Even an agreement to give him time to pay will not produce that effect, unless it was founded on such a consideration as would prevent the postmaster general from demanding payment in the mean time. M'Lemore v. Powel, Foster & Co., 12 Wheat. [25 U. S.] 554. The direction of the postmaster general to his deputy produced no change of the contract into which the defendant had entered; nor did it, for one moment, prevent the former from insisting upon the payment of any balance in the hands of the latter, or from causing a suit to be brought to recover it. The direction therefore did not discharge the defendant as surety, and is no defence whatever to this action. But since the court must say, upon the demurrer to evidence, that the matter of the ninth and of the tenth pleas ought to have been found by the jury as true, in point of fact, upon the evidence, and must therefore be assumed as true by the court; the question is, and I admit the difficulty of it, what judgment ought the court to give in such a case?

Suppose the jury had found specially the facts which the evidence stated in the demurrer would have warranted, or had found for the defendant on the ninth and tenth pleas; what judgment ought the court to have given on them? The difficulty which this question presents is, whether, in such a case, a repleader should be awarded, or whether the court ought to render a judgment for the plaintiff upon those pleas, non obstante veredicto; it being an undisputed principle of law that, if the defendant plead in bar, a matter which, in point of law, is no defence at all, judgment cannot be rendered for him upon the verdict, although it be in his favour, or if rendered for him, it will be reversed on a writ of error. I shall not prolong this opinion by a particular examination of the various cases which have been decided upon this subject (Lacy v. Reynolds, Cro. Eliz. 214; Cro. Eliz. 227; Wilkes v. Broadbent, 1 Wils. 63; Willis, 360; 2 Strange, 1124; Carth. 370; 2 Strange, 873; Rex v. Philips, 1 Burrows, 292; 1 Strange, 394; 2 Strange, 994; 1 Ld. Raym. 390; 6 Mod.; 2 Ld. Raym. 922; 1 Salk. 173; 1 Ld. Raym. 90; Cro. Car. 25; Cro. Jac. 442; 1 Term R. 118; 2 Term R. 753; 2 Tidd, Prac. 831; 2 Saund. note 6, p. 319), but shall content myself with observing that, after the most careful consideration of these cases, I am satisfied that they fully warrant the conclusion to which Chitty has come in his treatise on Pleading (volume 2, p. 634). "The distinction," observes this learned author, "between a repleader and a judgment, non obstante veredicto, is this—that where the plea is good in form, though not in fact, or in other words, if it contain a defective title or ground of defence, by which it is apparent to the court, upon the defendant's own showing, that in any way of putting it he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment non obstante veredicto; but where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for plaintiff or defendant; there, for their own sakes, they will award a repleader. A judgment, therefore, non obstante veredicto, is always upon the merits; and is never granted but in a very clear case; a repleader is upon the form and manner of pleading."

The reasons here assigned for the distinction we are considering, and the good sense in which they are founded, must be obvious at once, and they seem to be fully supported by the cases in which the distinction has been taken. For why order a repleader, when it is evident to the court that the vice of the plea is inherent to the matter of the defence, and is in no respect chargeable upon the form in which it is presented? If, in point of form, the case cannot be made better by further pleading, the objection to the plea cannot be removed, but must continue to be attached to it in any and every shape which can be given to it, and consequently the order to replead would, to say the least of it, be an idle and a vain thing. The defences growing out of the ninth and tenth pleas are to be taken as true in fact, and no exception has been or can be taken to the form in which they are pleaded; but, in point of law, they constitute no defence at all, and are altogether immaterial. No useful purpose, then, could be answered by awarding a repleader. It must be acknowledged that most of the cases to be met with upon this subject are cases of trespass, replevin, informations in nature of a quo warranto, or others, in which the plea was considered as amounting to a confession of the cause of action, and attempted to avoid it by an insufficient justification, and, in those cases, the judgment would seem to have been entered upon the confession. In Carth. 370, we have the form of the judgment in one of those cases. It is observable, nevertheless, that in no case is it laid down that the confession of the cause of action must be direct, in order to warrant the judgment being entered for the plaintiff. In many of them it is not so; and in some, it is a mere inference from the plea, not denying it, but attempting to avoid it, by setting up some new matter as a defence against it. And I understand the general rule of law upon this point to be, that every plea which does not deny the cause of action stated in the declaration, or allege sufficient matter in point of law to bar the action; does, in effect, and

by a necessary implication, admit, not only the facts so alleged, but the whole cause of action; and if the declaration contains a good cause of action, judgment must be for the plaintiff, although the truth of the matters stated in the plea be proved on an issue in fact, or be so found by a jury. This I take to be the substantial principle which runs through all the cases, although it would seem, at first view, from the circumstances, that in most of them, the confession is, in some measure, direct, as if something more than an implied admission of the cause of action was meant; whereas nothing more would seem to have been intended by the court, than that the plea amounted, in point of law, to a confession of the cause of action.

The following cases go far to show that the above inference is by no means unauthorised. Comyns, in his Digest (volume 5, p. 518), letter S, tit. "Verdict," after laying down the general principle, that the jury ought not to inquire of a thing which is agreed by the parties to the issue, exemplifies it by stating, that if, in an action of waste, on A, the defendant plead no such ville as A, the jury cannot inquire whether any waste was committed, or whether the plaintiff had any land in A, for that is confessed by the plea. He cites 2 Rolle, 691. In the case of Burdick v. Green, 18 Johns. 14, which was an action of assumpsit, one of the pleas relied upon a discharge under an insolvent law, passed after the making of the contract; which it was agreed would have been bad on a demurrer. But the plaintiff replied fraud, upon which issue was taken and found for the defendant. The court was of opinion, that the replication admitted the discharge; yet, as the plea, though true, contained no ground of defence, judgment was rendered for the plaintiff on that point, non obstante veredicto. Now, in this case, as well as in the preceding one, the plea contains no direct confession of the cause of action, but it is inferred from its setting up new matter in avoidance of the action, instead of traversing the material facts laid in the declaration. In the case of Jackson v. Stetson, 15 Mass. 54, it is laid down that the plea of tender, joined to a plea of non assumpsit, or non est factum, does not expressly confess the making of the promise, or the execution of the deed; but yet it is considered as an implied admission of the fact, so that the defendant can never have a judgment in his favour on the ground that he did not make the promise, or give the bond. The last of this class of cases which I shall notice, is that of O'Keefe v. Dunn, 6 Taunt. 305, which was an action brought by the indorser of a bill of exchange, drawn at one month after date, against the drawers. The defendants pleaded, that before the indorsement to the plaintiff, and presentment by her for acceptance, the bill was presented by the payee for acceptance, and refused, and that the defendants had no notice given them of such refusal. After verdict for the defendant, on the issue joined on a traverse of that plea, a rule nisi was obtained to enter up judgment for the plaintiff, non obstante veredicto; upon the ground that the plea averring no notice to the defendant of the first dishonour of the bill, was insufficient in law. The rule was made absolute for the reasons assigned for asking it, the court being of opinion that the objection of want of notice could not be made as against the plaintiff, a purchaser of the bill for valuable consideration, and without notice of its previous dishonour. In this case too, it may be observed, that the plea contained no direct confession of any thing. If then a verdict had been found, in the present case, for the defendant, I should have thought that the plaintiff would have been entitled to judgment, non obstante veredicto. This is a demurrer to evidence; but it is quite clear, that, in principle, there can be no difference between that and the present case, except as to the form of judgment. In the one, the jury finds the issue for the defendant; and in the other, the court declares the issue to be in his favour, if the evidence conduces to prove it so that the jury might justly have inferred it. But in both, the cause of action being confessed or admitted, and not being avoided by any legal defence, the plaintiff is entitled to judgment. Whether the judgment should, in strictness, be entered upon the confession, or upon the insufficiency of the defence set up by the plea, may possibly admit of some doubt. From a view of the cases on this point, it would seem as if it had been entered both ways; but, although the former should be considered as the best mode, the difference is merely formal, and can afford no sufficient reason for reversing this judgment on that ground.

There is, upon the whole, no error in the judgment of the district court, and the same must therefore be affirmed, with costs.

Case No. 11,312.

POSTMASTER GENERAL v. RICE et al.

[1 Gilp. 554; [1] 16 Haz. Pa. Reg. 18.]

District Court, E. D. Pennsylvania. May 19, 1835.

DEPUTY POSTMASTER'S BOND—AUTHORITY OF POSTMASTER GENERAL—LIMITATIONS—EVIDENCE OF ACCOUNT—ACT OF MARCH 3, 1825—RETROACTIVE EFFECT.

1. The postmaster general has a right to require a bond from a deputy postmaster, for the faithful performance of the duties of his office, although such bond is not expressly required by law.

[Cited in Barnet v. Abbott, 53 Vt. 126; Barnes v. Webster, 16 Mo. 266; Sweetser v. Hay, 68 Mass. 53.]

2. The equitable rule of limitation applied to bonds, where there has been no demand for

[1] [Reported by Henry D. Gilpin, Esq.]

twenty years, is a mere presumption of payment, not an absolute limitation.

3. The provisions of the act of 3d March, 1825 [4 Stat. 102], substitute a certified statement of the settled account as evidence in suits against deputy postmasters, in lieu of the certified copy of the account current required by the provisions of the act of 30th April, 1810 [2 Stat. 592].

4. The provisions of the act of 3d March, 1825, releasing the sureties of a deputy postmaster where suit is not brought within two years after a default, do not apply to a default which occurred before the passing of the act.

On the 26th February, 1816, John Appleback was appointed a deputy postmaster at Cherryville, in the state of Pennsylvania. At the time of his appointment, he gave bond to the postmaster general, together with Owen Rice and Sebastian Gundt, the defendants, in the penal sum of six hundred dollars, conditioned for the faithful execution of the duties of his office, and the punctual payment to the postmaster general of all moneys coming to his hands for postages. Mr. Appleback continued in office until the 1st April, 1820, at which time it appeared that a small balance had been left unpaid at the termination of every quarter, from the period of his first appointment. His accounts were subsequently examined and adjusted at the post-office department, and, on the 15th June, 1831, a balance was certified to be due from him of fifty-one dollars and sixty-five cents. To recover this balance suit was brought against all the parties to the bond. Mr. Appleback was not found, but the defendants appeared and pleaded the general issue.

On the 19th May, 1835, this issue came on for trial before Judge HOPKINSON and a special jury. After proof of the bond, the United States gave in evidence, though it was objected to on the part of the defendants, a statement certified under the seal of the post-office department, containing an account of the balance due from Mr. Appleback, on his post-office accounts, at the termination of each quarter, and the aggregate of these, amounting to the sum now claimed. The defendant, Owen Rice, proved that in the year 1825, long after this default of his principal occurred, but some years before this suit was brought, he had been himself appointed a deputy postmaster by the department.

Mr. Gilpin, Dist. Atty., for the postmaster general.

This suit is brought on a joint and several bond to which the defendants are parties. It is a bond similar to those usually given at that time by a deputy postmaster, for the faithful execution of the duties of his office. It requires that officer expressly, "once in three months, to pay all moneys that shall come to his hands for postages, to the postmaster general." That Mr. Appleback failed to do so, is proved by a certified statement under the seal of the post office department, which is declared by the thirty-first section of the act of 3d March, 1825, to be "evidence in all suits brought by the postmaster general for the recovery of balances or debts due from postmasters." The liability of the defendants therefore under their bond is fully established. 3 Story's Laws, 1996 [4 Stat. 102].

Mr. Scott, for defendants.

This is certainly a case of great hardship on the defendants, who are merely sureties, and one of whom at least is proved, by the act of the government, which, in 1825, appointed him a postmaster, to be a person of probity. Eleven years were suffered to elapse after the default of the principal was known, before the account against him was even stated, the deficiency communicated to his sureties, or a step taken for its recovery. Under these circumstances, the defendants are certainly entitled to avail themselves of all legal objections to this tardy claim. These are numerous; they relate to the bond itself, to the evidence of default, and to the time and mode of recovery. This suit cannot be sustained in this court on this bond. It purports to be an official bond, taken by the postmaster general, ex virtute officii; but all such acts are merely ministerial; they are the acts of an agent of limited powers; they cannot therefore extend beyond his powers. Now there was no law which authorised him to take this bond at the time he did so; the United States did not intend to exact such a guarantee from a deputy postmaster, or they would have so declared by law. The act of the agent, therefore, was neither within the letter nor spirit of his authority, and is void. If it be regarded as a mere voluntary bond, good at common law, though not by statute, then it is not sufficient to found this action on, in this court, for it does not present a case arising under the laws of the United States; a circumstance necessary to give this court jurisdiction. The case of Postmaster General v. Early differs from this, in being a suit brought against a delinquent postmaster himself, not his sureties, and in being instituted in the circuit, not the district court. 12 Wheat. [25 U. S.] 136. But there is a fatal objection, even if the action on the bond can be sustained. There is no legal proof of default. The sole evidence offered on the part of the United States, is a paper, certified indeed under the seal of the post-office department, but which, in a controversy between individuals, would be worthless. By this mode, the United States at first assume the settlement of the account, and then make their own settlement evidence of their claim. If they are to exercise such a privilege, they must at least do so in strict conformity with the law. By the twenty-ninth section of the act of 30th April, 1810, it is provided, that "certified copies under the seal of the general post office, of the accounts current of the several postmasters, after the same shall have been examined and adjusted at that office, shall be admitted as evidence." Such

was the law at the time the contract was made, the bond given, and the default occurred. Now this paper is a mere abstract of balances due at the end of each quarter; it is not even an account; it contains not a single credit; much less is it an account current. It is not evidence under the law in question. By the thirty-first section of the subsequent law of 3d March, 1825, "certified statements of the accounts of postmasters, after the same have been examined and adjusted, are to be admitted as evidence;" but this law is not to have a retrospective effect and to affect accounts closed, as this was, five years before it passed. This paper, however, is not even such a statement; it was surely meant that a statement should show the court what the postmaster had received and what he had paid; it was surely intended that his default should be made manifest. That is not done here. All that we see is a mere memorandum of a debt, as made up at Washington; nothing that can pretend to be called a statement of the accounts. 2 Story's Laws, 1166 [2 Stat. 592]; 3 Story's Laws, 1996 [4 Stat. 102].

Supposing, however, the bond to be sufficient, and the default to be proved; yet these defendants, being merely sureties, are discharged by the negligence of the public officers in bringing this suit. The bond was given on the 6th February, 1816, a default occurred on the 1st July, 1816, the suit was brought on the 18th June, 1831. Now if there were no express statute on the subject, so great a lapse of time would give a right to presume payment; this is especially so in the case of sureties, and it ought to be; here the principal, Mr. Appleback, has been suffered to escape; ten years ago he might have been found and could have paid the debt; he now goes untouched, while his sureties are called on to pay his debts. But there is an express statute. By the third section of the act of 3d March, 1825, it is provided, that "if the postmaster general shall fail to institute suit against a postmaster, who shall have made default, and his sureties, for two years from and after such default shall be made, then the sureties shall not be held liable to the United States, nor shall suit be instituted against them." Now in this case, more than two years did elapse, not only after the default was made, but after this law was passed, before the suit was brought; and of course the defendants are persons whom congress clearly meant to exempt. It is not a sufficient answer to say, that this construction gives to the law a retrospective character, and applies it to occurrences which happened previous to its passage. This effect was well known at the time. It was meant to change the existing policy; to carry into effect a new principle; and this congress had clearly a right to do. In our state and in New York, measures similar in principle have been adopted by the legislature, and the courts have not considered them as retrospective laws. To hold the reverse, would be to sustain the most palpable unfairness. The law of 1825, exempts every surety who subsequently gives bond, unless suit is instituted within two years after default; yet those who have previously done so, are to be held responsible for ever. To admit the rule, therefore, to apply to all cases, would be but to place them all on an equal footing; to apply it differently in one from another will be not merely to violate its avowed object, but to do a great injustice. 3 Story's Laws, 1986 [4 Stat. 102]; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; Postmaster General v. Early, 12 Wheat. [25 U. S.] 136; Com. v. Duane, 1 Bin. 98, 601; Eakin v. Raub, 12 Serg. & R. 330; People v. Jansen, 7 Johns. 332.

Mr. Gilpin, for the postmaster general, in reply.

The right of an officer of the United States, to secure the payment of a debt that may become due to them, by receiving security which is voluntarily given, even though not required to do so by law, seems to be too plain to admit of question; it is a means, certainly not illegal or improper, to attain an end contemplated by law; and a competent court would undoubtedly aid him in such a course. But in this case the act of the postmaster general is strengthened by usage and by law. To take bonds from deputy postmasters for the performance of their duty, has been an invariable usage, and these bonds have been repeatedly the subjects of judicial decision. It is true, that before the act of 3d March, 1825, the postmaster general was not required, in explicit terms, to demand them; but it is impossible to read the previous law of the 30th April, 1810, and not perceive that they were contemplated by it. The twenty-ninth section directs the manner in which suits are to be instituted, for "the recovery of balances due to the general post office, whether they appear by bond or obligation, or otherwise;" and the forty-second section expressly alludes to "the bonds given by deputy postmasters, for the faithful execution of the duties of their office." The same law authorises the postmaster general to bring these suits. The act of 3d March, 1815, removes every doubt that this is the court in which he ought to proceed, for it extends its jurisdiction to all suits brought by any officer of the United States, under the authority of an act of congress. 2 Story's Laws, 1166, 1168, 1531 [2 Stat. 602, 3 Stat. 244]; 3 Story's Laws, 1986 [4 Stat. 102]; Armstrong v. U. S. [Case No. 549]; Dugan v. U. S., 3 Wheat. [16 U. S.] 172; Postmaster General v. Early, 12 Wheat. [25 U. S.] 136.

The document offered to prove the default, is exactly that which the thirty-first section of the act of 3d March, 1825, means to make sufficient evidence; it is a statement of the account after settlement. The act of 30th April, 1810, required certified copies of the

accounts current; this law requires a statement of them; a variation occasioned by the experience of fifteen years. The paper offered is not a mere statement of balances, as has been alleged, but it is a certificate of the account as it stood at the end of every quarter, settled and adjusted; it is not like a general balance, in which every thing is thrown together, but there are items corresponding, as to the time of settlement, with those which must appear on the books of the postmaster, and consequently be susceptible of comparison and correction. Either this is what the law meant, or copies of the accounts on file must be given: that the latter are not intended is apparent from the change of the law: it follows that such a document as this is the evidence required. This provision differs essentially from that of the second section of the act of 3d March, 1797, on which a judicial construction has been placed by this court; there it is made necessary to produce "a transcript of the books and proceedings of the treasury;" that is similar to the former law, relative to the post-office, requiring copies of the accounts current, not to the present, requiring merely a statement; the decision of this court, therefore, in the case referred to, rather sustains than controverts the position now taken on the part of the United States. 1 Story's Laws, 464 [1 Stat. 512]; 2 Story's Laws, 1166 [2 Stat. 592]; 3 Story's Laws, 1996 [4 Stat. 102]; U. S. v. Patterson [Case No. 16,008].

The objection as to the time at which the suit was brought, presents itself in two aspects; first, as affording a reasonable presumption of payment; and secondly, as showing such neglect on the part of the postmaster-general, as to bar his right of action. In answer to the first it may be observed, that twenty years of continued default is the shortest time which will raise even a presumption of payment of a bond. Here at most ten or eleven years elapsed; for though a default may have occurred earlier, payments and settlements were made by Mr. Appleback as late as April, 1820. No attempt, besides, is made to fortify the presumption of payment by any evidence. To the second point it is answered, that no laches on the part of an officer can affect the rights of the United States. It is true the defendants endeavour to relieve themselves from the operation of this principle, by referring to the third section of the act of 3d March, 1825, where the United States have themselves made their rights dependent on the conduct of their officers; it would relieve them were it applicable to their case; but it is not. To apply it to the present case would be to make it retrospective; nay more, it would be to leave themselves actually without remedy, in every case of default, not prosecuted, which had occurred previous to the 3d March, 1825. Under no circumstances would it be proper to make such a retrospective application of a law. The point, however, is not left in the slightest doubt; the forty-sixth section of the same act expressly declares, that its provisions "are not to affect any existing debt or demand, due to the department, but that all such are to be adjudged, determined and executed according to the present laws." As regards this liability, therefore, of the defendants, no neglect has occurred to impair it, and if it is established by and arises out of the evidence, it still continues as a just foundation of the action. 3 Story's Laws, 1999 [4 Stat. 114]; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; U. S. v. Vanzandt, 11 Wheat. [24 U. S.] 184; Dox v. Postmaster General, 1 Pet. [26 U. S.] 318; Locke v. Postmaster General [Case No. 8,441]; Postmaster General v. Reeder [Id. 11,311].

HOPKINSON, District Judge (charging jury). This is an action brought to recover a balance due by John Appleback. He was appointed postmaster at Cherryville in 1816, and then gave bond with the two defendants, who were his sureties, to pay over all balances of postage, and to perform correctly the duties of his office. When taken, there was no law requiring this bond; but it was the settled usage of the department to take such a one from every postmaster, on his appointment. In the case of Postmaster General v. Early, which has been so frequently referred to, it was made a serious question whether such a bond was legal, and whether a suit could be sustained on it. The supreme court decided that the postmaster general had a fair right to take such a bond, and that, in case of default in paying over a balance of postage, the obligors were liable. That question, therefore, is now at rest.

The bond, then, is good. We next come to the account. That shows the various balances due and unpaid at the end of each quarter. It was the only evidence offered on the part of the United States. At the time it was offered, it was objected to by the counsel of the defendants. I had some doubt as to its being such a "statement of the account" as the law of 3d March, 1825, contemplates; though it was certainly the intention of that law to substitute a statement of the settled account, instead of the copies of accounts current, which that of 30th April, 1810, required. I admitted the evidence, however, because the accounts current could be obtained from Washington, though with considerable delay and at some expense; and it was not alleged or pretended that there was any error of fact in the document offered. The point, too, is reserved for the benefit of the defendants; and they may have the advantage of a more deliberate argument, should they desire it. In giving your verdict, therefore, you are to consider this document as legal evidence of the facts it contains; and as such it establishes, prima facie, the debt as due to the United States.

Have the defendants shown you that it has been satisfied, or that there is any circumstance to discharge them from their obligation to make it good? Their first ground is lapse of time. In ordinary simple contract debts, a right of recovery is barred in six years; but this does not extend to bonds. In courts of equity, however, the same principle has been applied to bonds, but the period of limitation is settled at twenty years where there has been no demand; this, however, is not an absolute limitation, as in the former case, it is a mere presumption of payment. The defendants, therefore, cannot rely on this; twenty years have not elapsed; only eleven years on the last item, and but sixteen on the earliest default. Besides, no evidence of any sort has been offered to sustain this presumption of payment. I am clearly of opinion that there is no legal presumption that this debt has been paid.

The next ground is one of law also, and has been very fully argued. It depends on the effect which the proviso in the third section of the act of 3d March, 1825, has on this claim. The argument of the defendants' counsel is, that it applies to previous cases, to cases occurring before the law itself was passed. That is not my opinion. Bonds were required to be taken by the postmaster general for the first time by the law of 3d March, 1825, and this clause directing him to bring suit on them, within two years after default, applies only to those bonds. What the district attorney says is perfectly true, that if it is to be applied to previous bonds, it will cut off the postmaster general from bringing suit, in cases where there was no law requiring him to do so. Previous to the act of 3d March, 1825, there was nothing whatever which directed him to institute proceedings within two years; his delay was not illegal, and might be founded on reasons he thought sufficient; yet the defendants' construction would take from him all his remedy, on the ground of that delay.

The jury found a verdict for the postmaster general for fifty-one dollars and sixty-five cents.

Case No. 11,313.

POSTMASTER GENERAL v. RIDGWAY et al.

[Gilp. 135.] [1]

District Court, E. D. Pennsylvania. Nov. 24, 1829.

PLEADING AND PROOF—SUIT ON JOINT AND SEVERAL BOND—PLEA OF NON EST FACTUM—AMENDMENT AFTER JURY SWORN — NEW COUNTS.

1. Where a plaintiff declares against one obligor alone, as jointly and severally bound, and the defendant pleads non est factum, a joint bond of the defendant and another person is not evidence, though it agrees in date and amount with that described in the declaration.

2. An amendment of the declaration, offered after the jury is sworn, and introducing a new cause of action, cannot be allowed.

3. In an action of debt against one obligor, a declaration setting forth a joint and several bond, cannot be amended, by adding a new count, setting forth a joint bond of the defendant and another person.

On the 8th September, 1804, Matthew Ridgway and Hugh Ross executed a joint bond, in the penal sum of five hundred dollars, to the postmaster general, conditioned for the faithful execution by Matthew Ridgway of the duties of the office of postmaster, at Milford, in Pennsylvania, and for the regular payment by him of all moneys coming to his hands for postages. On the 31st December, 1808, his accounts were settled at the post office department, as far as they were furnished, and showed a balance to be due from him, according to his own accounts, of eight dollars and fifty-five cents. But, besides this, he had neglected to render accounts from the 1st October, to the 31st December, 1806, and from the 1st April, 1807, to the 31st December, 1808; a period comprising twenty-four months or eight quarters, and estimated at seventy-two dollars and sixty-three cents. There was thus due and unpaid on the 31st December, 1808, a balance of eighty-one dollars and eighteen cents. On the 22d November, 1821, this account was stated by the proper officers of the department, and was transmitted to this district, where the present suit was brought, on the 3d December, against the two defendants Matthew Ridgway and Hugh Ross. At the return day of February sessions following, the marshal returned, "Non est inventus as to Matthew Ridgway, and cepi corpus and bail bond as to Hugh Ross." On the 12th March, 1822, the district attorney for the time being, declared against "Hugh Ross, impleaded with Matthew Ridgway, returned not found; for that whereas the said Hugh, on the 8th September, 1804, by his writing obligatory under his hand and seal acknowledged himself to be bound jointly and severally unto the postmaster general, in the sum of five hundred dollars to be paid when thereto requested, which, although often requested, he had refused to pay." To this declaration the defendant, Hugh Ross, on the 1st December, 1826, pleaded non est factum, and payment with leave, &c. The district attorney replied non solvit, and issues.

On the 24th November, 1829, the case came on for trial before HOPKINSON, District Judge, and a special jury. It was argued by Mr. Dallas, Dist. Atty., for the postmaster general, and Mr. Scott, for defendant Hugh Ross.

After the jury were impanelled and sworn, the district attorney offered in evidence the joint bond of Ridgway and Ross, dated the 8th September, 1804, to which the counsel for the defendant objected, on the ground that the declaration only counted on "a joint and several bond of Hugh Ross," while this was a joint bond of Ridgway and Ross; a vari-

[1] [Reported by Henry D. Gilpin, Esq.]

ance which was material and fatal. Dillingham v. U. S. [Case No. 3,913].

THE COURT sustained the objection, and overruled the evidence.

Mr. Dallas, for the postmaster general, moved to amend the declaration, by adding a new count, in which the bond was accurately stated, and distinct breaches of the several conditions were set out.

Mr. Scott, for defendant.

There is no equitable reason for listening to this application to amend; and if the court have the power, it ought not to be exercised, during the trial, and under the peculiar circumstances. Twenty-one years have elapsed since this balance accrued, and eight years since the suit was instituted. There are, however, objections strictly legal to the amendment now proposed. It is not an alteration of the existing pleadings, but it introduces an entirely new cause of action; it creates for the jury a new issue; it presents against the defendant a new substantive charge. He has pleaded non est factum; he denies that the bond stated in the declaration is his deed; that bond is described as a joint and several bond of Hugh Ross; if this amendment is allowed, it will be a joint bond of Matthew Ridgway and Hugh Ross, and of course an instrument essentially varying from that which is the subject of his plea. It has also the effect to revive a new right of action which, as the pleadings now stand, would probably be barred; sufficient time has elapsed to afford a legal presumption of payment; and an amendment ought not to be allowed which, by introducing a cause of action not now existing on the record, might deprive the defendant of the benefit of this presumption. The thirty-second section of the act of congress of 24th September, 1789, directs the court to amend "all imperfections, defects, and wants of form," merely, and does not extend to matters of substance, which this is, for it introduces an instrument of writing entirely different from that heretofore stated in the pleadings. 1 Story, Laws, 66 [1 Stat. 91]; The Harmony [Case No. 6,031]; Smith v. Jackson [Id. 13,065]; Sackett v. Thompson, 2 Johns. 206; Harris v. Wadsworth, 3 Johns. 257; Pease v. Morgan, 7 Johns. 468; Petre v. Craft, 4 East, 433.

Mr. Dallas, for the postmaster general, in reply.

There is nothing to deprive the plaintiff of his right to amend. Even supposing that the statute of limitations would run against the cause of action now before the court, yet that circumstance would itself be a good reason for allowing the amendment. There is however, neither legal limitation nor legal presumption of payment. The bond was sued out in thirteen years after the default; and its identity is clearly proved by the identity of the parties, dates, and sums. Nor is the introduction of a new allegation, if this were such, into the declaration an improper amendment; such amendments have been frequently allowed. This, however, is not of that character; it is but a more definite statement, in a second count, of what has been substantially laid in the first. The issue joined is not affected; the jury have been sworn to try the issue between the plaintiff and defendant; that issue is on the plea of non est factum, which is equally applicable to either count. The substantial merits of the case ought to be submitted to the jury, which this amendment will effect; if it is refused, it will only oblige the postmaster general to begin anew, without in any manner establishing for the defendant a just and legal objection. 2 Tidd, Prac. 653; Aubeer v. Barker, 1 Wils. 149; Blackwell v. Patton, 7 Cranch [11 U. S.] 471; The Edward, 1 Wheat. [14 U. S.] 264; Smith v. Barker [Case No. 13,013].

HOPKINSON, District Judge. This suit was brought eighteen years after the bond was executed, and fourteen years after the surety's liability by reason of the default of the principal. It is a suit on a sealed instrument, which is described by the plaintiff in his declaration, and which the defendant in his plea has alleged not to be his deed. A bond is now offered in evidence, which is not the bond so described, nor that which the defendant has denied to be his; it is a joint bond given by himself and another person, while the former is expressly stated in the declaration to be a joint and several bond of the defendant, and it is not alleged that any other person is joined with him. It is no doubt true that amendments may be made, not only in form but even in substance. But surely the court is not to be put to sea; nor is this privilege to be so construed as to introduce suddenly, and on the trial, new parties and a new cause of action. My difficulty is, that the proposed amendment would introduce an entirely new cause of action. The bond as set forth in the new count, now offered as an amendment, differs in the most essential particulars from that originally declared on, as it is described in the declaration. It is impossible for us to decide that they are the same instruments, merely from similarity in certain particulars. The same parties may, on the same day and in the same penalty, have given a joint and several bond, as well as a joint bond. What are pleadings? They are the manner and form in which a party is required to present his case to the court, and if he has made a mistake in this form, which is peculiarly under the direction of the court, he may be allowed to amend it. But here there is no error in the manner and form of stating the plaintiff's case, but in the case itself. He has mistaken his cause of action. He has brought the defendant here to answer his complaint; he has formally stated and declared what that complaint is; the defendant has put in his answer to it; and the parties appear, each to maintain his allegation.

But now the plaintiff informs the court that he has no such complaint as he has averred; although he has another which he prays may be substituted for that which he cannot maintain.

On the whole I am of opinion that the amendment ought not to be now made; and on the ground that it introduces a new cause of action.

A nonsuit was entered, with the assent of the district attorney.

Case No. 11,314.

POSTMASTER GENERAL v. ROBBINS.

[1 Ware (165) 163.] [1]

District Court, D. Maine. Dec. Term, 1829.

DESCENT AND DISTRIBUTION—WIDOW'S ALLOWANCE—PRIORITY OF DEBT DUE UNITED STATES.

The act of congress of March 3, 1797 [1 Stat. 512] giving to debts due to the United States a priority over all other debts due from a deceased debtor, does not entitle them to receive their debt from the administrator prior to his payment of the allowance to the widow, made by the judge of probate under the state law regulating the descent and distribution of intestate estates.

At a former term of this court the plaintiff recovered judgment against Waterman Many, a deputy postmaster, on his official bond, for a balance due on his account with the general post-office, of moneys received for postage; and this is a scire facias to revive the judgment and obtain execution against his administrator. The defendant [Willard Robbins, administrator] has filed several pleas in answer, but the third embraces the matter which is relied upon in the defence. This sets forth the statute of Maine relating to the settlement of intestate estates. By this statute it is provided that if an estate is insolvent the debts due for taxes, debts due to the state, and those due for the expenses of the last sickness and funeral of the deceased shall be first paid; and there is another provision in the same act, that in all cases of intestacy, whether the estate is solvent or insolvent, the widow shall be allowed her wearing apparel, together with such further allowance of the personal estate of her husband as shall be decreed by the judge of probate, he having regard to her quality and degree, and the family under her care. The plea then alleges that the estate was represented as insolvent, that commissioners were appointed according to law to receive and allow the claims of creditors, and that on their report the estate was decreed by the court to be insolvent; that the judge allowed, by his decree, $150 to the widow, out of the personal estate of the deceased; that the administrator has settled his account in the probate office, and there is a balance in his favor on the settlement of $13.49, and that he is allowed in his account $150, decreed to the widow by the judge of probate, $10 for expenses of the last sickness and funeral charges and his charges of administration; that these charges, with the allowance to the widow, had exhausted the whole estate which had come into his hands as administrator, before the time of suing out the scire facias, and that he has no goods in his hands to be administered. To this plea there is a replication that, before any of these payments were made, the defendant had due notice of the demand of the plaintiffs, and of the priority of this demand against the estate of the deceased, by the laws of the United States. To this there is a rejoinder that the matter of the replication is insufficient to avoid the plea and sustain the action.

Mr. Shepley, Dist. Atty., for plaintiff.
C. S. Daveis, for defendant.

WARE, District Judge. The question which is presented by these pleadings and which has been argued at the bar, is, whether the debts due to the United States take precedence of the claims against the estate, which the plea admits to have been paid. The statute of Maine, relied upon in the plea, provides that in all cases of insolvency, before any distribution shall be made of the effects of the deceased among the general creditors, "the debts due for taxes, debts due to the state, and for the last sickness and necessary funeral expenses of the deceased, shall be first paid." 1 Laws Me. c. 51, § 25. In another part of the same act (section 39) there is another provision that, "in the settlement of intestate estates, whether solvent or insolvent, the widow shall be entitled to her wearing apparel, and such other and so much of the personal estate as the judge of probate shall determine to be necessary to her quality and degree, regard being had to the family under her care." If there be no widow, the judge of probate has the authority to make a similar allowance for the benefit of the children of the deceased, who are minors. The policy of the law, in these cases, places the claims of humanity above the claims of justice, and will not permit a helpless family to be turned out of doors in a state of entire destitution, though the provision which is made for their necessities is made at the expense of creditors. The amount to which this allowance may be raised, and the proportion which it may bear to the whole estate of the deceased is confided entirely to the discretion of the judge of probate, and this allowance when fixed by the decree of the court, is, like the widow's dower in the real estate of her husband, withdrawn from the estate, and is not considered as assets in the hands of the administrator for the payment of debts. The statute, with the proceedings under it in the court of probate, afford a complete protection to the administrator against this action, unless the operation of the statute is controlled and overruled by that of the

[1] [Reported by Hon. Ashur Ware, District Judge.]

United States, relied upon in the replication. This act provides that "when the estate of any deceased debtor, in the hands of administrators or executors, shall be insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first paid." 2 Laws [Bior. & D.] 368 [1 Stat. p. 512, c. 20]. The paramount authority of the laws of the United States will give to their debts a precedence before any debts privileged by the laws of the state. But the payments shown in the plea, with the exception of that for the expenses of the last sickness, can in no proper sense be called debts due from the deceased. The expenses of last sickness are named in the account in a general charge with the funeral expenses, so that it is impossible to separate them, and say what proportion of the whole was for one, and what for the other. So far as this item includes the expenses of the last sickness, it is clearly a debt due from the deceased, and must stand, in point of privilege, after that due to the United States. So far as it is composed of funeral charges, it is not a debt due from the deceased, but more properly a charge on the administrator. The statute of Maine does indeed seem to contemplate funeral expenses as a debt due from the deceased, and assigns it a privilege in the same grade with taxes and debts due to the state. I do not mean to question the competency of the legislature to assign to this claim against the estate of a deceased person any rank or privilege which may seem just; but it appears too clear to admit of controversy, that a man cannot contract a debt after he is dead. In the nature of things, funeral expenses are a charge on the estate in the hands of the administrator, and stand in the same privilege with other charges of administration. But this point does not necessarily arise in the present case, as it appears from the plea that the whole estate which has come into the hands of the administrator has been exhausted by the payment of the allowance decreed to the widow, and the ordinary charges of administration.

The important point in the case is, whether the priority established by the laws of the United States attaches to the estate in the hands of the administrator, so that their debt must be paid before the allowance, decreed by the judge of probate, to the widow, the administrator having notice of their demand before the payment is made. This is maintained for the plaintiff, and denied for the defendant. The suit is in the name of the postmaster-general, but he sues merely as trustee for the United States. The debt is properly their debt, and the recovery would be exclusively for their benefit, and it was not disputed at the argument that this debt has all the privileges that it would have if the suit were in the name of the United States. In support of this claim, it is contended that the word "estate," in the statute, is intended to comprehend the whole property of which the deceased debtor is possessed at the time of his death, and that the priority attaches to the whole. Several decisions have been made on the construction of the priority acts, but no one of them has presented these statutes in the precise aspect that is exhibited by this case. In every instance it has been a contest between the United States and another creditor. In these cases it has been decided that the priority given by the law does not create a lien on the debtor's estate, but merely makes the debt of the United States a privileged debt against the general assets of the debtor in the hands of his assignees or administrator, and rendering them personally liable, provided any other debt is paid before that due to the United States. U. S. v. Fisher, 2 Cranch [6 U. S.] 358; U. S. v. Hooe, 3 Cranch [7 U. S.] 73. If the statute does not create a lien, it would seem it will not remove or supersede an existing lien, and this opinion is strongly intimated in the last case (Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386) in which these acts have been brought to the notice of the supreme court. The case of Thelluson v. Smith, 2 Wheat. [15 U. S.] 396, appears to favor a contrary doctrine, but in the case last cited this is said to have been determined on its own particular circumstances. On this principle, the prior right of payment of the United States would not overreach the widow's right of dower in the real estate of her husband. Indeed, this was not contended at the argument. If this be conceded, what good reason can be given for making a distinction between her right of dower in the real estate of her husband, and her claim for an allowance out of his personal estate? If her lien for dower places her right, in point of privilege, before a debt of the United States, why should not her claim for an allowance? I can see no satisfactory reason on which a distinction can be supported. Her lien for dower, indeed, spreads itself over the whole real estate of the husband from the time of marriage, and the extent of the right is fixed and ascertained by the law. Her right in the personal estate attaches itself only to that of which he was possessed at the time of his death, and perhaps, under the just construction of the statute, subject to all liens subsisting at that time. It is also uncertain as to the amount, but is rendered certain by the decree of the judge of probate; and when it is ascertained, I can see no reason why her right in the personal estate is not as sacred, and as highly privileged by the law, as her right in the real estate. Both are equally withdrawn, by the state law, from the reach of creditors, and neither is considered as assets for the payment of debts. But however this may be, the case may well be decided on narrower grounds. The language of the act of the United States is, "when the estate of the deceased is insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first paid," giving

a priority to the debt due to the United States over all other debts. It is clear, from this language, that the statute looks at no other charge on the estate of a deceased debtor than debts properly so called. The United States are satisfied in giving a priority to their claim on the estate over all other debts. The allowance to the widow is no more a debt of the husband than her right of dower. They are both of them charges on the estate, created by the law. They are not created, nor can they be defeated, by any act of his. The law of the United States does not, in its terms, give to debts due to them a priority over charges of this nature. Its words are satisfied by a narrower construction, and to give to it this enlarged operation would be giving it an effect, by interpretation, beyond the strict and proper meaning of its terms. It would also be trenching on the settled and deliberate policy of the state legislation, which has ordained that a part of the property of a deceased insolvent debtor shall be subducted from his estate for the benefit of his wife and minor children, before any part can be reached by creditors. On this construction of the statute, it becomes unnecessary to give an opinion on another point which was raised and discussed at the argument; that is, whether, as the state legislature, under our constitution, has the exclusive power to regulate the descent and distribution of estates, they have not also the paramount authority to determine what part of the estate of a deceased debtor shall be assets in the hands of his personal representative, for the payment of debts. Plea in bar adjudged good.

Case No. 11,315.

POSTMASTER GENERAL v. USTICK et al.

[4 Wash. C. C. 347.] [1]

Circuit Court, D. New Jersey. April Term, 1825.

PLEADING—DEMURRER TO PLEA CHARGING FRAUD—SUIT ON POSTMASTER'S BOND—FAILURE TO BRING SUIT.

Action by the postmaster general against a deputy postmaster, and his sureties, on the bond executed by them. The sureties plead, that the plaintiff did not, as he was bound by law to do, call upon the deputy to settle his accounts, or cause suits to be commenced against him for not so settling them, and paying the balance due by him; nor did he notify the sureties of the defaults of the deputy, but fraudulently, and in violation of his duty to the United States, and to the sureties, neglected to bring such suits, and to give such notice. The plaintiff demurred generally. The demurrer to the plea admitting the fraud stated in it, the plaintiff cannot recover.

[Cited in Sullivan v. Iron Silver Min. Co., 109 U. S. 555, 3 Sup. Ct. 343.]

This was an action of debt brought in the district court, in the name of the postmaster general of the United States, upon a bond given to the postmaster general by the defendants [Ustick, Potts and Allen], with condition that the defendant Ustick, who had been appointed postmaster at Burlington, should well and truly execute the duties of the said office; and once in three months, and oftener if required, render accounts of his receipts and expenditures, as postmaster, to the general post office, in the manner prescribed by the postmaster general; and should pay all the moneys that should come to his hands for postages to the postmaster general, deducting his legal commissions. The breach is, that, at divers days and times, after the date of the said bond, there came to the hands of Ustick, for postages, over and above his legal commissions, large sums of money, viz. the sum of $1,800, which sum he had neglected and refused to pay to the postmaster general, and still neglects and refuses, &c. Whereby, &c. Judgment by default was entered against the defendant Ustick, and several pleas were filed by the other defendants, his sureties, one only of which, in bar of the action, need be stated. After setting forth the provisions of the twenty-ninth section of the post office law of the 30th of April, 1810 [2 Stat. 592], the plea avers that Ustick did not render his accounts, and pay over to the postmaster general, the balance due by him at the end of every three months immediately following the date of the said bond, during his continuance in office, but wholly neglected to render such accounts, and to pay over such balances; nor did the postmaster general, within six months after the end of every three months, cause a suit to be commenced against said Ustick and the said defendants his sureties, for the balances due at the end of the said several periods of three months, nor did he give notice of such defaults of the said Ustick to the defendants, or either of them; but fraudulently, unlawfully and negligently, and in violation of his duty to the United States and to the defendants, neglected to cause such suits to be brought within the times aforesaid, or at any times, and to give such notice to the defendants of the defaults of Ustick. The plea further avers, that Ustick was able to pay the said balances at the times they became due, if he had been sued for the same according to law, but that at the time of bringing of this suit, he was and still is, wholly insolvent; by reason of all which the defendants allege that the postmaster general is charged with and liable for the said arrears, and not the defendants; who by the said fraudulent and negligent acts aforesaid, of the said postmaster general, are in law exonerated and discharged from any liability to the plaintiff. To this plea a general demurrer was put in, and judgment thereon was rendered for the plaintiff in the district court, from which

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

the cause came into this court by writ of error.

Mr. M'Ilvaine, for plaintiff.
Mr. Coxe, for defendant.

WASHINGTON, Circuit Justice. Whether the mere negligence of the postmaster general to comply with the duties so explicitly imposed upon him, of calling his deputies to account, and commencing suits against them, at the periods required by that law, or at other reasonable periods, is sufficient to discharge the sureties for such deputies, is a question of great difficulty and of vast magnitude, as well to the United States, as to the individual sureties for those deputies. It is one which I think need not be decided in this case; and I feel no disposition to give an opinion upon it until it does become necessary. The above plea, however, goes farther than alleging negligence and breach of official duty by the postmaster general. It not only avers his neglect to commence suits against Ustick for his alleged defaults, and to give notice of such defaults to the sureties, but that these omissions were practised fraudulently. This allegation being admitted by the demurrer, we are brought to the question, whether the omissions of the postmaster general stated in this plea, having proceeded from fraudulent motives, tending to the injury of the sureties, they are not discharged? I am of opinion they are. The plea in this case places the defence upon the broad ground of actual as well as of constructive fraud, and if issue had been taken on the plea, and the defendant had proved actual fraud, as for instance, declarations by the postmaster general to the sureties, tending to mislead them respecting the defaults of the principal, or an industrious concealment from the sureties, of the delinquencies of their principal, by reason of which they were prevented from averting the evil, or of saving themselves, there can be no doubt, I think, that the plaintiff could not have claimed a judgment in his favour against them, but would be estopped by his own fraudulent conduct. But the demurrer admits the fraud as broadly as the plea avers it, and I am therefore of opinion that the judgment must be given for the defendant upon this plea.

Case No. 11,316.

POTE v. PHILIPS.

[5 Cranch, C. C. 154.] [1]

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

PARTNERSHIP — SUIT AT LAW BETWEEN PARTNERS —EXPRESS PROMISE TO PAY BALANCE DUE.

1. If there has been no settlement of the partnership accounts, one partner cannot maintain an action at law against the other for any matter relating to their partnership affairs.

2. Although the partnership accounts may have been settled, and a balance acknowledged to be due by one partner to another, yet the creditor partner cannot maintain an action at law for that balance without proving an express promise, by the debtor partner, to pay it.

Assumpsit, upon the common money counts.

The plaintiff [William Pote, for the use of W. L. Brent] and defendant [William Philips] had been partners in merchandise, and on the trial at March term, 1836, in order to prove a settlement of the partnership concerns, and an acknowledgment of a balance due by the defendant to the plaintiff, he offered the testimony of —— Wilson, who testified, that on some day, the particular time or year, he could not recollect, the plaintiff and defendant met at the plaintiff's shop on Twelfth street west and Pennsylvania avenue, and the account books of the plaintiff and defendant were produced. The plaintiff told the defendant that he, the defendant, owed him about $1,200. The defendant said that he did not owe him so much. The plaintiff then asked him how much he owed him; and the defendant said he owed him about $1,000, but he would never settle or pay a cent until the plaintiff produced an account which he had rendered to the defendant, and which the defendant falsely said that the witness had stolen from him. The plaintiff and defendant had been in partnership under the firm of William Philips & Co. in a business of buying wood and other things in a shop and on a wharf near the Washington bridge, the capital of which concern was furnished principally by the plaintiff. That the book produced by the defendant was a partnership book kept by the defendant at the shop and wharf. That the plaintiff's book was his individual book, kept by him in a different shop in which he carried on a sole business, in a different part of the city, and in which he had charged William Philips & Co. with articles of merchandise and cash. That the object of the meeting on the part of the plaintiff, was a settlement of the partnership account, and of his account against the defendant individually. Also the testimony of Richard Wright, who testified that there had been an attempt to arbitrate the accounts; and that he had been requested by the plaintiff to act as his agent in stating and settling the accounts. That there had been several meetings between the plaintiff and defendant, at one of which the books of both parties were produced, and this witness extracted from both, the items admitted by the parties, which were added up on both sides; and the balance in favor of the plaintiff was about $1,150. That in this account, thus stated, he charged the defendant with all the items charged by the plaintiff, as well against the defendant personally, as against the firm of William Philips & Co.

Before CRANCH, Chief Judge, THRUSTON, Circuit Judge, and MORSELL, Circuit Judge.

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

THE COURT, at the prayer of the defendant's counsel, instructed the jury that if they should be satisfied, by the evidence, that there had been no settlement of the partnership accounts, and that the plaintiff's claim is upon matters relating to their partnership affairs, the plaintiff cannot recover in this action at law.

Whereupon, Mr. Brent, for the plaintiff, prayed the court to instruct the jury that if the defendant acknowledged that he was indebted to the plaintiff, upon settlement, in the sum of $1,000, the plaintiff could recover, notwithstanding the claim arose upon their partnership concerns. And he cited Fromont v. Coupland, 2 Bing. 170; Robson v. Curtis, 1 Starkie, 78, 2 Serg. & R. 304; Clark v. Glennie, 3 Starkie, 10; Rackstraw v. Imber, 1 Holt, N. P. 368; Musier v. Trumpbour, 5 Wend. 275: Colly. Partn. 153; Lamalere v. Caze [Case No. 8,003].

Mr. Z. C. Lee and Mr. Hellen, for defendant, contra, contended that there was no evidence of a settlement of the partnership accounts, and that if there were, a settlement alone, and a balance acknowledged, are not sufficient to support an action at law, without an express promise to pay. Foster v. Allanson, 2 Term R. 483; Fromont v. Coupland, 2 Bing. 170; Gow, Partn. 87.

THE COURT, being divided (THRUSTON, Circuit Judge, not having heard the evidence, did not give any opinion), did not give the instruction prayed by Mr. Brent.

MORSELL, Circuit Judge, because he thought there was no evidence tending to prove a settlement; and because a settlement and balance struck and acknowledged by the parties, will not support an action at law without an express promise to pay.

CRANCH, Chief Judge, thought there was some evidence tending to prove a settlement, namely, his acknowledgment that he owed, or would owe the plaintiff $1,000 upon the partnership concerns; the meeting being settled for a settlement, and having the whole accounts open before them, and the account and balance being stated by the witness in the presence and hearing of the defendant, and not objected to; and that these circumstances should be left to the jury. He was also of opinion, that if there was a settlement of the whole partnership accounts, and a balance struck and admitted by the parties, an express promise to pay, is not necessary to support an action by the creditor partner. He observed, that all the cases, in which it is said that an express promise is necessary, depend upon the case of Foster v. Allanson, 2 Term R. 483, in which the only question was, whether the plaintiff ought not to have brought his action of covenant upon the sealed articles of partnership, by which each partner bound himself to pay any balance which should appear against him upon the final settlement of the accounts, and not an action of assumpsit; because covenant is a higher action than assumpsit; and the rule of law is, that a man shall not maintain the inferior, when he has a right to a superior action. But the court decided, that although the plaintiff might have had an action of covenant on the articles, yet, as the acknowledgment of the balance of the partnership accounts was a good consideration for a promise, and as, in that case, there was an express promise to pay, the action of assumpsit was maintainable. Neither in that case, nor in that case referred to in the note to that case, is it decided that an express promise was necessary in any case where the plaintiff is not entitled to a higher action. The reason why one partner cannot sue another at law is, that nothing is due from one to the other on account of the partnership transactions, until the final settlement of the partnership accounts which can be compelled only in chancery. But when the partnership is dissolved, and the accounts are finally settled, and the balance struck and admitted, the reason ceases, and the parties stand in the same relation to each other, as ordinary debtors and creditors; and there is as much reason why the law should imply an assumpsit upon the acknowledgment of the balance due, in one case, as in the other.

The jury found a verdict for the plaintiffs; and the court granted a new trial, which came on at March term, 1837, when Mr. Hellen, for the defendants, prayed the court to instruct the jury, in effect, that there was no evidence of a final settlement of the partnership accounts, and that if there were, the defendant is not liable at law, unless upon his express promise to pay the balance.

THE COURT (CRANCH, Chief Judge, contra,) stopped Mr. Hellen, who cited 9 Serg. & R. 241, and who was about to argue in support of his prayer; and requested to hear the other side.

Mr. Brent, for plaintiff, cited Clark v. Glennie, 3 Starkie, 10; Rackstraw v. Imber, 1 Holt, N. P. 368; Robson v. Curtis, 1 Starkie, 78; Musier v. Trumpbour, 5 Wend. 275; Davis v. Barney, 2 Gill & J. 404; Starkie, Ev. pt. 4. p. 434; Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 172; 4 Wheeler, Dig. 342.

THE COURT (CRANCH, Chief Judge, contra,) gave the instruction as prayed by Mr. Hellen.

Verdict for the plaintiff, $950, with interest from 11th August, 1833.

POTOMAC, The (BAKER v.). See Case No. 778.

POTOMAC, The (BEDELL v.). See Case No. 1,215.

POTOMAC, The (CANNON v.). See Case No. 2,386.

POTOMAC BUILDING ASS'N (JOHNSON v.). See Case No. 7,406.

Case No. 11,317.

POTOMAC CO. v. GILMAN.

[2 Cranch, C. C. 243.] [1]

Circuit Court, District of Columbia. May Term, 1821.

SECURITY FOR COSTS — RESIDENT OFFICER OF FOREIGN CORPORATION.

A corporation aggregate, whose president and treasurer reside in this district, cannot be compelled to give security for costs, as being non-resident plaintiffs.

The defendant [E. Gilman] had obtained a rule on the plaintiffs to give security for costs under the act of Virginia of the 19th of December, 1792 (section 23). The clerk objected to swearing the jury until security should be given.

THE COURT, without argument, decided (nem. con.) that the rule could not be laid in such a case. The president and treasurer of the company reside in this district, and the company may be sued here.

Case No. 11,318.

POTOMAC CO. v. UNION BANK.

[3 Cranch, C. C. 101.] [1]

Circuit Court, District of Columbia. May, 1827.

INTEREST—RECOVERY AFTER PAYMENT OF PRINCIPAL.

After the plaintiff has received the principal debt, he cannot recover the interest in an action for principal and interest.

Assumpsit for money had and received. The defendants had refused to pay money deposited by the plaintiffs, whereby the defendants had incurred the penalty of twelve per cent. interest for 106 days, at the end of which period they paid the actual sum deposited with simple interest at six per cent. The balance claimed was $210.49. But before the defendants paid the deposit, the plaintiffs brought suit for the whole deposit, with twelve per cent. interest. The defendants refused to pay the twelve per cent., but paid the principal, which the plaintiffs received.

R. S. Coxe, for defendants, cited Tillotson v. Preston, 3 Johns. 229, and prayed the court to instruct the jury that if they should be satisfied, by the evidence, that the payment was made by the defendants, as and for the principal, the plaintiffs cannot recover the interest in this form of action.

Mr. Jones, and Mr. Key, for plaintiffs, admitted this to be the rule of law, and THE COURT gave no opinion.

By the act of congress of March 2, 1821 (3 Stat. 618), "To extend the charters of certain banks in the District of Columbia," if the bank refuses to pay a deposit, on demand, the depositor is "entitled to receive and recover interest on the same at the rate of twelve per cent. per annum."

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

POTOMSKA MILLS CORP. (DRAPER v.). See Case No. 4,072.

POTOWMACK CO. (BROOKE v.). See Case No. 1,935.

Case No. 11,319.

POTT et al. v. ARTHUR.

[15 Blatchf. 314.] [1]

Circuit Court, S. D. New York. Oct. 24, 1878.

SUIT TO RECOVER BACK CUSTOMS DUTIES—BILL OF PARTICULARS—AMENDMENT.

Under section 3012 of the Revised Statutes of the United States, construed in connection with section 954, this court has power, in a suit for the recovery of duties alleged to have been erroneously or illegally exacted by a collector of customs, to allow a bill of particulars to be served after the expiration of thirty days after notice of the appearance of the defendant, and to allow a defective bill of particulars to be amended.

[Cited in Dieckerhoff v. Robertson, 29 Fed. 781; Rickard v. Barney, 32 Fed. 582; Castner v. Magone, Id. 579; Sherman v. Hedden, Id. 757.]

[This was an action by James Potts and others against Chester A. Arthur, collector of the port of New York, to recover back duties paid on certain books.]

Hartley & Coleman, for plaintiffs.

J. Dana Jones, Asst. Dist. Atty., for defendant.

BLATCHFORD, Circuit Judge. I think that section 3012 of the Revised Statutes must be construed in connection with section 954, and that it is directory merely. Where jurisdiction of a cause is acquired by a court, whether one of general jurisdiction or one proceeding under a special statute, the well settled rule is, that the time fixed by statute for the performance of intermediate steps is to be regarded as directory merely, and that an omission to perform one or more of them in time will not render the whole proceeding abortive. In re Empire City Bank, 18 N. Y. 199, 220; People v. Cook, 8 N. Y. 67, 92; Dwar. St. (Am. Ed. 1871) p. 222, note 29, and cases there collected. The court has the same power, notwithstanding the provisions of section 3012, in a suit for the recovery of duties alleged to have been erroneously or illegally exacted by a collector of customs, that it has in any other suit, to allow a bill of particulars of the plaintiff's demand to be served after the expiration of thirty days after notice of the appearance of the defendant, and to allow a defective bill of particulars to be amended. The question in each case presented is, whether proper

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

ground is shown for the exercise of the discretion of the court.

In the present case, the bill of particulars of June 3d, 1875, seems to contain all the particulars required by section 3012, except the dates of the invoices. It was received and retained by the defendant's attorney without any notice that it would not be accepted as sufficient, or because served too late, and the defendant's attorney subsequently treated the action as one to be tried, and one in which the proper bill of particulars had been served in time, by serving a notice of trial. The defendant's motion to enter judgment of non pros. against the plaintiffs is denied, with leave to the plaintiffs to serve an amended bill of particulars, containing the dates of the invoices, if desired.

[In this case there was a judgment in favor of the defendant, which was affirmed by the supreme court in error. 104 U. S. 735.]

POTT (YOUNG v.). See Case No. 18,172.

POTTAWATTAMIE COUNTY (UNION PACIFIC R. CO. v.). See Case No. 14,384.

Case No. 11,320.

In re POTTEIGER.

[5 Reporter, 137.] [1]

Circuit Court, E. D. Pennsylvania. Jan. 4, 1868.

DISCHARGE—LONG DELAY IN APPLICATION.

Where a bankrupt neglects for an unreasonably long time to apply for his discharge, the circumstance that the assignee has not filed a return of no assets will not cure the laches, where no active step has been taken in the bankruptcy proceedings for a long time.

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

Potteiger was adjudged a bankrupt on creditors' petition, and in default of appearance, February 17, 1868. No assets came to the hands of the assignee, and he so returned after the filing of the present petition. On February 12, 1877, the bankrupt petitioned for his discharge, and the register reported that the grounds stated in the petition for the adjudication were untrue, and recommended the discharge. The district court refused the discharge on the ground of laches. [Case unreported.]

G. T. Bispham, for bankrupt, appellant. The time within which application for discharge may be made is regulated by Rev. St. § 5108, as amended by Act July 26, 1876 [19 Stat. 102]. "Final disposition of the cause" means, where there are assets, after final settlement; where there are none, after the assignee's return to that effect. Under section 5092, if the assignee neglect to call a meeting at the end of the three months any creditor may apply. In re Litchfield [Case No. 8,398]. Therefore the creditor can always bring about a settlement in a reasonable time, and the bankrupt cannot injure him by delay.

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

THE COURT held that the application was made too late; that it was within the power of the bankrupt to have had a return of no assets made at any time by the assignee; and therefore, the proceedings having long since come to a practical end, he could not claim that they were pending until the formal return by the assignee. Judgment affirmed.

[1] [Reprinted by permission.]

POTTER (ATLEE v.). See Case No. 636.

Case No. 11,321.

POTTER et al. v. BRAUNSDORF et al.

[7 Blatchf. 97.] [1]

Circuit Court, S. D. New York. Dec. 30, 1869.

PATENTS—CONSTRUCTION—SEWING MACHINES—INFRINGEMENT—REISSUE TO ASSIGNEE—EXTENSION TO PATENTEE.

1. The great feature of the invention of John Bachelder, embodied in the reissued patent granted to him, December 12th, 1865, for an "improvement in sewing machines," was the production of a sewing machine in which the cloth to be sewn is supported horizontally and is fed through the machine perpetually.

2. The sewing machine called the Aetna machine infringes the first, second, third, fourth, fifth, sixth, and eleventh claims of that patent, and those claims are not invalid for want of novelty.

3. The original patent was granted to Bachelder May 8th, 1849. It was reissued to his assignee November 2d, 1858, the specification of such reissue being signed by the assignee and not by Bachelder. Such reissue was not assigned to Bachelder. The original patent was, on his application, extended to him by the commissioner of patents, the certificate of extension being made on a copy of such original, because of the loss of such original, and not on the original itself or on such reissue: *Held*, that such extension was valid. The case of Potter v. Holland [Case No. 11,329], cited and applied.

[Cited in Bachelder v. Moulton, Case No. 706; Potter v. Stewart, 7 Fed. 215.]

[This was a bill in equity by Orlando B. Potter and others against Julius E. Braunsdorf and Henry Weil.]

This was a final hearing, on pleadings and proofs, of a suit in equity for a perpetual injunction and an account of profits, founded on the alleged infringement of letters patent reissued to John Bachelder December 12th, 1865 [No. 2,135], for an "improvement in sewing machines." The original letters patent were granted to Bachelder, as inventor, May 8th, 1849 [No. 6,439], for fourteen years. Isaac M. Singer and Edward Clark having

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

become assignees of the patent, it was reissued to them, as such assignees, November 2d, 1858, the specification of such reissue being signed by Singer and Clark and not by Bachelder. On the application of Bachelder, made after such assignment and reissue, the original patent granted to him was extended for seven years from May 8th, 1863, by the commissioner of patents. The original patent, so extended, was reissued to Bachelder September 22d, 1863, and was again reissued to him, as before stated, December 12th, 1865 [No. 1,543].

Edwin W. Stoughton and George Gifford, for plaintiffs.

A. C. Washburn and Charles A. Durgin, for defendants.

BLATCHFORD, District Judge. The specification of the reissued patent on which this suit is brought states: "In sewing machines operated with an eye-pointed needle and sewing with a continuous thread or threads, known to me prior to my invention, important defects existed, which operated as serious limitations to their usefulness and prevented their adoption to the extent their other merits demanded. In such prior machines, the material to be sewed was held vertically, by suspending it from points projecting from a plate technically called a baster plate, or in clamps, the body of the material hanging below and from such plate or clamps, and being moved through the machine, or fed to the sewing mechanism, while hanging in such vertical position. This method of holding and feeding the material required that it should be placed upon the points of the baster plate, or within the jaws of the clamps, by an operator, who, while using his hands for this purpose, could not at the same time properly attend to the sewing. It also threw the whole weight of the material upon that part of it which was held upon the points or in the clamps. Moreover, it was not well adapted for crooked or irregularly curved seams, and did not allow the operator conveniently to examine or inspect the stitches while the seam was being made, nor did it leave the material free to be directed by the operator conveniently during its passage to the needle, while the machine was in operation, but was applicable only to such seams and parts of garments as could be thus adjusted upon and suspended from the baster plate, or in clamps, and required so much time and labor in adjusting even such seams to the plate or clamps, that it was of limited utility in the branches of manufacture to which the sewing machine was otherwise applicable, or for domestic use. The object of my invention is, to hold and feed the material past the needle, horizontally instead of vertically, in such manner that the operator is not required to use his hands to hold the material vertically and apply it to the points or jaws of the feed, and, consequently, that he may inspect, guide, and give direction to the seam, during the continuous action of the machine. My invention is to be found, therefore, in the combination of mechanisms for supporting the cloth, holding it, and moving it past the needle with a regular intermittent action, with each other, and with the sewing mechanism and other essential parts of the sewing machine. The leading members of these combinations are: First. A device which advances the material regularly and horizontally, by an intermittent motion, over and upon the horizontally holding surface through which the needle acts, and over and upon the supporting bed by which the material is supported, and delivers it automatically, without requiring the sewing to be stopped for the purpose of attaching fresh portions of the material to the feeding instrument. This advancing device is hereinafter termed a 'perpetual feed.' Second. A holding surface, upon which the material immediately about the needle rests, and is borne up horizontally under the thrust of the needle. Third. A receiving plate, so arranged with reference to the feed, as to receive and support the material in its passage from the feed. Fourth. A yielding pressure holder, which rests upon the upper surface of the material, near the needle, and adapts itself to the varieties in the thickness of the material, and holds it to the supporting bed. Fifth. A supporting bed, provided with a throat for the passage of the needle. This supporting bed includes, as one of its parts, what is elsewhere termed, in this specification, the 'holding surface,' and the term 'supporting bed' is to be so understood wherever it is hereinafter used. Upon this bed the material to be sewed rests, and is supported against the force of gravity, the horizontality of this bed enabling it to support the material while it is in the machine. For greater clearness and certainty, I will here state the functions and mode of operation of each of these parts. The device termed the 'perpetual feed' takes hold of and moves forward the material horizontally and regularly, by an intermittent motion, upon and over the horizontally holding surface through which the needle acts, and upon the horizontally supporting bed upon which the material rests, and under the yielding pressure holder, and delivers it upon the receiving plate, which is placed behind the feed to receive it, taking hold of a fresh portion of the material, and delivering an equal portion, at each stitch. This feed thus takes hold of the material, moves it forward upon the horizontal supporting bed over the horizontally holding surface, and delivers it perpetually upon the receiving plate, so that any length of seam desired may be fed through and delivered during the continuous action of the machine. Although I have used an endless apron, furnished with points, as my perpetual feed, I do not intend to limit myself to the use of

such an apron, as a revolving circular table or a cylinder may be substituted therefor, the points being inserted in, or made to project from, the curved surface of either of them. The horizontally holding surface upon which the material immediately about the needle is supported, is so constructed and arranged with reference to the feed and needle, that it performs the office of supporting, horizontally, each portion of the material successively, in the line of the seam, against the thrust of the needle, firmly, in its normal, and undistorted condition, so that the stitches, when set, shall be regular and uniform. Each portion of the material in which stitches are to be set throughout the line of the seam, is moved by the feed, stitch by stitch, horizontally, under the needle, and over and upon this horizontally holding surface, where it is held during the passage of the needle, or while the stitch is being made. The receiving plate is so constructed and arranged, with reference to the feed, that it performs the office of receiving the material from the feeding instrument, and supporting it in its passage from the machine, thus insuring the free delivery and passage of the material from the machine, during its operation in sewing a seam, without entanglement with other members of the machine. The form and size of this receiving plate are mere matters of expediency, so long as it retains and performs its functions, as herein described. The supporting bed holds up the material by simply supporting it against the force of gravity, without requiring the attachment of the material to it, and, at the same time, by its throat, permits the needle to pierce it, and protrude the loop of needle-thread through it. It so holds it up while the feed is moving it forward, and the needle is piercing it, the material resting upon the bed while under the action of the needle. The yielding pressure holder rests upon the upper surface of the material, near the needle, and holds it, by a yielding pressure, to the supporting bed upon which it rests. This holder is so hung or mounted, that it may be readily raised by the operator, to place the material in, or remove it from, the machine, and it will rise and descend during the operation of the machine, and accommodate itself to the varying thicknesses and inequalities of the material or garment being sewed, while it maintains a constant pressure upon the material throughout the whole length of the seam. The combination of these supporting, holding and feeding mechanisms I believe to be new. It holds and feeds the material upon a supporting bed or surface, on which it rests of its own gravity, under convenient inspection, direction, and control of the operator, and thus saves the time and labor heretofore required in supporting or hanging up the material upon the points of a baster plate or in clamps. It also so holds and feeds the material, that seams of indefinite length may be made, and piece after piece be sewed during the continuous action of the machine, and thus saves the time and trouble heretofore required to attach the material by hand to the feed before it was sewed, and to detach it therefrom by hand after it was sewed. The sewing mechanism with which I have combined my improvements in my machine herein represented, is the same employed in the machine said to have been invented by Charles Morey and Joseph B. Johnson. It is one of the well-known sewing mechanisms to which my improvements are applicable, or with which they may be used. The mechanism by which the stitches are made, forms, of itself, no part of my invention, and any other sewing mechanism can be employed instead of the one employed by me, which parties employing my invention may prefer, so long as said sewing mechanism makes the stitches in proper time and order, in combination with my improvements. The reciprocating eye-pointed needle employed by me is well known in its functions and mode of operation, which are essentially the same in my machine as in other sewing machines. I have represented, in the drawings, other parts which are found in previous sewing machines, but to these I make no claim."

In the machine, as described in the specification, the holding surface is pierced with a throat, to permit the needle to pass downward. The throat is slightly larger than the needle, so that the latter can carry the thread freely through it, but it is too small to permit the passage of the material. The needle moves in a vertical plane, and descends, at each stitch, from above the holding surface, carrying, in its eye, a loop of thread through the material, and through the throat provided in the holding surface, and below such holding surface. This needle is attached to a needle-carrier, which has a reciprocating movement imparted to it. The perpetual feed consists of a belt of leather, supported by and running around three or any other suitable number of cylinders, and having a series of points fixed in and projecting from its upper surface, near the needle, at such distances apart as occasion may require. This belt moves intermittently, after each withdrawal of the needle, through just the distance necessary to space the next stitch. The yielding pressure holder lies upon the surface of this feed or belt. It is a heavy roller, free to revolve, and so hung by links, that it will approach to and recede from the belt, so as to accommodate itself to the varying thicknesses of the material, and maintain a constant pressure thereon throughout the whole length of the seam. The receiving plate is of such width and size as occasion may require. One end of it is brought in close contact with the surface of the feed, in such manner as to cause the material, when it is carried to it by the feed, to be delivered upon and over said plate, and from the points and feed. The

upper surface of the belt, the holding surface and the receiving plate, constitute together a supporting bed, which supports the material horizontally in the machine against the force of gravity, while permitting the passage of the needle through it; and upon this bed the material rests while the needle is acting upon it, while passing through the machine, and while being delivered therefrom. Connected with the specification are five figures of drawings representing, severally, different views of the machine—a top view; a front elevation; a vertical, central and horizontal section; a transverse vertical section, taken through the middle of the continuous feeding belt; and another vertical and transverse section. Appropriate machinery is described for imparting a reciprocating movement to the needle-carrier, and for moving the feeding belt intermittently, and the other parts of the machine and their action are appropriately described. In the operation of the machine, the material or garment is laid upon the perpetual feed belt and the holding surface, the portion where the stitch is being made resting smoothly upon the horizontally holding surface, over the throat for the passage of the needle, the portion beyond where the stitch is being made, if any, being upon the belt past the needle, and upon or towards the receiving plate, and the remainder lying in front of the needle upon the belt. The yielding pressure holder or roller is permitted to bear upon the material or garment, holding it down to the feed and upon the supporting bed. The hands of the operator rest upon the material or garment before the needle, directing it in its passage to the needle. The feed moves the material or garment in the line of the seam regularly and intermittently, stitch by stitch, horizontally, over and upon the holding surface and supporting bed, and delivers it to or upon the receiving and supporting plate, taking hold of a fresh portion, and feeding and delivering an equal portion, at each stitch, automatically. The holding surface holds or bears up each successive portion of the material, throughout the length of the seam, firmly, in its normal or undisturbed condition, against the thrust of the needle, as the same is moved over it by the feed. The receiving plate receives the material from the feed, and supports it when discharged, preventing it from being entangled in the machine, and ensuring its free delivery during the operation of the machine, as fast as sewed. The yielding pressure holder bears upon the upper surface of the material near the needle, and maintains a constant yielding pressure thereon, throughout the whole length of the seam, holding it to the bed on which it rests and to the feed, and rising and descending to accommodate itself to all the cross seams, inequalities, and varying thicknesses of the material. The material rests, during its entire passage through the machine and delivery therefrom, of its own weight, upon a supporting bed, as cloth rests upon a table, under the control and convenient inspection of the operator. Seams of indefinite length, or piece after piece, can be fed through, sewed, and discharged perpetually, during the continuous, uninterrupted, progressive action of the machine.

As shown by the evidence, the great feature of the invention of Bachelder, was the production of a sewing machine in which the cloth to be sewn is supported horizontally, and is fed through the machine perpetually. His machine was the first sewing machine in which the cloth was supported horizontally and advanced by an automatic feed of any kind. It is scarcely possible to estimate sufficiently the importance of such an invention, in the art of sewing by machinery.

The reissued patent sued on contains fourteen claims. The bill alleges that the first, second, third, fourth, fifth, sixth, and eleventh claims are infringed by the defendants. Those claims are to the following several combinations: (1) "In combination, the supporting bed which supports the material horizontally in the machine, and is provided with a throat for the passage of the needle, and the constant yielding pressure holder, each having the functions and mode of operation hereinbefore specified." (2) "In combination, the supporting bed, the constant yielding pressure holder, and the reciprocating eye-pointed needle, each having the functions and mode of operation hereinbefore specified." (3) "In combination, the supporting bed, the constant yielding pressure holder, and the reciprocating needle carrier, each having the functions and mode of operation hereinbefore specified." (4) "In combination, the supporting bed, the yielding pressure holder, the reciprocating eye-pointed needle, and the perpetual feed which moves the material horizontally under and past the needle, while it is supported by the supporting bed, each having the functions and mode of operation hereinbefore specified." (5) "In combination, the supporting bed, the yielding pressure holder, the reciprocating needle carrier, and the perpetual feed, which moves the material horizontally upon and over the supporting bed, each having the functions and mode of operation hereinbefore specified." (6) "In combination, the holding surface which supports the material immediately about the needle, horizontally, under the thrust of the needle, and the perpetual feed which moves the material horizontally, under and past the needle, upon and over such holding surface, each having the functions and mode of operation hereinbefore specified." (11) "In combination, the horizontally holding surface immediately about the needle, the perpetual feed, the yielding pressure holder, and the reciprocating needle carrier, each having the functions and mode of operation hereinbefore specified."

The machine of the defendants is called

the "Aetna Machine." It is a shuttle machine, having a reciprocating eye-pointed needle, and needle carrier, moving substantially in vertical planes, a yielding pressure holder, a perpetual feed, a holding surface, provided with a throat for the passage of the needle, and a table, a part of which receives and aids in supporting the material or garment. The perpetual feeding device in it is a short cylinder, arranged upon a horizontal axis, and caused to move intermittently. This cylinder is so arranged that the cloth lies horizontally upon it, and is partially supported by it. The cylinder is immediately in front of the needle, and of the horizontal holding surface, and causes the material to be fed perpetually, so that a seam of any length can be sewn, without removal or replacement of parts of the machine, and delivers the cloth, with a seam sewn in it, upon the receiving plate. The cylinder is provided with a roughened surface, instead of pins. In all particulars respecting its construction, arrangement, and mode of operation, except in regard to such pins, it is identical with the perpetual feeding device of Bachelder. By reason of its having a roughened surface, instead of pins, seams of any desired curvature can be sewn upon the machine, and the operator is relieved from the necessity of impaling the cloth upon the pins, or so directing the cloth that the pins will, in their revolutions, enter it. In this respect, the Aetna machine is a great improvement upon Bachelder's, but, nevertheless, it embodies Bachelder's invention. A part of the table or platform in the Aetna machine occupies the same position, with regard to the feeding cylinder, that the receiving plate in Bachelder's machine does with regard to the feeding belt, and receives and aids in supporting the cloth, as it is delivered by the feeding cylinder. This part of the table is, in construction, arrangement, and combination with the feeding device, the same as Bachelder's receiving plate. There is, in the Aetna machine, behind the feeding cylinder, and about level with its upper surface, a piece of iron, with a horizontal surface, provided with a throat for the passage of the needle. This piece of iron is, in construction, operation, and arrangement, with reference to the needle, the working surface of the feeding cylinder, and that portion of the table which constitutes a receiving plate, identical with Bachelder's horizontal holding surface. The working surface of the feeding cylinder, that portion of the table which constitutes a receiving plate, and the horizontal holding surface, have, in the Aetna machine, the same relative arrangement, and co-operate in supporting the cloth horizontally in the same way, as the same parts in Bachelder's machine, and are, therefore, the supporting bed of Bachelder's machine. The fact that there are, in the Aetna machine, additional parts, which support the cloth, does not alter the character or mode of operation of any or all of the other parts. There is, in the Aetna machine, a yielding pressure holder, consisting of a curved foot, pressed by a spring, so as to bear upon the cloth. Though differing formally, in construction, from the pressure holder in Bachelder's machine, it is combined in the same way with the surface of the perpetual feeding device, and has the same mode of operation. It is free to rise and fall, and is the equivalent of Bachelder's roller. The fact that, in addition to performing the same duties as Bachelder's roller, it also acts as a needle stripper, does not make it any the less the equivalent of Bachelder's roller, in respect to the duties performed in common by both. The Aetna machine has an eye-pointed needle, reciprocating in substantially a vertical plane, and combined with the other parts of the machine, in the same way that the eye-pointed needle, in Bachelder's machine, is combined with the corresponding parts of that machine. The Aetna machine has, also, a reciprocating needle carrier, identical with the one in Bachelder's machine, and performing the same operation in combination with the parts with which it is combined.

This statement of the construction and arrangement of the Aetna machine and of the points of resemblance and of difference between it and the Bachelder machine, shows that, beyond any doubt, the Aetna machine infringes upon each one of the seven claims of the Bachelder patent, alleged in the bill to be infringed.

Nothing is shown to affect the novelty of the said seven claims. The invention of Jotham S. Conant was subsequent in date to that of Bachelder, and was so conceded to be by the counsel for the defendants on the hearing.

The answer sets up, as a defence, that Singer and Clark, while owners of the original patent by assignment, surrendered it and obtained a reissue thereof on the 2d of November, 1858; that such reissued patent was not assigned to Bachelder prior to the granting of the extension, and was in force when such extension was granted; that the certificate of extension was made upon a copy of the original patent, and not upon the original patent itself or upon such reissued patent; and that such extension and the subsequent reissues of the patent were without authority of law, and are null and void. Bachelder having assigned the original patent to Singer and Clark, it was surrendered by them, and a reissue of it was granted to them November 2d, 1858, on an amended specification signed by Singer and Clark and not signed by Bachelder. Bachelder petitioned for the extension of the original patent. The certificate of extension made by the commissioner of patents is dated on the 21st of April, 1863, and certifies that the original patent is extended for the term of seven years from the 8th of May, 1863, and orders that, as it ap-

pears that the original patent has been lost and cannot be produced, the certificate of extension be entered on a certified copy thereof. On this state of facts, it is contended on the part of the defendants, that, as the original patent was surrendered on the 2d of November, 1858, and was not in existence thereafter, and as only the reissue of that date was in existence thereafter down to and until after the 8th of May, 1863, the extension was an extension of a patent not in existence, and was made after the term of the original patent had expired by such surrender, and, therefore, in violation of the provision of the 18th section of act of July 4th, 1836 (5 Stat. 125) which provides, that "no extension of a patent shall be granted after the expiration of the term for which it was originally issued;" and that, consequently, the extension is null and void. The view urged is, that such surrender extinguished the original patent so completely that any rights which, under the said 18th section, Bachelder had, after such surrender, to apply for and obtain an extension, could be exercised by him only to obtain an extension of the reissue to Singer and Clark, and must be asserted by him only under and in respect to such reissue. These views cannot be maintained. The question is disposed of by the decision in the case of Potter v. Holland [Case No. 11,329], made by Mr. Justice Nelson and Judge Ingersoll, in 1858. The court say: "We adopt the rule laid down by Judge Story, in the case of Woodworth v. Stone [Id. 18,021], that it is not in the power of the patentee, by a surrender of his patent, to affect without their consent, the rights of third persons, to whom he had previously passed his interest in the whole or a part of the patent. This consent may be manifested, either by joining in the surrender with the patentee, or by previously authorizing it, or by subsequently ratifying or approving it. To take advantage and benefit of it, would be a ratification. When such consent is given, the rights of the parties so consenting, in and to the old patent, are forever gone." Again, the court say: "To determine, then, the question, whether the rights of a third person to whom a patentee has previously passed his interest in a part of a patent, can be affected, without his consent, by the surrender of the old patent by the patentee alone, and the taking of a reissued one, it is necessary to determine whether, after such surrender and reissue, (both the surrender and the reissue being valid,) such third person has the same rights under the old patent, if he chooses not to take advantage of the surrender and the reissue, that he had to that patent before such surrender and reissue. If he has, then it will follow, that, by the surrender and the reissue, his rights have not been injuriously affected, and, consequently, that there can be no valid objection to the same." Still further, they say: "It is objected, that, if the person to whom the patentee has passed his interest in a part of the patent, can hold the right so passed, under such patent, after the same has been surrendered by the patentee and a reissued one obtained, and if the patentee can, at the same time, hold the rights not so passed to such person under and by virtue of the reissued patent, one right to an invention may exist in one person, in one part of the United States, and a different right to the same invention may exist in another person, in a different part of the United States, the one right evidenced by one patent, with a transfer of the right therein, and the other right evidenced by another patent; that there would be two or more patents to secure the different rights which different persons might have to one whole invention; and that this would not be in accordance with the patent laws of the United States, but directly opposed to the same, because such laws authorize only one patent for one whole invention. The object of a patent is, to secure rights to an invention throughout the whole of the United States. We can discover no good reason why a portion, or the whole, of the invention, for a particular portion of the United States, may not be secured by one patent, and the remaining portion of the invention, for the residue of the United States, be secured by another patent. These two patents would, in effect, constitute together but one patent for the whole invention, for the whole United States." These principles and views apply, with especial force, to the case in hand. Where a patentee, having secured his invention by a patent with a specification in such form as he regards to be most proper, assigns the entire patent for the original term only, reserving his right, under the 18th section of the act of 1836, to apply for and obtain an extension, it ought not to be, and it is not, in the power of the assignee, by surrendering the patent and obtaining a reissue of it, on a specification not signed, assented to, or adopted by the patentee, and which perhaps the patentee may regard as rendering the reissued patent invalid, or as securing, by new and different claims, rights of little value, to affect, without his consent, the statutory right conferred on the patentee to apply for and obtain an extension of the only patent which he has ever adopted or assented to. The point taken that such right is thus affected, is not made with any grace, nor is it entitled to any favor. It is not made in the interest of the assignees, Singer and Clark, who obtained the reissue. They have no interest whatever in the extended term. Their rights expired with the first term. The point is taken in the interest of infringers, to whom it must be a matter of indifference whether the certificate of extension was made on the original patent, or on the reissue granted to Singer and Clark. As Bachelder did not choose to take advantage of the surrender and reissue, or to ratify and adopt them, he had, after such surrender and reissue, the

same rights, in respect to obtaining an extension or prolongation of the original term of fourteen years, under the original patent, that he had before such surrender and reissue. The fact that his assignment to Singer and Clark was of the whole original patent, and not of an undivided part thereof, or of his interest in the same within and throughout a specified part of the United States, can make no difference. He still retained his right to apply for an extension of the original patent, as fully as he would have done if he had conveyed away less than the whole of his interest in the original term. The extended term did not come into being until the term granted by the reissue expired, so that the apparent objection does not obtain that there were two patents in existence at the same time for one and the same invention. The inhibition, in the 18th section of the act of 1836, against granting an extension after the expiration of the term for which a patent was originally issued, was intended to close the door absolutely, after the fourteen years have expired, against the issuing then of a further seven years' grant. The mischief to be guarded against was, that after the fourteen years had expired, individuals who had relied on such expiration should not be surprised by a grant thereafter of a new term of seven years. In the present case, the fourteen years had not expired when the extension was granted by the certificate referred to. The case of Moffitt v. Garr, 1 Black [66 U. S.] 273, has no application to the present case. There, the patentee himself had surrendered his patent, and the question was whether, after such surrender, he could maintain a suit at law to recover damages for an infringement of the surrendered patent.

The objections to the validity of the extension are overruled, and there must be a decree for a perpetual injunction and an account, in respect to the seven claims referred to, with costs to the plaintiffs.

[For another case involving this patent, see Case No. 706.

Case No. 11,322.

POTTER et al. v. COGGESHALL.

[4 N. B. R. 73 (Quarto, 19).] [1]

District Court, D. Rhode Island. 1870.[2]

BANKRUPTCY—PREFERENCE—MORTGAGES GIVEN AS SECURITY.

1. Where bankrupt was charged, on petition of creditors, with having, in December, 1867, executed a mortgage with intent to prefer other creditors, and, in April, 1868, with having suspended and not resumed payment within fourteen days, the court granted an injunction on said mortgage, and, in July, the debtor was adjudicated bankrupt. The bankrupt leased a spacious mansion, and converted it into an infirmary and bathing establishment, and was supplied with wares and merchandise for fitting up the same by the mortgagees, upon an agreement of credit. *Held*, there is not sufficient ground in the evidence for adjudging that debtor was insolvent or contemplated insolvency, or that, in making the mortgage, he even thought of the bankruptcy act [of 1867 (14 Stat. 517)], much less intended to violate any of its provisions. The mortgagees wisely asked for security, and the debtor had a right to give it. They are not shown to have violated any law, nor, so far as appears in the proofs, any private pledge or stipulation, or any wholesome custom of trade. Judgment in their favor, with costs of suit.

[Cited in Johnson v. Patterson, Case No. 7,403.]

[2. Cited in Bromley v. Smith, Case No. 1,922, and Rogers v. Winsor, Id. 12,023, to the point that, in cases unaffected by fraud, the assignee takes subject to all the equities binding upon the bankrupt.]

[Cited in Brown v. Brabb, 67 Mich. 28, 34 N. W. 408; Shaw v. Glen, 37 N. J. Eq. 135; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 824.]

[This was a petition by Potter, Denison & Co. against James H. Coggeshall, assignee in bankruptcy of Joseph Dow, for the purpose of establishing the validity of a certain chattel mortgage executed by the bankrupt to the plaintiffs.]

KNOWLES, District Judge. The issue presented by the record (made up by my predecessor on the 7th of October, 1868) relates solely to the validity of a certain mortgage, as between the petitioners, Potter, Denison & Co., mortgagees, and James H. Coggeshall, trustee of Joseph Dow, with the powers and rights of an assignee under the bankrupt act; and I understand that neither party now questions the legality or expediency of disposing of the cause upon its merits, regardless of all judicial dicta or decisions touching the forms of procedure in such cases. Whether a claimant of property in the hands of an assignee can prosecute his claim by petition simply, or is bound by the terms of the law to institute a suit in equity by formal bill of complaint, is a question upon which I am not to be understood here to intimate an opinion.

The controversy arises upon the following facts briefly stated: On the petition of Thomas Phillips & Co., a citation in bankruptcy was issued on the 23d of June, 1868, against Joseph Dow, returnable on the 1st of July, 1868. The acts of bankruptcy charged were these: First. That on the 24th of December, 1867, he, being insolvent, made and executed a mortgage of certain personal effects to Potter, Denison & Co., with the intent to give a preference thereby to them, they being creditors of his. Second. That, being insolvent, he, on the 24th of December, 1867, made said mortgage of said property, with the intent, by such disposition of his property, to defeat or delay the operation of the bankrupt act. Third. That on the 6th of April, 1868, being a trader, he suspended and did not resume payment of his commercial paper within a period of fourteen days. Fourth. That, on the 24th of December, 1867, he made a conveyance or transfer of certain

[1] [Reprinted by permission.]

[2] [Affirmed in Case No. 2,955.]

property, by way of mortgage, to Potter, Denison & Co., with an intent to delay, hinder, or defraud his creditors. On the 29th of June, on the representation of Phillips & Co. that Potter, Denison & Co. were about to take possession of said property under their said mortgage, the court granted an injunction against any disturbance of the possession of Dow, who, on the 8th of July, was adjudged a bankrupt by default, upon the aforesaid petition of Phillips, and the matter referred to a register. On the 27th of July, claims to the amount of seven thousand and forty-one dollars and ninety-five cents, were filed and proved by ten creditors, by whom, unanimously, James H. Coggeshall was appointed trustee, with the powers of an assignee (under section 4 of the bankrupt act), to whom conveyances as prescribed by law were made on the 5th of August, 1868, by said Dow. The property having thus constructively passed into the hands of the assignee, Potter, Denison & Co., on the 9th of September, 1868, filed a petition setting forth their claims and grievances, averring that the property was deteriorating (the trustee permitting it to be retained and used by the bankrupt), and praying for relief; upon a hearing of which, the court ordered that the property in question be appraised by disinterested appraisers, under oath, and the trustee give bond to Potter, Denison & Co., to pay to them the value of it, as reported by the appraisers, "if and whenever it shall be legally ascertained that the said mortgage is a valid mortgage, and that the title of said Potter, Denison & Co. to said property under the same, is valid." This order was made on the 7th of October, and the first Wednesday of November, 1868, assigned for the inquiry directed. The appraisers, on the 30th of November made report, appraising the property as of the value of one thousand six hundred and fifty-eight dollars and sixty-two cents—its cost in the autumn of 1867 having been two thousand two hundred and sixty-five dollars and nineteen cents.

Is the instrument in question a valid mortgage? is, therefore, the question submitted to me upon the depositions of Potter, Denison, and Colwell (their counsel) on the one side, and of Dow and Anthony (late of the firm of P., D. & Co.) on the other, and the documentary evidence, and the elaborate arguments of the learned and indefatigable counsel. The instrument relied on by the petitioners is a chattel mortgage in the common form, dated December 24th, 1867—acknowledged the same day, and lodged for record December 26th, 1867—the consideration named being two thousand two hundred and sixty-five dollars and nineteen cents; and the notes secured, being six in number, each for the sum of three hundred and seventy-seven dollars and fifty-one cents, with interest from December 24th, at bank rates, and payable respectively, one on the 1st of March, 1868—the others six, nine, twelve, fifteen, and eighteen months after date. The ordinary provisions in favor of the mortgagee, including a power to sell on breach of condition, are embodied in the deed, and the description of the property conveyed, is as follows: "The articles of personal property enumerated and described in the schedules and bills, marked respectively A, B, C, and D, hereto annexed, and constituting a part of this mortgage, meaning and intending hereby to convey, as well the articles mentioned in said schedules, upon which repairing, labor, and work has been done, as those charged and mentioned in said schedules, as furnished to said Joseph Dow by the said Potter, Denison & Co., said articles now being situated in the house occupied by said Joseph Dow in said Providence." The schedules referred to, A, B, C, and D, are simply the four pages of a bill of parcels and charges of Potter, Denison & Co. (dealers in household furniture), against said Dow—the first twenty charges being under dates of May 31 to August 8, amounting to about one hundred and sixty dollars, the others, amounting to over two thousand dollars, being under dates of September 9 to November 30. But these schedules, although attached to the mortgage, and although left with it at the office of the city clerk (as is shown by his indorsement upon the instrument), were not in fact recorded, so that the record book gave to inquirers only the information contained in the description above quoted.

And upon this state of facts the counsel for the trustee maintains that his client, stopping here, is entitled to a judgment in his favor, because, firstly, a mortgage, to be of avail against a bona fide purchaser or an attaching creditor, must, by our statute, be a recorded mortgage, and the assignee or trustee under the bankrupt act takes a bankrupt's property as a bona fide purchaser for value, as a creditor would; and, secondly, the instrument here relied on as having been recorded, inasmuch as without the schedules it was unintelligible, ought to be, and must be treated as a nullity. Two questions are here presented, each of interest and importance. Upon one only, however, is it necessary here to express an opinion. If, as maintained on behalf of Potter, Denison & Co., an assignee or trustee in bankruptcy is to be regarded as standing in the shoes of the bankrupt—as, in contemplation of law, a party to the transactions in which his assignor was a party, then it matters not to inquire whether the mortgage in this case was fully and effectually recorded or not, or whether or not it was recorded at all. On their behalf, in direct antagonism with the assumption on the trustee's part, it is contended that the assignee takes the property of the bankrupt, subject to all equities and liens (other than certain attachments) as held by him; and, consequently, that as the mortgage in question, under our state law, was valid as between Dow and the grantors, though not recorded, it must be held valid

between Dow's trustee and them. And in this construction of the law I am constrained to concur, after a deliberate consideration of the authorities referred to, and the arguments submitted by the learned counsel of the trustee in support of his position. My learned predecessor, as I am credibly informed, gave to the law this construction, and more recently the learned judge (Lowell) of the Massachusetts district, Ex parte Dalby [Case No. 3,540], has favored the bar and bench with an exhaustive opinion in support of that construction. A sufficient answer to the counsel's labored and ingenious argument, grounded on the proviso referring to mortgages in the 14th section of the bankrupt act, is found in this opinion, in these words: "The proviso appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages should be affected by the assignment, and not with any view of construing the law regarding record." Such has been my view of this proviso since, years ago, I was first called on as counsel, to advise concerning its meaning, and such, too, is the view of Chief Justice Chase, as I infer from his language reported in Re Wynne [Case No. 18,117]. Nor am I prepared to admit, as contended at the bar, that the opinion of Judge Blatchford in Re Meyers [Id. 9,518], cited by counsel, is not in harmony with this ruling of Judge Lowell. Under the statute of New Jersey, which Judge Blatchford was bound to regard, he could not rule, in the case before him, otherwise than he did. In Re Metzger [Id. 9,510], I fail to find in the opinion of Judge Hall anything inconsistent with the ruling of Judge Lowell in Ex parte Dalby [supra]. Adjudging, as I do, that the mortgage in question is not invalid for lack of proper registration, I proceed to treat of the other objections to the claim of the petitioners.

On behalf of the trustee, it is strenuously contended that upon the evidence said Dow is chargeable, in view of this mortgage transaction, with fraudulently preferring his creditors, Potter, Denison & Co., he being insolvent; and that Potter, Denison & Co. are chargeable, both with knowledge of his insolvency and knowledge of his fraudulent intent, as punitive consequences of which, Dow forfeits all claim to a discharge, and the petitioners not only are barred from claiming under their mortgage, but also are barred from proving their claim against the bankrupt's estate and sharing in the distribution of his assets. The answer of the petitioners to these allegations is two-fold. The first is, that assuming the allegations of the fact to be true, the trustee is estopped from impeaching the transaction, because the proceedings in bankruptcy against Dow were not commenced until six months (less one day) after the act of preference—and not within four months, as expressly required by the first clause of section 35 of the bankrupt act. After the lapse of four months, say they, the preferences—simply preferences—which an insolvent debtor may have made, are to be held valid as against all the world, so far as the preferred creditor is concerned. And this, in my judgment, is a sufficient answer. Nor am I aware that in thus ruling, I indicate dissent from any judicial opinion, or dictum even, to which my attention has been directed, or which has come under my observation. That my ruling is in harmony with the views of the distinguished framer or father of the bankrupt act, is evidenced by the Congressional Globe of March 27, 1866, page 1693, in the report of a colloquy between Mr. Jenckes and a fellow-representative, concerning the proviso of which I have above spoken. A second answer of the petitioners is an emphatic denial that Dow was insolvent in December, 1867, or then contemplated bankruptcy or insolvency, or that he or the petitioning creditors, in fact, gave a thought to that act, when the petitioners pressed for, and obtained a mortgage upon the goods they had themselves furnished or repaired, within the preceding ninety days, to secure payment for them within the eighteen months next to ensue. Of this second answer of the petitioners, under my ruling as above stated, it would be unnecessary to speak, did not the trustee further contend, that inasmuch as the mortgage in question was a transfer or conveyance of property within six months before the commencement of proceedings in bankruptcy, it is to be held void, and is moreover prima facie evidence of fraud, not being made in the usual and ordinary course of business of the debtor; contending also, of course, that the proofs bring the case within the provision of the second clause of section 35 of the bankrupt act, which is as follows: "And if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud."

To this claim on behalf of the trustee, as to the other, a twofold answer is given by the petitioners. They deny, as before, that the

facts warrant the conclusions which the trustee deduces from them, and on their part contend that the clause of section 35 above quoted, has no bearing whatever upon a case of preference by a bankrupt of a creditor's claim, which is, say they, the offense, and the only offense of which the bankrupt Dow is to be suspected even, upon the evidence. And in these views of the petitioners, both as to the bearing and effect of the proofs, and as to the construction of the statute, I concur. The statute recognizes—nay, demands—that we make a distinction between a preference to a creditor and a sale, transfer, or conveyance to one not a creditor; and when this required distinction is made, it is manifest that to the claim of the petitioners, the trustee makes no sufficient defense. This construction of the law, by the way, I find to be in harmony with the views entertained by my learned predecessor, Judge Bullock, as indicated in Re Hunt [Case No. 6,881].

The facts brought to view by the testimony are eminently exceptional, constituting a case strictly sui generis. The bankrupt Dow, in June or July, 1867, conceived the idea that to lease a spacious mansion-house on the corner of Waterman and Benefit streets, in Providence, for a term of ten years, and fit and furnish it as a quasi infirmary, with all conveniences for resident patients and all needful arrangements for bathing, à la Turque, and otherwise, for the public at large, would be a profitable enterprise. His income from his profession, as a physician, for two years preceding, had averaged from four to five thousand dollars per year, and he had of his own, or within his control, some five thousand dollars of the ten thousand dollars of capital deemed needful for the proposed undertaking, according to the estimates of the builders, furnishers, and artisans with whom he consulted. At that time, even before leasing the house above mentioned, he conferred with Denison, of the petitioning firm, concerning the furnishing of the house, stating what was his income, his means, and his purposes, and stating also that he should be obliged to ask credit for the furniture he should need, to cost, as he estimated, about a thousand dollars or more. The responses of Denison, it would seem, were in accord with Dow's wishes, as he undeniably understood that for any goods purchased of Potter, Denison & Co., should he need them, he would not be expected to pay until able to do so from his earnings as a physician, and the income and profits from his infirmary and bathing establishment. What were his representations to other parties with whom he proposed to deal, we are left to surmise; that he was not equally ingenuous in his statement to them, is not shown by any testimony, nor even asserted arguendo by counsel. In July he took possession of the Waterman street estate under try lease, and proceeded to arrange and adapt it to his purposes, employing, of course, laborers, carpenters, masons, plumbers, and other artisans, and contracting debts with carpet-dealers, crockery-dealers, and other traders, and in September, October, and November, ordered and received from Potter, Denison & Co., wares and merchandise to the amount (including a few charges for repairs of some articles of furniture), two thousand two hundred and sixty-five dollars and nineteen cents. It does not appear that until about the middle of November, anything was said to the doctor by any member of the firm concerning the amount of his account, or its settlement in any mode. Then, however, for the first time, he was called upon by Mr. Potter, whom he had never before seen, who introduced himself as senior partner of the firm, and after premising that the doctor's bill had swollen to a large amount, suggested that its payment in full, or in part, was desirable upon several grounds. To this the doctor replied with commendable frankness. He said he had not now the money in hand to discharge this debt, or certain other outstanding claims incurred in fitting up his establishment, not as yet fully, though about completed. He had expended and paid out all the money which he had at the outset, but, as his outlays, instead of coming within ten thousand or eleven thousand dollars as he had estimated, had amounted to about fifteen thousand dollars, he was at the stand as to what he should do. But as to the firm's claim, he had to say that he was surprised that a call for payment was made now, because it was understood and agreed that he was to be allowed a credit, and, but for that agreement, he would not have purchased the goods. To this, Mr. Potter's reply was, that the firm's terms were cash; that he, Potter, was the financial manager of the firm; and that Mr. Denison's agreements as to credit were not recognized as binding. Besides, the bill was for about twice the amount it was expected to be by Mr. Denison, and the firm needed the money. Between the doctor and Mr. Potter there were two or three interviews within the succeeding month, and Potter, ascertaining that the doctor could not, or would not, by borrowing or hiring, procure for him the money, at last insisted that he should give him notes for the amount of the debt, secured by mortgage of the goods specified in the bills rendered; and the doctor, after resentfully declining to give a mortgage, because the claim was already safe enough, and he confidently expected soon to be able to pay all his debts from his earnings and the profits of the new business in which he had engaged, and after proffering to Potter a return of the goods, which he declined accepting, finally consented to execute the mortgage, which Potter had caused to be prepared by his own attorney from instructions given (as I understand the testimony) before the debtor had agreed to give a mortgage, if not before the giving of one had

been a subject of negotiation. At this date (December 24, 1867, the new establishment not, in fact, being in operation) it is not shown or insinuated that any person other than the petitioning firm entertained a doubt of the success of the doctor's experiment. And whether, even at the date of the proceedings in bankruptcy (June, 1868), the doctor himself, or the mass of his creditors, had become skeptical or despondent in this regard, is matter of question: for (an exceptional fact this certainly!) it appears that before the petition in bankruptcy was filed by Phillips & Co., that firm and other creditors called on the doctor and asked him if he was willing they should put him into bankruptcy? To which he answered: "I thought it would injure my business; but I was in the hands of my creditors, and they must do what they thought best." He had, however, at the same interview, before any allusion to bankruptcy, told these gentlemen that he "didn't know of any other way to free himself from his embarrassment, but to give a mortgage on the improvements and fixtures of the leased estate, and get a loan, and pay all his creditors;" thus showing, that he, at least, in June, 1868, considered himself able to pay all his debts. And then —"in the hands of his creditors"—they file a petition in bankruptcy against him, on the 23d of June, containing charges as above quoted; on the 29th of June they obtain an injunction against any proceedings under their mortgage by Potter, Denison & Co.; on the 8th of July, Dow is adjudged a bankrupt on default; on the 27th of July all the creditors (saving P. D. & Co.) prove their claims and unanimously appoint a trustee to manage the estate; which trustee permits the entire property of the bankrupt to remain in his possession in use by him as originally contemplated, for an infirmary, bathing establishment, and boarding-house, down to this hour—not only without paying for the use of said property, but without even agreeing or promising ever to pay for that use, meanwhile persistently resisting the claim of the petitioners for the mortgaged property or its appraised value.

Now, without controverting divers familiar rules and maxims of law, cited on behalf of the trustee, I fail to find any sufficient ground in the evidence submitted for adjudging that Dow, in December, 1867, was insolvent, or contemplated bankruptcy or insolvency, or that, in making the mortgage in question, he even thought of the bankrupt act, much less deliberately resolved and intended to violate some of its wholesome provisions. It is true, that there were then outstanding claims against him, which he had not the money in hand wherewith to pay; but, on the other hand, it does not appear that any of these were then due under the arrangements and understanding between him and his creditors; while it does appear that all the property and effects, in procuring which these debts had been contracted, and some five thousand dollars of his own earnings been expended, were still in his possession, uninjured and undecayed; that his health was as vigorous, his skill as unquestioned, his character as untarnished, his credit as good, his friends, sympathizers and patients as numerous and zealous, and, finally, the enterprise of business in which he had just engaged as promising in prospectu, as ever before. Indeed, as we have seen, his business, in arranging for and establishing which his pecuniary obligations, then yet to mature, had been incurred, had not then commenced. To adjudge that he was then insolvent, within the reasonable intent of the bankrupt act, were to do what no court has yet done, and what the court of this district will not be the first to do. To adjudge that the petitioners were privy to a fraudulent intent on the part of such a debtor, in whose mind it must, upon the evidence, be conceded no such intent ever had birth or dwelling-place, were to do what were even more culpable, if that were not an impossibility. The petitioners wisely asked security for their debt upon the property they had agreed to sell upon a credit. Their debtor gave it, as was indisputably his right to do, both he and his grantees being, of course, bound to know that until four months should have elapsed the transaction would be impeachable, and for adequate cause be branded as void and fraudulent. They are not shown to have violated any law, nor, so far as appears in the proofs, any private pledge or stipulation, or any wholesome custom of trade. My judgment upon the issue presented is in their favor, with costs of suit, if, in this form of proceedings, costs are taxable. Of the action of the other creditors of Dow, under whose order and direction the trustee has so long resisted the claim of the petitioners, I refrain from speaking. The bankrupt act, it must not be forgotten, is designed and suited not only to thwart and defeat the machinations of the knavish bankrupt colluding with a rapacious mortgagee to hinder, delay and defraud the mass of his creditors, but also, and equally, to thwart and defeat the machinations of a body of creditors colluding with a demoralized or faint-hearted bankrupt to annoy, worry, delay, and wrong an innocent mortgagee. Says Chief Justice Chase, in Re Wynne [supra], "It is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid."

A decree was entered in accordance with the opinion, and the court adjourned to September 7th.

[The decree of this court was affirmed by the circuit court upon review. Case No. 2,955.]

POTTER (COGGESHALL v.). See Case No. 2,955.

Case No. 11,323.

POTTER et al. v. CROWELL.

[1 Abb. (U. S.) 89; 3 Fish. Pat. Cas. 112.] [1]

Circuit Court, N. D. Ohio. Sept., 1866.

INFRINGEMENT OF PATENT—PRELIMINARY INJUNCTION.

Upon a bill to restrain an infringement of a patent, if it is shown that defendants have formerly been engaged in infringing, the mere fact that since the commencement of the suit they have ceased to do so, and do not threaten to renew their sales, is not an answer to an application for a preliminary injunction to restrain the continuance or renewal of such infringement.

[This was a motion for a provisional injunction to restrain the defendants from infringing letters patent for an "improvement in sewing machines," granted to Allen B. Wilson, November 12, 1850 [No. 7,776], reissued January 22, 1856 [No. 346], and extended for seven years from November 12, 1864.] [2]

Samuel S. Fisher, for the motion.

Mr. Andrews, opposed.

WITHEY, District Judge. Complainants are, by assignment from A. B. Wilson, owners of the right secured to the latter by reissued letters patent, numbered 346, for improvement in the feed motion of sewing machines. They allege in their bill, that defendants infringe their rights by vending for use the "New England Sewing Machine," and apply to the court, by motion, for a temporary injunction to restrain defendants from selling the infringing machine. The defendants have answered, and affidavits are presented by both parties.

The fact is conclusively established, that the New England sewing machine does use the feed motion covered by the Wilson patent. Defendants admit that such machines were kept in their sales room in the city of Cleveland; and, that, as salesmen or agents for the owners, they exhibited, sold, and delivered them to customers of such owners, from time to time, prior and subsequent to the time of commencement of this suit; but that they had no interest whatever in the machines so sold.

Sales made under such circumstances render the persons selling infringers. This is conceded on the argument by defendants' counsel; and see Boyd v. McAlpin [Case No. 1,748]; Bryce v. Dorr [Id. 2,070]; Buck v. Cobb [Id. 2,079].

The principal objection urged against this motion is, that there is now no continuing injury; as, by their answer and proofs, defendants show, that, soon after the bill was filed and served, all the New England sewing machines in their rooms were removed by the owners, Clark & Barker, since which they have sold none; that they do not propose or desire to again engage in such sale, and that they have abandoned the injury complained of. It is claimed that the court will not do what there is no occasion for doing; and that, acting upon the case as it appears on the hearing of the motion, there is no occasion for the exercise of the restraining power of the court.

Let us look at the case as it is presented. The bill alleges the injury to complainants' rights as existing at the time suit was commenced, and for some time previous thereto; that defendants asserted their intention and right to continue it, and that notice had been served upon defendants prior to suit, directing them to desist from further sales of the infringing machine. Under these circumstances, complainants found it necessary to bring suit and apply to the court for protection to their rights. The defendants meet this application by denying in their answer that the New England machine does infringe the Wilson patent, thereby asserting a right to continue the sale of such machines; but say that soon after the bill was filed and served in this cause, Clark & Barker, owners of the New England sewing machine, removed all those machines from defendants' rooms; that defendants have none of them now in their possession, and disclaim any purpose or desire to again engage in selling them.

No compensation has been made or offered to complainants for the injury sustained; it is within the power of defendants to renew the injury, and under their claim of right, it is not impossible that they will change their minds hereafter, if no injunction is granted. Certainly there would be nothing to prevent, and complainants, in that event, would be obliged to renew their motion at any time before final hearing.

And certainly, if the abstract proposition, of no continuing injury at the time of hearing, is a valid objection against this motion, it is not easy to see why a like disclaimer by defendants on a second motion, and renewed abandonment of sales, would not be a second time successful.

Where the injury is not only past, but cannot, from the nature of the case, be renewed or continued, no injunction would be granted, for the well recognized principle should in such case prevail, that past injuries are not in themselves ground for injunction; and because the restraining power of a court of equity can only be invoked, not to remedy injuries already done, but to prevent injury.

Perhaps as safe a criterion of what is to be apprehended from defendants as can be obtained, is to look at that which they have done, and in their answer justify the right to do, rather than to look to the fact of their having discontinued the alleged injury, and their declaration of want of intention of renewing the same. The court is not prepared to say that no occasion for the exercise of its

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[1] [Reported by Benjamin Vaughan Abbott, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Abb. (U. S.) 89, and the statement is from 3 Fish. Pat. Cas. 112.]

[2] [From 3 Fish. Pat. Cas. 112.]

restraining power is shown in this case, when it is apparent that there was such occasion when the suit was commenced; that it has but recently ceased; that it may, if defendants feel disposed, be renewed at any time, and that the complainants claim that they apprehend a continuance of the wrong.

In Woodworth v. Stone [Case No. 18,021], cited by complainants, Story, J., says: "A bill for an injunction will lie if the patent right is admitted, or has been established, without any established breach, upon the ground of apprehended intention on the part of a defendant to violate the plaintiff's right." The opinion of the court in Sickles v. Mitchell [Id. 12,835], does not sustain the head note of the case. One of the two steamers owned by defendant, and using the plaintiff's patented invention, had been burned, but the other was still employed in navigation, and infringed upon plaintiff's rights by employing his patent; hence there was, at the time of hearing, a continuing injury. Complainants' counsel cited this case as an authority to the point, that it is not a sufficient answer to this motion that the infringement has been discontinued, and is not intended to be resumed, no compensation for the unlawful use having been made. While the head note of that case goes thus far, the opinion of the court does not; as will be seen from an examination of the case.

Nevertheless, upon principle, it seems to the court that the right of protection, which existed when this cause was commenced, ought not to be defeated by anything which has thus far been asserted on behalf of defendants, particularly as no injury can possibly result to defendants, while the allowance of the motion will ensure protection to complainants.

The nature and purposes of an injunction, and the general principles governing courts of equity in granting it, are, in the abstract, as stated and claimed by defendants' counsel; but every case presented to a court for the exercise of its restraining power, must necessarily depend to a great extent upon the peculiar circumstances of the individual case, and the judge must so apply principles as to accomplish the ends of justice and the purposes of jurisdiction. Injunction granted.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

Case No. 11,324.

POTTER et al. v. DAVIS SEWING-MACH. CO.

[3 Fish. Pat. Cas. 472.] [1]

Circuit Court, S. D. New York. Nov., 1868.

PATENTS—INFRINGEMENT.

The "assistant or helper" described in the patent granted to Job A. Davis, October 9, 1866, is an equivalent for and an infringement of one of the feeding surfaces patented to Allen B. Wilson, November 12, 1850. It may not be as perfect and efficient as the arrangement of Wilson, but it operates upon the same principle.

This was a motion [by Orlando B. Potter, Nathaniel Wheeler, and others] for a provisional injunction to restrain the defendants [Davis Sewing-Machine Company] from infringing letters patent for an "improvement in sewing machines," granted to Allen B. Wilson, November 12, 1850 [No. 7,776], reissued January 22, 1856 [No. 346], and extended for seven years from November 12, 1864.

S. J. Gordon and Geo. Gifford, for complainants.

S. D. Law, for defendant.

NELSON, Circuit Justice. The bill in this case is founded upon the extension of the reissued patents to A. B. Wilson, January 22, 1856, No. 346, and of December 9, 1856, No. 414, for new and useful improvements in the sewing machine. The only question that we consider material to notice is that of infringement. It is insisted, on behalf of the defendants, that no part of the feed motion of A. B. Wilson is embodied in their machine. The feeding device as claimed by them is what is commonly known as the needle feed, the cloth being advanced stitch by stitch by a lateral motion of the needle while in the cloth.

A recent improvement upon this needle feed, by Job A. Davis, and which is used by the defendants, it is insisted, for the complainants, does embody it. The patentee describes it as follows: "Which consists in the application and use of a device which acts as an assistant or helper to the needle, and which keeps the fabric, while being sewed, smooth, and prevents it gathering or bunching as the feed is effected, and which also holds the fabric and prevents its rising as the needle is withdrawn." The patent was granted October 9, 1866. This "assistant or helper" is an upright piece constructed alongside and in front of the needle, and suspended to the pressure bar with a foot resting on the cloth to be sewed, which is between it and the sliding plate that covers the shuttle race, and moves forward with the needle, as alleged by the patentee, to keep the cloth smooth while being sewed, but by the complainants as acting as a feeder to the needle upon the same principle as in the patents of A. B. Wilson.

The foot of this helper is made to bear with a yielding pressure upon the surface of the sliding plate, so as to grasp the cloth between the two surfaces sufficiently to advance it stitch by stitch in the working of the machine, at the same time that the needle is moved laterally. This feed motion of the helper may not be as perfect and efficient as the arrangement of A. B. Wilson, but that it exerts a material influence in effecting it is not to be denied, upon the evidence including the practical working of the machine before us at the argument. We think, therefore, the complainants

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

are entitled to an injunction as it respects the use of this arrangement in the defendants' machine. The defendants complain that there has been delay in the making of this motion, which has led them into expense as the result of the injunction. But, it should be remembered that their patent is recent, that they were early warned against the use of the invention, and that they have chosen to disregard the warning and to take all the responsibilities attending it. Injunction granted.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

Case No. 11,325.

POTTER et al. v. DIXON et al.

[2 Fish. Pat. Cas. 381; 5 Blatchf. 160.] [1]

Circuit Court, S. D. New York. July 2, 1863.

COMMISSIONER OF PATENTS—POWER WITH RESPECT TO INTERFERENCES—EQUITY JURISDICTION —PRELIMINARY INJUNCTION.

1. There is nothing in the statute limiting the power of the commissioner to a single interference, and the reason for the declaration of subsequent interferences, if any should appear before the issue of the patent, is as strong as for the first one.

2. Section 11 of the act of 1836 [5 Stat. 121] does not provide that the commissioner shall issue a patent to the applicant if the decision of the chief justice is in his favor, but simply declares that that decision shall "govern the further proceedings of the commissioner in such case"—and so it should, as it respects the parties concerned, but not as to other parties who may come in and claim the benefit of the provision.

3. Where, therefore, an interference was declared between the application of J. G. W. assignee of A. & F. and a patent previously issued to I. M. S., in which case, upon appeal to him, the chief justice decided in favor of J. G. W., and ordered a patent to issue to him, and, after the return of the order, but before the issue of the patent, another interference was declared between the same application and a patent issued to A. B. W., and the chief justice, upon appeal, held this last interference wrongfully declared, and peremptorily ordered the issue of the patent in pursuance of his first order, which was done: *Held*, that the chief justice erred, and that the patent issued in accordance with his last order was without authority and void, and should be enjoined.

4. It has been frequently decided that the power conferred upon the United States circuit court to entertain bills in equity in controversies arising under the patent act, is a general equity power, and carries with it all the incidents belonging to that species of jurisdiction.

5. The power conferred not only enables a court of equity to decree a final remedy, but to take care that the subject of the controversy shall not be rendered valueless pending the litigation.

[Cited in Perry v. Corning, Case No. 11,003.]

6. Preliminary injunction granted under section 16 of the act of 1836 [5 Stat. 123], as amended by section 10 of the act of 1839 [Id. 354].

[1] [Reported by Samuel S. Fisher, Esq., and Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 2 Fish. Pat. Cas. 381, and the statement is from 5 Blatchf. 160.]

[This was a bill in equity by Orlando B. Potter, Nathaniel Wheeler, and others against Courtlandt P. Dixon and Edward Learned.]

[2] [The bill in this case was filed to set aside letters patent (or so much thereof as conflicted with letters patent owned by the plaintiffs) issued by the commissioner of patents to James G. Wilson, in pursuance of an order by Judge Dunlop, chief justice of the district court of the United States for the District of Columbia, made on appeal, December 30th, 1862, and for an injunction, pending the suit, against the sale or use of the said patent. The order of Judge Dunlop was made under the following circumstances: Wilson, assignee of a patent granted to Akins and Felthousen [No. 8,282], applied to the commissioner for a reissue of that patent, upon which application an interference was declared with a patent previously issued to Isaac M. Singer. After a hearing of the issue between the parties, the commissioner decided in favor of Singer. Thereupon, an appeal was taken by Wilson, from the decision, to Judge Dunlop, who, upon a review of the case, reversed the decision, and ordered the reissue to be granted to Wilson. After the return of the order and papers to the patent office, and before the issuing of any reissued patent, parties interested in a patent previously granted to Allen B. Wilson, applied to the patent office to declare an interference between that patent and the one granted to Akins and Felthousen, which was done. After a hearing, the commissioner decided against the application, on the ground that Allen B. Wilson was the first inventor. Thereupon, an appeal was taken to Judge Dunlop, who held that the interference between the patent of Akins and Felthousen and the patent of Allen B. Wilson, was wrongfully declared and should be dissolved, on the ground that no second interference could be declared under the statute, and that his decision upon the interference between the patent of Akins and Felthousen and the patent of Singer, was conclusive upon the commissioner; and he thereupon peremptorily ordered the reissue [No. 1,388] of the former patent, in pursuance of his first order, and refused to look into the case on its merits. The plaintiffs now applied for said injunction.] [2]

Edwin W. Stoughton, George Gifford, and Samuel J. Gordon, for plaintiffs.

James T. Brady, Samuel Blatchford, and Clarence A. Seward, for defendants.

NELSON, Circuit Justice. The 7th section of Act July 4, 1836 (5 Stat. 119), provides that, on an application for a patent, if the commissioner shall be satisfied that the applicant is the original and first inventor, he shall be entitled to a patent; that if, upon the application, the commissioner shall refuse the

[2] [From 5 Blatchf. 160.]

patent, the applicant may appeal to a board of examiners provided for in the act; that the board shall have power to reverse the decision of the commissioner; and that, if it is reversed, a certificate shall be made of the fact, and "he shall be governed thereby in the further proceedings to be had on such application." The 8th section provides, that when an application shall be made to the commissioner for a patent which, in his opinion, would interfere with any unexpired patent which has been previously granted, it shall be his duty to give notice to the applicant or patentee, and that, if either party shall be dissatisfied with the decision of the commissioner, he may appeal from such decision, on like terms as in the preceding section, and the like proceedings shall be had to determine which, if either of the parties, is entitled to the patent. The 11th section of the act of March 3, 1839 (5 Stat. 354), substitutes the chief justice of the district court of the United States for the District of Columbia for the board of examiners, and makes special provision for a full hearing before him, and also provides that, on the return of the papers and of his decision to the patent office, the decision shall be entered of record, and "shall govern the further proceedings of the commissioner in such case." The 16th section of the act of 1836 provides, that when there shall be two interfering patents, any person interested in any such patent may have a remedy by bill in equity, and that the court having cognizance thereof may adjudge and declare either of the patents void, in whole or in part, or inoperative and invalid in any particular part of the United States.

The motion for a preliminary injunction in this case is placed on two grounds: (1) That the commissioner had no authority to receive the surrender of the patent to Akins and Felthousen, and reissue one to James G. Wilson, inasmuch as the order of Judge Dunlop was a nullity; and (2) that, if otherwise, the reissue was erroneous, as Allen B. Wilson was the first and original inventor.

1. By the 8th section of the act of 1836, already referred to, it is made the duty of the commissioner, on an application for a patent which in his opinion would interfere with a patent already granted, to give notice to the parties interested, receive proofs, and determine the question of priority of invention. The party against whom he decides may appeal to the chief justice. It is supposed, by the learned chief justice, that there can be but one interference declared by the commissioner, on an application for a patent, and that the decision of the chief justice is conclusive upon the commissioner, though, in the meantime, and before the patent issues, another case of interference should appear or be presented. There is certainly nothing in the statute limiting the power of the commissioner in this respect, and the reason for the hearing in the second case is as strong as for that in the first. The object of the provision is one that pervades the whole of the statute, namely, to secure to the real inventor the exclusive privileges therein provided for. Besides, a hearing and decision between the applicant for a patent and A., whether in favor of the one or the other, forms no rule for a decision between the applicant and B., in case of an interference declared between them. The proceedings are independent and inter alios. The effect sought to be given to the decision of Judge Dunlop would not be admitted if the proceedings had taken place in a suit at law or in equity, much less should it be allowed where they are informal and summary, with a view to the truth and merits of the case. The section is broad and unqualified: "That whenever an application shall be made for a patent, which, in the opinion of the commissioner, would interfere," &c., "with any unexpired patent," &c., "it shall be the duty of the commissioner to give notice," &c. How the commissioner is to obtain information of the interfering patent is not provided for in the statute, and hence the matter is necessarily left in his discretion, and he must obtain the information in the best way he can. If the party interested knows of the application, he can bring the interference to the notice of the commissioner; or, if the commissioner happens to recollect the issuing or existence of the previous patent, he may act upon that information. It would be very unreasonable to require him to recollect at the time all the previous patents that may interfere with the one applied for, or to require the party interested to know that an application is pending in the office for a patent interfering with his.

The interference declared between the patent of Akins and Felthousen and that of Singer, presented simply an issue between those two patents and nothing more, and the proofs did not necessarily extend, or might not have extended, beyond this issue. The decision of the chief justice in favor of the former was, doubtless, binding on the commissioner as between those parties, but no further. The 11th section of the act of 1839 does not provide that the commissioner shall issue a patent to the applicant if the decision of the chief justice is in his favor, but simply declares that such decision shall "govern the further proceedings of the commissioner in such case;" and so it should, as it respects the parties concerned, but not as to other parties who may come in and claim the benefit of the same provision.

I am quite clear, therefore, that the learned chief justice erred in refusing to entertain the appeal in the case of the interference declared with the Allen B. Wilson patent, and that his order to the commissioner dissolving that interference, and directing his order in the case of the interference with the Singer patent to be executed, was a nullity, and hence that the patent issued to James G. Wilson by the commissioner was without authority and void, and should be enjoined.

2. Even if the question in the case turned upon the merits, namely, whether or not the invention of A. B. Wilson was prior to that of Akins & Felthousen, I should have felt bound to interfere and enjoin the patent; for in several cases before me on a final hearing decided in August, 1860,—Potter v. Wilson [Case No. 11,342],—involving this question of priority, and in which J. G. Wilson was one of the defendants, I came to a clear conviction, upon the proofs, against the claim of Akins & Felthousen. The decision has been generally acquiesced in, and the invention gone into very general and extensive use, as appears from the papers in this case.

It may be proper to refer to section 8 of the act of March 3, 1837, which confers on the commissioner the same power on a reissue, over the question of granting it, which he possessed in the case of an original application for a patent.

It was argued on this motion by the learned counsel for the defendants that section 16 of the act of 1836, amended by section 10 of the act of 1839, did not authorize this court to grant an injunction, and that the power was confined to the specific remedy pointed out in the section. We do not assent to this view. It has been frequently decided that the power conferred on the United States circuit court to entertain bills in equity in controversies arising under the patent act, is a general equity power, and carries with it all the incidents belonging to that species of jurisdiction. The power conferred not only enables the court to decree a final remedy but to take care that the subject of the controversy shall not be rendered valueless pending the litigation.

Let an injunction issue according to the prayer of the bill.

Case No. 11,326.

POTTER et al. v. EMPIRE SEWING MACHINE CO.

[3 Fish. Pat. Cas. 474.] [1]

Circuit Court, S. D. New York. Dec., 1868.

PATENTS—EXTENSION—EFFECT UPON PRIOR REISSUE.

Where a patent has been extended to a patentee under section 18 of the act of 1836 [5 Stat. 124], it is immaterial whether or not he was vested with the entire interest in the patent at the time of a surrender and reissue made prior to the extension. The extension vested an absolute and complete title in him.

In equity. This was a motion [by Orlando B. Potter, Nathaniel Wheeler, and others] for a provisional injunction to restrain the defendants from infringing letters patent for an "improvement in sewing machines," granted to Allen B. Wilson, November 12, 1850 [No. 7,776], reissued January 22, 1856 [No. 346], and extended for seven years from November 12, 1864. Defendants were using what is known as a "wheel feed."

S. J. Gordon, E. W. Stoughton, and Geo. Gifford, for complainants.

C. A. Durgin, J. M. Van Coit, A. C. Washburn, and T. A. Jenckes, for defendants.

NELSON, Circuit Justice. 1. This case involves the validity of the reissued patents to A. B. Wilson, of January 22, 1856, No. 346, and of December 9, 1856, No. 414, for certain new and useful improvements in sewing machines.

These letters patent were extended by the commissioner of patents on November 8, 1864, for the term of seven years from and after the expiration of the first term. The two patents have heretofore been frequently before this court; and also before courts and judges in other districts and circuits; and have been the subject of laborious and exhaustive investigation, both by counsel and court. Indeed, there have been but few patents that have come before me or under my observation which have been more zealously or perseveringly contested; and yet, so far as appears, or I know, their validity in every instance has been maintained. Many of these cases will be found in the first and second volumes of Fisher's Patent Cases.

We shall not again go over the argument. The question must be regarded as at rest in this court.

2. That the defendants' machine embraces the material improvements in sewing machines described and claimed in these patents, we think is equally plain, and will be found authoritatively settled in several of the cases already referred to.

There is no substantial difference between the feed motion used by the defendants in their machine and that of A. B. Wilson, as has been sufficiently shown by the experts, and virtually heretofore adjudged by the courts.

3. We do not inquire whether A. B. Wilson was vested with the entire interest in the patents at the time of his surrender and reissues, in January and December, 1856, or some portion of the same were outstanding in third persons, as the extension of the patents to him by the commissioner, for seven years, which took effect on the expiration of the first term, vested an absolute and complete title to them in him for that period, under which the complainants derive their title.

Decree for complainants for preliminary injunction.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

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

POTTER (EVANS v.) See Case No. 4,569.

Case No. 11,327.

POTTER et al. v. FULLER.

[2 Fish. Pat. Cas. 251.] [1]

Circuit Court, S. D. New York. June, 1862.

INJUNCTION IN PATENT CASES—INFRINGEMENT BY SELLING — IRREPARABLE INJURY — VALIDITY OF PATENT — SENDING CASE TO JURY — VERDICTS WITHOUT CONTEST.

1. Where machines were not manufactured by the defendants, but were sold by them as agents of the maker, an injunction against such selling is not such an irreparable injury as could prevent the issue of the writ.

2. Where the validity of the patent is fully established, and the infringement is clear, a party has a right to protection by injunction, although it may cause great injury to the infringer.

[Cited in Hodge v. Hudson River R. Co., Case No. 6,560.]

3. The tendency of the courts in equity, as evinced in their decisions, both in England and America, for the last few years, has been to consider cases, arising under letters patent, themselves, upon full proof, instead of sending them to a jury.

4. There is no reason why parties, all of whom are interested in a patent, may not make a common fund for the purpose of protecting their common rights, by prosecuting those who, they think, have infringed them.

5. While a decision in a former case is conclusive only upon the parties to the litigation, it may be an adjudication upon the points in issue, so far as the validity of the patents is concerned, which is entitled to great weight in other cases, and which any court, upon a motion for a preliminary injunction, would, with extreme reluctance, attempt to overrule.

[Cited in Edison Electric Light Co. v. Electric Manuf'g Co., 57 Fed. 619.]

6. If verdicts are obtained without contest—without collusion—because the defendants chose to yield to a judgment, as much weight should be given to such verdicts as if there had been a full trial, and a jury had passed upon the facts.

[Cited in McWilliams Manuf'g Co. v. Blundell, 11 Fed. 422.]

In equity. This was a motion [by Orlando B. Potter, Nathaniel Wheeler, and others] for a preliminary injunction to restrain the defendant [Abraham Fuller] from infringing reissued letters patent, Nos. 346 and 414, for improvements in sewing machines, granted to Allen B. Wilson, and more particularly referred to in the report of the case of Potter v. Wilson [Case No. 11,342]. The defendant was selling what was known as the "Williams & Orvis" machine, in the Southern district of New York, as an agent of the manufacturers, who constructed the machines in Massachusetts.

George Gifford, for complainants.

Blatchford, Seward, & Griswold, for defendant.

Before NELSON, Circuit Justice, and SMALLEY, District Judge.

SMALLEY, District Judge. The bill is predicated upon two reissued letters patent to A. B. Wilson, one marked "346," dated January 22, 1856, and the other marked "414," dated December 9, 1856. All the right, title, and interest which Wilson had to this invention and patent have passed, by various assignments duly executed, to the orators. The title of the orators to these Wilson reissued patents is not denied. The bill, among other things, states that after the orators became the owners of said letters patent and the inventions therein described, and after the said reissues, the said reissue marked "346" was infringed by one Joel Chase, and his confederates, in the city of New York, by the manufacture of sewing machines, and the orators caused a suit in equity to be commenced against him in the United States circuit court for the Southern district of New York, and an application to be made to said court for an injunction to issue against him; that on or about September 27, 1856, an injunction was issued by said court, restraining and enjoining the said defendant Chase, and his confederates, from further infringement of said patent; that afterward, certain persons, seeking to possess themselves of the advantages of said invention, had prepared for and commenced the manufacture of sewing machines in the state of Connecticut, differing considerably from the inventions of said Wilson, but employing some parts thereof—the orators caused actions at law to be instituted against said persons in the circuit court of the United States for the district of Connecticut, to establish the validity of said patents, and to recover damages for the infringement thereof: that the defendants in said actions appeared by counsel, and the plaintiffs proceeded without delay to prepare for the trial of the same at the first term thereafter of said court, that is, the April term of 1858, and at that term obtained verdicts and recovered damages therein. That the validity of said patents to Wilson, and the utility of his inventions, and the exclusive rights secured thereby, were acknowledged and acquiesced in by all said defendants and the public to a large extent, and the same were thereby established.

But thereafter, in other suits in equity in said court, on applications for preliminary injunctions, some of the defendants not appearing to be satisfied with the adjudications already had, defended, and set up, and urged by their counsel in opposition to such applications, that the complainants had not sufficient title to said patents; that the subject-matter of some of the claims was not patentable; that the inventions made by the patentee were not useful, and that he was not the first or the original inventor of what is claimed in said patents; that said reissued patents were void, because said A. B. Wilson had no right to apply for the same, and because they are not for the same invention as was the original: also, that said inventions, or substantial parts thereof, had been anticipated by inventions of Thimonier,

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

of France; Elias Howe, Jr., Bradshaw, Walker, Bachelder, Sewell, Carpenter, and others. Long and elaborate arguments were had, and the court, after full deliberation, overruled all of said objections, and all matters which were set up in defense, and about the last of December, 1858, granted and issued injunctions against the defendants.

That in the month of February, 1859, more than twelve preliminary injunctions were granted and issued by the United States circuit court for the Southern district of New York, against infringers of said patents. That subsequently thereto a motion was made to dissolve one of said injunctions, and the motion, after a hearing thereof by the court, was denied, and the injunction was continued.

That in the year 1858, suits in equity were brought upon said patents in the circuit court of the United States for the Southern district of New York, against James G. Wilson and others, also against John R. Gibbs; and in December, 1858, another suit in equity was brought against George B. Sloat and others for infringements of said patents. That in the month of February, 1859, preliminary injunctions were granted and issued by the court against the defendants in said suits; that the defendants, in their answers in said last three suits, set up as a defense therein most of the matters which had been set up in the suits in the district of Connecticut; and in addition thereto, they alleged in their answers that the English patents issued to John Fisher and James Gibbons, Edward Newton and Thomas Archbold, James Cropper, John Brown Milnes, and the American patents issued to William H. Akins and Jacob D. Felthousen, dated August 5, 1851, and the patent to William H. Johnson, dated March 7, 1854, and the caveat of said William H. Johnson, filed November 7, 1848, contained the inventions, or substantial and material parts thereof, patented in and by said two reissued patents to said Allen B. Wilson; and that said inventions of said Wilson, and substantial and material parts thereof, patented by said two reissued patents to said Allen B. Wilson, had, prior to the invention of said Allen B. Wilson, been made by and was known to and used by said Akins and Felthousen, Leander W. Langdon, William H. Johnson, and divers other persons in the United States. That general replications were filed by the complainants to said answers, denying said allegations, and a large quantity of testimony was taken in said suits preparatory for final hearing on pleadings and proofs, commencing about January 1, 1859, and ending about November 14, 1859, and amounting to over eighteen hundred pages in print. That said suits were brought to a final hearing on pleadings and proofs, before Justice Nelson, Judge Smalley sitting with him, on June 20, 1860, and were argued by counsel on both sides, the arguments continuing for about two weeks. After the arguments were closed, the court held said suits under advisement until about August 17, 1860, when Justice Nelson rendered the decision of the court in said suits, overruling the defenses set up by the defendants therein, and deciding that said Allen B. Wilson was the first and original inventor of all that is claimed in said patents, or either of them, and that said patents are both good and valid, and that the same had been infringed by all the defendants in said suits, and ordered an account from said defendants, and each of them, and that perpetual injunctions be issued against all of said defendants in said suits. And that on October 4, 1860, a final decree was entered by the court against the defendants in each of said suits, adjudging and decreeing that said two reissued patents are good and valid; that said Allen B. Wilson was the original and first inventor of the improvements thereby secured; that the complainants in each of said suits, by virtue of said patents, and by the assignments alleged in the bill of complaint in each of said suits, were vested with the exclusive rights and privileges granted and secured in and by said patents and each of them; that the defendants in each of said suits had infringed upon said patents and each of them, and the exclusive rights of orators under the same; and also adjudging and deciding that the complainants in said suits should recover of the said defendants therein the gains, advantages, and profits which had arisen or accrued to the defendants therein respectively from their infringements of said patents, and each of them, together with the cost of the complainants in said suits; and also that a perpetual injunction be granted and issued against the defendants in each of said suits; and ordered a reference to a master of said court to take account of the same.

The bill further states, that a like final decree was entered by the said court on November 5, 1860, in another suit upon said two reissued patents, wherein Louis Planer and Joseph Anger, of the city of New York, were defendants, and against whom a suit had been brought in said court for the infringement of said patents.

And also, that a like final decree was entered by said court on December 4, 1860, in another suit upon said two reissued patents, wherein James Harrison, Jr., of the city of New York, was defendant, and against whom a suit had been brought in said court for the infringement of said patents. The bill further states, that after the orators became the owners of said letters patent and inventions as aforesaid, and after the reissues 346 and 414 above named, the same were at various times and at divers places infringed by Isaac F. Shepard, and many others who are named in the bill, in the district of Massachusetts, by the manufacture and sale of sewing machines; and the orators caused suits in equity to be commenced against them in the United States

circuit court for that district, and applications to be made to said court for injunctions to issue against said defendants. And such proceedings were thereupon had, that perpetual injunctions were duly ordered to issue by said court, restraining and enjoining all of said defendants and their confederates from further infringement of said reissues.

And the bill further states, that in the month of October, 1860, several suits in equity upon said patents were pending in the circuit court of the United States for the Eastern district of Pennsylvania; that the defendants had appeared by counsel in each of said suits, and put in answers therein; and in their answers respectively had set up as defense, among other things, the various matters of defense which had been set up by the defendants in the above-mentioned suits, in the Southern district of New York, and in the district of Connecticut; that replications were filed to said answers, denying said allegations; and testimony was taken in said suits preparatory for final hearing thereof; and that in or about the month of October, 1860, said suits were brought to a final hearing on pleadings and proofs before his honor, Justice Grier, at Philadelphia, in said district, and final decrees were granted and entered therein overruling all the defenses set up by the defendants in said suits, and adjudging and decreeing that said Allen B. Wilson was the first and original inventor of all that is patented in and by said patents, or either of them; and that said patents are good and valid; and that the complainants owned the same; and that the said patents had been infringed by all the defendants in said suits, and ordered and decreed an account from said defendants and each of them, and that perpetual injunctions be issued against all of said defendants in said suits.

These are the material facts stated in the bill. They are sustained to some extent by the affidavits of four machinists and experts in relation to the question of infringement.

Now, if the defendant's machine is found upon examination to infringe these patents, it is obvious that the bill makes a clear and strong case for an injunction. And certainly the orators are entitled to an injunction unless the evidence and exhibits, introduced by the defendant, defeat that right. That the defendant's machine has infringed, and that the one they are now selling is an infringement of said reissued patents, and each of them, in defiance of the rights of the orators, by using and vending to others to be used the inventions therein described, is claimed to be proved by the testimony of four experts and machinists, whose affidavits are attached to and read in support of the bill, and who testify that the defendant has been and is still using, or selling rather, machines similar in principle and operation to those described in the specification of said Wilson's reissued patents.

The defendant resists this application for a preliminary injunction on four grounds. First, he says, that this is not a case where a preliminary injunction should issue, even if it be true that the Wilson patents are valid, and if it should turn out upon a hearing in chief that the defendant's machine is an infringement; for, he says, first, that to grant a preliminary injunction would produce irreparable injury to the defendants. It is difficult to see how that objection can well be sustained in this case, even if such a fact would be good cause for withholding a preliminary injunction; for, it appears from the case that these machines are not being manufactured in New York; that they are only being sold here by an agent for the manufacturers, Williams and Orvis, who construct them in Massachusetts. Therefore, there is not much force in the objection that a preliminary injunction in this case would produce irreparable injury, if it be really an infringement of these patents, by simply enjoining them from selling in the Southern district of New York. Besides, where the validity of the patent is fully established and the infringement is clear, a party has a right to protection by injunction, although it may cause great injury to the infringer.

Another objection that is urged is, that the plaintiffs are not entitled to a preliminary injunction, because they have been guilty of great laches; and as evidence of these laches, defendants asserted in the affidavits filed by them and proved by records, that certain suits had been commenced against "Williams and Orvis," in the district of Massachusetts, for a violation of the Wilson patents in the manufacture and vending of the same machines sold by the defendant. The court is not disposed to regard that claim favorably. It is said that the parties have had an opportunity in that district to bring these matters to issue before a jury, and therefore that a preliminary injunction should not issue. It is unquestionably true that in former years it has been much the practice of the courts, in adjudicating upon patents, when there was a seriously-disputed question of fact, to send the matter to a jury. But I think the tendency of the courts, as evinced by their decisions, both in England and America, for the last few years, has been to consider the cases themselves upon full proof, instead of sending them to the jury. And I believe that the decision of a competent court, accustomed to the investigation of facts of this kind in relation to matters of art and science, would be more satisfactory to intelligent minds than the verdict of a jury would be likely to be. There is usually a great mass of evidence put in (and it has been shown, in this case, that a similar one in Boston occupied fifty-eight days in trial before the jury). The jurors, at least many of them, are not accustomed to investigations of this character, their minds become fatigued, their recollection of the testimony imperfect, and few, if any, take minutes of the evidence. For these reasons, and others not necessary to mention, I am inclined to think that the decision of a court of equity, upon a full investiga-

tion of the facts, is, and ought to be, more satisfactory than the verdict of a jury under such circumstances. And after this question of the validity of these patents has been once adjudicated, as it appears from the bill, and is conceded by the defendant in the argument that it has, and after it has been again examined, I should hesitate long before I would listen to the argument that the injunction should not issue because a jury has not passed upon the case. I think, therefore, that that objection is not well founded.

The third reason urged by the defendant why an injunction should not be granted in this particular case, is alleged to be on account of the oppressive conduct of the plaintiffs. That is said to consist in the fact, which appeared in the evidence by the affidavits and the papers, that the various parties in interest in these Wilson patents, the three classes of orators here, had agreed among themselves that they would make a common fund to prosecute infringements upon these patents, and thus protect their rights. This it is alleged, is a combination, oppressive in its character, which ought to be frowned upon by the court. But I can see nothing improper in the transaction. It does not appear that any parties entered into that arrangement who were not themselves interested in those patents; and why they might not make a common fund for the purpose of protecting their common rights by prosecuting those they thought had infringed them, I am at a loss to conceive. I can see no objection to the injunction, therefore, upon that ground.

The second ground on which the defendant resists the application is, that there has been no general acquiescence in the validity of these patents, and that the former adjudications upon them, which are set forth in the orator's bill, were based upon erroneous propositions; that Judge Ingersoll, in granting the injunction in the case of Potter v. Holland [Case No. 11,330], in Connecticut, was led to believe three erroneous propositions, which are now shown to be erroneous. These three errors, the defendant insists, consist in this: First. That Judge Ingersoll supposed that the Wilson machine of 1850 was capable of producing the result claimed for it by the patentee; Secondly. That the feeding instrument was a combination of two elements, namely, of the feeder and presser only, whereas, in fact, it is a combination of three elements. As to these two questions, the defendant claims that Judge Ingersoll committed a serious error in the hearing before him (which appears to have been elaborately argued and carefully considered), and that the same errors were sustained by the court in deciding the case of Potter v. Wilson [Id. 11,342], at Cooperstown, decided by Judge Nelson, heard before Judge Nelson and myself; that Judge Ingersoll first made the mistake, and the full bench followed him. It is sufficient to dispose of that position by saying that inasmuch as it has been once passed upon, after being fully argued before the late Judge Ingersoll, certainly an eminent patent law judge, and by the full bench, Mr. Justice Nelson presiding, it would hardly be presumed that this court, on a motion for a preliminary injunction, would attempt to reconsider and overrule those decisions, made after such full consideration. In addition to that, though there has been much time spent upon these propositions, I have yet to see any reason to believe that the first ruling of Judge Ingersoll, sustained by Judge Nelson and myself, was not correct.

The third reason which the defendant assigns, is a question of fact. That Wilson was not the first person who invented any feeding instrument by which the cloth could be fed automatically, while the direction of the seam could be changed at the will of the operator, without interfering with the regularity of feed. All the machines that the defendant now relies upon to sustain that proposition were before Judge Ingersoll, it appears, and again before the full court at Cooperstown, in 1860, except Ellithorpe's machine, which I shall consider more hereafter. That disposes of the three objections made by the defendant upon that point.

Then the inquiry returns, what weight and consideration ought to be given to those various adjudications in Connecticut, the Southern district of New York, in Massachusetts, and in Pennsylvania? It is stated in the bill, and not denied by any affidavit (no answer having been put in), that the case was very fully heard on the final trial in June, 1860; that the argument occupied some twelve days, and the testimony produced to the court occupied over eighteen hundred printed pages, that it received a full consideration, and that a final decree was made. Now, it is undoubtedly true that as this defendant, and as "Williams and Orvis," whose machines this defendant is selling, were not parties to any of those suits, that decision is not conclusive upon them; but is it not an adjudication upon the points in issue, so far as the validity of these patents is concerned, which is entitled to great weight, and which any court, sitting as this court now does, hearing a motion for a preliminary injunction, would, with extreme reluctance, attempt to overrule? In addition, it seems that in Connecticut various suits were brought and verdicts obtained. An affidavit, produced by the defendant, tends to show that those verdicts were not obtained upon trial, but by consent. But Judge Ingersoll, who was holding the court when those verdicts were rendered, states, in his opinion, that they were rendered without collusion; the suits were fully contested, although, before they went to trial, the parties defendant yielded to a verdict agreeing to the damages. Under those circumstances, the defendant says,

those verdicts are not entitled to any consideration. I take a very different view of the question.

If, as Ingersoll, District Judge, states—and certainly we are bound to take his statement as correct—the suits were without collusion, were honestly defended, and finally, the defendants only yielded to a judgment when it was evident that the contest could not be sustained, I think the evidence is quite as strong in favor of the propriety of those verdicts, and quite as much weight should be given to them, as if there had been a full trial and a jury had passed upon the facts; because it would indicate decidedly that the defendants and their counsel (and the papers show that they were eminent counsel—some of the first members of the bar), after a full examination of the facts in the cases, came to the conclusion that they could not be successfully defended, and, therefore, did not choose to risk a verdict of the jury upon them. It is said, as to those cases in Massachusetts, there were no trials, but decrees were entered by consent, and so also in the cases before Justice Grier. There is no evidence in either of those cases that there was any collusion, and, in the absence of evidence, certainly the presumption is that there was none. These objections, therefore, to the force that should be given to the previous adjudications, we think can not be sustained.

The defendant claims, among other things on this present hearing, that Wm. H. Johnson was the first inventor of the four-motion feed, and that Wheeler & Wilson's four-motion feed was an infringement of Johnson's; and he insists that it was so determined by the jury in the case recently tried in Massachusetts—Johnson v. Root [Case No. 7,409]. The answer to this objection is contained in one paragraph, in Judge Nelson's opinion, delivered in the case of Potter v. Wilson [supra], before referred to. Judge Nelson's last proposition was this: "It is further insisted that the device described in the caveat filed by Wm. H. Johnson, November, 1848, and in the patent issued to him 7th March, 1854, contains the principle of this improvement of Wilson; but it is only necessary to read the description and examine the model of this machine to see that the device has no resemblance to that of Wilson in this improvement in question." That would seem, therefore, to very effectually dispose of the claim that Johnson was the original inventor.

The defendant now produces, however, and relies, as he states, upon two inventions prior to Wilson, which have not been before presented, as it is claimed, to any court. One is that of Solomon B. Ellithorpe, invented and reduced to practice, as is asserted, in 1847. To establish this position, the defendant relies upon the affidavits of Ellithorpe, Marsh, and an exhibit, and copies of drawings from the patent office. I have looked into those affidavits very attentively. This subject of Ellithorpe's invention is not new to me; it was before me some eighteen months ago, in a question of injunction, and passed upon. Without any reference to that decision, however, I am disposed to review the evidence now before the court, and see if this position can be maintained. It appears, from Ellithorpe's affidavit (which is certainly very adroitly drawn), which has been read in the case, that he was, from 1841 up to 1847, living in Albany; that he was an apprentice at the hatter's trade, but had given much attention to experimenting in making sewing machines from that time (1841) to 1847; and that previous to 1847 he had perfected a number of machines, four at least, and had put them in use; that early in the year 1847 he had made specifications for one of them, and this specification (a copy of which is said to be before the court) is dated July 7, 1847.

He says he made a machine like it before that date; that a number of them were used; one was used by a tailor in the interior of New York, carrying on his trade, from whom he expected to obtain money to procure a patent, but he did not succeed in getting it; that he made arrangements, he said, with a friend of his to furnish him money to procure a patent, but that failed. It is a little singular that if he had at that time been the inventor of the machine, a small model of which has been before the court, certainly a very superior piece of mechanism, exhibiting great ingenuity, evidently containing all the elements of this automatic feed of Wilson, that no one could be found who would advance the necessary funds, thirty, forty, or fifty dollars, to procure a patent. Nothing, however, seems to have been done in any manner by him until eleven years afterward, in 1858. His excuse for this long delay is, that a great fire happened in Albany soon after he had got his papers and model partially prepared, which destroyed his property; and he had supposed his drawings were all lost, and did not find them until some time in 1858, after he had removed to the city of New York, when, in looking over a box, to use his own phrase, containing some old trumpery, he found this first drawing, from which, he says, he copied the one sent to the patent office, a copy of which is before the court. The inquiry might, perhaps, suggest itself—Where had this old box of trumpery been all this time? How came these drawings, so very valuable, the only ones he had, to remain there unexhumed for a period of eleven years? No explanation is given, and we are left to conjecture. In 1858 he filed his drawings in the patent office, which, he says, were copied from this original draft he found in this box, which he made in 1847, and asked for a patent, but, singularly, not for an improvement in the feed-motion of sewing machines, but for an alleged improvement in the bobbins of a sewing machine, an entirely

different thing from this; his specification does not indicate any thing of this kind. A copy of that application is before the court, furnished by the defendant, that describes it as being an application for an improvement in bobbins. Now, if his attention had been given from 1841 to 1847 to improvements in sewing machines, and if he really had invented this invaluable feed, which has done so much to improve these machines, creating such an immense amount of litigation throughout the country, it is hardly conceivable that he waited from 1841 to 1858, found his old drawings, and then only asked for an improvement in bobbins.

The story is incredible. Mr. Marsh's affidavit is relied upon to sustain Mr. Ellithorpe. It seems from Mr. Marsh's testimony that he was living in Albany about the same period of time, from 1841 to 1847, and he was an apprentice to the watchmaking business. He says he saw some drawings sometime before 1847, which Ellithorpe had made, and from his recollection, they are substantially like the ones that are now in the patent office. Well, that certainly is very vague, inconclusive, and uncertain. The idea that he, not being a machinist or expert, and knowing nothing about sewing machines himself, could carry in his mind twelve or fifteen years what the peculiar character of those drawings were, is hardly credible. But he says further, that he remembers seeing a model which he says is similar to the one that is exhibited in this case, and which he (Ellithorpe) made at that time; that he (Marsh) remembers making the brass spiral wire for it, and putting it into it. A number of suggestions are brought to the mind in relation to this part of the testimony; presuming Mr. Marsh to be an honest witness, and the court does not intend to question that. If Ellithorpe made such a model as that at that time, where has it been? They do not claim that that was burned in the building. The first we hear of the model is now. Where has that slept for fifteen years? The truth is, and it is useless to disguise it, this whole affair of Ellithorpe's resembles very much an entire after-thought for defeating the orators in their just rights, if they have any, and can not, in my view of the case, with this evidence, be regarded favorably at all.

It is again claimed that the Bachelder machine, known as the "wheel-feed machine," which Bachelder in his affidavit states was put in use in January, 1849, and was patented in May, 1849, is prior to Wilson's invention, and defeats his claim of novelty, and that that question has not been before passed upon by any court. There are three difficulties in sustaining this position. The first is, that it does not appear that this invention of Bachelder was prior to Wilson. Bachelder states that this machine was built as early as January, 1849, but it is not pretended that it was used before that date, while Wilson's invention goes back into 1848. In the case of Potter v. Wilson [supra], Nelson, Circuit Justice, says: "The proof is very full and satisfactory that the invention of Wilson was so far matured as to admit of sewing curved seams by way of experiment as far back as 1848." This opinion, it should be remembered, was pronounced after a very long hearing, as before stated, and a large amount of testimony pro and con. Again, it does not appear when the machine, of which Exhibit J. B. is a copy, was first constructed. It is claimed by Bachelder in his affidavit to be described in his application for a patent, December 27, 1848. But it seems from his own statement, that he had used various feed motions for his machines previous to that time (I think at least six are described by him, all differing each from the other); that at one time he used sand-paper; at another time he used dog-fish skin. These he called his "rough-surface feeds." And he states that as late as November, 1850, he made an application for a patent for this rough-surface feed, for an improvement upon his original machine, and that at a public exhibition in Boston in 1850, he exhibited a machine with a dog-fish skin rough-surface feed, and received a medal therefor. In what season of the year that exhibition was, the affidavit does not state, but probably it was in the autumn. Now, it should be borne in mind that this exhibit (J. B.) of the defendant, is a very ingenious machine, and as it was worked in presence of the court, does sew seams of nearly any desirable curvature; and I apprehend it can not be contended by any one but that it is infinitely preferable to any of Batchelder's rough-surface feed machines. Then, if Bachelder had, previous to this time (1850), when he presented his dog-fish skin rough-surface machine in Boston, and November, 1850, when he asked for a patent for that as an improvement upon his previous machine, for which he had got his patent, for which he applied in December, 1848; I say, if he had, previous to this time invented and put in operation a machine that worked so well and effectively, as an examination of Exhibit J. B. shows that it does, it is inconceivable that he should have exhibited at fairs, and made models of machines with dog-fish skin rough-surface, and afterward have applied for a patent for that as an improvement upon his previous patent. It should be noticed that Bachelder does not pretend to say when this machine, exhibited in court, was made. He says himself, that it is made in accordance with one of his claims; but for the reasons I have already assigned, I can hardly come to that conclusion. Bachelder's drawings were not furnished the court. They were here on the trial; but on looking for them among the papers, I could not find them. Again, one or more of the Bachelder machines, his drawings and patents, have heretofore been before the court, were presented in Connecticut and at Cooperstown, and they have been passed upon. The court, in both instances, decided that they did not

interfere, or in any way affect the validity of Wilson's patents, and could not be set up against them on that ground. For these reasons I think that this objection of the defendant can not be sustained

The defendant presents another reason why this injunction should not issue. He says that the machines of Williams and Orvis, which are sold by the defendant Fuller, do not infringe upon either of Wilson's reissued patents. Now, whether they do or do not, depends very much upon the construction that is to be given to those reissues. If the court should give to those reissued patents the limited and narrow construction claimed for them by the defendant's counsel, I am inclined to think that that position, perhaps, could be maintained. If, on the other hand, this court, on this question of preliminary injunction, follows the decision of Judge Ingersoll, and the full bench at a subsequent period, in relation to these same patents, it is very clear that the Williams and Orvis machines do infringe these reissued patents; and in truth it is hardly contended by the counsel for the defendant, that they do not. It seems to have been conceded by the principal argument made on behalf of the defendant, that if the decision of Judge Ingersoll, which was subsequently adopted and sustained by Judge Nelson, is a sound construction of those patents, that this is an infringement of Wilson's patent; but the attempt was made to show that both courts had committed several errors in the construction of those patents. I have said all I care to say upon that branch of the case. Much time was spent in the argument upon this very thing, more than upon any other; much ingenuity and nice criticism. But it should be borne in mind, and probably was known by some of the defendant's counsel, that there was no criticism urged before this court that was not urged with equal ingenuity and zeal and force before the court at Cooperstown. I have compared the briefs upon that subject, and I find that these questions were there presented and all have been passed upon. Justice Nelson, in the conclusion of his opinion in the case of Potter v. Wilson, says:

"3. An objection is also taken that the defendant's machines do not infringe the improvement of the feed motion of Wilson.

"The leading original idea of Wilson, and which he has embodied into his improvement, is the substitution of the two surfaces between which the cloth is clasped or held, for the baster-plate of previous machines, and so arranging these two surfaces that one of them, by an automatic intermittent motion of one or both, would advance the cloth to the needle, and at the same time admit of its being turned by the hand so as to sew curved seams. Now, it is quite clear that this conception, which has remedied a great defect in previous machines by getting rid of the frame upon which the cloth was fastened, and which could move only with the frame or baster-plate, and hence, practically, could sew straight seams and fixed curves only, was capable of being embodied into a working machine in various modes and forms. A skillful mechanic, by mere skill, and without the use of the inventive faculties, could embody it and adapt it to practical use by different mechanical devices. This requires ingenuity simply, not invention. But so long as Wilson's ideas are found in the construction and arrangement, no matter what may be its form or shape or appearance, the party using it is appropriating his invention, and must be held an infringer; and within this view we are satisfied the machines of the several defendants must be regarded violations of the patents in question."

It can hardly be expected, these questions having already been settled by the highest judicial tribunal in the Southern district of New York, that I should on a question of preliminary injunction, attempt to overrule it. If that decision at Cooperstown was wrong, the defendants could have carried it up; and it will not be pretended that that was a collusive case: it was fought too earnestly. I might almost say, bitterly. But they chose to settle down under the decision of the court, making it a perpetual injunction upon the hearing in chief. If, upon this case, after they have a hearing in chief, the court should again take the same construction of these reissued patents that has been before taken, then there is an appeal to a higher tribunal; but until that time comes, all the courts of this district will—and most certainly I shall—feel bound by this decision. The consequence is, the injunction must issue according to the prayer of the bill.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

POTTER v. GIBBS. See Case No. 11,342.

Case No. 11,328.

POTTER v. HICKS.

[Cited in Shimer v. Huber, Case No. 12,787. Nowhere reported; opinion by Cadwalader, District Judge, not now accessible.]

Case No. 11,329.

POTTER et al. v. HOLLAND.

[1 Fish. Pat. Cas. 327; 4 Blatchf. 206.] [1]

Circuit Court, D. Connecticut. Sept., 1858.

PATENTS—RIGHT TO SURRENDER—JOINT OWNERSHIP—"ASSIGNEE"—"GRANTEE"—"LICENSEE"—RIGHTS OF THIRD PERSONS.

1. The sole right to surrender letters patent is given (1) to the patentee, if he is alive, and

[1] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 1 Fish. Pat. Cas. 327, and the statement is from 4 Blatchf. 206.]

has made no assignment of the original patent; (2) to the executors or administrators of the patentee after his decease, where there has been no such assignment; (3) to the assignee where there has been an assignment of the original patent.

2. Where, however, there has been an assignment of an undivided part of the whole original patent, in such a case, the assignee of such a part, and the patentee, become joint owners of the patent, and should join in the surrender, and if they do not, it will be invalid, unless the part owner, not joining, shall ratify it.

3. There are three classes of persons in whom the patentee can vest an interest of some kind in the patent. They are, an assignee, a grantee of an exclusive sectional right, and a licensee.

4. An assignee is one who has transferred to him, in writing, the whole interest of the original patent, or any undivided part of such whole interest, in every portion of the United States.

[Cited in Meyer v. Bailey, Case No. 9,516; Clement Manuf'g Co. v. Upson & Hart Co., 40 Fed. 472.]

5. A grantee is one who has transferred to him, in writing, the exclusive right (excluding the patentee as well as others), under the patent, to make and use, and to grant to others to make and use, the thing patented within and throughout some specified part or portion of the United States.

[Cited in Perry v. Corning, Case No. 11,004; Meyer v. Bailey, Id. 9,516; Clement Manuf'g Co. v. Upson & Hart Co., 40 Fed. 472; Rice v. Boss, 46 Fed. 196.]

6. A licensee is one who has transferred to him, in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest.

[Cited in Clement Manuf'g Co. v. Upson & Hart Co., 40 Fed. 472; Jones v. Berger, 58 Fed. 1,007; Union Switch & Signal Co. v. Johnson R. Signal Co., 10 C. C. A. 176, 61 Fed. 944.]

7. A mere licensee can not bring an action at law for the violation of a patent.

[Cited in Nelson v. McMann, Case No. 10,109; Wilson v. Chickering, 14 Fed. 918.]

8. The terms, "assignee" and "grantee," are not used in the patent law of 1836 [5 Stat. 117], as synonymous terms, though courts, without having their attention particularly called to the subject, have sometimes used them indiscriminately and in their popular sense.

[Cited in Moore v. Marsh, 7 Wall. (74 U. S.) 521.]

9. It is not in the power of the patentee, by a surrender of his patent, to affect the rights of third persons, to whom he had previously passed his interest in the whole or a part of the patent without their consent.

[Quoted in Potter v. Braunsdorf, Case No. 11,321.]

10. This consent may be manifested, either by joining in the surrender with the patentee, or by previously authorizing it, or by subsequently ratifying or approving it.

11. A person, to whom the patentee has passed his interest in a part of the old patent, upon the surrender of the same by the patentee, and obtaining a reissued patent, is entitled to the same right under the reissued patent that he had to the old one.

[Quoted in Potter v. Braunsdorf, Case No. 11,321. Cited in Campbell v. James, Id. 2,361.]

12. He may, however, elect to hold under the old patent, and it is not a valid objection that in such event there would be different claims of right in the same invention secured to different sectional owners.

[Cited in Sickles v. Evans, Case No. 12,839; McComb v. Brodie, Id. 8,708; Burdsall v. Curran, 71 Fed. 919.]

13. Under section 7 of the act of 1837 [5 Stat. 193] the owner of a sectional interest may make a disclaimer for his sectional interest, which is to be taken as a part of the original specification for the section owned by him, and to no greater extent.

14. After such disclaimer a different claim of right is secured to the disclaimant, the owner of a sectional interest, from what is purported to be secured to the patentee, the owner of the remaining interest.

In equity. This was an application for a provisional injunction. The bill set forth, that, on the 12th of November, 1850, letters patent [No. 7,776] were granted to Allen B. Wilson, for an "improvement in sewing machines;" that, on the 26th of November, 1850, Wilson, by an assignment in writing, sold and assigned to Aaron P. Kline, three undivided fourth parts of the invention and patent, except the right to construct, use, and sell the invention in the state of New Jersey, and the right to use the invention for sewing leather in the state of Massachusetts; that, on the same day, Wilson, by an assignment in writing, sold and assigned one undivided fourth part of the invention and patent to Elisha P. Lee, except the right to construct, sell and use the invention in the state of New Jersey, and the right to use the improvement for sewing leather in the state of Massachusetts; that Lee, on the 6th of May, 1851, sold and assigned to Joseph N. Chapin, one undivided sixth part of all his right, title and interest in the patent and invention, excepting the states of Indiana, New Hampshire, Vermont, Virginia, California, Mississippi, Louisiana, Wisconsin, and Oregon; that Lee, on the 6th of May, 1851, by an assignment in writing, sold and assigned to said Kline, five undivided sixth parts of all his right, title, and interest in and to the patent and invention, excepting the last-mentioned states; that Chapin, on the 19th of May, 1851, by an assignment in writing, sold and assigned to said Kline, all his right, title and interest in the patent and invention, except the right thereto in and for the state of New Jersey; that Kline, on the 9th November, 1854, by an assignment in writing, sold and assigned to Nathaniel Wheeler, one of the plaintiffs, all his right and interest to the patent and invention; that, in November, 1855, Wheeler, and Orlando P. Potter, sold and assigned to said Wilson all their right and interest in the patent and invention; that, subsequently, Wilson surrendered the patent to the patent office, and obtained a reissued one for the same invention, upon an amended specification; and that such reissued patent had been assigned to the plaintiffs by Wilson, by an assignment which conveyed his whole interest in the patent and invention. On the hearing of the motion for the injunction, a preliminary objection was

taken by the defendants [Goodrich, Holland and others] to the validity of the reissued patent, on the ground that it did not appear by the bill, either that Lee joined Wilson in surrendering the original patent, or authorized Wilson to surrender it, or ratified the surrender after it had been made. This objection was argued and considered by itself.

Roger S. Baldwin, Ralph I. Ingersoll, and George Gifford, for plaintiffs.

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

Before NELSON, Circuit Justice, and INGERSOLL, District Judge.

INGERSOLL, District Judge. It is stated in the bill, that Chapin, in his transfer to Kline, excepted from its operation the right which he had in the state of New Jersey. But the bill shows that he never had any right in the state of New Jersey. He only took a portion of the right, which had been transferred to Lee; and Lee never had transferred to him any right of any kind for that state. The bill therefore shows that when the surrender was made, and the reissued patent was obtained, no one had any interest of any kind in the old patent, except Wilson and Lee.

Exception is now taken to the validity of the reissued patent, upon which the sufficiency of the bill depends, for the reason, as is alleged, that the surrender of the old one was not lawfully made. To make that surrender lawful, it is claimed that Lee should have joined Wilson in making it, or should have authorized Wilson to make it, or should have ratified the surrender after it had been made by Wilson; and as the bill does not show either that Lee joined Wilson in making the surrender, or authorized him to make it, or ratified it after it was made, that it must be held that the surrender was not lawfully made, and consequently that the reissued patent was not legally issued, and is therefore void. There being no other objection to the reissued patent, it will follow, if the surrender of the old one was lawfully made, that that patent was legally issued.

In the 13th section of the patent law of 1836, is contained all the right to make a surrender. By that section it is provided, "that whenever any patent which has heretofore been granted, or which shall be hereafter granted, shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new, if the error has or shall have arisen, by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor, for the same invention, for the residue of the period, then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification. And in case of his death, or any assignment by him made of the original patent, a similar right shall vest in his executors, administrators, or assignees."

The sole right to surrender is given (1) to the patentee, if he is alive, and has made no assignment of the original patent; (2) to the executors or administrators of the patentee, after his decease, when there has been no such assignment; (3) to the assignee, when there has been an assignment of the original patent. And the right to surrender is given to no one else. Where, however, there has been an assignment of an undivided part of the whole original patent, in such a case, the assignee, of such a part, and the patentee, become joint owners of the patent, and should join in the surrender; if they do not, it will be invalid, unless the part owner, not joining, should ratify it. If Lee, therefore, was not an assignee of the original patent, or an assignee of an undivided part of the original patent, within the meaning of the terms assignee and assignment, as they are used in the patent law, then it will follow that he had no legal right, as assignee, to surrender, and that the surrender by Wilson, without his concurrence, was valid. If he was such assignee, then the surrender was invalid. It is therefore necessary to determine what is meant by the terms assignee of the original patent, and assignment of the original patent, as they are used in the patent law. An assignment, as understood by the common law, is a parting with the whole property. 2 Black, 326. The 4th section of the patent act of 1793 [1 Stat. 322] provides "that it shall be lawful for any inventor, his executor or administrator, to assign the title or interest in the said invention, at any time; and the assignee, having recorded the said assignment in the office of the secretary of state, shall thereafter stand in the place of the original inventor, both as to right and responsibility, and so the assignees of assignees to any degree." Under that law it was held, in the case of Tyler v. Tuel, 6 Cranch [10 U. S.] 324, that a transferee of all the right secured by a patent excepting in the counties of Chittenden, Addison, Rutland, and Windham, in the state of Vermont, was not an assignee within the meaning of the law. He was merely a grantee of a sectional interest, without power to sue at law. By that act the right to bring a suit at law was confined to the patentee and assignee. It was held, however, in the case of Whittemore v. Cutter [Case No. 17,600], that a transferee of an undivided part of the whole patent was an assignee, entitled to join the patentee in a suit. It was thus held that no one was an assignee, unless the whole property in the patent, or an undivided part of such whole property, had been passed to him.

The power of the patentee as it now exists to make an assignment of the patent, and to create other interests in it, is contained in the 11th section of the patent law of 1836. That section is as follows: "Every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent to make and use, and grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the patent office, within three months from the execution thereof, for which the assignee or grantee shall pay to the commissioner the sum of three dollars." And the 14th section authorizes suits at law to be brought in the name of the persons interested, whether as patentees, assignees, or grantees of the exclusive right within and throughout a specified part of the United States. A mere licensee can not bring an action at law for a violation of the patent.

There are three classes of persons in whom the patentee can vest an interest of some kind in the patent. They are an assignee, a grantee of an exclusive sectional right, and a licensee. An assignee is one who has transferred to him in writing the whole interest of the original patent, or an undivided part of such whole interest in every portion of the United States. And no one, unless he has such an interest transferred to him, is an assignee. A grantee is one who has transferred to him in writing the exclusive right, under the patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout some specified part or portion of the United States. Such right must be an exclusive sectional right excluding the patentee therefrom. A licensee is one who has transferred to him, in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest.

Does the bill, therefore, show that Lee had ever transferred to him the whole interest in the original patent, or an undivided part of such whole interest in every portion of the United States? It appears, by the bill, that no such interest was transferred to him. The interest transferred to him was an undivided part of the patent, in a part and portion of the United States, not the whole patent, nor an undivided part of the whole patent, in every part and portion of the United States. No interest was conveyed to him for the state of New Jersey. He had no interest in the patent for sewing leather in the state of Massachusetts. He never was, therefore, an assignee of the original patent, within the meaning of the patent law of 1836, nor would he have been an assignee within the meaning of the patent law of 1793.

The terms "assignee" and "grantee" are not used in the patent law of 1836 as synonymous terms, though courts, without having their attention particularly called to the subject, have sometimes used them indiscriminately, and in their popular sense. They have, however, the separate and distinct meanings above indicated. But if they were used in the law as synonymous terms, and if a grantee of an exclusive sectional interest were an assignee, it would not aid the defendant in the exception that has been taken. For Lee was neither an assignee, nor such grantee, but a licensee merely, having no legal rights in the patent.

It appears clearly by the case of Gaylord v. Wilder, 10 How. [51 U. S.] 477, that his interest was an interest only of the latter description. Chief Justice Taney, in giving the opinion of the court in that case, on page 494, says: "The patentee may assign his exclusive right, within and throughout a specified part of the United States, and upon such an assignment, the assignee may sue in his own name for an infringement of his rights. But in order to enable him to sue, the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee had in the territory specified, excluding the patentee himself, as well as others. And any assignment short of this is a mere license."

The action in that case was in favor of the patentee. It was for a violation of the rights granted by the patent. Previous to the commencement of the suit, there had been a contract entered into between the patentee and one Herring, which purported to grant to Herring the exclusive right to make and vend the Salamander safe in the city, county, and state of New York. By the contract, Herring agreed to pay the patentee one cent a pound for every pound the safe might weigh, to be paid monthly. There was reserved to the patentee the right to set up a manufactory, or works, for making these safes, in the state of New York, provided it was not within fifty miles of the city, and to sell them in the state of New York, paying Herring one cent a pound on each safe so sold within the state. The court, on page 495, say, "It is evident that this agreement is not an undivided interest in the whole patent, nor the assignment of an exclusive right to the entire monopoly in the state or city of New York. It is to be regarded, therefore, as a license only; and under the act of congress, does not enable Herring to maintain an action for an infringement of the patent right. The defendant in error (the patentee) continues the legal owner of the monopoly created by the patent." In the case now before the court, there was no transfer of an undivided interest in the whole patent, nor the exclusive right to the entire monopoly in any specific territory, excluding the patentee from all right in such specific territory. And the language of the court is, that "any assignment short of this is a mere license." It

conveys no legal right in the patent. Notwithstanding the transfer to Lee, Wilson continued "the legal owner of the monopoly created by the patent."

It has been strongly urged against the right of the patentee to surrender the old patent, and take in his name a reissued one, without the assent of a third person to whom the patentee had previously passed an interest in the patent, either as grantee or licensee, that by such surrender and reissue the rights of such third person would be injuriously affected; that he would be deprived against his will by the act of the patentee of rights under the old patent, which he had purchased, and that no construction of the law relating to the surrender of patents, should be adopted, which would produce so unjust a result. It is well known that in the most important patents which have been issued, vast interests have been transferred to grantees and licensees, which interests may be injuriously affected, provided this view taken of the case by the defendant, is well founded. We have, therefore, given it the most attentive consideration.

We adopt the rule laid down by Judge Story, in the case of Woodworth v. Stone [Case No. 18,021], that it is not in the power of the patentee, by a surrender of his patent, to affect the rights of third persons to whom he had previously passed his interest in the whole or a part of the patent, without their consent. This consent may be manifested, either by joining in the surrender with the patentee, or by previously authorizing it, or by subsequently ratifying or approving it. And taking advantage and benefit of it would be a ratification. And when so consented to, the rights of the party so consenting, in and to the old patent, are forever gone. And it may be considered as a sound and settled principle that a person to whom the patentee has passed his interest in a part of the old patent, upon the surrender of the same by the patentee, and obtaining a reissued patent, is entitled to the same right under the reissued patent that he had to the old one. The patentee by taking a reissue can not deprive him of the same right to it that he had to the old one, if he wishes to take benefit of such right. Woodworth v. Hall [Id. 18,016]. And when he does take advantage and benefit of the reissued patent, he consents to give up, and does give up, the right which he had under the old one.

It does not follow from this, however, that because a third person to whom a patentee has passed his interest in a part of a patent, is entitled to the same right to a reissued patent that he had to the old one, that he is compelled to take under the reissued one, and thereby be compelled to give up the right which he had under the old one. If he was, his right might be injuriously affected without his consent. If he was so compelled, a grantee under an old patent, of an exclusive territorial right, would be forced, without his consent, to give up any amount of damages which he might be entitled to under the old patent, for a violation of right secured to him by that patent. And it might so happen that the old patent surrendered was a valid one, and that the reissued one was invalid; or that the rights secured by the former were important, while the rights secured by the latter were of little consequence.

To determine the question then, whether the rights of a third person, to whom a patentee had previously passed his interest, in a part of a patent, can be affected without his consent by the surrender of the old patent, by the patentee alone, and the taking of a reissued one, it is necessary to determine whether, after such surrender and reissue (both the surrender and reissue being valid) such third person has the same rights under the old patent, if he chooses not to take advantage of the surrender and the reissue, that he had to that patent before such surrender and reissue. If he has, then it will follow that by the surrender and the reissue his rights have not been injuriously affected; and, consequently, that there can be no valid objection to the same. It is insisted by the defendant that one right to an invention, in favor of one person under a reissued patent, and a different right to the same invention in favor of another person under the original patent, can not exist at one and the same time.

When a patent is granted, certain exclusive rights are secured, or purported to be secured to the inventor. The object of the reissue is to secure greater rights than were actually secured by the first patent. The subject of both patents is the same invention, and the object of both patents is to secure rights in the same. This is the only object in both. A less right is, or may be, secured in the invention by the first patent. A greater right is, or may be, secured to the same invention by the reissued patent. It is objected, if the person to whom the patentee has passed his interest in a part of the patent, can hold the right so passed under such patent, after the same has been surrendered by the patentee and a reissued one obtained, and the patentee at the same time can hold the rights not so passed to such person, under and by virtue of the reissued patent, that one right to an invention may exist in one person in one part of the United States, and a different right to the same invention may exist in another person, in a different part of the United States: the one right evidenced by one patent, with the transfer of the rights therein, and the other right evidenced by another patent; that there would be two or more patents to secure the different rights which different persons might have to the one whole invention, and that this would not be in accordance with the patent laws of the United States, but directly opposed to the same; that such laws authorize only one patent for one whole invention.

The object of a patent, is to secure rights to an invention throughout the whole United States. We can discover no good reason why a portion of the whole invention, for a particular portion of the United States, may not be secured by one patent, and the remaining portion of the invention, or what is claimed in it, for the residue of the United States, be secured by another patent. These two patents would in effect constitute together but one patent for the whole invention for the whole United States. Two patents for separate parts, the separate parts together comprehending only the whole, would in effect be but one patent for the whole; no more than two separate deeds, for two separate sections of one whole lot of land, would be in effect more than one deed for the whole lot. No more would be secured by the two patents, than is authorized by law to be secured, or than could be secured, by one. The two, in effect, would constitute but one.

The patent laws of the United States expressly authorize different claims of right to the same invention to be secured to different fractional or territorial owners or claimants. By section 7 of the patent law of 1837, it is among other things provided, that when any patentee shall have, through inadvertence, accident or mistake, made his specification of claim too broad, claiming more than that of which he was the original or first inventor, some material and substantial part of the thing patented being truly his own, that the owner of a sectional interest in the patent, may make disclaimer of such parts of the thing patented, as he shall not claim to hold by virtue of the patent and transfer to him, stating therein the extent of his interest in the patent. Which disclaimer shall thereafter be taken and considered as a part of the original specification to the extent of the interest which may be possessed in the patent by the disclaimant, and by those claiming by or under him, and to no greater extent. The patentee may not wish to make a disclaimer. He is authorized to do it, but is not compelled to do it. If he does not do it, his patent may be void for claiming too much. The owner of a sectional interest, however, can make a disclaimer for his sectional interest, which is to be taken as a part of the original specification, for the section owned by him, and no greater extent. After such disclaimer a different claim of right is secured to the disclaimant, the owner of a sectional interest, from what is purported to be secured to the patentee, the owner of the remaining interest; different claims of right in the same invention are secured to different sectional owners; there are two specifications for the same invention, one making one claim or right to an invention, for one section of country, and the other making another and different claim of right to the same invention, for another section of country. In effect it makes two patents out of one, one securing a claim of right to one person, and the other securing a different claim of right to another person. This is expressly authorized by the patent law.

It is to be inferred from the case of Woodworth v. Stone [supra] that Judge Story was of the opinion already indicated. That case was upon the familiar Woodworth patent. The original patent was granted to the inventor for fourteen years from the 27th day of December, 1828. It was subsequently renewed by the commissioner, in favor of the administrator of the inventor for seven years from the 27th day of December, 1842. It was further extended by act of congress for seven years from the 27th day of December, 1849. On the 8th day of July, 1845, the administrator surrendered the patent and obtained a reissued one. The history of the patent, as appears by various reports, in which the rights of parties under it were in controversy, shows, that previous to the surrender and reissue, various and important rights under the original patent had been transferred to various persons in different parts of the United States. The supplemental bill was upon the reissued patent, and one to whom a right previous to the surrender had been passed, in a territory in which the claimed violation took place, was made a party with the administrator. No one had joined in the surrender with the administrator. Exception was taken that the surrender and reissue were invalid, that the owner of the territorial right, who, with the administrator, was made a party to the bill, had not joined the administrator in the surrender. The supplemental bill, which was founded upon the sufficiency of the surrender and the reissued patent, was sustained. The judge holding that, by becoming a party to the supplemental bill, such owner of a territorial right ratified the surrender. The reports of other cases show that when this case was before Judge Story, he knew that there were other persons, in various parts of the United States, who had rights under the original patent, and who had not joined in the surrender, and whose rights would be affected by the surrender, against their consent, if they should not agree to it, provided he held the surrender good, and provided, also, they could not hold under old patent.

When, therefore, he held the surrender good and valid, and decided that "it was not in the power of the patentee, by a surrender of his patent, to affect the rights of third persons, to whom he had previously passed his interest, in the whole or a part of the patent, without their consent," he must have been of the opinion that notwithstanding such surrender and reissue, such third persons could hold under the old patent, if they should choose, for otherwise their rights would be injuriously affected without their consent.

With this view of the case, the exception

taken by the defendant to the sufficiency of the complainants' bill, must be overruled.

[Subsequently a provisional injunction was issued in favor of the complainants. Case No. 11,330.]

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

Case No. 11,330.

POTTER et al. v. HOLLAND.

[4 Blatchf. 238; 1 Fish. Pat. Cas. 382; Merw. Pat. Inv. 424.] [1]

Circuit Court, D. Connecticut. Dec., 1858.

PATENTS—CONSTRUCTION—PRIMA FACIE EVIDENCE OF VALIDITY—COMMISSIONER'S DECISION AS TO REISSUE—COMBINATION—VALIDITY—LIBERAL CONSTRUCTION—NOVELTY.

1. The inventions of Allen B. Wilson, embodied in his patent of November 12th, 1850, for "improvements in sewing machines," as reissued January 22d, 1856, and December 9th, 1856, defined and explained.

2. A patent is prima facie evidence that the grant contained in it is valid, that what it purports to secure was new and required invention and is useful, and that it was invented by the patentee; and such prima facie evidence must have full effect unless it is rebutted by sufficient countervailing evidence.

[Cited in McComb v. Brodie, Case No. 8,708; Smith v. Woodruff, Id. 13,128a.]

3. The decision of the commissioner of patents, in reissuing a patent, under section 13 of the act of July 4, 1836 (5 Stat. 122), that the reissued patent is for the same invention originally discovered and intended by the patentee to be secured by the original patent, is not re-examinable by this court, unless it is apparent, upon the face of the patent, that the commissioner has exceeded his authority, or unless there is a clear repugnancy between the old and the new patents, or unless the new one has been obtained by collusion between the commissioner and the patentee.

[Cited in Sickles v. Evans, Case No. 12,839; Blake v. Stafford, Id. 1,504; House v. Young, Id. 6,738.]

4. Wilson having invented a new mechanical automatic feed motion in a sewing machine, which is not to be used in conjunction with, or in aid of, or in addition to, any old mode of feeding, but is a new and independent element, in a combination consisting of a table or platform to support the material to be sewed, and a sewing mechanism, and such new feed motion, such combination forming a new machine: *Held*, that such machine is a new and different machine from a machine containing the combination of the old elements—a table or platform, and a sewing mechanism, and another kind of feed motion—and is not merely an improvement on the machine containing such combination of old elements; and that Wilson has a right to cover, by his patent, the combination, in a single machine, of the two old elements—a table or platform, and a sewing mechanism—and the new feed motion, and is not obliged to limit his claim to an improvement on the old feed motion.

[Cited in Potter v. Muller, Case No. 11,334.]

5. A patent is to be construed liberally, and is not to be subjected to a rigid interpretation; and it is to be presumed that the commissioner of patents has done his duty and has not granted a patent when he ought not to have granted one.

[Cited in Burke v. Partridge, 58 N. H. 351.]

6. The validity of a patent is not to be determined by the amount of invention required to produce what it covers. If the device is new and useful, there is a sufficient amount of invention to authorize a patent.

7. The effect of quiet enjoyment, acquiescence, recoveries without collusion, and strong evidence as to novelty, in inducing the issuing of a provisional injunction to restrain the infringement of a patent, considered.

8. To authorize such an injunction, it is not necessary that all the claims of a patent should have been infringed by the defendant.

[2] [In equity. This was a motion [by Orlando B. Potter and Nathaniel Wheeler] for a provisional injunction to restrain the alleged infringement [by Goodrich Holland] of letters patent [No. 7,776], for an "improvement in sewing machines," granted to Allen B. Wilson, November 12, 1850. The original patent was surrendered and reissued January 22, 1856, in two divisions or patents, designated as reissue Nos. 345 and 346. Reissue 345 was surrendered and reissued December 9, 1856, the last reissue being designated as reissue No. 414. A question relating to the validity of these reissues was argued in September, 1858, and the opinion of the court is reported in Potter v. Holland [Case No. 11,329]. The claims of the original patent of 1850, were as follows: "What I claim, etc., is forming a stitch by each throw of the shuttle and corresponding motion of the needle; that is to say: making one stitch at each forward, and another at each backward motion of the shuttle, both constructed, arranged, and operating as herein described, or in any other mode substantially the same. Second. I claim the combination of the sliding bar, Q, the plate, r, the feeding-plate, V, the spring, W, the screw, t, the lever, R, and the clamping plate, T, for holding and feeding the cloth to the needle, and regulating the length of the stitch, in the manner herein described, or in any way substantially the same." The claim of reissue 345, afterward surrendered, was as follows: "What I claim is forming a stitch by each throw of the shuttle and corresponding motion of the needle; that is to say: making one stitch at each forward, and another at each backward motion of the shuttle, both constructed, arranged, and operated as herein described, or in any other mode substantially the same." The claims of reissue 346 were as follows: "What I claim is, the method of causing the cloth or material to be sewed in a sewing machine, to progress regularly by the joint action of the surfaces between which it is clamped, and which act in conjunction, substantially in the manner and for the purpose

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Blatchf. 238, and the statement is from 1 Fish. Pat. Cas. 382. Merw. Pat. Inv. 424, contains only a partial report.]

[2] [From 1 Fish. Pat. Cas. 382.]

herein specified. 2d. I claim holding the cloth or other material at rest by the needle, or its equivalent, in combination with the method of causing it to progress regularly, the whole substantially as herein set forth. 3d. I claim arranging feeding surfaces, substantially such as are herein specified, in such relation to the needle as herein set forth, that they, or one of them, shall perform the office of stripping the cloth or material from the needle as it rises, or recedes from it, as herein described. 4th. I claim so mounting and attaching one of the feeding-surfaces to some other part of the machine, that it may be removed or drawn away from the other surface at pleasure, substantially in the manner and to effect the objects herein set forth." The claims of reissue 414, obtained by surrender of reissue 345, were as follows: "I claim: 1st. The combination, in a single machine, of these three following elements, namely: A table, or platform, to support the material to be sewed, holding it for the action of the needle, and presenting it properly to the grasp of the feeding apparatus; a sewing machine proper, consisting of a needle and shuttle, or their equivalents, and a mechanical feed automatic and causing the cloth to progress regularly, by a feeding mechanism, to which the cloth is not attached, and so grasping the cloth that it may be turned and twisted by the hand of an operator, such twisting not interfering with the regular progression of the cloth; and the whole being constructed and acting together, and in combination with each other, substantially in the manner and for the purposes herein specified. 2d. I claim moving a shuttle, so shaped and held by its race, that jaws may embrace it, by means of two jaws, which are alternately in contact with the shuttle, and are constructed and move substantially in the manner herein set forth, making and breaking their contact without any aid from cams or springs, or the equivalents of such devices. And, lastly, I claim a double-pointed shuttle, substantially such as is herein specified, in combination with jaws for driving it, substantially such as are described, whereby the shuttle may be thrown alternately from opposite directions, through loops, without practically disturbing the loop-thread."

[The feeding device described by Wilson, consisted of a bar beneath the table, having, upon the upper side of one vibrating end, serrations, or roughened projections, resembling, somewhat, a shoemaker's rasp. A slot in the table permitted these projections to rise slightly above its surface, so that cloth laid upon it would be caught by the projections and carried forward with each forward movement of the bar. To afford resistance, and enable the serrations to seize the cloth, a plate pressed upon the cloth from above, kept in place by a spring, and this plate or presser, and the roughened bar, constituted the "two feeding surfaces," which were the principal features of the patent. The teeth upon the bar projected forward, so that they caught the cloth when moving in that direction, but slipped under it without moving it, when drawn backward; a result which was facilitated by the descent of the needle through the cloth simultaneously with the retraction of the feed-bar.] [2]

R. S. Baldwin, R. J. & C. R. Ingersoll, and Geo. Gifford, for complainants.

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

INGERSOLL, District Judge. Prior to the invention of Wilson, the cloth to be sewed in a sewing machine had been fed by various devices. In some of the machines known, the material to be sewed was advanced under the needle by the hand of the operator. In other machines, the material was secured upon a baster-plate or frame, by means of nippers or pins, or some suitable contrivance, and this plate received a regular progressive motion, through the agency of suitable machinery. In the former machine, there was no security of any regularity of stitch; but, by it, curved seams could be sewed. In the latter, there was a regularity of stitch, but the baster-plate hampered the free motion of the cloth, prevented its being turned, and reduced the capabilities of the machine, and prevented it from sewing seams of any considerable degree of curvature. To obviate the objections to the old modes Wilson made his invention. The feed between his surfaces is not effected by a continuous intermittent motion of the surfaces forward, but is effected by the reciprocating intermittent motion of one of them in conjunction with the pressure made by the other one. He dispenses with the baster-plate or baster, and, by the instrumentalities which he adopts, a regularity of stitch is secured, the cloth is not hampered by the baster-plate, and seams can be formed of almost all degrees of curvature. By his invention the difficulties and objections incident both to a hand feed and to that derived from the baster-plate are obviated, while, at the same time, the good features of both are retained. A regularity of stitch and the sewing of curves are secured. Surfaces, as before used and applied, could not be used and applied to cloth, so as to sew seams of any considerable degree of curvature. By his devices, as contrived, the cloth, while held between the surfaces, can be turned and twisted so as to sew curved seams, it being grasped in only a small portion of its surface by the feeding clamps.

The patent No. 346 purports to be for the invention of a new and useful method of feeding the cloth or material to be sewed, in machines for sewing, and it purports to grant to Wilson and his assigns, the exclu-

[2] [From 1 Fish. Pat. Cas. 382.]

sive right, for fourteen years from the 12th of November, 1850: (1) To the method described in the specification, of causing the cloth or material to be sewed in a sewing machine, to progress regularly, by the joint action of the surfaces between which it is clasped, and which act in conjunction, substantially in the manner and for the purposes in the specification mentioned; which manner is a regular intermittent progress of the cloth, by the means described, so that the cloth, while grasped by the surfaces, can be turned as it was before turned, when the cloth was advanced by the hand of the operator, and which purpose is to secure a regularity of stitch, and also that seams may be sewed of any considerable degree of curvature. (2) To the method of holding the cloth or other material at rest by the needle, as described in the specifications, or its equivalent, in combination with the method of causing it to progress regularly as in the patent is set forth. (3) To the mode of arranging feeding surfaces substantially as in the specification set forth, in such relation to the needle, that they, the feeding surfaces, or one of them, shall perform the office of stripping the cloth or material from the needle, as it rises or recedes from it. (4) To the mode of mounting and attaching one of the feeding surfaces to some other part of the machine, as described, so that it may be removed or drawn away from the other surface at pleasure, to effect the objects in the specification set forth. The patent is prima facie evidence that the several grants of right contained in it are valid, that the several things, methods and devices granted were new, that they are useful, that they required invention, and that they were the invention of Wilson; and this prima facie evidence must have full effect, unless it is rebutted by sufficient countervailing evidence.

The invention described in patent No. 414, purports to be certain new and useful improvements in machinery for sewing seams; and, among other things, it purports to grant to Wilson the exclusive right, for fourteen years from the 12th of November, 1850, to the combination, in a single machine, of the three following elements, namely, a table or platform to support the material to be sewed, holding it for the action of the needle, and presenting it properly to the grasp of the feeding apparatus; a sewing mechanism proper, consisting of a needle and shuttle, or their equivalents; and a mechanical feed automatic, causing the cloth to progress regularly, to which the cloth is not attached, and so grasping the cloth that it may be turned and twisted by the hand of an operator, such twisting not interfering with the regular progression of the cloth, and the whole being constructed and acting together, and in combination with each other, substantially in the manner and for the purposes in the specification set forth. This patent is prima facie evidence, also, that the grants of right contained in it are valid, that the improved combination which the patent purports to secure was new and is useful, that it required invention, and that Wilson was the inventor of the same.

The patents upon which this bill of complaint is founded are reissued ones, the original one which was surrendered having been granted on the 12th of November, 1850. The question of the validity of the surrender has been heretofore argued and determined. See Potter v. Holland [Case No. 11,239].

The 13th section of the patent act of July 4, 1836 (5 Stat. 122), provides, that, whenever any patent shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee's claiming in his specification, as his own invention, more than he had a right to claim as new, if the error shall have arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be the duty of the commissioner, upon the surrender of the old patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the inventor for the same invention, for the residue of the period then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification. The power and duty of granting a new patent for the original invention, when a lawful surrender of the old patent has been made, are by law expressly confided to the commissioner. The decision made by him in this case is, that the reissued patents are for the same invention originally discovered and intended by the patentee to be secured by the original patent. That decision the law has confided to his judgment. The court must take that decision as a lawful exercise of his authority. It is not re-examinable here, unless it is apparent, upon the face of the patent, that the commissioner has exceeded his authority, or unless there is a clear repugnancy between the old and the new patents, or unless the new one has been obtained by collusion between the commissioner and the patentee. Woodworth v. Stone [Case No. 18,021]. It is not apparent upon the face of either of the reissued patents, that the commissioner, in granting the same, exceeded his authority; neither does there appear to be any clear repugnancy between the old patent and the new ones; nor is there any satisfactory evidence to show that either of the new patents was obtained by collusion between the commissioner and the patentee. The exception taken by the defendant, that the invention secured by the reissued patents was not the invention of the patentee when the original patent was granted, and was not intended by him to be secured by that patent, must, therefore, fail. The grants of right contained in the reissued patents must, therefore, be considered valid grants of right, entitled to protection, unless it appears upon the face

of the patent that they are invalid, or unless the prima facie evidence which the patents afford, that the several things, methods and devices patented were new and useful, that they required invention, and that they were the invention of Wilson, has been destroyed by sufficient countervailing testimony.

What is patented by the patent No. 414 is a sewing machine, having in combination the three elements above described, namely, a table or platform, to support the material to be sewed, in the manner stated; a sewing mechanism proper, as described; and a mechanical feed automatic, as described. The only element that is claimed to be new is the mechanical feed automatic, by which the cloth is made to progress regularly to be sewed, and to which the cloth is not attached. It is insisted by the defendant, that, before the invention of Wilson, a sewing machine, having in combination the three elements, of a table or platform, to support the material to be sewed, a sewing apparatus, and a feed motion, by which the cloth was made to progress to be sewed, was known and in public use; and this being so, it is claimed that, if Wilson did invent a new mechanical automatic feed, entirely unlike any feed motion before known, except only in its being a feed motion, he could not, by the patent law, have patented to him the combination, in a single machine, of the elements of the table or platform, to support the material to be sewed, and the sewing mechanism, which constituted two of the elements of the old combination, and the new mechanical automatic feed invented, but that he could only have patented to him an improvement on the old feed motion, by which the old combination would be made more useful, and that a patent for such a new combination as is patented, is void. "Whoever discovers that a certain useful result will be produced in any art, machine, manufacture or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses, in a manner so full and exact, that any one skilled in the science to which it appertains, can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And, if this cannot be done by the means he describes, the patent is void. And, if it can be done, then the patent confers on him the exclusive right to use the means he specifies, to produce the result or effect he describes, and nothing more." O'Reilly v. Morse, 15 How. [56 U. S.] 62, 119.

Wilson invented a new mechanical automatic feed, which causes the cloth to be sewed to progress with a regular, intermittent motion, and to which the cloth is not attached. It was new, never having before been known. It was a new mechanical automatic feed. It was an improvement on the old feed only in that sense, that any new and useful mechanical device, to accomplish a given object, is an improvement on all other known mechanical devices to accomplish the same object. It is not something in aid of the old mode, and to make the use of any old mode better. It dispenses with and discards the old modes, and substitutes in their place other means, to accomplish a useful result. It is not an addition to any old mode, to be used in conjunction with such old mode, and to make such old mode better and more effectual. If it were, then there would be force in the exception taken by the defendant to the patent and now under consideration. Barrett v. Hall [Case No. 1,047]. Having discovered such new mechanical automatic feed, which was to be used independent of all other feeds, and not in conjunction with, or in aid of, or in addition to, any old mode, he discovered, that, by the use of the means by which it was accomplished, in combination with a table or platform, to support the material to be sewed, in the manner stated, and a sewing mechanism proper, as described, a new machine would be produced, that would accomplish a certain useful result. By the combination of these means in a machine, the elements of which were partly old and partly new, such useful result is produced. If Wilson made this discovery, and it was new, the patent which purports to confer on him the exclusive right to use these means in combination, in a machine to produce such useful result, must be valid; and it was his discovery, and it was new, unless the old combination of a table or platform to support the material to be sewed, and a sewing apparatus, and some kind of a feed motion, which caused the cloth to be sewed to progress, was a combination of the same means.

If Wilson's new mechanical automatic feed were but an improvement on the old feed, and to be used in conjunction with or in aid of, or in addition to, the old feed, then his combination would include the old one; then his combination would be the old combination, with an improvement of one of the old elements composing the old combination added to it; then there would be a combination of the same means, in what was patented to him, that existed in the old mode, with something in addition, to improve one element of the combination of the old means used. But it has been already shown, that Wilson's new mechanical automatic feed is not to be used in conjunction with, or in aid of, or in addition to, the old feed, that it is not merely an improvement on the old feed, but that it is independent of it, that it dispenses with it, that it discards it, that it is an entirely new device, and not something added to an old device. The old mode was not a combination including all feed devices, known and unknown, but only one of certain known devices, acting in a particular way. As Wilson's mechanical automatic feed is not used in conjunction with, or in aid of, or in addition to, the old feed, which made one of

the elements of the old combination, but is a new and independent element in the combination patented to him, and not an improvement merely in one of the elements of the old combination, it must be held that a machine containing the combination of elements patented to him, is a new and different machine from a machine containing the combination of old elements known before his invention, and not an improvement merely on such machine containing such combination of old elements. The exception taken by the defendant to the validity of the patent No. 414, must, therefore, be overruled.

As has already been shown, there are four several claims and grants of right in the patent No. 346. The defendant admits that the second claim is, by itself, a valid claim. But it is insisted that that is vitiated by the patentee's making, in the same patent, and joining with it, invalid claims of right; and exception is taken to the other three claims. It is urged that each of the other three claims is invalid.

In considering the questions that have been raised against the validity of the patent, it should be borne in mind that patents are to be construed liberally; that they are not to be subjected to a rigid interpretation; and that it is to be presumed that the commissioner has done his duty, and has not granted a patent when he ought not to have granted one.

In regard to the first claim, the ground taken is, that the cloth, or material to be sewed, will not progress regularly, merely by the joint instrumentality of the surfaces between which it is clasped; that, in order to make it progress regularly, the aid of the needle, or some other instrumentality, is required; that, therefore, no useful result is produced by the use of the means in the claim specified; and that a patent for the same is invalid. It appears, by the operation of the devices patented to Wilson, when they are properly adjusted, that the cloth, or material to be sewed, will progress or go forward regularly, as claimed, by the joint instrumentality of the surfaces between which it is clasped, without the aid or assistance of any other instrumentality, and be ready, after it has progressed and gone forward as desired, to be acted upon by the needle, for the purpose of being sewed. The instrumentality of the needle is not required to make the cloth progress or go forward. It is a security, however, that the cloth shall be kept stationary after it has progressed and gone forward, while one of the surfaces, by whose instrumentality the cloth is made to advance, is receding, preparatory to another progress of the cloth forward, as desired, by the joint instrumentality of the same two surfaces between which the cloth is clasped. The way in which the cloth is made to progress regularly by the instrumentality of the two feeding surfaces, without the aid of the needle, is pointed out in the specification. To effect this operation, the lower feeding surface is roughened by small teeth, like saw teeth, which, when moved in one direction, slip under the cloth, without moving it, but, when moved in the other direction, catch the material on the points of the roughened surface, and force it to traverse along with the surface. When the devices are properly adjusted, this is accomplished. The use of the means specified in the claim does, therefore, produce a useful result.

It is insisted that the third grant of right in the patent No. 346, is not for any new means to accomplish a useful result. Prior to the invention of Wilson, a stripper had been known and used. He did not invent the stripper. He does not pretend to have invented it. He claims to have invented a new mechanical automatic feed, and to have invested one of the feeding surfaces, in his new mechanical automatic feed, with the additional power or function of stripping the cloth from the needle, which function in a feed surface was not before known. If his mechanical automatic feed (the instrumentalities by which the feed is effected being the surfaces acting as described) was new, and if, before his invention, one of the feed surfaces had not been used as a stripper, then it will necessarily follow that the grant made to him of his peculiar mode of arranging his feeding surfaces as in the specification set forth, in such relation to the needle, that one of them, in addition to performing the office of causing, with the aid of the other surface, the cloth or material to be sewed to progress regularly, shall perform the additional office of stripping the cloth or material from the needle, as it rises or recedes from it, was new, although a stripper distinct and independent of the feed surfaces was well known before, and was therefore old. The peculiarity of the invention is, that one of the feed surfaces is used as a feed surface and also as a stripper, that it acts in this two-fold capacity, and that it has this double character. The defendant insists that the stripper which he uses is one which has long been known, and was in use prior to the invention of Wilson. That may be so; and, if it is so, it will have its proper effect when the question of fact, whether the defendant has infringed on the third grant of right to Wilson, comes to be considered. The question now under consideration is, whether the third grant of right contained in the patent is invalid—not whether the defendant has infringed upon that grant of right. The grant of right is the mode of arranging feeding surfaces as pointed out, so that they, or one of them, in addition to the office which they perform of acting as a feeder, shall also perform the office of a stripper. This was new, and not before known. The grant of right, therefore, is valid; which grant of right, however, will not prevent the defendant from using any stripper which was known and in use prior to the invention of Wilson.

It is insisted, also, that the fourth grant of right in this same patent is invalid, for the alleged reason, that that which is granted required no invention. The patent is prima facie evidence that what is granted did require invention. The validity of the grant is not to be determined by the amount of invention that was required. If the device is new, if it is useful, and if it had not been known before, there is a sufficient amount of invention to authorize a patent. Curt. Pat. p. 5, note 1. It has been already shown that the method described in the specification, of causing the cloth or material to be sewed to progress regularly, by the joint instrumentality of the surfaces between which it is clasped, for the purpose specified, is useful, and did require invention. It follows, therefore, that the action of the surfaces, as described in the patent, is useful, and required invention. If the action of the surfaces, as described in the patent, is useful, and required invention, it follows that something added to the surfaces, by which their action will be facilitated, and be made more perfect and useful, is also useful; and, if so, there was sufficient invention to authorize a patent. The fourth claim is for so mounting and attaching one of the surfaces, in a particular manner, that the action of both of the surfaces may be more effectual and perfect and useful than such action would be without having one of the surfaces so mounted and attached. If, therefore, the means, namely, the feeding surfaces, which, by the device in the fourth claim mentioned, were to be made more useful, were new and useful without such device, it follows that the device which made them more useful accomplished a new and useful result, and was, therefore, a new and useful device. If it was new as well as useful, there was sufficient invention to authorize a patent. The exception taken by the defendant to the fourth claim, must, therefore, be overruled.

The evidence to support the plaintiff's rights are, the issuing of the patents; the quiet enjoyment under them, for a considerable time; several judgments at law, as well as decrees in equity, in which parties have already been enjoined; and the affidavits of several persons qualified to know, who testify that the invention was new. No patent is issued without an examination at the patent office, by persons skilled in the subject, into the specification, and the subject and extent of the claims. The commissioner is entrusted, by law, with the power and duty of granting patents for new and useful inventions. He is authorized to grant a patent only for a new and useful invention or improvement, and it is to be presumed that he has performed his duty, and has not neglected or disregarded it. Under these circumstances, the patent, when issued, affords prima facie evidence of the novelty and utility of the invention patented, which prima facie evidence is sufficient to establish such novelty and utility, unless it is rebutted by countervailing testimony.

It is charged, in the bill, that the public have for a long time acquiesced in the validity of the invention by Wilson. This charge is not sufficiently met by the defendant. There have been several suits at law on the patents, in which verdicts and judgments have been obtained by the plaintiffs. It is true, that, when the trials were had, the validity of the patents was not contested, though such validity was threatened. The judgments were obtained without collusion. Under these circumstances, the evidence is strong in favor of the plaintiffs' rights. Orr v. Littlefield [Case No. 10,590]. There have also been suits in equity, in which parties have been enjoined against the use of the invention patented to Wilson. The whole subject was also investigated by the commissioner of patents, and determined in favor of the patentee, on a question of interference had before him. In addition thereto, the evidence of witnesses well qualified to know, is strong in favor of the novelty of the invention. The strong case thus made out is not shaken by the evidence relied on by the defendant. The various inventions relied on by him, as shown by the models introduced before the court, appear to be different from the invention of Wilson. There are three claimed inventions relied on by the defendant as being prior to that of Wilson, where there have been no models produced before the court, namely, what have been called the Serrell invention, the Carpenter invention, and the Watson invention. The evidence to establish the identity of these claimed inventions, or either of them, with that of Wilson's, is not sufficient to destroy or impair the strong case made out on the part of the plaintiffs. It must be held, therefore, that the inventions patented to Wilson were new and useful, and that his patents are valid patents.

A machine of the defendants has been produced in court. Having determined what the grants of right were to Wilson, it is easy to determine, from the operation of the machine produced, aided by the testimony of witnesses who have been examined on the question of infringement, whether the devices in that machine interfere with any of the grants of right so secured to Wilson and his assignees. It has the contrivances and peculiarities which constitute the prominent features of the Wilson invention. In particular, it has substantially the method described in the specification of Wilson, of causing the cloth or material to be sewed, to progress regularly, by the joint instrumentality of the feeding surfaces, as described, between which it is clasped, and which act in conjunction, in the manner and for the purposes in said specification specified. It has substantially the method of holding the cloth or other material at rest by the needle, as described in combination with the method of causing it to progress regularly. It has the substantial means used

by Wilson, and described by him in his specification. To authorize an injunction, it is not necessary that all the grants of right to Wilson should have been infringed. All that is required is, that some of them should have been. I do not, therefore, go into the question of fact, whether the defendant has used any other stripper except such as was known or used as a stripper prior to the invention of Wilson. In the patent No. 346, there are four several grants of right. Three of them are irrespective of any stripping operation. The patent may be violated without determining what particular kind of stripper has been used by the defendant.

With this view of the case, an injunction must issue, as prayed for.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341].

Case No. 11,331.

POTTER et al. v. MACK.

[3 Fish. Pat. Cas. 428.] [1]

Circuit Court, N. D. Ohio. Sept., 1868.

APPEAL IN PATENT CAUSES—REFERENCE TO MASTER—DECREE FINDING INFRINGEMENT—PERPETUAL INJUNCTION—SUSPENSION UNTIL FINAL DECREE.

1. No appeal lies from a decree in a patent case which provides for a reference to a master to state an account, until the coming in of the master's report.

2. The practice in all of the circuits is to make a perpetual injunction part of the decree which finds the infringement.

[Cited in Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 805.]

3. The injunction ought not to be suspended until the final decree, unless there be shown some special grounds of peculiar hardship to the defendant.

[Cited in Brown v. Deere, 6 Fed. 490; Munson v. New York, 19 Fed. 314; Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 21.]

In equity. This was a motion [by Orlando B. Potter, Nathaniel Wheeler, and others] to suspend an injunction and permit the defendant [William A. Mack] to give bond to keep an account until the coming in of the master's report. A bill had been filed to restrain the infringement of reissued letters patent, granted to Allen B. Wilson, for improvement in sewing machines, and referred to in numerous previous cases, particularly Potter v. Wilson [Case No. 11,342]. The defendant was manufacturing and selling the Domestic machine, using a "wheel feed," consisting of a wheel with a roughened surface, and having an intermittent motion. A preliminary injunction was asked for, but was refused, the defendant being required to give bond in the sum of $10,000 to keep an account and pay damages. Subsequently, the case came on to final hearing, and a decree was entered establishing the patents, finding infringement, granting a perpetual injunction against the defendant, and referring it to a master to state an account of profits made by reason of the infringement. The defendant now moved to suspend the injunction until the coming of the master's report and the entry of the final decree, and tendered bond to keep an account, citing Barnard v. Gibson, 7 How. [48 U. S.] 650. He claimed that, upon appeal, the injunction would be stayed by the supersedeas, and urged the hardship of granting it pending the reference.

F. J. Dickman and S. S. Fisher, for complainants.

Ranney & Bolton, for defendant.

SWAYNE, Circuit Justice. In this case a final decree was entered at this term, enjoining the defendant from using certain principles of a certain sewing machine, covered by letters patent, upon which the bill of the plaintiff was founded.

The court decreed a perpetual injunction, and also a decree that the account should be taken. The case was referred to a master for that purpose, with a view to ascertain the amount of damages which were finally to be allowed to the plaintiff.

An application is made that this final decree shall be suspended, as it regards the injunction, until the account shall be determined upon and the decree shall be finally made upon that account, and when the defendant, for the first time, will have the right to appeal. He can not appeal from the decree as it at present stands, because, although the decision is final as to the merits of the case, it is in form an interlocutory decree only, and the rule established by the supreme court is, that an appeal can be taken only from a final decree. It has been held, in this class of cases, that a decree is not to be considered final for the purposes of appeal until after the coming in of the master's report.

I have no doubt of the power of the court to sustain this motion. Such power exists as incidental, in my judgment, to equity proceedings. There is no question, in my judgment, of the power of the court to stay a judgment at law. And it is a constant practice of the state courts and the circuit courts of the United States, where the equities between the parties require it, to make such an order.

If I had any doubt about it, the authority of Barnard v. Gibson, 7 How. [48 U. S. 650], is conclusive.

The facts of the present case are, that a bill having been filed and an injunction asked, my learned brother, the district judge of this court, knowing the difficulty and hardship which might ensue, refused to grant the injunction, and took a bond for an account. This saved the necessity of a second hearing in the case, and postponed the final determination until there was a hearing upon the proof. This course, while it was eminently beneficial to the defendant, subjected the plaintiff to no injury, because bonds were required to cover all damages that might ensue.

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

At the last January term, as my learned brother informs me, he intimated that the case, in his opinion, was against the defendant. At the May term, he informs me, he decreed for the complainant. At the instance, as I am advised, of the defendant's counsel, his final action on the subject was deferred until a case pending in one of the Eastern courts should be brought to a close. The case was accordingly postponed; and at the September term of this court, 1868, an interlocutory decree was entered, and notice of the injunction has been duly given to the defendant. Now we are asked to suspend the operation of this injunction until a final decree is made from which alone the defendant can appeal.

Now, I have to remark upon this subject, that when a party obtains a decree, such as was given in this case, settling the right to an injunction in respect to the matter in controversy, the practice in all the circuits, as I have understood, is, to make the injunction a part of the decree. That is the right of the party, unquestionably, unless there be shown some special grounds of peculiar hardship to the defendant. In a case of that character, it would be proper for the court to grant some extenuation.

The question is, is this a case of that character? Is it proper to establish, as a general rule, that this power of suspending the operation of an injunction shall be exercised or withheld when a case shall have reached this stage. I say, no. I see no ground on which such a general rule should be established. It seems to me, it would be as objectionable as to hold, in every case of a judgment at law for the payment of money, that the judgment shall be stayed until the next term, or any other given time. There may be circumstances which would render that action proper, but I should not be willing to establish such a rule as general.

Again, too, as within my own knowledge, the practice in all the other courts is diverse from that now sought to be established, and I should be reluctant to strike out a new course.

Then what are the peculiar circumstances of this case? The preliminary injunction was refused, and that, too, under circumstances somewhat different from the practice of my brethren in other circuits. Their rule, as I am advised, is that upon a proper hearing, if it is thought proper that an injunction should be granted, it is granted. I prefer that there should be but one hearing, and that before a full bench and upon all the proofs. I am satisfied with that practice, and, as a general rule, will adhere to it.

At the January term last, it was intimated by the defendant that he wanted to work up his material on hand and to prepare for the injunction. At the May term, a still more decided intimation of the opinion of the court was given. A decree giving the injunction was finally entered at this term of the court. Under these circumstances I feel warranted in sustaining that part of the decree of my learned brother.

In this connection I lay no stress upon the fact, which was referred to in the argument, that like questions in some other cases have been decided in the same way by some of my brethren. That is not one of the elements under whose influence my mind has been brought to the conclusion which I have announced.

The motion must be overruled, and the decree will stand.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

Case No. 11,332.

POTTER v. MARINE INS. CO.

[2 Mason, 475.] [1]

Circuit Court, D. Rhode Island. June Term, 1822.

INSURANCE—PRIORITY CLAUSE—POLICIES CONCURRENTLY EXECUTED—PROOF.

1. If two policies bear the same date, the parties, to entitle themselves to an exoneration from payment of a loss, under the common clause, as to insurance by prior policies, may shew the actual time of execution of each policy, and the policy first executed, if it covers the whole interest, is alone to bear the loss.

[Cited in Ryder v. Phœnix Ins. Co., 98 Mass. 187; Deming v. Merchants' Cotton-Press & Storage Co., 17 S. W. 97.]

2. Where two policies are concurrently executed, the operation of the priority clause is excluded, and the assured may recover his whole loss upon either policy; and the other underwriters are liable only for contribution.

This was an action on a policy of insurance. At the trial the principal question was, whether the plaintiff [Robinson Potter] had an insurable interest beyond what was covered by prior policies; in which case, by the usual memorandum in American policies, the defendants would be exonerated from any liability. It was referred to an auditor to ascertain the facts of interest, and his report was made in favour of the plaintiff, for an uninsured interest of about $1200. There was no objection to this report; but the plaintiff having procured a policy to be underwritten by another insurance company for the same risk upon the same property, which bore the same date as the policy now declared on, a question was made by Hazard & Hunter for the defendants, whether, in case of policies bearing the same date, it was competent for the plaintiff to show an actual priority in time in the execution of either policy, by evidence aliunde; and they contended, that it was not, and that the policies must be considered as concurrently executed; therefore the plaintiff could recover only for a moiety of the insurable interest upon each.

Mr. Pitman, for plaintiff, was stopped by the court.

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

STORY, Circuit Justice. In my judgment there is no difficulty in the question stated at the bar. I have no doubt, that it is competent in all cases, where the priority clause in our policies renders it material, to inquire into the actual fact of prior execution. The law, when it is material, will examine into fractions of a day, and give parties their rights accordingly. In this case, therefore, I shall admit the evidence of the actual time of the execution of the two policies. If one was executed in point of fact before the other, though both bear the same date, the plaintiff is entitled to recover upon the first policy only, as that is more than sufficient to cover all his uninsured interest; since, by the very terms of the common clause, the underwriters on the second policy are liable for so much interest only, as is uncovered by any prior policy. It has been intimated at the bar, that it is incumbent on the plaintiffs to prove, that the present policy was the first underwritten. But I take it to be quite clear, that no such duty devolves upon him. The priority clause is a matter of defence, and if the defendants could exonerate themselves from the payment of a loss, they must show, that there was some prior policy, which absorbed the whole interest. It is not incumbent on the plaintiffs to prove negatively, that no prior policy was underwritten. In the present case the defendants offer to prove, that a policy of the same date was actually underwritten on the same risk; and upon their own argument it was a concurrent, and not a prior policy. If, therefore, the fact be with them, there is nothing in point of law in the defence. They can exonerate themselves only by showing a prior policy in date, and not by showing a concurrent policy in date. The clause in the policy may, therefore, be entirely laid out of the question; and if so, then the case stands upon the common law, independently of that clause. At common law, if the assured has the same interest insured by several policies, he may sue, on which he pleases, and is entitled to recover his whole loss upon either of the policies; and all that remains is a mere right in the party sued to recover contribution from the other underwriters. Upon this principle the plaintiff is entitled to recover the whole, and not merely a moiety of the loss, in the present suit. But I shall hear the testimony upon the point of fact, as to the priority of the execution of the policies, which, if it turns out, as stated at the bar, will be equally decisive.

MEM. It was proved, that the present policy was executed in the morning, and the other policy on the evening, of the same day; and thereupon a verdict and judgment passed for the plaintiff.

POTTER v. The MONTICELLO. See Case No. 3,971.

Case No. 11,333.

POTTER et al. v. MULLER.

[2 Fish. Pat. Cas. 631; 1 Bond, 601.] [1]

Circuit Court, S. D. Ohio. Dec., 1865.

INJUNCTION IN PATENT CAUSES—CONTEMPT.

Whether a defendant, who has been enjoined from infringing a patent by manufacturing or selling the infringing article, continues to sell in his own right, or as the agent of another, he is equally guilty of a contempt, and is liable to attachment.

This was a motion [by Orlando B. Potter and others], for an attachment. The defendant [Anton Muller] had been enjoined, Potter v. Muller [Case No. 11,334], from infringing the patents of Allen B. Wilson for improvements in sewing machines; the machine in question having a wheel feed, in imitation of the Singer machine. He continued to sell machines after the service of the injunction, alleging that he had disposed of his establishment to his brother, and that he made sales not in his own right but as the mere agent or employee of his brother.

S. S. Fisher, for the motion.

G. E. Pugh, contra.

LEAVITT, District Judge. I will state very briefly the grounds upon which I base my action in this case. Originally there was a bill in the name of O. B. Potter against the defendant, Anton Muller, charging an infringement in the manufacture and sale of sewing machines. The question of the validity of the patent and the novelty of the invention, as well as the question of infringement, were decided by the court on a motion to dissolve the injunction which had been previously ordered. That motion was very fully argued, and the court had no doubt at all that the complainant had fully made out his case, establishing the validity of his patent, and proving the infringement on the part of the defendant. The court, therefore, without hesitation, refused to dissolve the injunction, and made it perpetual.

Subsequent to this decision, but before the present term, there was an application for a rule against this defendant to show cause why he should not be attached for a violation of that injunction; and, upon a return of the rule and hearing, the court adjudged the defendant to pay a small fine of only twenty-five dollars and costs, with the admonition, however, that, if there was a repetition of the offense, he would be visited with a severer penalty. At the present term, the application has been made and granted for an attachment against the defendant for a second violation of the injunction. The defendant has appeared, and has filed answers to the interrogatories that were propounded

[1] [Reported by Samuel S. Fisher, Esq., and by Lewis H. Bond, Esq., and here compiled and reprinted by permission.]

to him. The question now to be decided by the court is, whether he has violated the injunction and incurred a second penalty? The present application for an attachment is predicated upon the affidavit of James W. Harnden, who swears, in substance, that some time in the early part of the present month he went to the manufacturing establishment of this defendant, and, after some conversation and negotiation, the defendant being present with his brother, he made a purchase of one of these sewing machines, which, it is distinctly admitted in the answer of the defendant himself, was a machine in violation of the plaintiff's patent. The affiant, Harnden, states, in substance, that this defendant avowed himself as acting as the agent of his brother, William Muller, stating to him that he sold out the establishment to his hands, and he was acting as agent only. It appeared, however, that in the sale of the machine, the defendant was not only present, but took an active part in the transaction, and although he avowed that his brother, William Muller, was the party interested, it is to be remarked that it does not appear that there was any bona fide sale or transfer of this manufacturing establishment by the defendant to his brother. Indeed, it appears from his own statement that if there was any sale or transfer, it was entirely without consideration; that his brother paid nothing for the manufactory, or for the use of the tools. Now, the only question is, whether this is a bona fide transaction, or whether it is a mere subterfuge, to evade responsibility and liability under the injunction that had been granted. One of the two propositions is undoubtedly true—either that this defendant was still the legal owner of that establishment, or, if he was not, he was the agent of the parties who were the owners. Harnden, in his affidavit, states that he avowed himself to be acting as the agent. In either case, if there has been a sale of the machine, that is an infringement of the patent and in violation of the injunction. This defendant is clearly liable whether he was, in fact, the owner of the establishment, or whether he acted as the agent of another party, as the injunction, in its terms, applies to and reaches the defendant himself, acting in any capacity, and all agents, employees, or servants.

I have no doubt at all that this pretended arrangement between this defendant and his brother was simply evasive, and, I must think, a very clumsy subterfuge to evade liability. If he was the owner of the concern (which appears most probable to the court, notwithstanding the pretended transfer), then he was liable. If he was acting as the agent of another party, he was liable also.

I am very clear, therefore, from the facts as they are before the court, that this party has violated the injunction, and it has been done under circumstances of aggravation. When this party was before the court at a previous term he was admonished by the court that he incurred great liability in contemning the process and authority of the court; but there was some reason, at that time, to suppose that the defendant might have acted under some misapprehension in regard to the issuing of the injunction and its effect and operation upon him, and as he was a foreigner, the court, inclined to be as lenient as possible under the circumstances, adjudged a merely nominal fine against him.

It now appears that he has again violated this injunction without any excuse, and, certainly, with a full knowledge not only of its existence, but also of its effect and operation; and, under the circumstances of the case, it appears to be the imperative duty of the court to visit this party with a more severe punishment than was adjudged to him on the previous occasion.

I do not know what may be the views of the defendant in regard to his liability to obey the laws and respect the authority of the government. It is possible that, being a foreigner, and having come from a government of despotism to a land of freedom, liberty, and equality, he supposes that our institutions guarantee to him the right of doing as he pleases, without reference to law and the rights of others. That may be his conception of true liberty; but it is a great mistake, and foreigners should know that it is against the theory, and would lead to the utter destruction and overthrow of our institutions, if it were recognized and sanctioned. True liberty consists, undoubtedly, in obedience to the law; and there is no way by which the rights of individuals or the peace and good order of the community can be maintained, except by due respect to the authority of the law and the government of the country.

This party must know that he can not, and ought not, by any subterfuge, evade the liabilities which he has incurred under the orders and decisions of this court. It is not because the defendant owes any peculiar respect or reverence to the individual who occupies this place, but because he owes respect, reverence, and obedience to the authorities of the country and the laws of the land.

The defendant is adjudged to pay a fine of four hundred dollars and the costs of this proceeding, and to stand committed until the fines and costs are paid, or the court shall otherwise order.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

Case No. 11,334.

POTTER et al. v. MULLER.

[2 Fish. Pat. Cas. 465.] [1]

Circuit Court, S. D. Ohio. April, 1864.

INJUNCTION IN PATENT CAUSES—PRESUMPTION IN FAVOR OF PATENT—LENGTH OF POSSESSION.

1. Injunctions in patent cases are now granted without a previous trial at law, in cases where the owner of the patent shows a clear case of infringement, and has been in the possession and enjoyment of the exclusive right for a term of years without any successful impeachment of its validity.

[Cited in White v. Heath, 10 Fed. 293; Dickerson v. De La Vergne Refrigerating Mach. Co., 35 Fed. 144.]

2. There is no fixed rule as to the length of time the possession and enjoyment of the right under a patent shall have continued. It must be sufficient to justify a presumption in favor of its validity.

3. The presumptions in favor of a patent, arising from the length of possession and enjoyment since its issue, are greatly strengthened by the fact that its validity has been affirmed and sustained by prior judicial decisions, either at law or in equity.

4. The first claim of A. B. Wilson's reissue 346 does not involve or require the agency of the needle to make it valid or effective. The invention of Wilson is not anticipated by a feed wheel armed with short metal points to hold the cloth, and which prevent it from being turned, so as to sew curved seams at the pleasure of the operator.

5. The rights emanating from and existing under a patent are as sacred and as well entitled to protection as any other species of property.

6. Although it is conceded that to justify the stringent remedy by injunction, the party seeking it should clearly establish his right, yet, when so established, it is not only a rightful, but often the only remedy which is available for him.

In equity. This was a motion [by Orlando B. Potter, Nathaniel Wheeler, and others] to dissolve a provisional injunction, granted to restrain the defendant [Anton Muller] from infringing reissued letters patent Nos. 346 and 414, for "improvements in sewing machines," issued to Allen B. Wilson, and more particularly set forth in the report of Potter v. Wilson [Case No. 11,342]. The defendant claimed to be the first and original inventor of the improvements patented to Wilson, and denied infringement.

S. S. Fisher, for complainants.
George E. Pugh, for defendant.

LEAVITT, District Judge. This is an application to dissolve the preliminary injunction granted in this case. The injunction was allowed after due notice to the defendant, but without opposition on his part; and the only question on the pending motion is, whether it is a proper case for the allowance of the writ? If the court is now satisfied that the order for the writ ought not to have been made, the injunction will be dissolved; if otherwise, it will be perpetuated.

The complainants aver in their bill that they are the owners, by legal assignments, of the exclusive right and benefit of a patent granted to A. B. Wilson November 12, 1850, for an improvement in sewing machines, which was subsequently surrendered by the patentee, and on January 22, 1856, two new patents issued, marked or designated as reissues No. 345 and No. 346, and that on December 9, 1856 (reissue No. 345 having been surrendered), a third reissue, 414, was granted, which said reissued patents covered the invention set forth in the original patent.

The bill alleges an infringement of the reissued patents 346 and 414, by the manufacture and sale of a large number of machines, at the city of Cincinnati, embodying substantially the invention of Wilson, as secured to him by his patents. The bill is sworn to by the complainants, and is sustained by affidavits proving the identity of the machines made and sold by the defendant with the improvements covered by Wilson's patents.

The defendant has filed an answer under oath, setting up in substance two grounds of defense: (1) That Wilson was not the original and first inventor of the improvements patented to him, and that his patent is therefore not valid; and (2) that the machines made and sold by the defendant do not infringe the invention patented to Wilson in 1850.

The present motion must be decided on the facts as they are before the court, without anticipating what may be the aspect of the case on the final hearing. And it is not, therefore, the duty of the court to notice any point made in the argument which has no application to the motion to dissolve the injunction.

The rule as to granting or continuing injunctions in patent right cases is now well settled by the modern usages of the courts of the United States. They are now granted without a previous trial at law in cases where the owner of the patent shows a clear case of infringement, and has been in the possession and enjoyment of the exclusive right for a term of years without any successful impeachment of its validity. Such possession and enjoyment, aided by the presumptions arising from the patent itself, are usually regarded as sufficient to warrant an injunction to restrain infringement. And there is no fixed rule as to the length of time the possession and enjoyment of the right under a patent shall have continued. It must be sufficient to justify a presumption in favor of its validity. In the present case, there can be no doubt of the fairness of such a presumption from the age of the patent. The original patent was issued in 1850, and nearly fourteen years had expired when this suit was commenced. Or, if dating back only to the reissues of 1856, the time of the possession and enjoyment of the rights under Wilson's patent includes nearly eight years.

But the presumptions in favor of a patent, arising from the length of time which has

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

elapsed since its issue, are greatly strengthened by the fact that its validity has been affirmed and sustained by prior judicial decisions, either at law or in equity.

This principle bears on the present case with unusual force. It is not of frequent occurrence that a patent is sustained so strongly by the weight of judicial authority as that now under consideration. And I am greatly relieved from the labor of investigating and deciding some of the points involved in the present motion by the adjudications referred to. They affirm clearly that the improvements referred to, or inventions described, by Wilson, in the specifications and claims of his patent, are the proper subjects of a patent, and are set forth by him in accordance with the requirements of the statute. They also satisfactorily establish the novelty and originality of his inventions, so far, at least, as the attempt was made to invalidate his claim in this case.

The court has been favored with copies of the opinion of Mr. Justice Nelson, as delivered by him in the circuit court for the Southern district of New York, and also of Judges Smalley, of the district of Vermont, and Ingersoll, of the district of Connecticut. I have read these opinions with care, and have no hesitancy in adopting their conclusions, both as to the law and the facts investigated by them. In one of the cases, before Justice Nelson, assisted by Judge Smalley, there was a very protracted and laborious trial, with full argument on both sides by counsel of eminent ability. The learned judge, in that opinion, as also another involving substantially the same questions, fully affirms the validity of Wilson's patent, both as to the sufficiency of the specifications and the novelty and originality of his invention.

As to the date of Wilson's invention, the learned judge, from the evidence before him, comes to the conclusion that it was perfected in the mind of the inventor as early as November, 1848, and that his first machine was completed in the month of April or May, 1849. The other judges referred to, in the cases before them, reach substantially the same result. They are fully sustained by the affidavit of Wilson, offered by complainants in resistance of the motion now before the court. Wilson is not a party to this suit, and the court is apprised of no reason why his affidavit is not entitled to entire credence. He states the facts connected with the date of his invention precisely as found by Judge Nelson, as above set forth; and in confirmation of these facts the affiant gives extracts from two periodicals published about the time his invention was perfected, in which it is referred to and minutely described. There is therefore no reason to doubt that as early as April or May, 1849, it was practically completed by the construction of a working machine, embodying the improvements covered by the patent of November 12, 1850, and the subsequent reissues.

The defendant, however, has set up in his answer that he was the inventor of an improvement in sewing machines substantially the same as that patented to Wilson. This claim is alleged for the purpose of impeaching the validity of Wilson's patent, as not being for a new and original invention. Without inquiring here whether there is any substantial identity between these inventions, it may be remarked that the proofs before the court clearly show Wilson's is prior in date to that claimed as the defendant's. The defendant swears, in his answer, that before he left Germany he had conceived the idea of an improvement in a sewing machine, in which the feeding apparatus was substantially the same as that patented to Wilson. But he admits that his invention was not perfected until after his arrival in this country. From his own showing, his first machine was made by him at Cincinnati, and was not completed until September or October, 1849. This was six months after Wilson had completed a practical machine, embodying his improvement in the feeding device. If the two inventions were identical, it is apparent that Wilson's, being prior in time, can not be affected or invalidated by a discovery or invention of a later date.

But there is another answer to this attempt to impeach the novelty of the improvement patented to Wilson. The defendant has exhibited a mutilated and imperfect model of his machine, with some affidavits as to the time it was made, and the principle of its operation. Without professing to be an expert on the question of the identity of two mechanical structures, I can not hesitate in the conclusion that the defendant's machine does not embody literally or substantially the feeding device described in Wilson's specification as being his invention.

The main and distinguishing element of his invention is the mechanical device by which curved seams may be sewed. It is this that constitutes its great value, and has made its use indispensable on every practical sewing machine. On this subject, Judge Nelson, after noticing the objection to all prior feeding devices, says: "The object of the improvement in question was to remedy these defects by causing the cloth to be moved automatically under the needle, and the device so arranged as to admit of seams of any curvature." And Judge Ingersoll, in describing Wilson's improvement, says: "Surfaces as before used and applied, could not be used and applied to cloth so as to sew seams of any considerable curvature. By his (Wilson's) devices, the cloth, while held between the surfaces, can be turned and twisted so as to sew curved seams, it being grasped only in a small part of its surface by the feeding clamps."

Now it is clear, from an inspection of the defendant's machine, that it is not adapted to make, and can not make, curved seams. It provides for a wheel, with a series of short

metal points to hold the cloth, and which necessarily prevent it from being turned so as to give a curvature to the seams. The cloth does not move over a flat table or surface, but over an arch or wheel, and can, therefore, only move in a straight direction, and can not be turned, at the pleasure of the operator, so as to produce a curved seam.

Without noticing further the want of identity between the two structures, it may be remarked that the defendant impliedly admits the defects of his invention by the fact that the machines made and sold by him and charged as an infringement of Wilson's patent, are not constructed upon the plan which he claims as his invention. This is conclusive to show that, in his opinion, his device for feeding was entirely defective, as not adapted to the making of curved seams.

Convinced beyond a doubt that the defendant has wholly failed to impeach Wilson's patent on the ground that the invention covered by it is not new and original, I will examine briefly the remaining question, whether the machines made and sold by the defendant, so far as relates to the feeding device, embody the principle of Wilson's invention, so as to constitute an infringement. Without attempting a minute comparison of the two machines, I will refer to the evidence before the court as to their identity, coming from experts upon whose statements and opinions I place more reliance than I should be justified in doing from a mere personal inspection of the structures. The testimony of this class of witnesses, when intelligent and otherwise reliable, is of great value in patent right controversies, involving questions of identity as between two machines. The complainant, in this case, has submitted the affidavits of two witnesses on the point which, for the purposes of the present inquiry, may be regarded as conclusive.

If, therefore, a comparison of the two structures left a doubt as to the identity of the feeding device, the oaths of the two witnesses referred to, uncontradicted as they are, would be quite sufficient to establish it.

It is insisted, in the argument of the defendant's counsel, that in Wilson's device for moving the cloth and holding it to its place in sewing, he describes and claims the use of the needle as a necessary agency, and that as the defendant, in the machines made and sold by him, does not use the needle for such purpose, he does not, therefore, infringe. The first remark to be made on this point is that the defendant's theory is in direct conflict with the oaths of the two witnesses referred to, who clearly prove the identity of the devices for moving and holding the cloth on the two machines. But it appears from the specification of Wilson's reissue 346, that he does not claim the use of the needle for the purpose before indicated. The first claim is described as "the method of causing the cloth or material, to be sewed in a sewing machine, to progress regularly, by the joint action of the surfaces between which it is clamped, and which act in conjunction, substantially in the manner and for the purpose herein specified." Now, it appears that the objection stated above was urged in the case heard by Judge Ingersoll. In the opinion of the learned judge (Potter v. Holland [Case No. 11,330]), he holds that "the instrumentality of the needle is not required to make the cloth progress or go forward;" and, again, he says: "The way in which the cloth is made to progress regularly by the instrumentality of the two feeding surfaces, without the aid of the needle, is pointed out in the specification."

Judge Nelson, in his opinion (Potter v. Wilson [Id. 11,342]), says: "Now, it is apparent that all the several claims rest upon and grow out of the main improvement of the feeding apparatus, consisting of two surfaces clasping the cloth and advancing it to the needle by the intermittent motion of one of them, and so arranged as, at the same time, to admit of the turning of the cloth, and sewing seams of any practically useful curvature."

It will be observed that neither of the two judges gives a construction to the specification as constituting a claim to the agency of the needle in holding or advancing the cloth, and it is obvious that if the defendant, in his machines, uses the needle in a way different from what it is used in the Wilson machine, it would not protect him from liability as an infringer, if he used the other and material parts of the invention.

But it can not be necessary that the court should enlarge upon the question before it. From the case made by the pleadings and proofs, I am satisfied the complainants have a valid patent, and that the defendant has infringed their exclusive rights under it. These rights, though emanating from and existing under a patent, are as sacred and as well entitled to protection as any other species of property. And although it is conceded that to justify the stringent remedy by injunction, the party seeking it should clearly establish his right, yet, when so established, it is not only a rightful, but often the only remedy which is available for him. Such seems to be the aspect of the present case, and the court can not release the defendant from the operation of the injunction that has been awarded.

The motion to dissolve the injunction is, therefore, overruled.

[For a hearing on a motion for an attachment, see Case No. 11,333. For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

Case No. 11,335.

POTTER v. OCEAN INS. CO.

[3 Sumn. 27;[1] 1 Law Rep. 17; 1 Hunt. Mer. Mag. 68.]

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

MARINE INSURANCE—GENERAL AVERAGE—ABSENCE OF CARGO—SURVEY AT FOREIGN PORT—EXPENSE—CONSUL'S FEES—REPAIRS.

1. The wages, provisions, and other expenses of the voyage to a port of necessity, for the purpose of making repairs, constitute a general average.

[Cited in The Star of Hope, 9 Wall. (76 U. S.) 236.]

2. It makes no difference in the application of the principle to policies of insurance, that there happens to be no cargo on board, so that there is, in fact, no contribution to be made by cargo or by freight; for general average does not depend upon the point, whether there are different subject-matters to contribute, but whether there is a common sacrifice for the benefit of all, who are, or may be, interested in the accomplishment of the voyage.

[Cited in The Star of Hope, 9 Wall. (76 U. S.) 236; Hobson v. Lord, 92 U. S. 409.]

[Cited in brief in Alexandre v. Sun Mut. Ins. Co., 51 N. Y. 257. Cited in Greeley v. Tremont Ins. Co., 9 Cush. 419; Orrok v. Commonwealth Ins. Co., 21 Pick. 470.]

3. Neither does it make any difference in the application of the principle, that the insurance, on which the question arises, is not for a particular voyage, but on time.

4. If the ship is so disabled by a storm that she becomes unmanageable, and thereby her boat is lost, and the loss is properly attributable to the crippled and disabled condition of the ship by the storm, the loss is properly attributable to the storm, although the cause of it did not occur during the actual continuance of the storm. The rule, causa proxima non remota spectatur, does not apply to such a case.

[Cited in McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 202; Greene v. Pacific Ins. Co., 9 Allen, 217; Indianapolis Ins. Co. v. Mason, 11 Ind. 180; White v. Republic & R. Ins. Co., 57 Me. 93.]

5. Where a survey is properly made at a foreign port, in order to ascertain the amount of damage and the propriety of making repairs, if the damage is a peril insured against, the underwriters are to bear the expense of the survey.

6. A survey need not be, though it commonly is, ordered by a court of admiralty. It may be directed by an American consul, as, by usage, a part of his official duty; or even be made by persons voluntarily appointed by the master, if, under the circumstances, that is a sound exercise of his discretion.

7. There is no law positively requiring, that, in case of a survey, the surveyors should be under oath.

8. There is no statute of the United States fixing the fees to be charged by an American consul for services connected with a survey.

9. In cases of repairs of the damage done to a ship by the perils insured against, the customary deduction of one third new for old, is applicable only to the labor and materials employed in the repairs, and to the new articles purchased in lieu of those which are lost or destroyed; and it does not apply to other incidental expenses, having no connection with the repairs or new articles furnished, and from which the assured can possibly derive no enhanced benefit or value beyond his loss, such as steamboat towage, boat hire, &c.

Action on a policy of insurance, dated the 4th of March, 1836, whereby the Ocean Insurance Company insured the plaintiff [Robinson Potter], "fourteen thousand dollars on the bark Hannah, at sea and in port, for and during the term of one year, commencing the risk on the 3d of March, 1836, at noon. Should this vessel be at sea on a passage, on the expiration of the year, the risk to continue, at pro rata premium, until her arrival at her port of destination, paying one half per cent. additional premium, &c., at and after the rate of five per cent. premium." The policy contained the usual risks, and the usual provisions in the Boston policies, and, among other things, a clause, that "the company are not liable for wages or provisions, except for general average." The demandant alleges a loss by the peril of the seas. Plea, the general issue.

At the trial it appeared in evidence, that the bark Hannah sailed from New Orleans on the 4th of November, 1836, with a cargo destined and to be landed at Tampico. In course of the voyage, on the 9th of the same month, in a severe squall from the north, both of the masts were carried away; and, on the 11th of the same month, a heavy gale was experienced, in which a heavy sea struck the stern boat from the stern, and stove it to pieces; and on the 5th of December following, the bark arrived at Tampico, and delivered her cargo. The necessary repairs, to enable the bark to prosecute any further voyage, could not be obtained at Tampico; and the bark returned to New Orleans, and there the repairs were made. The amount of those repairs, and the incidental expenses of the return to New Orleans, as in case of a general average, and the value of the stern boat, were claimed by the plaintiff from the insurance company. The insurance company paid into court the sum of $947, being the sum admitted by them to be due on account of the repairs. But the company contended that they were not liable for the wages, provisions, and other expenses incurred in the return voyage to New Orleans, as a general average; (1) because the contemplated destination of the bark was, in the regular course of her projected voyage, intended to be directly back from Tampico to New Orleans; (2) because it could not be treated as a case of general average, since there was no cargo intended to be taken back from Tampico to New Orleans. The company, also, contended, that they were not liable for the loss of the boat, as it was lost in another and a distinct storm, and that the loss would not amount to five per cent. It appeared, in evidence, that the crew were shipped at New Orleans, on a voyage "from New Orleans to Tampico, and from thence back to a port of discharge in the United States." The cargo was shipped under a charter party, which

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

contemplated the landing of the cargo at another port (Metamoras) at the election of the agent of the shippers at Tampico. The master, in his deposition, swore that the voyage was not intended to be directly back to New Orleans; that, on the contrary, it was his intention, after delivery of the cargo, to employ the bark in that way which should be most for the interest of the owner. At the time, he had it in contemplation, to go to Tobasco, for a load of wood to carry to New York. But he was prevented from employing her in that way or any other by the disaster. He also swore that his return to New Orleans was not in the regular course of the projected voyage; but solely for, and from the necessity of the repairs to be made there, as the nearest and most convenient port for that purpose. The counsel for the plaintiff contended (1) that, under the circumstances, the voyage to New Orleans was a voyage of necessity for repairs; that the company were liable to the usual expenses of wages, provisions, &c., for that voyage, as in the nature of general average; (2) that the loss of the boat was solely attributable to the disabled and crippled condition of the bark by the first storm, and her being unable to be kept from rolling in the trough of sea by the want of any proper sails.

The jury were directed to consider these points. If they were of opinion that the return to New Orleans was in the regular course of the voyage, then their verdict on that point ought to be for the defendants;—if, on the contrary, it was a new voyage of necessity for repairs, then their verdict on that point ought to be for the plaintiff. As to the loss of the boat, they were instructed, that if it was a direct result, properly attributable to the disabled and crippled condition of the bark by the preceding storm, and would not have occurred but from that disabled condition, then they were to find for the plaintiff on that point; otherwise, for the defendants. The jury found a verdict on both points for the plaintiff; and by agreement of the parties, a verdict was taken for the plaintiff, for $1,250, subject to the opinion of the court upon the report of an auditor (Willard Phillips, Esq.) appointed to ascertain and report the amount of the loss.

The auditor, having heard the parties accordingly, made his report as follows:

REPORT OF THE AUDITOR.

Loss on schooner Hannah in nature of general average of expense of seeking ports of necessity to repair, from Dec. 17th, 1836, to Jan. 17th, 1837.

Chargeable wholly to schooner, no freight or cargo being at risk.

	0-0 off.
One half of George Robertson's bill for order of survey, report thereon, extending protest, copy of same, and surveyor's fees, (whole bill $65)	$ 32 50
Captain Barker's bill for amount paid for boat and men to attend schooner over Tampico bar	30 00
Pilotage out of Tampico	10 00
Bill of brig Mary for lumber, and also Henry Frey, carpenter's bill for temporary repairs at Tampico, besides work of crew, in order to fit schooner to make the passage to New Orleans. Barker's deposition—Ans. 28. Waite's deposition—Ans. 22	8 00
Steam tow-boat—Sharp's bill for towing from sea into New Orleans	225 00
Baily & Abbot's charge for payment of pilotage from sea into New Orleans	10 00
Baily & Abbot's charge for payment of port-warden and harbor fees at New Orleans	11 99
Baily & Abbot's charge for payment of entry fee on entering port of N. O.	2 50
Baily & Abbot's charge for payment of wharfage	40 00
Wages from time of discharging at Tampico until time of arriving at the levee, N. O., 31 days:	
Captain at $60 per month	$60 00
Mate 50 " "	50 66
7 men 141 " "	145 70
	256 36
Provisions for same time:	
Master 31 days at $1 00	$31 00
Mate " " 50	15 50
7 seamen " 25 each	54 25
	100 75
Commissions of Baily & Abbot, ship's agents, 2½ per cent. on amount of above items	18 18
Exchange at N. O. on Boston, 2 per cent. on amount of above 745 28	14 90
	$760 18

PARTICULAR AVERAGE.

	1-3 off.	0-0 off.
One half George Robertson's bill for order of survey, report thereon, extending protest, copy of same and surveyor's fees		$32 50
Gerard, blacksmith's bill for repairs at New Orleans	$ 91 87	
Baily & Marcy, carpenter's bill of repairs, whole bill 656 87½—charge for steering sail boom deducted by consent of plaintiff, and proportional part of labor on the same accordingly deducted, (656 : 173 : : 6 50) 171 = 8 21	648 67½	
Ferguson & Hall, ship chandler's bill, whole bill 223 73, deduct half cost of paint brushes, 87½	222 85½	
Henry Spearing, sail maker's bill	294 18	
Steamboat Pacific's bill for towing across the river to ship yard for repairs	15 00	
Baily & Abbot's charge for payment of fees of survey at New Orleans		15 00
Baily & Abbot's charge for payment of bill for towing from ship yard to the levee	20 00	
Captain Barker's bill of amount paid six men for labor in repairs, 245 62	245 62	
To his bill, amount paid other men for mooring schooner, and ferrage at sundry times	19 50	
New yawl boat as certified by Captain Barker	75 00	
Captain Barker's charge for his own services attending to repairs, 30 days, at $2 per day	60 00	
His board same time	30 00	
The mate's wages for assisting during repairs, at $50 per month	50 00	
His board same time, $1 per day	30 00	
William Roswell, notary public's fees, for arranging and attesting in duplicate the vouchers and documents relating to the repairs		10 00
Postages from New Orleans to Newport		4 75
	$1,802 70	$62 25
Commissions of Baily & Abbot, ship agents, at 2½ per cent	45 06	1 56
	$1,847 76	$63 81
Deduct old materials	85 60	
	$1,762 16	
Deduct 1-3 for new	587 38	
	$1,174 78	1,185 03
		$1,238 59
Exchange at New Orleans on Boston, 2 per cent		24 77
		$1,263 36
Whole amount of loss		$2,023 54

The parties having been heard on the subject of the above report, the defendants object:

1. To including the fees for the survey at Tampico, on the ground, 1st, that the consul

had not jurisdiction to order a survey, and that it should have been ordered by a maritime court; 2d, that the surveyors do not appear to have been sworn; and, 3d, that the fees exceed the rate which an American consul is authorized by law to charge.

2. That the defendants are not liable for any of the expenses of the passage to New Orleans, on the ground, 1st, that a pending voyage was not interrupted to seek a port of necessity; 2d, that the Hannah would have probably gone to New Orleans, had she not needed repairs, as the shipping articles provided only for a return to a port of discharge in the United States.

3. That the second, third, and fourth items on the second page of Gerard, the blacksmith's bill for iron work on the jib-boom (as the auditor reads the account) amounting to $3.50, ought to be struck out, there being no evidence of loss or injury to the jib-boom. (They are included in the adjustment, because the schooner appears by the evidence to have been nearly new and well fitted out and furnished, and the master and mate both mention in their depositions, injury to the iron work in the disaster, by which the loss was occasioned, without undertaking to specify every particular, which the auditor supposes would have been impracticable.)

4. That the charge of $10.53, and a proportional part of labor, in Baily and Marcy, carpenter's bill, for a boom, 38 feet long, should not be allowed, on the ground, that there is no evidence of two booms being broken at the time of the disaster occasioning the loss. (This is included by the auditor for the reason that the schooner is proved to have been in good condition previous to the voyage, and that the spar rather appears by the log-book and other evidence, to have been broken or carried away at the time of the principal disaster, than at any other, and the survey at New Orleans alleged the captain to have stated to the surveyors, that two booms—viz. the topmast and lower studding sail booms—were lost on the ninth of November. This is the only direct evidence of the loss of the two booms on that day. The log-book, November 9th, and the captain and mate's depositions, answer 12, omit mentioning specifically, the loss of any booms on that day, the statement in all being that the heads of the foremast and mainmast were both carried away above the eyes of the rigging, and topmasts, tops, crosstrees, trussel-trees, and "some of the small spars" broken. One of the booms in the carpenter's bill is described to be the studding sail boom, 26 feet long, the other is not described, but is said to be 38 feet long; but the rate per foot, and the price at which it is carried out, show a mistake in the length, and that it was but 28 feet long. And it has been stated to the auditor, by an experienced person, that these spars may well enough come under the description of "small spars," on board of a schooner of the size of the Hannah.)

5. That the charge of $1.75 for three paint-brushes in shipchandler's bill should not be allowed, on the ground that the vessel ought to have paint-brushes as a part of its outfit. (Considering that the owners are not obliged to use their own paint-brushes, if they have any, for repairs of damages within the risks insured against, and that the three brushes purchased were probably not worn out in painting the schooner at New Orleans, but remained for the use of the owners, the auditor has included one half of the cost of them.)

6. That the charge in the same bill for pump leather, $4.50, and pump tacks, 88 cents, ought not to be included, as there was no evidence of any extraordinary injury to the pumps, and the owner ought to repair damage occasioned by mere wear and tear. (But as the auditor understands, that these descriptions of articles are not intended exclusively for the pump, but are used for divers purposes about a vessel; that the leather particularly is used in putting up and repairing rigging; and as there does not appear to have been any extraordinary wear and tear of the pumps, the probability seems to be, that these articles were used for other purposes than repairing the pumps.)

7. That the copal varnish charged in the same bill, $3.00, is rather for ornament than utility, and so ought not to be charged to the underwriters. (The auditor, however, understands from an experienced person, that this article is ordinarily used on the deck, and often on the sides.)

8. That the deterioration of the sails from the 9th of November to the time of arrival in New Orleans ought not to be allowed for in adjusting the average. That is, that the underwriters ought to be liable only for the repairs of the sails in the state in which they were directly after the damage insured against was done. The damage to the sails by such wear and tear might be from $20 to $25. (This deduction is not made in the adjustment reported, because the auditor understands the allowance of one third for new to cover it, and that makes no difference whether the depreciation for which the allowance is made, is occasioned by use before the loss, or afterwards, before repairs can be made.)

9. That there is no proof of damage by the disaster of the 9th of November to the main royal sail, that rendered a new one necessary, and that the new one accordingly ought not to be charged in the adjustment. (The survey at New Orleans recommends this new sail, and the auditor considers the evidence of the circumstances of the disaster as well as the general statement in the log-book, protest, and depositions as to damage to the sails, sufficient proof of this part of the loss.)

10. That the old sails, which were directed

by the surveyors to be sold, do not appear to be accounted for. (The plaintiffs have produced the affidavit of the master, dated November 20, 1837, stating, that the old sails were included in the proceeds of old materials accounted for.)

11. That the item for wharfage, $40, ought not to be included. (The auditor understands that every vessel is subjected to a charge on coming up to the levee at New Orleans, varying according to the tonnage, and covering the two expenses of dockage and wharfage charged in some other ports. The charge is exacted on the vessel's coming to the levee; and is the same, whether she discharge or takes in a cargo, or does not. The auditor, therefore, considers it as among the expenses incidental to making the port to refit, and that, though the vessel afterwards takes on board a cargo there for Boston, without any additional charge for wharfage, still this advantage, if any, is considered to be merely casual and incidental, and not to be taken into account in adjusting the average.)

12. That the fees of the port-wardens for survey at New Orleans ought not to be charged, on the ground of there being no necessity for a survey, and that it was not an authentic survey. (This charge is included, because the auditor understands it to be usual to survey in that port under similar circumstances, and because it appears to him, that the master acted prudently in having the survey made independently of any consideration of the customary course at that port. As to the survey being an authentic one, it appears by the testimony that the port-wardens are sworn officers; and the auditor understands, from the testimony in the case, that the matter came before them as port-wardens. The auditor is not aware of any particular forms being very rigidly required in making surveys. The master having pursued the customary course, the charge is included.)

13. That the expense of towing the schooner from the shipyard across the river back to the Levee, after she was repaired, ought not to be included. (The auditor understands that a ship at a ship-yard across the Mississippi, for repairs, is not in a position for commencing any enterprise, and that to be in such a position she must be towed across the river to the Levee again. The expense of towing her back is accordingly included in the adjustment.)

14. That Captain Barker's bill of $355.12 for labor, not being receipted, is not a sufficient voucher for that payment. (This bill appears to have been one of the documents annexed to Captain Barker's affidavit made before Mr. Roswell, notary public at New Orleans. That affidavit states, "All the materials and work charged in the annexed bills were furnished or done to the schooner." This is considered by the auditor as rendering the bill a sufficient voucher.)

15. That, as the Hannah did not sail from Tampico until the 5th of January, 1837, the charge for wages and provisions of the crew, if made at all against the underwriters, should not commence until that time. (The charge is begun from the 17th of December, 1836, in the adjustment, because the schooner was then fully discharged, and began to refit by temporary repairs and otherwise, to New Orleans.)

16. That, if the defendants are chargeable with the expenses of going to New Orleans, they ought to be credited with the proceeds of the sand ballast brought from Tampico. (This the auditor would have credited and asked the plaintiffs for an account of such proceeds. The captain makes affidavit, November 20, 1837, that the expenses attending the discharge of this ballast, were equivalent to the proceeds, viz. $32.)

17. That the wages and board of the mate during the repairs, $80, ought not to be included, on the ground that one person, the captain, was enough to attend to the repairs. (This charge is included in the adjustment, because the mate or some other person was wanted, as a ship keeper, and also because it does not appear but that the mate was as usefully employed about the repairs, as any other person who was employed about them.)

18. That the charge $10, by Mr. Roswell, the notary public at New Orleans, for arranging and authenticating the documents relating to the repairs, ought to be rejected. (This charge is included because it seems, under the circumstances, to have been the prudent step on the part of the master, to authenticate and forward to his employers, the vouchers for his expenses, and though the charge for this service by the notary, is higher, perhaps, than would be made in some other ports, yet the charges and fees at New Orleans, are well known usually to be high.)

The plaintiff objects: That the expense of towing the schooner across the Mississippi to be repaired, $15, and that of assistance in getting her across, and boat hire, $19.50, and that of towing her back after the repairs had been made, $20, ought not to be subject to the deduction of one third for new. (The adjustment was made by a deduction of a third from the items in question, merely because it is the more usual and general, though not the invariable practice, so to adjust a particular average in Boston. The auditor understands from a very experienced insurer, that there are exceptions to, or variations from, this practice, in the port of Boston. The adjustment was made in the above manner, without any evidence of, or reference to, any general commercial custom beyond Boston, in support of it, and without any consideration, on the part of the auditor, of the rule on this subject, to which the principles of the maritime law and the law of insurance would lead.)

Willard Phillips.

F. C. Loring, for plaintiff.
Paine & Aylwin, for defendants.

STORY, Circuit Justice. Upon most of the exceptions which have been argued, I do not think it necessary to make any particular remarks, as the reasons given by the auditor for his allowance and disallowance of items are entirely satisfactory to me. Indeed, considering his acknowledged professional learning, and great experience in this branch of the law, it would be difficult not to give his opinion great weight as to the practical adjustment of losses.

In respect to the leading objection which has been taken to the report, that it allows the expenses of wages, provisions, &c., of the voyage back to New Orleans, as in the nature of a general average, the jury have found that the voyage was a voyage of necessity for repairs to a proper and convenient port. According to the established doctrine in the Massachusetts courts, the wages and provisions of the crew, and other expenses, on such a voyage of necessity constitute a general average. It was so held in Padelford v. Boardman, 4 Mass. 548, and Clark v. U. S. Fire & Marine Ins. Co., 7 Mass. 365. See, also, 1 Phil. Ins. 348, 349; 2 Phil. Ins. 241, 242. But the argument is, that here there was no cargo on board, and that there can be no contribution by freight or cargo; but the whole is to be borne by the ship; and that, therefore, it is a particular average on the ship, and not a general average. The argument proceeds upon the ground, that what is, and what is not a general average, does not depend upon the nature and objects of the thing done, or sacrifice made, for the general good; but solely upon the point, whether there are in fact different contributory subjects. I do not so understand the law. As I understand it, the rule, as to what constitutes a general average or not, is founded upon the consideration, whether it is for the benefit of all, who are, or may be interested in the accomplishment of the voyage; or only for the benefit of a particular party. Suppose a person to be owner of the ship and cargo, and of course ultimately of the freight also; and he should insure the ship, cargo, and freight in three different policies, by different offices, if a jettison should be made, or a mast be cut away, or any other sacrifice be made for the common benefit of all concerned in the voyage; there can be no doubt that this would be a case of general average; and the underwriters on ship, cargo, and freight must all contribute as for a general average. What possible difference in such a case could it make, that the same underwriters were underwriters in one policy on the ship, cargo, and freight? or that the owner singly had no insurance at all, or an insurance upon one only of the subjects put at hazard? Must not the loss still be treated in the contemplation of law, as a general average, or in the nature of a general average? As I understand it the phrase, "general average," as found in our policies of insurance, is used in contradistinction to particular average. It means a voluntary sacrifice for the benefit of the voyage, and not merely an involuntary encounter of a loss without action or design. It looks to the efficient cause of the loss; and not to the effects of it. It looks to the consideration, whether the act is intended for the benefit of all concerned in the voyage; and not in particular to the consideration, who are to contribute towards the indemnity. To be sure, if the owner stands as his own insurer throughout, the question degenerates into a mere distinction; for it is a pure speculative inquiry. Not so, when there is an insurance; for in such a case, the underwriters are, pro tanto, benefited by the sacrifice or other act done; and they are, in a just sense, bound to contribute toward it. In the present case, the insurance was not upon any particular voyage; but it was on time. Unless the owner had a right to repair the bark so as to perform other voyages, within the year, at the expense of the underwriters, he must have had a right to abandon to the underwriters for a total loss; for in her crippled condition, the bark was incapable of any further employment. The going to New Orleans, therefore, was not an act solely for the benefit of the ship-owner; but was for the benefit of the underwriters, also, to save them from a total loss. The plaintiff was bound to repair, if he could, and to seek some convenient port for that purpose; and the expenses of going thither were properly incidental expenses to the repairs, in the nature of a general average, to replace the bark in the condition in which she was before the accident. If the plaintiff was not fully insured, he must contribute his proportion toward the common expenditure in going to New Orleans. If he was fully insured, he has only shifted the whole loss upon the underwriters. The expenses of going to New Orleans are just as much a matter of general average, as would have been the expenses of towing the bark into port, if she had become water-logged, or incapable of getting to a place of repairs, without the employment of an additional crew. Suppose, after the disaster, and arrival at Tampico, it had been necessary to employ a steamboat, to tow the bark to New Orleans to repair, would not the underwriters have been liable to pay the expenses as in the nature of salvage? If, in order to constitute a case of general average, it be necessary, that there should be some cargo on board, or some other things besides the ship at hazard, what is to become of the case of an insurance on an empty ship, whose masts are cut away in a storm, or which, after losing her masts, is compelled to be brought into port by salvors, in consequence of the disabled state of the

ship and the crew? Are not the underwriters bound to pay the loss and the salvage? If so, are not these emphatically charges in the nature of a general average? Suppose an empty ship, which is insured, is dismasted in a storm, and is compelled to put away into a port of necessity, in order to repair; or otherwise she must be abandoned at sea; are not the expenses of the voyage in such a case to the port of necessity of the nature of a general average? Are they not incurred, as much for the benefit of the underwriters, as for the ship owner? I put these cases, because it seems to me, that they bring the principle of the argument to its true test. And it seems to me, that it would be an entire novelty in cases of insurance, not to hold that, under such circumstances, the underwriters were liable for the charges, as in the nature of a general average. If so, the clause in the policy, that the company are not liable for wages and provisions, "except in general average," is wholly inapplicable, for the present case is brought within the meaning of the exception. I have no difficulty, therefore, in overruling this objection.

In relation to the next point of objection, as to the payment for the loss of the boat; it seems to me to be disposed of by the verdict of the jury. They have found, that it was a direct consequence attributable to the preceding storm; so that the principle, in case of loss, that, "causa proxima, non remota spectatur," is not at all interfered with. If the bark had become wholly unmanageable and innavigable from the immediate effects of the storm, I do not well see how the direct results from that unmanageableness and innavigability are to be treated otherwise than as a part of the loss. The storm is still the causa proxima. In causes of this sort, it will not do to refine too much upon metaphysical subtilities. If a vessel is insured against fire only, and is burnt to the water's edge, and then fills with water and sinks; it would be difficult, in common sense, to attribute the loss to any other proximate cause than the fire, and yet the water was the principal cause of the submersion. If a vessel be insured against barratry of the master and crew, and they fraudulently bore holes in her bottom, and thereby she sinks, in one sense she sinks from the flowing in of the water; but in a just sense, the proximate cause is the barratrous boring of the holes in her bottom.

In relation to the item for the survey at Tampico, there are three objections stated in the exceptions to its allowance. First, that the consul had no jurisdiction to order a survey; and that it should have been ordered by a maritime court. It is certainly the usual practice of courts of admiralty, and I deem it a very useful and beneficial practice, to order surveys in cases of this sort, as a matter of admiralty and maritime jurisdiction within their cognizance, and in my judgment, rightfully within their cognizance.[2] But I am not aware that it has ever been held to be indispensable to the validity of a survey that it should emanate from such a source. The object of a survey is to assist the judgment of the master, as to his proceeding to repair damage, or to sell the ship. It is designed to protect him in the fair discharge of his difficult and often critically responsible duty in great emergencies, by giving him the aid of the opinion of other men of sound judgment, intelligence, and skill in naval affairs. Indeed, this course is so universally adopted in practice, that a master, who should venture to deviate from it, would be treated as guilty of some improvidence, if not of gross rashness and neglect of duty. A survey is a common public document, looked to both by underwriters and owners, as affording the means of ascertaining upon the very spot, at the very time, the state and condition of the ship, and other property at hazard. In some policies, as for example, when what is technically called the "rotten clause" is inserted, such a document seems indispensable; as the survey may amount to a discharge of the underwriters. See cases on this clause, Dorr v. Pacific Ins. Co., 7 Wheat. [20 U. S.] 582; Janney v. Columbian Ins. Co., 10 Wheat. [23 U. S.] 411, 416–418; 1 Phil. Ins. 154, 158. But although surveys are and may be thus ordered by courts of admiralty, I am not aware, as I have already said, that this is an indispensable requisite. On the contrary, a survey may be made upon the mere private application of the master directly to the surveyors; and there does not seem any good reason, why, if an American consul should interpose in behalf of the master, and with a view to assist him, should appoint the surveyors at his request, and thereby sanction their competency to the task, such an appointment should be deemed objectionable. As a known public officer, the act of a consul would, even if he had no express or implied authority to make the appointment ex officio, be deemed an act of higher authority, and more entitled to public confidence, than that of the master himself, and might be an inducement to the surveyors to undertake the duty with more promptitude and responsibility. But I am not aware, that the issuing of a commission for a survey is, in truth, beyond the rightful authority of a consul in cases of this sort. That depends upon the course of trade and the common functions established by the general consent and customs of nations in regard to consuls. Our own statutes do not pretend to ascertain, or establish their rights, or their duties generally,

[2] This jurisdiction seems incidentally affirmed in the case of Dorr v. Pacific Ins. Co., 7 Wheat. [20 U. S.] 612, 613, and of Janney v. Columbian Ins. Co., 10 Wheat. [23 U. S.] 411, 418. Among my own MSS. is a copy of a decree of the admiralty court at Boston, in 1745, before Judge Auchmuty, in which, upon petition of the master to survey a vessel (The Three Marys), she was condemned, and ordered to be sold as unseaworthy.

but have merely given them certain authorities. One of these statutes has declared, "that the specification of certain powers and duties, &c., &c., shall not be construed to the exclusion of others, resulting from the nature of their appointments, or any treaty or connection under which they may act." Act 1792, c. 224, § 9 [1 Stat. 257]. Whether acts of this nature are usually done by consuls, is more than I know. But in the absence of all controlling proof, the fact, that the consul did make the appointment in this case, affords some presumption that it was a rightful exercise of authority. Be this as it may, there is no ground to say, that it is indispensable that surveys of this sort are absolutely required to be made under the authority of any maritime court. On the contrary, I am strongly impressed, that they are often made under the authority of other magistrates, and often at the mere private request of the master. See Wesk. Ins., tit. "Certificate," p. 89; Id. "Damage," p. 162, § 5; Id. "Estimate." The other objection to the survey, that the surveyors do not appear to have been sworn, is equally untenable. There is no law positively requiring it to be done. The remaining point under this head, as to the fees charged by the consul, is unmaintainable; for there is no law fixing his fees in a case of this sort.

In regard to the survey at New Orleans, the reasons given by the auditor for the allowance seem to me entirely satisfactory. It was a proper precaution to guard against any future difficulty in adjusting the loss; it might be important to the underwriters, as well as the ship-owner, as one of the appropriate documentary proofs to establish and limit the extent of the loss. See Benecke & S. Average (by Phillips; 1833) p. 384.

In regard to the deduction of one third new for old, the true interpretation of that rule has always appeared to me to be, that it is strictly applicable only to the labor and materials employed in the repairs, and to the new articles purchased in lieu of those, which were lost or injured by the disaster. It would be strange to apply it to other independent expenses, which were merely incidental to the loss; for in no just sense can it be said, that the owner is benefited thereby, or that he receives an enhanced value therefrom, beyond his indemnity. I am not aware, that any different exposition of the rule has ever been judicially established. The case of Sewall v. United States Ins. Co., 11 Pick. 90, so far as it goes, is confirmatory of it, as indeed is the text of the best elementary writers on the subject. 1 Phil. Ins. 371,372; Benecke & S. Average, (by Phillips) 167; Note, Id. 238, 374, 384, 385. For this reason and upon principle, I think, that the deduction allowed by the auditor of one third from the amount of the expense of towing the schooner across the Mississippi ($15), and that of assistance in getting her across and boat hire ($19.50), and that of towing her back ($20), ought not to stand. It is true, that from the report, it seems to have been the more general practice, though not a universal practice, in Boston, to make the deduction; and the auditor has stated, that this was his sole reason for allowing it, he having no reference to the principles of maritime law on the subject. But though the sum is trifling, I think the practice of making the deduction is inconsistent with principle, and ought not to be permitted to stand. It has a tendency to introduce confusion, and to perpetuate perplexing questions, as to what items are, or are not within the reach of the rule. If we stand by the purport of the rule in its simple form, as applicable merely to the labor and materials used in the repairs, or in the replacing of lost or injured articles, very little difficulty can arise in its practical application. Upon the whole, my judgment is, that the auditor's report ought to stand confirmed, except as to the deductions allowed upon these three small items; and, as to them, it ought to be reformed; and the verdict awarded and entered for the plaintiff accordingly.

NOTE. I have been furnished with a MS. copy of the report of the case of Bixby v. Franklin Ins. Co. [8 Pick. 86], at the November term, 1828, of the supreme court of Massachusetts. The report of the case is as follows:

"This was assumpsit on a policy of insurance made by the defendants, on the 3d day of January, 1825, on the brig Columbia and her cargo, on a voyage from Boston to a port or ports of the island of St. Domingo, and thence to her port of discharge in the United States. $2,500 was insured on the cargo, and $1,500 on the brig, which was valued in the policy at $2,000. The brig sailed on the 7th day of January, 1825, bound for the island of St. Domingo, as the mate testified, whose deposition was used on the trial, and is in the case, and on the 10th day of January met with a storm, in which she received the injury for which the suit is brought. When the weather moderated, the brig bore up for the first convenient port, and the first she made was Paix, in the island of St. Domingo. Finding it impracticable to obtain repairs there, or at any other port at which she touched, she went into Maragoane. The plaintiffs introduced evidence to show, that, in the state of the brig, and the course of the winds, it was impracticable for them to go to the city of St. Domingo, or any port to the eastward of the one she took, or to procure the necessary repairs at Maragoane, or at any other port in the island of St. Domingo. After discharging her cargo, and making some partial and temporary repairs, the brig proceeded in ballast to Wilmington, in North Carolina, where thorough repairs were made, and the vessel returned with a cargo to Maragoane, and took in her return cargo, and came back to Boston. No loss was claimed on the cargo. The defendants, on trial, proposed to show, by the log-book of a former voyage, that the brig in the preceding year, under the command of said Hibbert, but not with the same mate as on this voyage, made a voyage from Wilmington to Maragoane, and then back to Boston, and expected thereby to diminish the plaintiff's claim for seamen's wages, victualling, &c., by showing that the brig had not been obliged to depart from her accustomed and intended voyage. This was objected to by the plaintiff's counsel, and rejected by the judge, but the fact that the vessel did make such a voyage, was admitted by the plaintiff.

"The jury assessed damages on the ground of a partial loss. By the decision of the judge, with the assent of the parties, the jury omitted to consider and find damages for the seamen's wages and expenses of protest, surveys, &c., at

Maragoane, and wages from thence to Wilmington, where the crew were discharged on arrival. Should the action be sustained, an assessor is to be appointed by the court, who, under the orders of the court, shall assess the proper amount for wages and expenses as aforesaid, which is to be added to the verdict. The policy is made in the name of Bixby, Valentine & Co. and Joseph Hibbert, the captain. The firm of Bixby, Valentine & Co., consists of Luther Bixby, John S. Valentine and Orpheus Holmes. Before that copartnership was formed, Holmes and Hibbert owned the brig, in equal parts—they having purchased her of Samuel Upton, by a bill of sale, and taken out the papers in their own names. Neither at the time the copartnership was formed, in the summer of 1824, nor afterwards, was there any transfer made by Holmes, of his half of the brig to Bixby, Valentine & Co., by any bill of sale or other document, but she still continued to stand at the custom-house in the names of Holmes and Hibbert. On the 4th day of January, 1825, the day after the policy was made, Holmes and Hibbert surrendered their enrollment and took out a register for the brig, when Holmes swore that he, with the said Hibbert, were the only owners of said brig, and some years afterwards, she was sold and conveyed by Holmes and Hibbert, only by a regular bill of sale, to Nesmith and Leeds. When the copartnership of Bixby, Valentine & Co. was formed, a credit was entered in their books to Holmes for the estimated value of one half of the said brig, in the hand-writing of Holmes, who became book-keeper of the firm—and in the annual accounts of the company's stock, one half of the brig was introduced, till she was sold to Nesmith and Leeds, and until that sale, the said one half of the brig had been treated as the property of said company, and the repairs which were made on the brig from time to time, were paid for by the company. The policy, register, and bill of sale to Nesmith and Leeds, and all the papers used at the trial, may be referred to.

"The defendants object to the recovery of the plaintiffs at all. 1st. On the ground that Bixby and Valentine had no legal interest in the vessel. 2d. That if they had any capable of being insured, it was not insured by this policy, and no loss can be recovered in this case. If the court should be of opinion that these objections are well founded, the plaintiffs shall be nonsuited. Or, if the log-book was legally admissible for the purposes for which it was offered by the defendants, a new trial shall be ordered. Otherwise, judgment shall be rendered on the verdict, with such additions as shall be made by an assessor, to be appointed as aforesaid, or the court may make any other disposition of the action which law and justice may require."

The cause was afterwards, at March term, 1829, referred to an auditor, whose report was as follows:

Expense of seamen's wages at Maragoane, from the arrival of the Columbia at the port, on the 5th of February, 1825, to her departure from that port, March 9th, 1825,—one month and four days. The time of arriving and sailing are stated in the log-book and protest.

	Rate of Wages.	Time. Month.	Days.	Amount.	Vouchers.
Captain Hibbert	$30	1	4	$34 00	Shipping Papers.
Barrett (mate)	24	"		27 60	"
Wilson (seaman)	12	"		13 80	"
Rollock "	13	"		14 95	"
Rams "	14	"		16 10	"
Greene "	11	"		12 65	"
Cushing "	14	"		16 10	"
				$135 20	
Provisions for the same time; estimating for the captain $1 per day, for mate 50 cents, seamen 25 cents,—making $2.50 per day for thirty-two days,				80 00	
				$215 20	

The brig sailed from Maragoane March 9th, 1825, and arrived at Wilmington, N. C., March 25th, and discharged her crew March 29th,—twenty days (time stated in the log-book).

	Rate of Wages.	Time. Days.	Amount.	Vouchers.
Barrett (captain)	$30	20	$20	Rate of Barrett's wages not stated; wages of Captain Hibbert assumed.
Hildrup (mate)	24	"	16	Shipping Papers.
Four seamen; one at $11, one $12, one $13, two at $14 per month,	64	"	42 66	
			$78 66	
Provisions at the same rate as above			50 00	
			$128 66	

The brig sailed from Wilmington May 8th, 1825, arrived at Maragoane, June 17th, forty days—one month and nine days—(stated in the log-book).

	Rate of Wages.	Time. Month.	Days.	Amount.	Vouchers.
Captain	$30	1	9	$39	The rate of wages actually paid for this passage are not stated in the documents. The plaintiff assents to the previous rate, which is probably below that actually paid.
Mate	24	"		31 20	
Five men, at the same wages as above.	64	"		83 20	
				$153 40	
Provisions at the same rate as above, viz $2 50 per day, for officers and men for forty days,				100 00	
				$253 40	

Expense of documents at Maragoane:

		Vouchers.
Protest,	$16 50	Amount charged in an account purporting to be rendered by Capt. Hibbert.
Interpreting,	16 00	Cazilier's receipt.
Translating,	17 00	William Bastu's receipt.
Clearance,	4 50	Charged in an account purporting to be rendered by Capt. Hibbert.
	$54 00	

Note.—An item of $64 is charged in the accounts purporting to be rendered by Capt. Hibbert, for officer's fees; and $15 for port-warden's fees.

WILLARD PHILLIPS, *Assessor.*

From a memorandum on the back of the report, in the handwriting of the late Mr. Chief Justice Parker, the final opinion of the court was in favor of the plaintiff, for the allowance of the wages and provisions in going to the first and second ports of necessity, and also the expenses of the documents, &c., connected with the transactions. The vessel and cargo appear to have been owned by the same persons. The memorandum of the chief justice is in these words:—"We are of opinoin, that only so much of the damages found by the assessor as relate to the expense at Maragoane, from thence to Wilmington (N. C.), and at Wilmington until the crew were discharged, can be allowed. That from thence the vessel began a new voyage, instead of resuming the voyage from which she was driven by necessity. If the plaintiff is content with this, he may have judgment; otherwise, the cause must remain for argument at the adjournment.—J. P." The parties (it is understood) acquiesced in this opinion.

POTTER (PIKE v.). See Case No. 11,162.

Case No. 11,336.

POTTER v. PROVIDENCE WASHINGTON INS. CO.

[4 Mason, 298.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1826.

MARINE INSURANCE—GENERAL AVERAGE—CUTTING AWAY MASTS AND RIGGING—OWNERSHIP OF VESSEL AND CARGO.

1. A policy was underwritten on a vessel for twelve months. In the course of her voyages,

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

during this period, she sailed from Providence bound to New Orleans, with a cargo on board belonging to the owner of the ship; and encountered a gale, and was compelled to cut away her masts and rigging, and to return to New York for repairs, where it was found that the repairs would cost more than half her value. The cargo was taken out and sold by the owner, who had insured the same. The claim was now for a total loss of the vessel, she having been abandoned to the underwriters. In adjusting the loss, it was held, that the cutting away of the masts and rigging was a general average, to be borne by the ship and cargo in the same manner, as if they belonged to different owners.

[Cited in Griswold v. Union Mut. Ins. Co., Case No. 5,840.]

[Cited in brief in Scudder v. Bradford, 14 Pick. 14.]

2. In such a case, if the owners of the ship and cargo are different, the owner of the ship may recover the whole amount of his loss, without any deduction of the general average due on the cargo. But where the ship owner is also owner of the cargo, the amount due from the cargo may be deducted from the total loss on the ship, by the underwriter.

[Cited in Force v. Providence Washington Ins. Co., 35 Fed. 768.]

[Cited in brief in Forbes v. Manufacturers' Ins. Co., 1 Gray, 372. Cited in Greely v. Tremont Ins. Co., 9 Cush. 419; Matheson v. Equitable Ins. Co., 118 Mass. 212.]

Assumpsit on a policy of insurance, dated 10 Sept., 1825, as follows, "$5,000 on ship Jefferson and appurtenances for and during the term of twelve months in port and at sea, and at all times and places during that period, beginning the adventure on the 1st of September at 12 o'clock at noon." Premium, 8 per cent. The loss was averred in the declaration to be by perils of the seas. Plea, the general issue. At the trial, the facts were not disputed. It appeared that the ship sailed from Providence in August, on a voyage to New Orleans, with a cargo on board belonging to the plaintiff, who was also owner of the ship. On her passage she encountered a severe hurricane, and was so much wrecked and injured, that she was obliged to put into New York for repairs. On a survey there, it was found that she was injured more than her whole value; and the plaintiff [John D. Potter] accordingly abandoned her to the defendants. The cargo was taken out and sold by the plaintiff, who had insured the same, and made a claim on the underwriters, but no loss had been paid by the latter. During the hurricane, the masts and rigging, &c. were voluntarily cut away by the master to avoid foundering. The only questions made were, first, whether the cutting away the masts and rigging was a general average or not, to be borne by ship and cargo, for no freight was earned; secondly, if so, whether the defendants had a right to deduct from the plaintiff's demand, the amount which was due from him as owner of the cargo; or whether he was entitled to recover the total loss, and leave the defendants to their remedy against the underwriters on the cargo for the general average.

A verdict was taken for the plaintiff, subject to the opinion of the court on both points; and it was agreed that the adjustment of the average and other legal deductions should be made by a commissioner according to the opinion of the court.

Mr. Searle, for plaintiff, cited 1 Caines, 196, 215; 1 Johns. 412; 7 Johns. 57; 6 Mass. 318.

Mr. Bridgham, for defendants, cited Phil. Ins. 333, 353, 459; 7 Johns. 412; 1 Maule & S. 318; 9 East, 72; 4 Bin. 502.

STORY, Circuit Justice. There is no question in this case, but that there has been a total loss of the ship, for which the underwriters are liable. The injuries sustained by the hurricane were so great, that upon the ship's arrival in the port of New York, it was found that it would cost more to repair her, than she would be worth after she was repaired. An abandonment, therefore, was rightfully and seasonably made. The question now in dispute, arises from another circumstance. During the storm, the masts and rigging were voluntarily cut away for the benefit of all concerned, and this sacrifice, beyond all doubt, constitutes, in ordinary cases, a claim for general average upon ship, cargo, and freight. The owner of the ship is also owner of the cargo. The voyage being defeated, no freight was earned. The cargo was insured by another policy. No expenses were in fact incurred for repairs on account of the general average, and no loss has been paid by the underwriters of the cargo as the contributory share of the cargo to the average. Upon this posture of the facts, the defendants contend, first, that the plaintiff being owner of both ship and cargo, they are entitled to receive from him the amount of the contributory share of the cargo to this loss. Secondly, that this amount may and ought to be deducted from the sum received in the present suit.

In respect to the first point, it does not appear to me, that there is any reasonable ground for disallowing the general average. This case must be decided in the same manner as if a stranger were the owner of the cargo. The cargo has been preserved by a voluntary sacrifice, and the ship owner, if there had been no abandonment, would be clearly entitled to demand from the owner of the cargo, a contribution to the general average. It does not appear to me that the abandonment makes any difference in the case. A total loss of the ship, that is, total in construction of law, has arisen; but the cargo has been saved. Where indeed a partial loss or damage to the ship occurs in the course of a voyage, and afterwards, in the same voyage, a total loss of the ship, there the former is absorbed in the latter, unless expenses have, in the intermediate time, been incurred to repair it, and in that event, those expenses are payable by the underwriters in addition to the total loss. Jumel v. Marine Ins. Co., 7 Johns. 412, 424, note C.

But here, though a total loss has occurred, the previous sacrifice constituted not a loss solely to be borne by the ship owner, but a contributory loss to be borne by all the property at hazard. The ship owner had a right to say, I subsequently lost my vessel, but your property was saved at my expense, and you must contribute to relieve me from this burthen. If the ship owner may say so, it appears to me, that the same claim belongs to the underwriters after the abandonment, for they succeeded to the rights of the assured.

Then as to the second point. If this were a suit to recover the amount of the loss of the masts and rigging &c. sacrificed for the common benefit, I am of opinion, that the ship owner would be entitled to recover the whole amount of the loss, without first seeking to recover against the owners of the cargo their contributory share; and the underwriters must be left to recover their recompense over. The ship owner is entitled to receive his full loss by a peril incurred against, without troubling himself with any remedies over against third persons. I follow, in this respect, the doctrine in Maggrath v. Church, 1 Caines, 196, and the other cases in New York, which have succeeded it (Vandenheuvel v. United Ins. Co., 1 Johns. 412; Watson v. Marine Ins. Co., 7 Johns. 57), in preference to that of Lapsley v. United States Ins. Co., 4 Bin. 502. I speak here of a case where the ship and cargo are owned by different persons. Where they are owned by the same person, a different rule may well apply. There the same hand that loses, pays. As between himself and the underwriters on the ship, his real loss is only the contributory share of the ship to the loss. The other losses are borne by him as owner of freight and cargo, for which he directly is liable. If he actually repairs the loss, the expenses paid must be deemed expenses paid as well in his character of owner of the cargo, as of the ship. To declare that he would in such a case be entitled to recover the whole expenses against the underwriters, would be to decide, that he might recover a sum, which he was bound to pay on his own account; to recover that which he was bound immediately to pay back to the underwriters. The law does not justify such a doctrine. And the authority of Jumel v. Marine Ins. Co., 7 Johns. 412, is directly opposed to it; and Williams v. London Assur. Co., 1 Maule & S. 321, goes with the latter. In principle, there ought to be no difference, whether the owner of the ship has repaired the loss or not. In either case, he can recover only the amount of his loss. This loss must be in either case no more than what he has incurred as ship owner. In contemplation of law, as owner of freight and cargo, he is indemnified as to their portions of the loss.

My judgment accordingly is, that in this case there must be a deduction from the verdict of the amount of the contributory share of the cargo towards the loss, for to this extent the ship owner has actually in his own hands an indemnity. The case is precisely the same as if he had received from a third person, who was the owner of the cargo, the amount of his contribution. Pro tanto, it would be an indemnity going to diminish the total loss.

The district judge concurs in this opinion, and there must be judgment accordingly.

POTTER (RIDDLE v.). See Case No. 11,811.

Case No. 11,337.

POTTER v. SCHENCK.

[1 Biss. 515; 3 Fish. Pat. Cas. 82.] [1]

Circuit Court, N. D. Illinois. May Term, 1866.

PATENTS — VARIETY OF FORM NOT A CHANGE OF PRINCIPLE—INJUNCTION—WHEN GRANTED.

1. When a mechanic has the leading idea which is developed in Wilson's patent, once thoroughly understood and fixed in his mind, he can carry out that idea in a variety of forms, simply by the exercise of mechanical ingenuity, which nevertheless are not substantial variations from the invention patented.

[Quoted in Adams v. Joliet Manuf'g Co., Case No. 56. Cited in Norton v. Jensen, 1 C. C. A. 452, 49 Fed. 866.]

2. Merely reversing the feeding bar of Wilson does not change the principle of his invention.

[Quoted in Adams v. Joliet Manuf'g Co., Case No. 56.]

3. An injunction being the strong arm of equity, ought never to be granted without the most complete conviction, on the part of the court, of its absolute necessity.

4. If it be true that the patentee is entitled to his claims of invention as his property, there is an end to all hardship, because no man ought either in law or in morals to use the patentee's property without compensation and without his consent.

In equity. This was a motion for a provisional injunction to restrain defendants from infringing letters patent for "improvement in sewing machines," granted to Allen B. Wilson, November 12, 1850 [No. 7,776], reissued January 22, 1856 [No. 346], and extended for seven years, November 12, 1864. The defendants were selling single-thread sewing machines in which the cloth was advanced by a sliding presser foot, provided on the lower side with serrations pressing the cloth against the table or platform on which it rested.

The facts appear in the opinion of the court.

S. S. Fisher, for complainants.

J. Edwards Fay and Bonney & Griggs, for defendants.

DRUMMOND, District Judge. The alleged infringement consists in the violation, on the

[1] [Reported by Josiah H. Bissell, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission.]

part of the defendants, of the patent of Allen B. Wilson, obtained in January, 1856, called re-issue No. 346, and is for the feeding apparatus of the sewing machine and its appurtenances. It contains four claims.

One is for the method in which the cloth is moved by what Wilson calls the joint action of two surfaces between which it is clamped, and which act in a particular way so as to cause the cloth to proceed forward in the operation of sewing.

Another is the arrangement by which, in the operation of sewing, the cloth is held by the needle so as to prevent the cloth from moving backward during the return of the feeding apparatus.

A third is a mode by which the cloth is retained in its position and the needle permitted to escape, called stripping.

The fourth is the manner in which the upper surface is arranged or mounted, so as to enable the operator to lift it from the cloth in order to remove the latter.

This is a very general statement of the claims, and, of course, would not be understood except by those who had examined the specifications, or were familiar with the operation of the machine.

There is no controversy as to the validity of the patent on the claims set forth; the only question is as to the infringement.

It is alleged that the defendants have not infringed the claims set forth in the schedule of Wilson.

The examination, perhaps, would have been more satisfactory if there had been a model of the machine here precisely of the form of the part in question, in which it was originally devised and used by Wilson. The machines that are now operated by the plaintiffs, it is conceded, differ in form from that which is described in the claims of Wilson in 1856. Still, the apparatus, as now used, enables us to understand how it was employed in the machine when constructed in conformity with the specifications of Wilson.

The machines, now, have what is called the four-motion feed. According to the specifications and the proof, the arrangement of Wilson was to have something in the form of a shoe beneath the plate, upon which the cloth was placed, the upper surface of which was roughened by saw-teeth cut upon it. This shoe acted through an opening in the plate, and a motion was given to it backward and forward, so that when there was a pressure from above upon the cloth which was lying upon the plate, sufficient to force it upon the shoe, the teeth caught the cloth and carried it forward. This was the first claim. Then, when the shoe ceased to act, the needle pierced the cloth so as to prevent it from coming back; and that was the second claim. There was also an arrangement by which the cloth was held by the spring which created the pressure from above, so as to prevent it from rising and moving as the needle was withdrawn, and thus accomplished the process of stripping, as it was termed, in the third claim.

Then there was another arrangement by which this spring that presses upon the cloth was raised, so as to enable the operator to remove the cloth from the machine.

That substantially was the manner in which the feeding apparatus, as described by Wilson in the specifications, operated, and the question now is whether the apparatus used by the defendants interferes with or incorporates in itself the invention of Wilson in whole or in part. So far as I have been able to examine the question, I think that it does.

The machine of the defendants is a single thread sewing machine, one of the cheap kind. The main difference in the construction of the defendants' machine and that of Wilson, as to the feeding apparatus is this: in the machine of the defendants, the principal part of the feeding apparatus is placed over the plate upon which the cloth rests, instead of underneath. It is in fact in the form of a shoe more distinctly than that used by Wilson. This shoe is provided with saw teeth on the under side, and is made to press upon the cloth from above, substantially in the same way as the one used underneath the plate by Wilson, presses upon the cloth from below. The purchase as obtained by this pressure, and the teeth operating from the top instead of from the bottom, move the cloth forward. Then the needle goes in in the same way substantially and holds the cloth when the shoe is drawn back. The shoe also holds the cloth down or strips it from the needle when the latter is drawn up, and it is so connected with the upper part of the machine as to enable the operator to lift it and remove the cloth.

The question is, whether this is a substantial variation in all or any of its particulars, from the invention of Wilson as described in his specifications of 1856. I have already stated that it is not, and, as it seems to me, on this ground, viz: that when a mechanic has the leading idea which is developed in Wilson's patent, once thoroughly understood and fixed in his mind, he can carry out that idea in a variety of forms, simply by the exercise of mechanical ingenuity. Here was a great leading principle in the feed of the machine, devised and invented by Wilson. He, to be sure, describes the particular manner in which he carries out that idea; but once get that in the mind and it is clear that you can carry it out in a variety of forms. This is, it may be said, an ingenious variation or difference by which the idea of Wilson is carried out.

The shoe or main part of the feeding apparatus, is not placed beneath the plate upon which the cloth rests, but is on the top of the plate, or, as was contended and I think with a good deal of force, by the counsel for complainants, instead of being placed as Wilson describes it, it was merely reversed. It

is clear that that does not change the principle of the invention, and it is clear, too, as already stated, that a mechanic once having the idea in his mind could apply it by adopting a great variety of forms and devices, and this among others.

This device of Wilson's has been the subject of a great deal of litigation as is set forth in the bill. The claim has been contested with all the skill, ingenuity, and ability which could be brought to bear in this country upon a question which involves not only so much of personal and individual, but also so much of public interest, as a machine like this, which, it may be said, comes home to every family.

The invention of Wilson has stood the test of all this protracted and severe litigation; and it is shown by the proof that machines similar in their character to the machines used by the defendants have already come under judicial examination, and have been held to be infringements of Wilson's patent.

Now I understand and fully appreciate what was pressed with so much zeal and pertinacity by the counsel for defendants, that patentees frequently, by the monopolies of their inventions, accumulate wealth, form combinations, and may wear out men of inferior means in litigation. I understand, too, that it is not uncommon for parties interested in inventions to make arrangements with persons who use similar machines or improvements to those claimed by themselves, by which pretended litigation is carried on with a view of accomplishing a particular result. But I think that can hardly be true of the litigation in relation to this part of the sewing machine. And if it has been fair, carried on in good faith, and without collusion, then certainly the result is entitled to great consideration from this court, when the question is brought up here for the first time. So that independently of the view which I am inclined to take from an actual examination of these machines, I am confirmed in the conclusion to which I have come, by the result of this protracted litigation.

The affidavits filed on the part of the defendants, are all substantially the same. The witnesses undertake to specify various particulars in which they claim that the feeding apparatus used in the defendants' machines, materially differs from the invention mentioned in the specifications of Wilson.

It is unnecessary for me to go into a detailed examination of the particulars which are referred to by the various witnesses; such as, that one is the result of the joint action of two or more surfaces and the other is not; that one has not so many parts as the other; that there is a difference in movement, etc.

From what has already been said, the view of the court as to the substantial identity of the feeding apparatus of the machines will be apparent, the principle of the two machines, as it seems to me, being substantially the same, with a variation in form, merely, in one.

A very considerable portion of the argument for the defendants which was pressed upon the court with so much zeal and force, was the serious consequences upon the business of the defendants that would follow the issuing of an injunction. That, of course, every court of equity always appreciates. An injunction is the strong arm of equity. It often lays its hand upon a man's business and stops it entirely. It ought never to be granted without full conviction on the part of the court of its urgent necessity.

In this case, it was said by the complainants' counsel, and is apparent from the evidence and from the whole history of the case, that there are parties who sell single-thread machines similar in character and in price to the machines sold by the defendants, who have acknowledged the validity of the Wilson patent, and pay it a tribute by obtaining a license. Now if it be true that Wilson is entitled to these claims of invention as his property, as I think he is, there is an end, as a matter of course, to the alleged hardship. Because, if the defendants are using the complainants' property, they ought not to use it, either in law or in morals, without compensation and without their consent.

So, too, if the proprietors of other single-thread machines pay a license fee to Wilson or to his assignees, for this feeding apparatus, it would not be attended with ruinous consequences to these defendants, more than to other parties, to pay a license fee; so I do not think that the consideration urged is entitled to the weight it would be, if, in point of fact, the injunction were to stop absolutely and in any contingency, the sale of these machines. If it does, it is because the machine is so inferior to the single-thread machines of others in the market that it cannot successfully compete with them when paying a license fee.

Injunction granted.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

POTTER (SKOLFIELD v.). See Case No. 12,925.

POTTER v. SLOAT. See Case No. 11,342.

Case No. 11,338.

POTTER et al. v. STEVENS et al.

[2 Fish. Pat. Cas. 163.] [1]

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

PROCEDURE AT PATENT OFFICE—EX PARTE APPLICATION AND ADJUDICATION—PRIMA FACIE CASE FOR INJUNCTION.

1. The application for a patent at the patent office is not a judicial proceeding; it may be

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

made a contested proceeding, but rarely is so. It is made upon ex parte application, and can only be treated as an ex parte adjudication.

2. Where the complainant makes a prima facie case for an injunction, the defendant must overcome it by testimony, or the injunction will issue.

In equity. This was a motion [by Orlando B. Potter and Nathaniel Wheeler] for an injunction to restrain the defendants [Henry L. Stevens and James H. Stevens] from infringing letters patent for "an improvement in sewing machines," granted to Allen B. Wilson, November 12, 1850 [No. 7,776], and more particularly referred to in the case of Potter v. Wilson [Case No. 11,342]. So much of the opinion of the court is given, as follows a statement of the substance of the bill.

George Gifford, for complainants.

A. K. Hadley, for defendants.

SMALLEY, District Judge. The answer makes substantially but one issue with the bill. It denies that the said Allen B. Wilson, in said bill of complaint named, ever was the original and first inventor of these improvements in sewing machines. On the contrary, the answer sets up that one Solomon B. Ellithorpe was the original and first inventor of said improvement; and that he, the said Ellithorpe, made a full and complete drawing and specification of said improvement in the summer of 1847.

Some affidavits have been filed which it is hardly necessary to refer to, and also certified copies of papers from the patent office at Washington, and also the opinion of the circuit judge.

The fact that whatever right Allen B. Wilson or his assignees had to this invention is now in these complainants, is admitted. It is set out in the bill, and not denied by the answer.

The answer, however, claims—and that is the real question now in controversy before the court—that Allen B. Wilson was not the original and first inventor of this sewing machine, the right to make, use, and vend which is said to be infringed by these defendants. The answer claims that Solomon B. Ellithorpe is the original and first inventor thereof; that as early as 1847 he invented this machine, this feed motion; that some time after that—the answer does not specify when—he applied to the patent office for a patent, and lodged his specifications and drawings in the patent office. The papers furnished to the court from the patent office show that in June, 1858, nearly eleven years after he claims to have made the invention, he made application to the patent office for a patent. The commissioner of patents refused it. From that Ellithorpe took an appeal to the circuit judge of the District of Columbia. The hearing was had before this judge, and he refused the patent. These papers are referred to, and relied upon by the counsel for the defendant, for the purpose of showing that, in point of fact, the commissioner was satisfied that Ellithorpe was really the original inventor, and that the judge of the circuit court was equally well satisfied, but that they refused a patent because he did not follow it up—because he slept too long upon his rights, if he ever had any.

Another fact in the case should be stated, that under an act of congress application was made by bill to the circuit court in this district, to have an order issued to the commissioner of patents to grant to Ellithorpe a patent, and that subsequently a hearing was had upon the bill before Judges Nelson and Shipman, and that an order and a decree were made that the commissioner of patents at Washington should grant to Ellithorpe a patent.

It must be borne in mind that the bill sets out the several patents which were granted for these inventions, all the assignments in detail down to the present complaints—further, that a large amount of severely-contested litigation in relation to the right of the assignees of Wilson, as the first inventor, had been had in the state of Connecticut, and in the Southern district of New York, and adjudications sustaining their rights; that they had earnestly-contested suits in equity, and some at law in Connecticut, and others in equity here; and that after a very protracted litigation, a very large amount of testimony having been taken, the whole matter was finally heard before Justice Nelson and myself, in June last, and a final decree made, sustaining the complainant's claims from beginning to end, and awarding a final decree against all infringers in those suits. This is not denied by the counsel for the respondents; and that of itself affords sufficient, abundantly sufficient, prima facie evidence for the court to grant the preliminary injunction asked for in this case, unless the evidence introduced upon the part of the respondents clearly overthrows these various adjudications in favor of the validity of these patents.

Then the inquiry returns: What is the evidence upon which the defense relies to overthrow this strong prima facie case? They rely, in the first place, upon the answer of the defendants. They say that in 1847 Ellithorpe invented these improvements. It seems from that and his affidavit, which accompanies the answer, that he slept upon it for a period of ten or eleven years before he made any application to the patent office for a patent; that he then applied to the patent office for a patent, and the commissioner declined to grant a patent. He then took an appeal to the judge of the district court, and the judge also declined it. Now, the defense insist that inasmuch as the commissioner, in giving the reasons why he declined, based his judicial action upon the ground that he, Ellithorpe, had slept too long; and that, inasmuch as the judge, in giving the reasons

why he refused to order the patent to be issued, assigned the same reason, there are two judgments in favor of Ellithorpe being the first and original inventor.

On the contrary, this court, can give no such construction to these proceedings. In the first place, the application for a patent at the patent office is not a judicial proceeding; it may be made a contested proceeding, but rarely is so. It is made upon ex parte application. The hearing probably rested—judicially we must suppose from the papers it rested solely—upon the affidavit of the applicant Ellithorpe. The only thing that appears in the proceedings at all is, that the officers, after having refused the patent, remarked that they were of the opinion that he, Ellithorpe, was the first inventor, but failed to so follow up the invention as to secure any rights. That certainly is not an adjudication of the point, and if an adjudication, it can only be treated as an ex parte adjudication, and can have but very little weight in overcoming the earnest, contested litigations in different courts, between different parties, and in different states, which the bill sets up have been had by the complainants, wherein their rights have been fully sustained by the courts.

Another thing relied upon by the defendants to overcome this strong prima facie case, is the proceeding before Judges Nelson and Shipman, in this court, by which a decree and order were issued to the commissioner of patents, directing him to issue a patent to Ellithorpe on his specification and drawings in the patent office. That, it should be borne in mind, however (as it especially appears from the proceedings, and is so conceded by the arguments), was a mere ex parte hearing—no one appearing to contest it.

Again, in looking at that proceeding, this singular state of facts appears to have existed. It was first brought up before Judge Ingersoll, who, after a full examination, drew up and filed an elaborate and certainly able opinion upon the subject, denying the application and dismissing the bill. It is a little difficult to see, that bill having once been dismissed, and there being no application for a rehearing in the usual form, how the matter could come again before the court; and I was informed by Judge Shipman, when he was here, that he had just a few hours before ascertained the existence of this written opinion of Judge Ingersoll, and that, if he had known it, he was of the decided opinion that he should have regarded it as res judicata.

But laying the decision of Judge Ingersoll entirely out of the question, what effect has this ex parte hearing, based solely upon the affidavit of Ellithorpe? What effect ought that to have in overcoming the strong prima facie case of the complainants, arising from these various adjudications? There is nothing more, after all, than the affidavit of Ellithorpe, on which it was based; it is not pretended that there was any other evidence introduced. The court evidently made a decree upon a bill taken pro confesso.

Therefore, the evidence relied upon in favor of Ellithorpe being the first and original inventor, in opposition to the various adjudications in favor of the complainants' right and title, seems to have been entirely based upon an ex parte application, and upon the affidavit of the alleged inventor himself, after having slept upon the matter some ten or eleven years, according to his own account.

Under such circumstances, I can have no doubt that the evidence is entirely insufficient to do away with the prima facie case made by the complainants; and, therefore, the complainants are entitled to an injunction. Many other questions have been made in the case, but I have thought it entirely unnecessary to consider them, as this disposes of the motion, and it disposes of both applications in like manner.

And the order for injunction in both of these cases will issue according to the prayer of the bill.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

Case No. 11,339.

POTTER v. SUFFOLK INS. CO.

[2 Sumn. 197.] [1]

Circuit Court, D. Massachusetts. May Term, 1835.

MARINE INSURANCE — ACCIDENTS — INHERENT WEAKNESS OF VESSEL—STRANDING—LOSS BY EBBING OF TIDE.

1. Quære—If underwriters are liable for a loss within the terms of the policy, occasioned by the negligent or improper conduct of the master or owners.

[Answered affirmatively in Copeland v. New England Mar. Ins. Co., 2 Metc. (Mass.) 450.]

2. The underwriters on the common policy of insurance, are liable for all accidents arising from any extraordinary circumstances, and not from the inherent weakness of the vessel.

[Cited in Swift v. Union Ins. Co., 122 Mass. 578.]

3. Where an accident occurs in the ordinary course of grounding a vessel in a harbor, and there is no proof of inherent weakness, the loss must be attributed to some extraordinary cause, as the striking on some hard substance, or malposition, or overlaying the dock, which would be a peril of the sea, for which the underwriters would be liable.

[Cited in Anthony v. Aetna Ins. Co., Case No. 486; Pennsylvania R. Co. v. Manheim Ins. Co., 56 Fed. 303.]

4. A ship, proved to have been stoutly built, and between two and three years old, and without any circumstance in the evidence to lead to the supposition that she was rotten, or had at any previous period met with any calamity, having on board a small cargo, in a harbor, and at a wharf, which were usually safe for vessels of her tonnage, after taking the ground, was discovered to leak so badly, that surveyors were called, who, after a careful survey, reported the nature of her damage, and that "it was sustained

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

by the said vessel lying badly on the ground." *Held*, that this loss cannot be attributed to any inherent weakness of the vessel, but to some extraordinary cause, and is within the perils of the sea, for which the underwriters are liable.

[Cited in Hagar v. New England Ins. Co., 59 Me. 463.]

5. The effect of the memorandum clause in policies is not to enlarge the perils underwritten against, but to exempt the underwriters from certain losses, within these perils.

[Cited in Dole v. Merchants' Mut. Mar. Ins. Co., 51 Me. 472.]

6. To constitute a stranding, within the policy, the vessel must be on the strand under extraordinary circumstances.

7. A loss by the ebbing of the tide is a loss by the perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode.

This was the case of a policy of insurance dated on 30th of March, 1830, "for $9000 on the brig Benjamin Ruggles, at and from New York, commencing the risk at noon on the 27th of March, 1830, to, at and from, all ports and places to which she may proceed, for and during the term of one year from that time," with a provision for a continuation of the risk if she should be then at sea, &c. at a premium of 7 per cent. Vessel valued at $15,000. The policy contained the usual risks of Boston policies. The declaration contained several counts. (1) For $987.53, a proportion of general average incurred; (2) for a total loss by perils of the seas; (3) count for money had and received. Plea, the general issue. The facts not in controversy in the cause were as follows: The brig being of 296 tons burthen, perfectly seaworthy at the commencement of the voyage, sailed from New York for Philadelphia and then for London, and arrived at London. She afterwards sailed from London for Newport, in Monmouthshire in England, and safely arrived there in the latter part of June, 1830. The purpose of going to Newport was to take in a cargo of iron for New York. On the 6th of July, the brig, having discharged a part of her ballast, hauled along side the iron wharf in Newport, and on the 9th of July commenced loading, and continued to discharge ballast and load iron until the 17th of the same month, and then had on board about 290 tons of iron, which was not an undue cargo for a vessel of the size of the brig, she being capable of carrying more than 400 tons of iron. The harbor of Newport is a dry harbor, the tide rising and falling about thirty feet; the bottom, at the wharf where the brig lay, consisted of soft mud of several feet thickness, resting on a stony bottom, commonly called "shingles." On the 18th of July, it was found, that the brig made a good deal of water, fourteen inches per hour. A surveyor was called, who directed the cargo to be unloaded, and the vessel put into a dry dock, in order to inspect her bottom. She was accordingly unloaded and put into a dry dock. The surveyors, in their survey, state, that upon "a strict and careful survey of the damage sustained by the said vessel, lying badly on the ground at Tredegar wharf, Pillgwenlly" (the iron wharf), they found the butt ends of the sheathing started off, the false keel very much chafed, and the scarf of it hove out. On taking off some sheathing board in the way of the bilges, keel, and garboard, they discovered the butts to be very open, and the seams in general much strained, and in some places the oakum worked out. They afterwards, when the whole of the cargo was taken out, and the sheathing was taken off, and the bottom trimmed down clean, in pursuance of their recommendation, made a second survey, in which they state, that the butt ends and seams, fore and aft, were much strained; and several of the butts started, particularly in the bilges and bottom; several treenails bad, and butt bolts started in and out; three planks under the larboard bilge very much damaged, worm-eaten and split; the false keel much chafed, and the scarf started; the butts and seams of the water-ways, covering board and deck, strained and open. They recommended the false keel to be dubbed down, and fresh bolted; three planks under the bilge to be taken out, and replaced with three new ones (proper shifts), and bad treenails bored out; the ship properly calked from keel to gunwale, water-ways and decks all round, and new wood sheathed. They further stated, that the lumber and rim boards were up, and none of the ground timbers were broken; but were all sound and good. The repairs were accordingly made. The brig took in a full cargo of iron, viz. about 450 tons, and safely arrived therewith at New York.

The parties agreed, that the cause should be heard by the court, and a verdict for the plaintiff [Robinson Potter] taken subject to the opinion of the court, upon the whole evidence; and then the amount to be ascertained, if necessary, by an auditor, according to the principles decided by the court.

J. Mason, for plaintiff. T. Parsons and S. Hubbard, for defendant.

STORY, Circuit Justice. The principal claim now in controversy is for the repairs made at Newport. And the question is, whether, under all the circumstances in the case, they are a loss within the perils in the policy; or rather, as the declaration is framed, whether, it is a loss by the perils of the seas, for which the underwriters are responsible. The brig was built in Newport (Rhode Island), in 1827, of oak and spruce of the first quality, and quite strong and stout. And no evidence exists to show, that she had, during the present, or any former voyage, sustained any such injuries as would materially impair her structure or strength. She had, in a previous voyage, carried a cargo of 400 tons of rail-road iron from the neighboring port of Cardiff, in Wales, to Philadelphia, and the loading was under circumstances not materially different from these on the present occasion, so far

as the harbor and fall of the tide are concerned. That the loss on the present occasion arose from severe straining of the vessel cannot well be doubted. But the important inquiry is, as to the cause or manner, in which it was occasioned. Was it from the ordinary manner of the ship's taking the ground in such a harbor? It is hardly to be presumed, that such could be the fact; for under such circumstances, the harbor or wharf would not be a fit place for vessels of such a burthen under any circumstances; which is not pretended, and indeed, is refuted by the evidence. If the harbor or wharf was an improper one for such a ship, and the loss was occasioned by the negligent or improper conduct of the master, then, indeed, the underwriters would not be liable for the loss, unless in those cases, in which, upon the doctrine, "Causa proxima, non remota spectatur," underwriters are held responsible for losses. Perhaps it may be thought, that the doctrine maintained in Massachusetts, contrary to what has been maintained in England and in the supreme court of the United States (See Busk v. Royal Exchange Assur. Co., 2 Barn. & Ald. 73; Walker v. Maitland, 5 Barn. & Ald. 171; Bishop v. Pentland, 7 Barn. & C. 219; Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 222), is, that no recovery can be had for a loss of this sort, caused by the negligence of the owner or the master. I do not say, that it has been definitely so adjudged in Massachusetts; but such has been the course of opinion in the state. See Brazier v. Clap, 5 Mass. 1; Cleveland v. Union Ins. Co., 8 Mass. 321; Ellery v. New England Ins. Co., 8 Pick. 14, 22. But it is unnecessary to decide this point; because it cannot be doubted from the evidence, that in the ordinary course of taking the ground in this harbor, or at this wharf, the present loss would not have occurred. It must, then, have arisen either from the inherent weakness of the vessel, or from some extraordinary accident or casualty. There is no doubt, from the evidence, that such a loss might be occasioned by the vessel striking on some hard substance, or from the vessel overlaying her dock, or from some mal-position. Some of the witnesses assert, that accidents of the like sort have occurred in this very harbor from such overlaying the dock or mal-position. The captain of the brig, however, attributes this very loss to another circumstance, viz. the striking upon some hard substance. But, whether it was occasioned in the one way, or in the other, or in any other unknown manner, if it was not such a loss as would ordinarily occur in taking the ground at that wharf on the ebbing of the tide, and it was not in truth occasioned by the inherent weakness of the vessel itself, it is not material; for the underwriters are responsible for all accidents of this sort occasioned by the recess of the tide, where they arise from extraordinary and extraneous circumstances, and not from such inherent weakness. Striking on a hard substance would be such an extraordinary accident. But it is only one instance, illustrative of the rule, and not itself of the essence of the rule. Any other accident, not in the usual course of grounding on the recess of the tide, but arising from some unexpected and unusual cause, would be equally within the rule. There is no doubt, that any injury, which must arise in the ordinary course of grounding at every tide in a tide harbor is not a loss within the policy; but it is treated as the ordinary wear and tear of the voyage. There must be some extraordinary injury, not arising from the ordinary course of the navigation to make the underwriters responsible.

It appears to me, that this view of the matter is fully borne out by the authorities. The case of Fletcher v. Inglis, 2 Barn. & Ald. 315, is directly in point. There, a transport in the government service, insured on time, was moored in the harbor of Boulogne, near one of the quays. The harbor of Boulogne is a dry harbor, with a hard uneven bottom, and upon the recess of the tide, the ship took the ground and struck hard, and received some injury in several of her knees, for which the suit was brought. The question was, whether the loss was a loss by the perils of the sea within the meaning of the policy. The argument was, that it was a mere taking of the ground under ordinary circumstances; and, therefore, the injury was but ordinary wear and tear; and that it did not arise from any extraordinary accident, which would be a peril of the sea. But the court were of opinion, that the loss was by the perils of the sea. Now, the sole ground of this determination must have been, that the loss was not such, as would naturally and commonly occur by the ordinary grounding; for then it would be mere wear and tear; but that it was unusual and extraordinary in character and degree. The case of Thompson v. Whitmore, 3 Taunt. 227, is clearly distinguishable. There, the loss was, while the vessel was hauled down on a beach to be cleaned and caulked; and, when the tide fell, some of the planks of the side, on which she lay, gave way, and some of her foot hooks were broken; and it was held, that, as the damage happened on land, it was not a loss by the perils of the sea; which was the only loss declared on. Rowcroft v. Dunmore, there cited, was decided on the same ground. In Phillips v. Barber, 5 Barn. & Ald. 161, the loss under like circumstances was held not to be by perils of the sea, but still that it was a loss within that policy.

The cases on the memorandum clause, in the common policies, so far from impugning, fortify the doctrine. They all proceed upon the definition of what constitutes a stranding in the sense of the policy,—so as to let in all losses by the ordinary perils, within the policy. Now, if the losses in those cases, supposing there were no memorandum clause, would not be within the policy, it would be wholly unnecessary to consider, whether

there was a stranding, or not; for the underwriters would not be liable, either way, for the loss. The memorandum clause does not operate as an enlargement of the perils underwritten against; but it operates to exempt the underwriters from certain losses within those perils. It seems to me, that those cases are founded in entire good sense. They decide this general principle, that where the vessel, in a tide harbor, takes the ground in the ordinary way upon the ebbing of the tide, it is not a stranding within the policy, although, in common language, the vessel is on the strand. But, to constitute "stranding," she must be on the strand under extraordinary circumstances, or from extraneous causes. I do not go over the cases. They are commented on with great ability and clearness in Wells v. Hopwood, 3 Barn. & Adol. 20, and Kingsford v. Marshall, 8 Bing. 458, which contain all the learning upon the subject. But in none of those cases was there any doubt, that the loss itself, except for the memorandum clause, would have been a loss within the policy. In Kingsford v. Marshall, Id. 462, Lord Chief Justice Tindal prefaced his able opinion by saying, "That the injury done to the ship or goods by settling on a hard substance at the bottom of the harbor (which was the case before the court) would be a damage recoverable on a policy on a ship, or a policy on goods, not included in the memorandum, as an injury occasioned by perils of the sea, is beyond all doubt." It thus affirms the principle, that the loss by the ebbing of the tide is a loss by the perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode. If a ship should, in taking the ground, fall over, and thereby bilge (which would be no ordinary injury, but an unusual accident), it would be a loss by perils of the sea, just as much as it would be if done by striking on a hard substance. This seems also to have been the doctrine in Carruthers v. Sydebotham, 4 Maule & S. 77, as it certainly was in Wells v. Hopwood, 3 Barn. & Adol. 20, and Bishop v. Pentland, 7 Barn. & C. 219. The case of Fletcher v. Inglis, 2 Barn. & Ald. 315, did not turn upon any distinction, whether the injury was by a hard or by a soft substance; but upon the point, whether it was an ordinary injury, or an extraordinary accident. Unless, therefore, that case is to be overturned, and it has no where been questioned or denied, it governs the present, if the present injury was not from the inherent debility of the ship; for no person pretends, that it was the ordinary wear and tear in grounding in the harbor of Newport. The only case, which can, as I think, be deemed to lead in the opposite direction upon this point, is Hearne v. Edmunds, 1 Brod. & B. 388. That case, however, turned, not upon any question, as to the loss being a loss by the perils of the sea; but, whether it was a case of stranding. So it has been understood in all subsequent discussions on the same subject; and if otherwise understood, it would be irreconcilable with other decisions.

The present case is, therefore, after all, narrowed down to the consideration, whether the loss was from the inherent weakness of the vessel; for if it was not from such weakness, it was occasioned by an unusual and extraordinary accident in grounding, upon the ebbing of the tide, which would be a peril of the sea. Upon examining the testimony, it does not strike me, that there is any sufficient proof of such weakness. So far as the proof goes, it seems to me to be, if not altogether, at least by a great preponderance of weight, the other way. In the first place, the original build and age of the vessel will not justify any such conclusion. She is proved to have been strongly and stoutly built. She was only between two and three years old; and there is nothing in the whole evidence to lead to the slightest supposition that she was rotten, or had, at any previous period, met with any calamity, which could render her either infirm, or incapable of carrying such a cargo. On the contrary, in a prior voyage, she had taken on board a cargo of railroad iron of 400 tons at the neighboring port of Cardiff, where the tide ebbs and flows in the like manner, without the slightest complaint or injury. In the next place, she was not, at the time of this accident, heavily laden. She had on board only about 290 tons of iron, which no one now pretends was either a burthensome or overloaded cargo for her in such a harbor; and the wharf, where she lay, was a safe wharf for vessels of her tonnage. The principal foundation, upon which the argument of her inherent weakness rests, is, that she was so greatly strained and injured, that it could not have arisen from the ordinary wear and tear of grounding in her local position, or from her cargo, which was not a heavy cargo; and, therefore, it must have arisen from her inherent weakness. Now, there is this difficulty in the very structure of the argument, that it does not provide for certain other events, either of which was capable of producing the same effects, viz.: striking on a hard substance in grounding, or overlaying her dock, or accidentally taking the ground in a mal-position, or at an unsuitable point, so as to throw an unusual and extraordinary strain upon the parts of the vessel, which sustained so much injury. Besides; this supposed inherent weakness is not only not established by the antecedent history of the vessel in other voyages; but it is in apparent opposition to her subsequent history. In this very voyage, after the repairs were made upon her (which were not great) she took on board a cargo of 450 tons of iron, and brought it safely home; and in other voyages she has carried cargoes equally burthensome. It seems to me exceedingly difficult to maintain, that, under such circumstances, there is any just

ground to attribute the injury to any inherent incapacity of the vessel to bear such a cargo in the ordinary way, in such a harbor, at the ebb of the tide. It is no answer to say, that, in fact, she proved too weak to bear it. It is necessary to show, that such inability was the result of her intrinsic weakness, and not of any extraordinary or extraneous cause.

My opinion, upon a full survey of the evidence, is, that the loss is not attributable to any inherent weakness of the vessel, but is attributable to other extraneous and extraordinary causes, such as striking some hard substance, or mal-position, or bad taking of the ground, or overlaying the dock. If attributable to any such extraneous and extraordinary cause, taking effect by reason of the ebbing of the tide, it is in my judgment a loss by perils of the sea, for which the underwriters are responsible. The verdict for the plaintiff is, therefore, correct in principle; and the cause will be referred to an auditor, to ascertain the amount, to which the plaintiff is entitled.

Case No. 11,340.

POTTER v. THAYER et al.

[Holmes, 293; 6 Fish. Pat. Cas. 603; 2 O. G. 32.] [1]

Circuit Court, D. Massachusetts. Dec. 2, 1873.

PATENTABLE INVENTION—INFRINGEMENT.

1. It is not a patentable invention to substitute in a device for securing a button-head or stud to a helical shank, a disk soldered to the shank and sunk in the head or stud, and having a serrated edge to keep it from turning, in place of a disk so soldered and sunk, having a smooth edge.

2. A patent for a device for attaching a button-head to a helical shank by means of a disk with a smooth edge, soldered to the shank and sunk in the button-head, in combination with one or more cross-bars secured to the shank or head and resting in grooves in the bottom of the head radial to the shank, is not infringed by a stud in which a disk with a serrated edge to hold it in place is soldered to a helical shank and sunk in the stud-head.

[Final hearing on pleadings and proofs. Suit brought [by Charles L. Potter against Oscar S. Thayer and others] upon letters patent for "improvement in devices for attaching the shanks to mineral and composition buttons," granted Charles L. Potter, December 13, 1870 [No. 110,070]. The claim of the patent was as follows, viz.: "What I claim as my invention, and desire to secure by letters patent, is that improvement in the means for fastening shanks to mineral and other like buttons, which consists in combining a cross-bar b with a base-plate a, to which latter the shank is attached, both cross-bar and plate being secured to the button-head, substantially as described."] [2]

B. F. Thurston and W. W. Swan, for complainant.

C. D. Wright and J. E. Maynadier, for defendants.

SHEPLEY, Circuit Judge. Complainant is the patentee of an improvement in devices for attaching the shanks to mineral and composition buttons. Oscar S. Thayer, one of the defendants, has also taken out a patent of a subsequent date for an improvement in shirt-studs, which related to the method of securing the helical screw more firmly to the button of a shirt-stud by means of teeth formed on the edge of the cup which is sunk into the button.

The method first adopted of securing the helix of wire to a shirt-stud or button, was to solder the wire to a small disk of metal. This disk was then dipped in cement, and pressed closely into the hole sunk in the stud. The hardening of the cement held the disk firmly in the hole. Afterwards the use of cement was dispensed with, and the metal disk was made cup-shaped. The wire was soldered to the convex side of the cup-shaped disk. The cup was then placed in the hole in the stud, and a small tool was used to flatten the cup, and cause its edges to force themselves into the material of the stud. Defendant makes his disk and places it in the hole in the same way, and flattens it with the same tool; the only difference being that the edge of his disk is roughened or serrated, to overcome the liability of the disk to be turned in the hole by the action of screwing the helical shank into the hole in the shirt.

The complainant makes use of the same device of a disk soldered to the shank, to be inserted in the same way into a circular cavity in the bottom of the button, and held by cement, or burnished down at the edge; but, in addition thereto, he employs a metallic cross-bar, which is soldered to the plate or shank, and is let into channels cut in the bottom of the button radial to the shank. The ends of the cross-bar are also bent, to enter holes drilled in the button-head at the ends of such channels.

The object of the complainant's invention was to obviate the difficulty which had been experienced in attaching such shanks to the head so as to prevent them from becoming loosened by the operation of screwing in and out the button.

Complainant contends that defendants' serrated disk is the equivalent of his combined base-plate, or disk, and cross-bar. His position, substantially, is, that any projection from the periphery of the disk would be an equivalent of his cross-bar. If his patent were to receive a construction as broad as contended for, it could not be sustained, for it would then be a patent for substituting for a

[1] [Reported by Jabez S. Holmes, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from Holmes, 293, and the statement is from 6 Fish. Pat. Cas. 603.]

[2] [From 6 Fish. Pat. Cas. 603.]

circular disk that turned in a circular hole, a form of disk and hole other than circular. If the difficulty to be obviated was that the circular disk attached to the shank became loosened and turned in the circular hole in the operation of screwing in and out the button, it required no invention to substitute for the circular disk a square or triangular one, or one of any form not circular. This is what Thayer has done, and it is very difficult to see sufficient invention to support his patent for a mere substitution of a serrated edge which is forced into cavities which it makes in the button, or cavities made to receive it, for the circular edge which had been before used. It required no invention in the complainant merely to substitute a form of disk not circular for the old circular disk. This is what is done whenever a mechanic uses a spline or fin to prevent one thing from turning upon another. The complainant did not do this merely. With reference to the materials to which his shank is intended to be applied ("mineral and composition buttons"), he found that there were practical difficulties in making the hole in the stud square or triangular or polygonal, as the hole could only be made cheaply by boring. But, by the tools in common use, a slot could be sawed or cut across the hole, and, if necessary, other holes bored at the extremity of the slot to receive the bent ends of the cross-bar which fitted into the slot. For this combination his patent can be supported; but his claim cannot be sustained upon a construction broad enough to cover any form of disk which is not circular. As it required no invention in the state of the art as it existed at the date of complainant's invention to substitute a disk with a serrated edge for the old disk with a circular edge, and as this is all that the defendants have done, they cannot be considered as infringing upon his patent, which is for the combined cross-bar and disk, both disk and cross-bar being arranged as described in his patent.

Bill dismissed.

POTTER (UNITED STATES v.). See Cases Nos. 16,075–16,078.

POTTER (WATT v.). See Case No. 17,291.

Case No. 11,341.

POTTER et al. v. WHITNEY.

[1 Lowell, 87;[1] 3 Fish. Pat. Cas. 77.]

Circuit Court D. Massachusetts. May, 1866.

INJUNCTIONS IN PATENT CAUSES—HEARING UPON EX PARTE AFFIDAVITS—TITLE AND INFRINGEMENT.

1. As a general rule, if the plaintiff in a patent case in equity has made out a clear title, and the question of infringement presents no difficulty, an injunction will be granted.

2. The hearing is had upon ex parte affidavits, and if the questions are difficult and complicated, especially if they involve disputed facts which have never been passed upon by a court or jury, then, although the court may be inclined to think the complainant is right, yet it will not interfere at this stage of the cause, whether the questions relate to title or infringement.

3. And even where the title is clear and the infringement clear, yet if there are peculiar circumstances which show that the defendant's interests would be very injuriously affected, while those of the plaintiff would not be so affected, an injunction may be refused.

[Cited in Eastern Paper-Bag Co. v. Nixon, 35 Fed. 754; Southwestern Brush Electric Light & Power Co. v. Louisiana Electric Light Co., 45 Fed. 896.]

4. There is always an element of discretion entering into the consideration of the question, and all that a complainant is entitled to is the best judgment of the court upon a question of judicial discretion, and not to an absolute injunction on any given state of facts.

[Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 804.]

5. Although it is the duty of the judge in every case of this nature, where the defendant has not been a party to any former suits, to examine the case anew, and to exercise his discretion upon the questions presented, yet when the questions are in fact the same as in the former cases, he cannot but admit those decisions as having great weight,—as much as in any other case in which the point in controversy has been passed upon and decided.

[Cited in McWilliams Manuf'g Co. v. Blundell, 11 Fed. 422.]

6. Maynard's primer would not be likely to suggest even to an ingenious mechanic, and did not in fact suggest to Wilson his improvement, and the latter was patentable notwithstanding the prior existence of the former.

[Cited in Johnson v. McCabe, 37 Ind. 539.]

This was a motion [by Orlando B. Potter and others] for a provisional injunction, to restrain defendant [Washington Whitney] from infringing letters-patent for "improvement in sewing-machines" granted to Allen B. Wilson, November 12, 1850 [No. 7,776], reissued January 22, 1856 [No. 346], and extended for seven years from November 12, 1864. See Potter v. Holland [Case No. 11,330]. The defendant was manufacturing and selling single-thread sewing-machines, in which the cloth was advanced by a sliding-presser foot, provided on the lower side with serrations pressing the cloth against the table or platform on which it rested.

B. R. Curtis, George Gifford, and E. L. Sherman, for complainants.

Joel Giles, F. A. Brooks, and L. A. Jones, for defendant.

LOWELL, District Judge. The principles which govern courts in granting or refusing preliminary injunctions in patent cases are well established. As a general rule, if the plaintiff has made out a clear title, and the question of infringement presents no difficulty, an injunction will be granted. The hearing is had upon ex parte affidavits, and if the questions to be decided are difficult and complicated, especially if they involve disput-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission.]

ed facts which have never been passed upon by a court or jury, then, although the court may be inclined to think the complainant is right, yet it will not interfere at this stage of the cause, whether the questions relate to title or to infringement. And even when the title is clear, yet if there are peculiar circumstances which show that the defendant's interests would be very injuriously affected by an injunction, while those of the plaintiff would not be so affected by refusing it, it may be refused. Such were the cases of Howe v. Morton [Case No. 6,769], decided by Judge Sprague, and the burring-machine case, —Morris v. Lowell Manuf'g Co. [Id. 9,833],— which came before me; in both of which the patent was about to expire, and the defendant's business would be very seriously interfered with for the few weeks that the exclusive right would remain in force, only to be resumed again immediately afterward at great expense and loss. There is, therefore, always an element of discretion entering into the consideration of this question, and all that a complainant is entitled to is the best judgment of the court upon a question of judicial discretion, and not absolutely to an injunction on any given state of facts. The present case does not present any peculiar features of hardship, nor any difficult question of infringement, and depends only on the validity of the patent.

These cases being tried, as I have said, on ex parte evidence, must be decided on broad views of the rights of the parties. It is usual to present proof, either of long and general acquiescence in the plaintiff's exclusive rights, or of their having been sustained by the courts. The ground on which acquiescence is important is that it shows exclusive possession, which, if it has been of long standing, open and notorious, is a clear foundation of a presumption of title. It is not always, however, so satisfactory as positive adjudications, because it may have arisen from the comparatively small commercial value of the invention, and in that case shows only that no one has thought it worth infringing.

In the present case it is in evidence, and is not denied, that very many suits have been brought upon this patent, every one of which has been decided in favor of the patentee. Two of these, one at law and one in equity, were carried as far as they could be carried in the circuit courts for the second circuit, and a final judgment and decree were given upholding the patent. Of the numerous injunctions, many were granted after argument and careful deliberation.

I cannot say that this extensive litigation shows a general acquiescence in the inventor's rights, excepting in the sense that the decisions of the circuit courts have been acquiesced in; but the result of the suits shows a great unanimity of opinion among many judges, including the presiding judges of this court, in favor of the patent.

Although it is the duty of the judge in every case of this nature, where the defendant has not been a party to any former suits, to examine the case anew, and exercise his discretion upon the questions presented, yet when the questions are in fact the same as in former cases, he cannot but admit those decisions as having great weight, as much as in any other case, arising, for instance, in admiralty or at common law, in which the point in controversy has been passed upon and decided.

Upon a careful examination of the case and of the several opinions furnished by counsel, I am not prepared to say that I dissent from the conclusions reached in those cases. One new point has been raised before me, founded upon a machine not given in evidence in any former trial, and which, it is argued, anticipates the plaintiff's invention. This is the Maynard primer, a patented improvement in guns and pistols. On examination of that machine, it appears that Maynard pushed forward his priming paper or pasteboard in a mode which bears a considerable resemblance to the feed-motion by which the plaintiff advances cloth to the needle in his sewing-machines. But the contrivance, as found in the fire-arm, is combined with two devices essential to the proper operation of that machine, and the absence of which is essential to the operation of the plaintiff's machine.

If the holding-spring and the channel are both removed from the primer, it is useless as a primer, but might probably feed cloth; but Maynard never did remove them; and it is shown that his contrivance would not be likely to suggest, even to an ingenious mechanic, and did not in fact suggest to Wilson his improvement; and even if it had, I cannot see why the new arrangement would not be patentable. The third claim of this patent has been repeatedly held to be good, notwithstanding the earlier patent of Howe; but as this point has been reargued with a good deal of earnestness, I may say, that it appears to me, that Howe's feeding surfaces are not substantially like those of Wilson, because his bar "X" aids in the feeding, so far as it is a stripper, but no farther, while Wilson's upper surface assists in moving the cloth forward as well as in stripping it.

Under our practice, the defendant in a suit in equity upon a patent, can bring the case to final hearing; and, if the decision is against him, can appeal to the supreme court. It was intimated at the argument, that this defendant might desire to avail himself of this right. He can do so, of course, and is not precluded nor prejudiced by the fact that other defendants have not chosen to do so; and it may be that he can show a different state of facts, or obtain a new construction of the patent on the final hearing here. But, as the case now stands, he does not deny the validity of the second

claim of the patent, nor that he has infringed that claim; and the only ground on which he defends against the injunction, is that the other three claims are too broad, and ought to have been disclaimed or limited by the patentee or his assigns; and that until this is done, an injunction should not be granted for an infringement of the valid claim; and that if the patentee has unreasonably neglected to do this his patent is void.

I do not think that these claims are too broad; but even if I did, I should hesitate to say that the patentee had been negligent in filing a disclaimer, in respect to a patent which has been repeatedly and uniformly upheld by the courts.

Upon the case as presented, I must grant the application.

Injunction ordered.

[NOTE. For other cases involving this patent, see Potter v. Wilson, Case No. 11,342; Potter v. Muller, Id. 11,334; Potter v. Schenck, Id. 11,337; Potter v. Davis Sewing Mach. Co., Id. 11,324; Potter v. Empire Sewing Mach. Co., Id. 11,326; Grover & Baker Sewing Mach. Co. v. Sloat, Id. 5,846; Potter v. Holland, Id. 11,330; Potter v. Fuller, Id. 11,327; Potter v. Holland, Id. 11,329; Potter v. Muller, Id. 11,333; Potter v. Stevens, Id. 11,338; Potter v. Mack, Id. 11,331; Potter v. Crowell, Id. 11,323; Burdell v. Denig, Id. 2,142, 15 Fed. 397, and 92 U. S. 716; Burdell v. Comstock, 15 Fed. 395; Florence Sewing Mach. Co. v. Singer Sewing Mach. Co., Cases Nos. 4,884, 4,885; Wilson v. Barnum, Id. 17,787.]

Case No. 11,342.

POTTER et al. v. WILSON et al.

[2 Fish. Pat. Cas. 102; 17 Leg. Int. 333.] [1]

Circuit Court, S. D. New York. August, 1860.

PATENTS — NOVELTY — LICENSEES AS PARTIES TO SUIT FOR INFRINGEMENT—INFRINGEMENT.

1. Previous to the invention of Wilson, the material to be sewed had been advanced under the needle by the hand of the operator, or fixed permanently to a frame called a baster plate, which was advanced with the cloth by a regular progressive motion, to the needle, through the agency of suitable machinery. By the former process the cloth could be turned at will, but there was no security for regularity of stitch except the care and skill of the operator. By the latter, the regularity of stitch was attained; but from the permanent attachment of the cloth to the baster plate, a seam, with curvatures and angles, at the will of the operator, could not be formed. The object of the improvement of Wilson was to remedy these defects, by causing the cloth to be moved automatically under the needle, and the device so arranged as to admit of seams of any curvature, and at the same time secure regularity of stitch. This Wilson accomplished by the machinery and process described in the specification of the patent. Instead of the baster plate, the cloth was advanced under the needle mechanically, by the joint action of two surfaces between which it is held, an intermittent motion being given to at least one of them, which caused the cloth to progress regularly, securing uniformity of stitch, and at the same time permitting the material to be turned by the hand so as to sew a straight or curved seam. The novelty of the invention of Wilson examined and sustained.

[Cited in Potter v. Muller, Case No. 11,334.]

2. Where it was claimed that two companies for whom the complainants held the patents in trust, should have been made parties complainant, *held*, that if those companies were but licensees under the complainants, their interest would not be such as would, in the sense of the patent law, require them to be joined.

3. The objection to the introduction of testimony at the hearing, not introduced before the examiner, is too plain to call for observation. If introduced before the examiner, the attention of the opposite party would have been called to it, and an opportunity afforded for explanation.

4. So long as a patentee's ideas are found in the construction and arrangement of the defendants' machine, no matter what may be its form or shape or appearance, the party using it is appropriating his invention and must be held to be an infringer.

This was a bill in equity, filed [by Orlando B. Potter and Nathaniel Wheeler] to restrain the defendants [James G. Wilson and Alexander C. Stockmar] from infringing letters patent, granted to Allen B. Wilson, November 12, 1850 [No. 7,776], for an "improvement in sewing machines." The original patent was surrendered and reissued January 22, 1856, in two divisions, designated as "Reissue Nos. 345 and 346." Reissue 345. was surrendered and reissued, December 7, 1856, and designated as "Reissue 414." See, also, Potter v. Holland [Case No. 11,330].

The claims of the original patent of 1850 were as follows: "What I claim, etc., is forming a stitch by each throw of the shuttle and corresponding motion of the needle; that is to say: making one stitch at each forward, and another at each backward motion of the shuttle, both constructed, arranged, and operating as herein described, or in any other mode substantially the same. Second. I claim the combination of the sliding bar, Q, the plate, r, the feeding plate, V, the spring, W, the screw, t, the lever, R, and the clamping plate, T, for holding and feeding the cloth to the needle, and regulating the length of the stitch, in the manner herein described, or in any way substantially the same."

The claim of reissue 345, afterward surrendered, was as follows: "What I claim is forming a stitch at each throw of the shuttle and corresponding motion of the needle; that is to say: making one stitch at each forward and another at each backward motion of the shuttle, both constructed, arranged, and operated as herein described, or in any other mode substantially the same."

The claims of reissue 346 were as follows: "What I claim is, the method of causing the cloth or material to be sewed in a sewing machine, to progress regularly by the joint action of the surfaces between which it is clamped, and which act in conjunction, substantially in the manner and for the purpose herein specified. 2d. I claim holding the

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. 17 Leg. Int. 333, contains only a partial report.]

cloth or other material at rest by the needle, or its equivalent, in combination with the method of causing it to progress regularly, the whole substantially as herein set forth. 3d. I claim arranging feeding surfaces, substantially such as are herein specified, in such relation to the needle as herein set forth, that they, or one of them, shall perform the office of stripping the cloth or material from the needle as it rises, or recedes from it, as herein described. 4th. I claim so mounting and attaching one of the feeding-surfaces to some other part of the machine, that it may be removed or drawn away from the other surface at pleasure, substantially in the manner and to effect the objects herein set forth."

The claims of reissue 414, obtained by surrender of reissue 345, were as follows: "I claim: 1st. The combination, in a single machine, of these three following elements, namely: A table, or platform, to support the material to be sewed, holding it for the action of the needle, and presenting it properly to the grasp of the feeding apparatus; a sewing machine proper, consisting of a needle and shuttle, or their equivalents, and a mechanical feed automatic and causing the cloth to progress regularly, by a feeding mechanism, to which the cloth is not attached, and so grasping the cloth that it may be turned and twisted by the hand of an operator, such twisting not interfering with the regular progression of the cloth; and the whole being constructed and acting together, and in combination with each other, substantially in the manner and for the purposes herein specified. 2d. I claim moving a shuttle, so shaped and held by its race, that jaws may embrace it, by means of two jaws, which are alternately in contact with the shuttle, and are constructed and move substantially in the manner herein set forth, making and breaking their contact without any aid from cams or springs, or the equivalents of such devices. And, lastly, I claim a double-pointed shuttle, substantially such as is herein specified, in combination with jaws for driving it, substantially such as are described, whereby the shuttle may be thrown alternately from opposite directions, through loops, without practically disturbing the loop-thread."

In the sewing machines of Howe, Bachelder, and others, invented and used prior to the invention of Wilson, the cloth was fed to the needle by reciprocating or rotating baster plates. These consisted of strips of steel furnished with sharp, needle-like points about one-fourth of an inch in length, upon which the cloth was impaled or hung, the points penetrating the layers of cloth and "basting" them together. By appropriate mechanism these plates were moved past the needle, carrying the cloth with them. The feeding device described by Wilson, consisted of a bar beneath the table, having, upon the upper side of one vibrating end, serrations, or roughened projections, resembling, somewhat, a shoemaker's rasp. A slot in the table permitted these projections to rise slightly above its surface, so that cloth laid upon it would be caught by the projections and carried forward with each forward movement of the bar. To afford resistance, and to enable the serrations to seize the cloth, a plate pressed upon the cloth from above, kept in place by a spring, and this plate or presser, and the roughened bar, constituted the "two feeding surfaces," which were the principal features of the patent. The teeth upon the bar projected forward, so that they caught the cloth when moving in that direction, but slipped under it without moving it, when drawn backward; a result which was facilitated by the descent of the needle through the cloth simultaneously with the retraction of the feed-bar.

Geo. Gifford and E. W. Stoughton, for complainants.

Blatchford, Seward & Griswold, for defendants.

NELSON, Circuit Justice. These suits are founded upon two reissued patents to A. B. Wilson, for improvements in the feed motion of a sewing machine. The original patent for the invention was granted November 12, 1850. It was surrendered, and two reissues, numbered 345 and 346, were issued thereon, both bearing date January 22, 1856. 345 was subsequently surrendered, and reissued December 9, 1856, numbered 414.

Previous to the invention of Wilson, as claimed by the plaintiffs, the material to be sewed had been advanced under the needle, or sewing apparatus, by the hand of the operator, or fixed permanently to a frame, called, in technical language, a "baster plate," which was advanced with the cloth by a regular progressive motion, to the needle, through the agency of suitable machinery. By the former process, feeding by hand, the cloth could be turned at will, so that seams of any given curvature could be sewed, but there was no security for regularity of stitch except the care and skill of the operator. By the latter, the regularity of stitch was attained, but from the permanent attachment of the cloth to the baster plate, a seam, with curvatures and angles, at the will of the operator, as the sewing progressed, could not be formed. The object of the improvement in question was to remedy these defects, by causing the cloth to be moved automatically under the needle, and the device so arranged as to admit of seams of any curvature, and at the same time secure regularity of stitch. This Wilson accomplished by the machinery and process described in the specification of the patent.

Instead of the baster plate, the cloth was advanced under the needle mechanically, according to the arrangement, by the joint action of two surfaces between which it was held, an intermittent motion being given to at least one of them, which caused the cloth to progress regularly, securing uniformity of stitch, and at the same time permitting

the material to be turned by the hand so as to sew a straight or curved seam.

The claims in the reissued patents, numbered 346 and 414, which are in controversy in these suits, are all founded upon this feed improvement upon the previous sewing machines.

The utility of the improvement is admitted; indeed, it is apparent, that without it, or some equivalent which would admit of curved seams to be sewed automatically, the sewing machine, now in almost universal use, would have been comparatively very limited in its operation. It is insisted, however, that Wilson was not the first and original inventor, which objection raises the principal question in these cases.

The persons mainly relied upon, and indeed the only persons that can be relied upon, according to the proof, with any plausibility, to prove priority of invention, are Wm. H. Akins, of Ithaca, and Leander W. Langdon, of Rochester, New York.

The proof is very full and satisfactory, that the invention of Wilson was so far matured as to admit of sewing curved seams by way of experiment as far back as 1849. In April, 1849, its peculiarities were noticed in the Berkshire Culturist, published at Pittsfield, Massachusetts; and in November of that year, a more extended notice of it, with full lithographic prints, was given in the Scientific American, published in New York and Boston.

Akins himself has been examined as a witness in these cases upon the question of priority of his invention, and he does not carry its date further back than the latter part of the year 1850. He had made, previous to this examination, three affidavits on the subject, but in neither of these does he state that his improvement extended back to 1848; the furthest his affidavits carry its date is the fall of 1849. And over and above his testimony, the clear and decided weight of the proof confirms the date he gives of the invention, when examined as a witness in the cases, namely, the fall of 1850. One very decisive fact upon this question is not in dispute, and that is, that the first machine made by Akins, after the partnership with Felthousen (which commenced in August, 1850), had upon it the feed of the baster plate, resembling that of the Lerow & Blodgett machine, which was exhibited in Ithaca in the winter of 1849 and 1850.

The feed admitting of curved seams was first introduced into the second machine made by him in the fall of 1850, some two years after the date of Wilson's improvement, and which was even after the date of his patent. It is remarkable, if Akins had invented the feed improvements as early as 1848, which admitted the sewing of curved seams, an improvement so useful, and which has added so much to the value of the instrument, that some two years afterward, when he commenced the business of manufacturing the machines, he should have omitted the use of it altogether.

There is another remarkable feature in this claim of Akins. A patent was issued to him and Felthousen jointly, August 5, 1851, as joint inventors, including this improvement. This was upon a model of the second machine made by him. It is agreed that these patentees first commenced business together in August, 1850, and that Felthousen had had no previous connection or interest in sewing machines, nor any knowledge of them. Both must have made oath that they were the joint inventors of the improvements claimed before the patent could issue; and if true, as to Felthousen, the date of the invention must have been later than August, 1850. It is now pretended that Akins was the sole inventor of the improvement of the feed; if this be true, the patent office was imposed upon, as it could not properly have issued a patent to Akins and Felthousen, as joint inventors, for an improvement on the sewing machine by one of them. It is said that Akins was the inventor of the improvement in the feed, and Felthousen of the set-screw above the needle-arm; if so, then separate patents ought to have issued to each for his own improvement, and not a joint patent to the two. If so issued, the patent is void. This action of Akins and Felthousen in procuring the patent, goes to confirm the view of Akins himself, in his testimony, that he did not invent the improvement until after the partnership with Felthousen, in August, 1850.

We forbear going over the proofs in detail upon this question of priority, and shall content ourselves by saying, after a very careful analysis and examination, the weight is all one way, and that is against the pretension set up in behalf of Akins.

In respect to the claim of Leander W. Langdon, his own account of his invention is as follows: That when thirteen years of age, and in the service of Daniel Rall, in Rochester, New York, some time in the year 1847, he read the description of a sewing machine in a newspaper, and observed from the description that the cloth was placed on pins or sharp points, so that the curve of the seam could not be varied after the cloth was placed upon the pins, and that the idea then occurred to him of making a feed, by which the curve of the seam could be varied; that after some weeks, he had so far matured his thoughts as to make a feed model out of a shingle. No other parts of the machine were made. Nothing further was done in the way of perfecting his improvement, or in adapting it to practical use, till the fall of 1850, when he commenced the construction of a machine in the shop of a Mr. Wright in Rochester. The shingle feed model of 1847 was not preserved, as of any value or importance at the time, and has been lost.

He claims that the machine made in Wright's

shop in the fall of 1850, was a working machine, and embraced the feed motion devised in 1847. Langdon, in a subsequent examination, attempted to change the time of working upon the machine in Wright's shop, from the fall of 1850 to 1849.

It is quite clear, adopting the most favorable account of the invention of Langdon, as given by himself, that the proof falls short of overcoming the patents of Wilson, and the testimony upon which the originality and priority of his improvements rest. The proof fails as matter of law. "It is not enough to defeat a patent already issued that another conceived the possibility of effecting what the patentee has accomplished. To constitute a prior invention, the party alleged to have produced it, must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. It must have been carried into practical operation, for he is entitled to a patent who, being an original inventor, has first perfected the invention and adapted it to practical use. Crude and imperfect experiments, equivocal in their results, and then given up for years, can not be permitted to prevail against an original inventor, who has perfected his improvement and obtained his patent." Parkhurst v. Kinsman [Case No. 10,757].

In this case, the pretended shingle model, containing the feed of a sewing machine, had no provision or arrangement for connecting it with or adapting it to the machine, and was laid aside for years and forgotton till after the improvement by Wilson was perfected, a patent granted, and the working machine had gone into general use.

But, independently of this ground, which we regard as conclusive upon the question, the proofs are overwhelming that Langdon's alleged improvement was long after that of Wilson, and even after the issuing of his patent of November 12, 1850.

Even the engine at Rall's, which he pretends to have been engaged in working when he read a description of the sewing machine in a newspaper, and made his shingle model of the feed in 1847, was not erected and put into operation until the spring or summer of 1848. And the clear weight of the evidence is, that he never worked upon a sewing machine till he went to work for Burroughs, in the fall of 1851, who was engaged in manufacturing A. B. Wilson's machines, and did not commence making a machine for himself, or with a view to any improvement upon the same, till the spring or summer of 1852.

Our conclusion is, that upon the whole of the proofs in the case, the clear weight of them supports the priority of A. B. Wilson's invention of the feed motion, and consequently the patents founded upon it.

Some objections have been taken to the defense, independently of the question upon the invention, which it is necessary briefly to notice:

1. An objection that the proper parties complainant have not been joined in the suit.

This objection is founded upon the testimony of Orlando B. Potter, who was examined as a witness for the complainants. He states that the suits were commenced for the interest and benefit of the two companies represented by himself and Nathaniel Wheeler, namely, the Wheeler & Wilson Manufacturing Company and the Grover & Baker Sewing Machine Company; and that the nominal complainants have no interest in the suits, except as representatives of the two companies, and as stockholders therein. That the patents are held by them as trustees of these companies.

The proofs show that the legal title to the patents, and exclusive right to them in the state of New York, are in the complainants; and in a court of law they are the only parties proper to bring the suits.

It is urged, however, that in equity all parties must be joined who are interested in the subject-matter of the litigation.

In one sense, according to the testimony of Potter, these two companies may be said to be interested, but whether so or not, as to require them to be joined in the suit, is not certain. If they are but licensees under Potter and Wheeler, then their interest would not be such as would, in the sense of the law of patents, require them to be joined; and this is the relation they hold to the complainants, as insisted upon by their counsel.

This objection as to parties was not taken in the answer, nor do the proofs on either side seem to have been directed to the question. It has been raised for the first time at the hearing. An effort was made by the counsel for the defense to introduce evidence on the subject at the hearing, but the objection to its reception is too plain to call for any observations. If introduced before the examiner, the attention of the opposite party would have been called to it, and an opportunity afforded for explanation. These objections, as to parties, are not favored when postponed to the final hearing upon the pleadings and proofs. [Mechanics' Bank of Alexandria v. Seton] 1 Pet. [26 U. S.] 299, 306; [Story v. Livingston] 13 Pet. [38 U. S.] 375.

2. Objections have also been taken to some of the claims under the reissued patents of January 22, 1856, and December 9, 1856, Nos. 346 and 414.

The first claim in No. 346 is the method of causing the cloth to be sewed to progress regularly by the joint action of the surfaces between which it is clamped, and which act in conjunction, substantially in the manner and for the purposes specified.

The second, holding the cloth at rest by the needle or its equivalent, in combination with the method of causing it to progress regularly, substantially as set forth.

The third, arranging the feeding surfaces, substantially as specified in such relation to

the needle that they or one of them shall perform the office of stripping the cloth from the needle as it rises or recedes from it; and—

The fourth so mounting and attaching one of the feeding surfaces, to some other part of the machine, that it may be removed or drawn away from the other surface at pleasure, as set forth.

Now, it is apparent that all the several claims rest upon and grow out of the main improvement in the feeding apparatus, consisting of two surfaces clasping the cloth, and advancing it to the needle by the intermittent motion of one of them, and so arranged as, at the same time, to admit of the turning of the cloth, and sewing seams of any practically useful curvature. If this device is novel, and we have already shown that it was, then these dependent combinations and devices may well be maintained.

The same observations are applicable to the claim for a combination, embracing this feed improvement, in the patent numbered 414.

3. An objection is also taken that the defendants' machines do not infringe the improvement of the feed motion of Wilson.

The leading original idea of Wilson, and which he has embodied into his improvement, is the substitution of the two surfaces between which the cloth is clasped or held, for the baster plate of previous machines, and so arranging these two surfaces that one of them, by an automatic intermittent motion of one or both, would advance the cloth to the needle, and at the same time admit of its being turned by the hand, so as to sew curved seams. Now, it is quite clear, that this conception, which has remedied a great defect in previous machines by getting rid of the frame upon which the cloth is fastened, and which could move only with the frame or baster plate, and hence, practically, could sew straight seams and fixed curves only, was capable of being embodied into a working machine in various modes and forms. A skillful mechanic, by mere skill, and without the use of the inventive faculties, could embody it, and adapt it to practical use by different mechanical devices. This requires ingenuity, simply, not invention. But so long as Wilson's ideas are found in the construction and arrangement, no matter what may be its form or shape, or appearance, the party using it is appropriating his invention, and must be held to be an infringer; and within this view we are satisfied the machines of the several defendants must be regarded as violations of the patents in question.

Upon the whole, after the best consideration we have been able to give to these cases, we are satisfied the complainants are entitled to a decree for the infringements and for injunctions, and a reference to master to take an account.

Decree for perpetual injunction and account.

[For other cases involving this patent, see note to Potter v. Whitney, Case No. 11,341.]

Case No. 11,343.

POTTER v. WRIGHT.

[1 Wkly. Notes Cas. 637; 1 N. Y. Wkly. Dig. 245.] [1]

Circuit Court, E. D. Pennsylvania. June 18, 1875.

BANKRUPT ACT, § 43—TRUSTEE.

Certain creditors of a bankrupt moved for an order of court that the bankrupt and his assignee should convey the former's property to the complainants as trustees under section 43 of the bankrupt act [of 1867 (14 Stat. 517)]. Thereupon the court directed (inter alia) the said assignee and bankrupt to execute proper conveyances under the direction of the register, "subject to the approval of the court." This was done, no creditor objecting, but the approval of the court was not obtained. Certain bonds and mortgages to prevent merger, etc., were temporarily assigned by the trustees to the defendant, who gave a receipt therefor, stating that "all the above recited assignments of mortgages to be assigned by me" to the said trustees. They were, however, deposited in the safe of one of the complainants till the defendant, in the complainants' absence, and without their consent, obtained the securities and refused to deliver or re-assign them. *Held*, that the complainants were not entitled to the relief prayed for, as an essential part of the foundation of their claim, viz. the approval of the court, was wanting.

This was a bill in equity against Samuel Wright by Stephen A. Potter and William Wright, trustees in bankruptcy of Bancroft and Grambo. The bill alleged that Bancroft and Grambo had severally been adjudged bankrupts in 1873, and that Samuel Wright had been chosen assignee of both bankrupts. Subsequently, at a meeting of the creditors of the respective bankrupts, held under the provisions of the forty-third section of the bankrupt act, Potter and William Wright, the plaintiffs, were appointed trustees, and certain other persons a committee of creditors, under whose direction the trustees were to wind up, settle, and distribute the estates of the bankrupts. It was further resolved, that the said estates should be settled as one estate, and that the same persons should be trustees and committee of both estates. The proving creditors gave their assent to such deeds as might be proper to carry into effect these resolutions. The counsel of Samuel Wright subsequently moved on his behalf as assignee and creditor, and for other creditors, for an order of court that the respective bankrupts, and Samuel Wright, the assignee, should convey all of the said estates to Potter and William Wright, the plaintiffs, as trustees, and that upon the execution of the necessary deeds, all further proceedings in the respective bankruptcies should be stayed. The court thereupon ordered, inter alia, that the said assignee in each case and respective bankrupts should, under the direction of the

[1] [1 N. Y. Wkly. Dig. 245, contains only a partial report.]

register, "subject to the approval of the court," execute conveyances and transfers of the respective properties and estates, so that they should be administered for the benefit of the creditors by said Potter and William Wright, as if they had been originally appointed the respective assignees in bankruptcy. At a meeting of the committee of the creditors held in September, 1873, it was resolved, that there should be paid to each creditor a certain number of bonds executed by Grambo, and that upon receiving the same each creditor should surrender to the trustees all evidences of indebtedness and collaterals therefor held by him for his debt. In accordance with the terms of this resolution nearly all the creditors of Bancroft and Grambo gave up the mortgages held by them. While the transfers of real estate were pending, it was deemed advisable, in order to prevent merger, etc., that all mortgages against the bankrupt estate should be temporarily assigned to Samuel Wright, he giving the following receipt in writing: "Philadelphia, Sept. 16th, 1873. Received of —— all the above recited assignments of mortgages to be assigned by me to William Wright and Stephen A. Potter, trustees of estate of Harrison Grambo. (Signed) Samuel Wright."

The said assignments were made to defendant solely for the purposes in this paragraph mentioned. Among the securities so assigned were the following: (Here followed a description of four bonds and mortgages.) These securities remained in the possession of Wright for some time, and on his becoming ill were placed in Grambo's fireproof. The committee and trustees, considering this an improper place, sent for and obtained them, and they were finally placed in the fireproof of the complainant Potter; the joint receipt of Potter, and of Samuel Wright, acting for William Wright, having been first given therefor to the counsel of Samuel Wright. In June, 1874, Samuel Wright and Grambo went to the said fireproof in Potter's absence, and, having induced his wife to open the safe, took therefrom the four mortgages hereinbefore mentioned, which were then placed in Grambo's fireproof, and their return or assignment refused. A decree was prayed for directing the defendant to assign to the complainant the said bonds and mortgages, and restraining him from assigning or transferring the same to others.

The case was heard on the averments in the bill, no answer having been filed or evidence taken.

[A proceeding in bankruptcy had been instituted in the district court, but, on account of its crude form, the court recommended a bill in equity. Case No. 5,680.]

Sutton & McMurtrie, for complainants.

The only question here is whether the defendant ought to be compelled to re-assign these mortgages to us, from whom he received them, upon a receipt promising to make such return.

(Cadwalader, District Judge. Your right to have them depends on the order of court referred to in your bill. The conveyances, etc., were to be made expressly "subject to the approval of the court," which has never been obtained.)

It was not understood that more than the acquiescence of the court was necessary, when none of the creditors expressed dissent. This objection was never before made by any one. The register, the court's officer, approved and obeyed. The whole matter was transacted under his, and therefore this court's, direction and approval. Nor is the approval of the court necessary where none of the creditors dissent. The court is only to interfere when required to do so by a creditor. Besides, the court will not look into our title as against a wrongdoer. This property was obtained from us on a promise to return it, which return is now refused. The question of our title cannot be raised by the defendant.

Chapman Biddle, contra, was not called on.

Eo die McKENNAN, Circuit Judge. Section 5103, p. 989, of the Revised Statutes provides for the settlement of a bankrupt estate by trustees. The language of that section plainly shows that a responsibility was imposed upon the court which it cannot shirk. "If it appears, after hearing the bankrupt and such creditors as desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, the court will confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up, and settled by trustees, according to the terms of such resolution, the bankrupt, or, if an assignee has been appointed, the assignee, shall under the direction of the court, and under oath, convey, transfer," etc. Under this section Judge Cadwalader made the order referred to in the bill, but reserved his approbation of the measures to be adopted by directing that they should be made "subject to the approval of the court," which has never been obtained. An essential element is, therefore, wanting to the establishment of the complainant's rights, and they are not now entitled to the relief they ask for. Bill dismissed without prejudice.

Case No. 11,344.

Ex parte POTTS et al.

[Crabbe, 469;[1] 1 Pa. Law J. 159.]

District Court, E. D. Pennsylvania. July 9, 1842.

INSOLVENCY — AGREEMENT FOR EXTENSION — ATTACHMENT BY CERTAIN CREDITORS—FRAUDULENT TRANSFER — ACT OF BANKRUPTCY — IN PURSUANCE OF PRIOR AGREEMENT.

1. P. & G., of Philadelphia, being in involved circumstances, certain of their creditors entered into an agreement for an extension of credit, which agreement was not to be binding unless all the creditors became parties to it; subsequently other creditors, in New York, attached property of P. & G., in that city. This was such an unequivocal act of dissent on their part as to render the agreement null, and to enable those who signed it to become petitioning creditors.

2. Any transfer of property, no matter in what form, if with a view to give a preference, and in contemplation of bankruptcy, is void.

3. Where it is doubtful whether or not the intention of a transfer of property was such as to make it an act of bankruptcy, evidence will be received to prove the true circumstances of the whole transaction.

4. An agreement for an extension of credit being in circulation among the creditors of P. & G., they, under the advice of counsel, endorsed a bill of lading to a third party, a creditor, for the avowed purpose of protecting the property from attachment, and for the benefit of all the creditors: this was not an act of bankruptcy.

5. Parties in prosperous circumstances agreed to transfer certain property to a third person as collateral security for advances made, but the transfer was not then completed: subsequently, after they became involved, the transfer was concluded in pursuance of the agreement: this was not an act of bankruptcy.

6. The specific acts of bankruptcy relied on by the petitioners must be set forth in their petition, and evidence of no others will be received under it.

This was a petition by certain creditors of Potts and Garwood to have that firm declared bankrupt. It appeared that Potts and Garwood were shipping merchants in Philadelphia. During the month of April, 1842, they became involved, and called a meeting of their creditors, which was very generally attended by them, and at which a committee was appointed to examine and report upon the affairs of the firm; under the recommendation of this committee an agreement was subsequently entered into by most of the creditors, among whom were the petitioners, by which further time was given to enable the respondents to meet their liabilities, it being however expressly stated in the agreement that it should be of no binding effect unless entered into by all the creditors. Before it was ascertained whether all the creditors would agree to this extension, a quantity of coffee arrived in New York consigned to the respondents, and, on receiving the bill of lading thereof, they desired to endorse it to one Richard D. Garwood, the father of one of the firm, stating to him that they wished to do so for the benefit of all the creditors and to protect the property from attachment; the proposed endorsee declined consenting to this until he, together with the respondents, consulted Mr. Nathan R. Potts, the father of the other member of the firm, and a practising lawyer in Philadelphia, who on the same statements being made to him advised the transaction. Richard D. Garwood then consented, the bill of lading was endorsed to his order on the 6th of May, 1842, he at once endorsed it to a firm in New York, who were the correspondents of Potts and Garwood, and by letter directed these endorsees to receive the coffee and forward it to him in Philadelphia. Richard D. Garwood was then an endorser of notes of Potts and Garwood, amounting to more than $7000. The coffee had, in the mean time, and without the knowledge of any of the parties in Philadelphia, been attached in New York by one Herricks, a creditor of the respondents. It also appeared that during the months of February and March, 1842, when Potts and Garwood were, as far as appeared, perfectly solvent, an agreement was entered into between them and one Smith, by which he was to make advances and receive, as collateral security therefor, the policies of insurance and bills of lading of a certain vessel and cargo belonging to them and then at sea, as soon as such policies and bills came into their possession. Under this agreement Smith made advances, the last of any amount being in March, and Potts and Garwood endorsed the bills and policies to him, one endorsement being as late as the 1st of May. This proceeding was commenced on the 14th of May, 1842, immediately after it was discovered that the coffee had been attached in New York, the petitioning creditors alleging that Potts and Garwood had become bankrupts by "fraudulently concealing their goods and chattels and effects, to prevent their being levied upon, or taken in execution or by other process, by their creditors; and by making a fraudulent conveyance and assignment, on the 6th day of May then last past, of their goods and chattels, that is to say of a certain quantity of coffee, to Richard D. Garwood, in contemplation of bankruptcy."

The case came on to be heard before Judge Randall, on the 27th of June, 1842, and was argued by M'Ilvaine & Dallas for the petitioning creditors, and by Mr. Sergeant for Potts and Garwood.

Mr. M'Ilvaine, for petitioning creditors.

These creditors have a right to present their petition, and are not barred by the agreement for extension of credit. That agreement failed by means of the attachment on the coffee by the New York creditors. The great and glaring act of bankruptcy was the transfer of the bill of lading for the coffee to Richard D. Garwood. That transfer was absolute on its face, and if there were any trust in it, that trust was secret; the evidence shows it

[1] [Reported by William H. Crabbe, Esq.]

to have been a legally fraudulent assignment, and this fraud alone renders it an act of bankruptcy under the first section of the act, without there being any necessity for its execution in contemplation of bankruptcy. An act of bankruptcy is different from contemplation of bankruptcy, and an unequivocal act of bankruptcy like this cannot be explained away. Eden, Bankr. 13, 17; Colkett v. Freeman, 2 Term R. 59, 62; Hopkins v. Ellis, 1 Salk. 110; Worseley v. Demattos, Burrows, 484. Acts of bankruptcy are of two classes: one, where the act is equivocal and the intent becomes material, the other where the act, being positive, the intent is immaterial. Eden, Bankr. 32. If the transfer were made to Richard D. Garwood in consideration of his debt, and to secure him, then it was a preference; if it was not so made, it was without consideration and void. By the respondents' own avowal, it was made to prevent attachments, and such an intent constitutes it an act of bankruptcy. Passmore v. Eldridge, 12 Serg. & R. 201; Thomson v. Dougherty, Id. 453; Gilmore v. North American Land Co. [Case No. 5,448]; M'Clurg v. Lecky, 3 Pen. & W. 93; M'Kee v. Gilchrist, 3 Watts, 230. An intent to hinder creditors by such an assignment will be presumed if the assignor is simply in debt; how much stronger is our case, where there is an avowal of that intent. Irwin v. Keen, 3 Whart. 354; Eden, Bankr. 26, 35. There is no doubt that the respondents were insolvent; their very act of placing property in a third party's hands for the benefit of creditors was an avowal of it, and insolvency is presumptive evidence of a contemplation of bankruptcy. Eden, Bankr. 12; Harrison v. Sterry, 5 Cranch [9 U. S.] 301; Poland v. Glyn, 2 Dowl. & R. 310; Singleton v. Butler, 2 Bos. & P. 283; Ogden v. Jackson, 1 Johns. 370; Phœnix v. Day, 5 Johns. 414; Rust v. Cooper, Cowp. 629. The transfer was void under the act of assembly of Pennsylvania of 24th March, 1818 (Dunl. Laws, 3d Ed., 323), requiring such assignments to be recorded within thirty days. Englebert v. Blanjot, 2 Whart. 244. But it was good and valid between the parties to it, and therefore a preference. Stewart v. Kearney, 6 Watts, 454.

Mr. Sergeant, for Potts and Garwood.

The petitioning creditors have no right to be before the court: this proceeding was commenced while the agreement for extension of credit was still in circulation; that agreement amounted to an undertaking not to proceed against the respondents until a reasonable time had been allowed them to obtain the assent of all their creditors; these petitioners therefore had no debt due to them when they came into court. The petition alleges two acts of bankruptcy: a fraudulent concealment of goods to prevent their being taken in execution, and a "fraudulent conveyance and assignment," on the 6th May, of a quantity of coffee, to Richard D. Garwood, in contemplation of bankruptcy. The petitioners have chosen to rely on the expression "conveyance and assignment," and they are bound by it. The words thus used mean a deed of precisely similar character, that is, a conveyance under seal (Eden, Bankr. 26; 2 Bl. Comm. 210); yet in support of this allegation they offer the endorsement of a bill of lading. But how does this case stand under the bankrupt law? That law makes acts of bankruptcy of all fraudulent conveyances or transfers, and by "fraudulent" is meant all such transfers as were fraudulent under the statute of 13th Elizabeth or by common law, or such as were made fraudulent or acts of bankruptcy by the bankrupt law itself; and here it may be remarked that all transfers declared void under the bankrupt law are acts of bankruptcy. This transfer, however, was not fraudulent under the statute of Elizabeth, for that statute only applied to transfers without good consideration, while this had an ample consideration in the endorsements by Richard D. Garwood. It is certain also that no other law in force in Pennsylvania, independent of the bankrupt law, would invalidate this transfer, for, so far as the act of assembly of March, 1818, is concerned, it will be sufficient to say, besides other objections, that but eight days elapsed between the transfer and the filing of this petition. If, therefore, this transfer was void and an act of bankruptcy, it must be so under the bankrupt law itself; and it must be under the second section of that law, for the first section only applies to such transfers as are void by the statute of Elizabeth or the common law. Under the second section of the bankrupt law, a transfer, to be void and an act of bankruptcy, must be in contemplation of bankruptcy, and to give a preference. But this transfer was not such as would be void as in contemplation of bankruptcy. Fidgeon v. Sharpe, 5 Taunt. 539; 1 Marsh. 196; Harwood v. Bartlett, 6 Bing. N. C. 62. Neither was its purpose a preference, but the benefit of all the creditors.

Mr. Dallas, for petitioning creditors, in reply.

The questions to be met are two:—first, whether the petitioners have a right to be before the court; and second, whether they have made out a case to entitle them to the decree prayed for. The only objection to the right of these creditors to come into court arises under the proposed agreement for an extension of credit to Potts and Garwood; but we assert that this agreement was violated and destroyed both by the transfers to Smith and Richard D. Garwood, which gave them means of payment while other creditors were postponed, and by the attachment of the coffee by the New York creditors, which was such an expression of dissent on their part as dissolved the agreement by its own provisions. To make out their case for a decree, the petitioners allege that the transfers to Smith and Richard D. Garwood were acts of bankruptcy, under the bankrupt law, as fraudulent prefer-

ences, made in contemplation of bankruptcy. They were fraudulent under the first and second sections of the bankrupt law, for we think that the acts described in the second section, are there described to show what shall be considered fraudulent under that law, and are, therefore, included under the term "fraudulent" in the first section. They were preferences, for on their face, and by their necessary operation, they gave to some creditors means of securing themselves which others did not possess. They were in contemplation of bankruptcy, because it appears from the evidence that so early as the 1st of May, the respondents had good reason to believe themselves insolvent, and, therefore, must have had the idea of bankruptcy presented to their minds.

RANDALL, District Judge. Objection has been made to the right of G. Harley and Son, who filed this petition, to become petitioning creditors, inasmuch as they had signed the agreement for an extension of credit, and a sufficient time had not elapsed to ascertain whether all the creditors would become parties to that agreement, so as to make it binding. Under ordinary circumstances, and if there had been no express dissent, perhaps a reasonable time had not elapsed, and they would not have been entitled to proceed against the respondents; but I think that where a creditor, after a proposition to compromise has been submitted to him, attaches the property of his debtor in another state, it is such an unequivocal act that his dissent may reasonably be presumed. The transfer to Richard D. Garwood has been mainly relied on as the act of bankruptcy here; and whether it is or is not such an act depends on the terms and conditions on which it was made. If the object of the transfer was to give Richard D. Garwood a preference over the other creditors, and if it was made in contemplation of bankruptcy, then it is void, as being contrary to the spirit and policy of the bankrupt law, which contemplates equality among all the creditors; and it matters not whether a preference, by a person subject to be involuntarily declared a bankrupt, is given by a general assignment of all his property or by a transfer of a portion of it; if it is done with a view to give a preference, and in contemplation of bankruptcy it is void, no matter what be its form. In this case the transfer of the bill of lading is made in the ordinary form. No trust appears on the face of it, and none was declared in writing by Richard D. Garwood when he received it, and it is contended that no evidence can now be received to show a trust. It may be that a substantive and unequivocal act of bankruptcy, where the preference is apparent on the face of the instrument, can not be explained by other circumstances; but when the act is of an uncertain or doubtful character, I can see no objection to evidence tending to prove the true circumstances of the whole transaction. What is the evidence here? A majority of the creditors of Potts and Garwood offered them an extension of nine, twelve, and fifteen months, for payment, provided all the creditors named in a schedule attached to the agreement should assent to it, and on condition that they should be paid in equal proportions out of the property of Potts and Garwood, while if these last were able to anticipate the time of payment it was to be done. The coffee in question was part of the property relied on for paying the creditors. As soon as it was ascertained that it had arrived in New York the transfer of the bill of lading was made to Richard D. Garwood, for the purpose of carrying out the views of the creditors. It is true that this object of the transfer does not appear on the face of it; but it is clearly in evidence that it was made and accepted, under the advice of counsel, for the equal benefit of all the creditors and as the best mode of carrying their intentions into effect; the transferee disclaiming all right or claim to any priority.

But still it is said this transfer was, under the circumstances, an act of bankruptcy. The first section of the bankrupt law makes any "fraudulent" conveyance, assignment, sale, gift, or other transfer of lands, tenements, goods or chattels, credits, or evidences of debt, an act of bankruptcy. To know what are "fraudulent" conveyances, &c., we may consider: First, what are fraudulent at common law; second, what are fraudulent by the statute of Elizabeth; and third, what are declared so by the second section of the bankrupt law, as frauds upon that act. If the view I have taken of the evidence in this case be correct, the present transfer does not come within any of these classes. An assignment for the benefit of creditors is made on good and sufficient consideration, and is perfectly valid, both at common law and under the statute, while to make it void under the second section of the bankrupt law, it must be made, not only in contemplation of bankruptcy, but also for the purpose of giving a creditor, endorser, surety, or other person, a preference or priority over the general creditors of the bankrupt; but where the object is as the evidence shows it to have been here, to prevent such a preference or priority, I cannot consider the transfer as a fraud. The transfers to D. Smith, Jr., as collateral security for his advances have been urged as acts of bankruptcy, one of them being as late as the 1st of May, 1842; but the evidence is, that they were made in pursuance of an agreement entered into in February, and the last advance of any amount was made in the early part of March, when the parties were supposed to be in prosperous circumstances. [See McMechen's Lessee v. Grundy, 3 Har. & J. 185.][2]

It has, however, been urged, that the respondents are insolvent, and therefore, liable to be declared bankrupts under the fourteenth section of the bankrupt law. Without undertaking to decide whether that section declares insolvency in case of partners, to be in itself

[2] [From 1 Pa. Law J. 159.]

an act of bankruptcy, and, if so, whether such insolvency means a mere present inability to pay debts, or an open, notorious insolvency, exhibited by an assignment of all their property, or an application for the benefit of the insolvent laws, it is sufficient, at present, to observe, that this is not one of the acts of bankruptcy specified in the petition. The rules of court require the particular acts of bankruptcy intended to be relied on to be specially set forth; and the act of congress directs twenty days' notice of the time and place of hearing to be given to the respondents, that they may be prepared to rebut the allegations if unfounded in fact. The propriety of this rule is exemplified in the present case. The parties are charged with having made a fraudulent transfer of their property, and evidence has been taken in relation to that charge; on the hearing, the charge of insolvency as an act of bankruptcy is, for the first time, made. It has been said that in criminal cases, if any offence is proved, the party will not be released, whether it is the offence charged or not. This may be true on a preliminary hearing; but on a final trial, such as this, the specific offence charged must be proved, or the party will be acquitted; though a new prosecution may be had against him on other charges. I am of opinion that the petitioners have failed to establish their right to have the respondents declared bankrupt; and that, therefore, the petition should be dismissed.

[Subsequently to this decision, as the reporter was informed, a friend of the respondents purchased Henrick's claim for 75 p. c., and all the creditors then came into the agreement of extension. The Harleys sued P. and G. on the debt upon which the petition was founded, alleging that the terms were not complied with by a transferee's signing the extension. P. and G. then brought suit against the Harleys for damages, the result of having filed this petition.][2]

[For subsequent proceedings in this litigation, see Case No. 5,258.]

POTTS, Ex parte. See Case No. 5,258.

Case No. 11,345.

POTTS v. FINDLAY et al.

[1 Cranch, C. C. 514.][1]

Circuit Court, District of Columbia. Nov. Term, 1808.

DRAFT UPON CONSIGNEE—SALE TO MEET BILL.

When bills are drawn upon the consignee, on a shipment of tobacco, he has no right to hold up the tobacco after the time of payment of the bills, without orders, but should sell to meet the payment of the bills.

This was a suit in chancery, under the act of Virginia of December 26, 1792 (chapter 78, p. 115). The bill claimed the price of a cargo of tobacco, for which the defendants [Findlay, Bannatine & Co.] might have sold it, but did not, and kept it on a falling market, after notice and acceptance of bills drawn by the plaintiff [John Potts] upon the shipment.

The answer of the defendants denied fraud and negligence, and averred that they acted bonâ fide, and according to their best judgment.

C. Lee, for plaintiff, contended that, although the plaintiff had not expressly ordered the defendants to sell immediately, yet, as the bills were drawn upon the shipment, at sixty days' sight, it was the duty of the defendants to sell so as to meet the bills at maturity; and that it might be inferred from the plaintiff's letters that such was his intention. There was evidence that the defendants had sold the tobacco of others at a good price, while they held up that of the plaintiff until the price had fallen. Marsh. 206; Beaw. Lex Merc. 45, 48.

Mr. Swann, contra. The defendants acted with good faith. It was their interest to sell for the best price. There is no evidence that they could have sold the plaintiff's tobacco for a better price. They had a discretion. They had no positive orders to sell at any time. The drawing of the bills by the plaintiff would have been an excuse for selling, but was not an order to sell at all events.

The plaintiff claims unliquidated damages. That is not such a debt as will give jurisdiction in a chancery attachment, under the act of assembly of Virginia of 26th December, 1792, p. 115, c. 78.

E. J. Lee, in reply. The act of assembly does not give jurisdiction, it only regulates the mode of proceeding. The remedy is not confined to liquidated debts. The act of assembly gives it in all cases of suit in equity for relief against absent defendants. In cases where absent debtors have property within the jurisdiction of the court, it has cognizance of the cause under its general equity jurisdiction. 1 Atk. 19. If a case is doubtful, or the remedy at law difficult, the court of equity will not pronounce against its jurisdiction. Weymouth v. Boyer, 1 Ves. Jr. 424.

Mr. Swann, in support of his objection to the jurisdiction of the court, cited Thornton v. Spotswood, 1 Wash. [Va.] 142.

THE COURT was of opinion that the defendants were not justified in holding up the tobacco after the time of payment of the bills drawn by the plaintiff; and directed an issue to ascertain the prices at which the tobacco might have been sold on the day of payment.

[For a trial of an issue from chancery to ascertain for what sum the defendants could have sold the tobacco, see Case No. 6,396.]

[2] [From 1 Pa. Law J. 159.]

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

Case No. 11,346.

POTTS v. GHEQUIERE.

[Cited in Wright v. West, Case No. 18,102, and in Addison v. Duckett, Id. 77, to the point that an answer in an equity proceeding will not be allowed, unless sufficiently certified. Nowhere reported; opinion not now accessible.]

Case No. 11,347.

POTTS v. GILBERT.

[3 Wash. C. C. 475.] [1]

Circuit Court, D. Pennsylvania. April Term, 1819.

ADVERSE POSSESSION — LIMITATIONS IN PENNSYLVANIA.

1. The statute of limitations of Pennsylvania is substantially the same as that of 21 Jac. I. c. 16. The limitation begins to run from the time of an actual adverse possession, and not before.

[Cited in Armstrong v. Risteau, 5 Md. 273; Scott v. Woodruff (Ark.) 4 S. W. 911. Cited in brief in Mason v. Crowder, 85 Mo. 528.]

2. A grant from the commonwealth of Pennsylvania, passes a legal possession to the grantee, which continues until disturbed by an actual adverse possession. The title vests in the grantee, upon the return and acceptance of the survey and payment of the purchase money; and the legal possession vests at the same time.

3. Adverse possession must continue, in point of locality, during the twenty-one years. A possession of part of a tract of land, short of twenty-one years, cannot be joined to a possession of another part, so as to make up the period. The possession of different intruders, in succession upon the same part of the tract, cannot be added together by the last intruder, so as to make up twenty-one years of adverse possession, against the real owner.

[Distinguished in Barger v. Miller, Case No. 979.]

[Cited in Allen v. Holton, 20 Pick. 465; Armstrong v. Risteau, 5 Md. 275. Cited in brief in Brolaskey v. McClain, 61 Pa. St. 158. Cited in Hole v. Rittenhouse, 25 Pa. St. 493; McEntire v. Brown, 28 Ind. 349; City & Co. of San Francisco v. Fulde, 37 Cal. 354; Sawyer v. Kendall, 10 Cush. 245; Scott v. Woodruff (Ark.) 4 S. W. 911.]

4. The possession of the disseisor, to bar the plaintiff, can never extend beyond the limits of the particular spot upon which he is seated; and the legal possession of the owner continues unaffected as to the residue of the tract, by such tortious possession; and his legal possession revives, the moment the intruder quits the part of the tract he may have occupied.

[Cited in brief in Ament v. Wolf, 33 Pa. St. 335. Cited in City of St. Louis v. Gorman, 29 Mo. 602; Goewey v. Urig, 18 Ill. 241; Melvin v. Locks & Canals, 5 Metc. (Mass.) 32. Disapproved in Scheetz v. Fitzwater, 5 Pa. St. 131. Cited in brief in Taylor v. Burnsides, 1 Grat. 182. Cited in Wells v. Austin (Vt.) 10 Atl. 410.]

5. A sale, by one intruder to another, without an exact definition of the property conveyed, will not aid the purchaser in establishing a continued adverse possession. Semble, that an intruder, who has not had twenty-one years' possession, has no title to convey.

[Cited in Casey's Lessee v. Inloes, 1 Gill. 501. Cited in brief in Faloon v. Simshauser, 22 N. E. 835, 130 Ill. 650.]

This was an ejectment to recover 300 acres of land. The plaintiff produced a regular title from the commonwealth of Pennsylvania, commencing with a warrant in 1784; payment of the purchase money in the same year; return of survey in the year 1788; and a patent in 1800. The defendant produced a special warrant, dated in 1773, for the same land, to Samuel Clark; and a survey of the same, in 1803, with an endorsement "that it interfered with the survey of Potts," under which the lessee of the plaintiff claimed.

On the part of the plaintiff, it was proved, by the deposition of Jonathan Stevens, a deputy-surveyor, that, in the year 1813, or 1814, the defendant applied to him to know if this land was vacant—saying, that if it was so, he wished to purchase it from the state; if otherwise, he wanted to discover who had the office title. The witness informed him, that a warrant for this land had issued to Samuel Clark, in 1773, which had been surveyed in 1803.

On the part of the defendant, the following depositions were read: N. Hicock, who stated, that, in 1794, one Eickter sent a person on the land, to build a cabin. In 1793, that there was a sugar bush on it. That part of Eickter's family resided on the land in 1794. In 1795, Gibson, with his family, resided on the premises, in a comfortable house, having a small piece of ground cleared. There has been, ever since, some person on the land; and there is now 20 or 30 acres cleared. R. Gough deposed, that, in 1793, Eickter went on the land, with part of his family;—in the fall of the same year, Gibson bought him out, and went on; and there has been, ever since, some person on the land,—understood that they claimed only by possession. J. Lewis deposed, that, in July, 1794, Gibson lived on the land—had a good house, and four acres in corn. Gibson bought of one Means, and sold to Dougherty, who lived eighteen years on the land, and then sold to Bowman, who sold to the defendant. There has always been one or more families on the land, since he knew it. The deed from Dougherty to Bowman, dated in 1810, and from Bowman to the defendant, dated in 1813, were given in evidence. Stacey Potts was examined by the plaintiff, who stated, that, in 1810, the defendant applied to him to buy this land; but, on account of Clark's survey, he declined selling. This suit was commenced in the year 1817.

Ingersoll & Baldwin, for defendant, contended, 1st. That the warrant and survey of Clark, showed the title to be out of the plaintiff. 2d. That the plaintiff was barred by the act of limitations of this state, as he

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

had made no entry on the land, from the year 1788; and that an adverse possession had continued, since the year 1793, exceeding the twenty-one years mentioned in the statute. They therefore claimed a verdict for 200 acres, the quantity conveyed by Dougherty to Bowman, and by Bowman to the defendant. They further contended, that the jury ought to presume a conveyance from Clark to Eickter, and conveyances by the different persons who came into possession, to their successors. Cases cited: 1 Phil. Ev. 119; 2 Esp. 6; Ball. Lim. 32; 4 Taunt. 16; Cowp. 215; 2 Inst. 118.

Tilghman & Sergeant, for plaintiff, contended, that a possession to defeat the right of the plaintiff, by virtue of the act of limitations, must be actual, adverse, and continuing, under a claim or colour of title; without which, the presumption is, that the possession was not adverse; and that, at all events, if all these requisites were proved, which they denied to be the case, still the defendant could not protect more than the land actually held by adverse possession, which ought to be designated. Cases cited: 1 Johns. 158; 2 Johns. 230; 3 Johns. 388; 9 Johns. 163, 174; 10 Johns. 475. Also, Hall v. Powel [4 Serg. & R. 462], decided in the supreme court of this state; [Greene v. Liter] 8 Cranch [12 U. S.] 229; 2 Caines, 183; 3 Johns. Cas. 124.

WASHINGTON, Circuit Justice (charging jury). The only defence, seriously relied upon in this case, is the act of limitations; because, as to the title of Clark, it cannot be used against the plaintiff, whose title was perfected in the year 1800, three years before Clark's warrant was even surveyed; and this was not accomplished, until thirty years after the date of the warrant; nor was any part of the purchase money ever paid. The statute of limitations of this state, is, in substance, the same as that of 21 Jac. I. c. 16; and declares, that no entry shall be made on land, but within twenty-one years next after the right or title to the same descended or accrued. In the construction of both statutes, it has always been held, that the actual entry of the owner, is not necessary to prevent the operation of the law, unless an actual adverse possession is taken by a stranger; from which time, and not before, the limitation begins to run. The grant of land, by the government, passes at once to the grantee the legal possession, as well as the title; which continues, until he is disturbed by an actual adverse possession. This was decided in the case of Greene v. Liter, 8 Cranch [12 U. S.] 229. According to the law, as decided in this state, the title of the commonwealth vests in the grantee, upon the return and acceptance of his survey, and payment of the purchase money; and, consequently, the legal possession must be vested in him at the same time. The adverse possession before mentioned, must not only continue, but it must continue the same, in point of locality, during the prescribed period of time, sufficient to constitute it a bar; that is to say, a roving possession from one part of a tract of land to another, cannot bar the right of entry of the owner, upon any part of the land which had not been held adversely for twenty-one years, although the different periods of possession of the separate parcels, should amount, in the whole, to that number of years. For, it is a clear principle of law, that the right acquired by the adverse possession of a disseisor, or of one who enters, or retains possession by wrong, can never extend beyond the limits of the particular spot to which his occupation is confined. If he could go beyond these limits, there would exist no other to circumscribe his claim. He cannot resort to the metes and bounds of the tract upon which he has settled; because the legal possession of the owner continues unaffected by the tortious entry, except so far as the actual adverse possession has disturbed it. The legal owner is constructively in possession of the whole tract, because his title extends to the whole;—a wrongdoer can claim nothing in relation to his possession by construction.

Whether, to support the possession of a person who enters without title, and who encloses, improves, and cultivates it, and continues the same peaceably for the space of twenty-one years; it is incumbent upon him to show that such possession was taken and continued under a claim or colour of title; is a question of great importance, and in our opinion of no small difficulty. The affirmative of this question, seems to be maintained by the learned judges of New York, and the opinion is therefore entitled to our highest respect. Our own mind is not decided upon the point; and as it is not material to the decision of this case, we shall express no opinion upon it. But the court is perfectly clear, that where different persons enter upon land in succession, each retaining the possession for a period short of twenty-one years, the last possessor, who may be the defendant, cannot tack the possessions of his predecessors to his own, so as to make out continuity of possession, sufficient to bar the entry of the owner. The possession of A, the first occupant, cannot be the possession of B, the next occupant; because the moment A quits the actual possession, the legal possession of the real owner is restored, and the entry of B constitutes him a new disseisor; and if he seek to bar the entry of the owner, he must show an actual adverse possession, continued in himself for twenty-one years. There is no privity between A and B. Neither do we think the present case is strengthened, in favour of the defendant, by the evidence of the witnesses, that the several occupants sold to their successors. Nothing can be more vague than

this testimony. It does not state, that any conveyances were executed, or what each person sold;—whether it was title, possession, or good will; or whether any two of the sales were applicable to the same spot. Indeed, what had any of them, in point of title, to sell? Not only is an adverse possession to bar an entry, to be confined to the particular parcel so occupied, but some evidence should be given to show the location of such parcel, that it may be seen, whether the continuity of possession, during the whole period, was applicable to it or not.

Verdict for plaintiff.

Case No. 11,348.

POTTS et al. v. SKINNER et al.

[1 Cranch, C. C. 57.] [1]

Circuit Court, District of Columbia. Jan. Term, 1882.

COMMISSION TO TAKE TESTIMONY—NOTICE TO ATTORNEY.

Notice, given to the attorney at law, of a motion for a dedimus, is sufficient.

[This was an action by Potts & Ramsay against Skinner & Cadogan.]

Motion by the plaintiffs for leave to take a commission to New York to examine a witness.

Mr. Swann, for defendants, objected that the notice of this motion was given to him, who was only attorney at law for the defendants, and not their attorney in fact. The act of assembly means attorney in fact. Act Nov. 29, 1792, § 13; Rev. Code, p. 279.

But THE COURT decided the notice to be sufficient, and ordered the dedimus.

POTTS (SMITH v.). See Case No. 13,094.

Case No. 11,349.

POTTS v. The WILLIAM A. BURDEN.

[N. Y. Times, April 16, 1864.]

District Court, S. D. New York. 1864.

COLLISION—PLEADING—TWENTY-THIRD RULE.

[A libel for collision must state the courses of the vessels, their speed, and specific acts of negligence by the respondents.]

[This was a libel for collision by Frederick A. Potts against the steamboat William A. Burden. Heard on exceptions to the libel.

Mr. Fithian, for libelant.

Benedict, Burr & Benedict, for claimant.

Before BETTS, District Judge.

This case came up on exceptions to the libel. The case was brought for damages caused by a collision. The claimant excepted to the libel, as not conforming to the requirements of the twenty-third rule of the supreme court by setting out allegations of the facts of the collision; that it did not state the courses of the vessels, or their speed, or in what respects the Burden was carelessly managed, or what she ought to have done that she did not do.

HELD BY THE COURT: That no liberality of intendment or indulgence will be permitted to rescue a party from the consequences of diregarding an express direction in law as to the mode of procedure in a suit. That the statements in the libel are in reality no more than suggestions or even inferences that the damages complained of were caused by the negligence or improper conduct of the steamboat. That this is not a fulfillment of the rule of the supreme court, and consequently is inadequate to lay a legal foundation for the action brought. That the exceptions therefore must prevail, but they are so technical and strict that it will be without costs, and with leave to the libelant to amend within ten days.

Case No. 11,350.

Ex parte POULSON.

[15 Haz. Reg. Pa. (1835) 380.]

Circuit Court, E. D. Pennsylvania. 1835.

CONTEMPT OF COURT—POWER OF COURTS TO PUNISH—PUBLICATIONS CONCERNING TRIALS.

[The act of March 7, 1831 (4 Stat. 487), limiting the power of the federal courts to punish in cases of contempt, took away the jurisdiction of the court to proceed for contempt against one publishing in a newspaper an article tending to prejudice or affect the rights of parties to a suit on trial in such court.]

Motion for a rule on Zachariah Poulson, Esq., editor of the American Daily Advertiser, to show cause why an attachment should not issue against him for a contempt of court in publishing the following article in his paper of the 12th ult.:

"Drew, the Counterfeiter.—This notorious fellow, who was arrested some time since at Philadelphia, and lightened of about six thousand dollars of good money, has recently had the effrontery to bring a suit against the mayor of that city to recover this amount of property. We believe that the Drews, father and son, were both arrested, but that the latter was liberated upon turning state's evidence, and that he has since turned upon his heels and made off. Another person, who was to have given testimony against Drew, has denied his belief in a future state of being, and thus become incapacitated for testifying. The elder Drew, thus seeing a clear field before him, set about recovering the $6,000, and has brought on witnesses to prove that he was a man of wealth, and that it was no uncommon

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

thing for him to have such an amount of property! The city solicitor of Philadelphia, Mr. Olmstead, came down in the last boat, and the mayor of this city, Mr. Gilman, together with several of our old inhabitants, have gone on to Philadelphia to give in their testimony concerning the Drews, who, we believe, originated in these parts.—Bangor Whig."

BALDWIN, Circuit Justice (delivering the opinion of the court). The following are the circumstances under which this motion is made: This action was brought to the last October term of this court, and, being regularly at issue, was ordered for trial on the 11th inst., when a jury was sworn, and the trial proceeded. It was resumed on the 12th, when Mr. Ingersoll, counsel for the plaintiff, stated that he had a motion to submit to the court in relation to a publication which had appeared in Poulson's American Daily Advertiser of that morning. Hugh Grimes, being sworn, deposed that he had purchased at the office of Mr. Poulson a paper, produced and identified, containing the offensive publication, taken from a newspaper published at Bangor, in the state of Maine.

From the evidence given on the trial of the cause thus far it is clear that the publication refers directly to the plaintiff, and the cause of action which he has submitted to the court and jury, and in a manner calculated to produce the worst effect upon the administration of justice, as well by the character of the paper in which it appears as the nature of the remarks upon the plaintiff, his cause now trying, and the witnesses who appear in his behalf.

In the present stage of the cause, it would be improper for the court to express any opinion as to the truth or falsehood of the matter contained in the publication. That must be reserved till all the evidence is heard and commented on by counsel, when it will be ascertained what are the facts of the case. These considerations can have no bearing upon the present application against a person who is no party to the suit, and cannot be the subject of comment without running the risk of prejudging the rights of the contending parties. It is, however, not only a duty to them, but to the public, to express the strongest disapprobation of any outdoor interference with the administration of justice. Be it in whatever mode it may, it cannot fail to embarrass or obstruct if not defeat, the regular course of judicial proceedings.

The supreme law of the land has secured to every man a right of appealing to the law for the redress of an injury of which he complains; has appointed tribunals to hear and determine upon their justice, and prescribe the modes of proceeding according to established rules of evidence and principles of law. The laws will have been enacted in vain, courts of justice will become useless, and suitors be deprived of the benefits of resorting to them for redress, if it shall be their common fate to be obliged to encounter the effect of publications of a description now before us on the merits of their cause. It is headed, "Drew, the Counterfeiter." "This notorious fellow" "has had the effrontery to bring a suit," &c., and the language of the article is of a consistent character throughout. It cannot be too much reprobated, or the evil example too much feared, when it is suffered to appear in a paper highly respectable, conducted by a most estimable member of society. Nor can any friend to the due administration of the law and justice to the suitors in its courts look on the prevalence of such a practice without the deepest regret. Every good citizen should make the case his own, by supposing himself a plaintiff in a suit on trial by a jury, many, if not all, of whom have read a similar allusion to himself and case. He could appreciate the consequences, and decide whether it was such an interference with the cause of justice as to require the interposition of the law for its prevention and punishment. What has been the fate of Mr. Drew may be the fate of all other suitors. Causes on trial in court may be simultaneously tried in the public papers; the one conducted by established rules, evidence received only on oath, and the law applied by a responsible tribunal, the jury bound to listen in court only to the evidence, the counsel, and the law; but out of court, at liberty to hear and read statements, respecting the case, made without regard to either. It would be but one short step more to take, and the jury would be tampered with at pleasure when not in the box, and be liable to be assailed by any person who might please to attempt to benefit or prejudice a suitor. The moral offence, or the pernicious effects, would be but little aggravated if done in open court, or when the jury are deliberating on their verdict. Let it be done there, or in the public papers, it is a violation of the legal and constitutional rights of those who appeal to the law for redress.

From its nature, it is necessary that the means of prevention should be prompt and summary, or the mischief will become consummated by delaying a remedy which must be sought in the usual forms of law. That which is now asked is of this description, and the injury complained of is the most aggravated kind, though the cause of the re-publication be inadvertence or the unconsciousness of its impropriety. That is no matter of consideration in the present stage of this motion. The first inquiry is into the jurisdiction of this court to issue an attachment for contempt for a publication relating to a suit on trial, or in any way pending before it.

On March 2, 1831 [4 Stat. 487], congress passed "An act declaratory of the law concerning contempt of court," the first section

of which enacts: "That the power of the several courts of the United States, to issue attachments, and inflict summary punishment, for contempt of court, shall not be construed to extend to any cases except misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." Pamph. Laws 1831, c. 99. The history of this act, the time of its passage, its title and provisions must be considered together, in order to ascertain its meaning and true construction. It was enacted shortly after the acquittal of Judge Peck, of Missouri, on an impeachment preferred against him for issuing an attachment against a member of the bar for making a publication in relation to a suit which had been decided by that judge. On the trial the law of contempt was elaborately examined by the learned managers of the house of representatives and the counsel for the judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause during its pendency, and all admitted its illegality when done while the cause was actually on trial. It had too often been exercised to entertain the slightest doubt that the courts had power, both by the common law and the express terms of the judiciary act, § 17 [1 Stat. 83], as declared by the supreme court, to protect their suitors by the process of attachment.

With this distinct knowledge and recognition of the existing law, it cannot be doubted, that the whole subject was within the view of the legislature; nor that they acted most advisedly on the law of contempt, intending to define in what cases the summary power of the courts should be exercised, and to confine it to the specified cases. From the title and phraseology of the act it would seem to have been their intention to declare that it never existed in any other cases than those enumerated. It is "a declaratory act," which is a declaration of what the law "was, is, and shall be hereafter taken" when put into the form usual in statutes, which operate to settle the law retrospectively. These words are not in this law, but there is an expression which is tantamount,—"the power of the several courts, &c., shall not be construed to extend," &c.,—which refers to the past, the present, and the future, as a proviso or limitation to powers of the courts, from whatever source derived, repudiating their summary action as effectually as if they had never been authorized. As this is an inferior court within the provision of the constitution, it is created by the laws, with such powers only as congress has deemed it proper to confer, among which is this: "And to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause, or hearing before the same." Act 1789 (1 [Story's Laws] 63; [1 Stat. 88.]) The acts of 1831, must be taken to be the declared construction of this and all other laws limiting its operation in the manner prescribed, and, as generally considered, congress is to this court what the constitution is to the supreme court. Their acts must be construed on the same principles, and operate as constitutional amendments, which is to give such construction to the original act as if the jurisdiction had never been given.

The third article of the constitution extends the judicial power to controversies between a state and citizens of other states, a state and foreign states, citizens or subjects. Suits of this description were brought and sustained till the adoption of the eleventh amendment, which declared, that "the judicial powers of the United States shall not be construed to extend" to such cases. This was held by the supreme court to have a retrospective effect, annulling all jurisdiction over such cases past, present, and future. [Bingham v. Cabot] 3 Dall. [3 U. S.] 382; [Cohens v. Virginia] 6 Wheat. [19 U. S.] 405, 408; [Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 850, 858. The same effect must be given to this act, so as to make it what it evidently intended to be, a prohibition of the exercise of summary jurisdiction over contempts, excepting only such cases as are defined. In its prospective operation its terms are peremptory, admitting of no construction which can bring the present application within the exception without doing violence to its plain meaning.

There can be no doubt of the constitutional power of congress to act upon this subject, as far as respects our courts. It is no invasion of the rights of a suitor to bring or defend a suit, or in any way affect its legal remedy, in the ordinary course of justice. It is in the discretion of the legislative power to confer upon courts a summary jurisdiction to protect their suitors or itself by summary process, or to deny it. It has been thought proper to do the latter, in language too plain to doubt of the meaning of the law, or, if it could be doubted by any ordinary rule of construction, the occasion and circumstances of its enactment would most effectually remove them. It would ill become any court of the United States to make a struggle to retain any summary power, the exercise of which is manifestly contrary to the declared will of the legislative power. It is not like a case where the right of property or personal liberty is intended to be affected by a law, which the court would construe very strictly to save a right granted or secured by any former law. Neither is it proper to arraign the wisdom or justice of a law to which a court is bound to submit, nor to make an effort to move in relation to a matter

when there is an insuperable bar to any efficient action.

The law prohibits the issuing of an attachment, except in certain cases, of which the present is not one. It would therefore be not only utterly useless, but place the court in a position beneath contempt, to grant a rule to show cause why an attachment should not issue, when an exhibition of the act of 1831 would show most conclusive cause. The court is disarmed in relation to the press; it can neither protect itself, or its suitors; libels may be published upon either without stint; the merits of a cause depending for trial or judgment may be discussed at pleasure; anything may be said to jurors through the press, the most wilful misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of causes by out of door influence practiced with impunity. The second section of the same law provided "That if any person or persons shall corruptly, or by threats, or force, endeavor to influence, intimidate or impede any juror, witness or officer in any court of the United States, in the discharge of his duty, or shall corruptly, or by threat, or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor, by indictment," &c. This provision is in further confirmation of the view taken of the first section. It is a clear indication of the meaning of the law, that the misbehavior which may still be punished in a summary manner does not refer to those acts which subject a party to an indictment. To construe it otherwise would be to authorize accumulative punishment for the same offence. Taking the two sections in connection, the law admits of only one construction. The first alludes to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business; not to any attempt to influence, intimidate, or impede a juror, witness, or officer in the discharge of his duty in any other manner whatever. "The obstruction of the administration of justice," in the first section, refers to that kind of behavior which actually disturbs the court in the exercise of its functions while sitting; "the obstructing and impeding the administration of justice," or the endeavor to do so, in the second, refers to some act of corruption, to some force or threat, by which it is done or attempted to be done. The endeavor to influence, intimidate, or impede a witness, juror, or officer in the discharge of his duty is not punishable unless it is done corruptly, by force or threats. If done by any other manner, the law is silent; and, this being a penal section, its provisions must be confined to the special cases to which it extends. [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 94, 95.

With this limitation on the summary jurisdiction of the court, and the want of any legal provision making it cognizable by indictment, we cannot say that the publication which is the ground of this motion, or any other, is or can be any disturbance of the business of the court. The action of the press is noiseless, producing the same effects, far or near, it matters not. The business of the court is not interrupted. Judges and jurors can perform their functions on the bench and in the box by confining their attention to the law and evidence. Disorder may be repressed in their presence or hearing in a summary manner, but after an adjournment no attachment can be issued for anything done out of court, during the intermission of its actual session. Nor can any publication, which holds out no corrupt motive to influence a juror, witness, or officer, or uses any threats to influence, intimidate, or impede him in his duty, be the subject of an indictment, consistently with this law. The press is free, if not set to work in the presence of the court, or so near as to interrupt its business. The law does not prohibit any endeavor made to influence or intimidate a juror or witness, if corruption, force, or threats are avoided. Papers may be put into their pockets, conversation held with them, newspapers put into their hands, or statements made in relation to any matter in issue while they are actually impanelled. The court may regret and censure the practice, and perhaps admonish the party who thus tampers with a juror or witness, but can neither punish the offence or prevent its repetition. The law has tied their hands. The judges must be passive. It is not for them to be the first to set the example of disobedience to the law, or attempt to evade plain enactments; most especially not by the exercise of a forbidden jurisdiction. These are all the powers with which congress have entrusted the courts of the United States, in insuring the fair administration of the laws, protecting themselves, jurors, witnesses, and officers from any improper interference with their respective duties, either by attachment or indictment.

For the protection of parties, for their security of a fair and impartial trial and decision of their case on the evidence and law which apply to it; to defend them against the efforts of the press or of individuals to excite a prejudice in the minds of a jury, to induce them to find a verdict on out of door statements, or other means of perverting their judgments,—no legal check is interposed. It is left to the discretion of the conductors of public journals, and all others, to take whatever course their sense of public justice requires; to decide what is proper for jurors to hear and see, as guides to their verdict, whether it is the truth or false, the effects of malice, prejudice, or from any excusable motive. Before the passage of the act of 1831 there was an acknowledged power resting in the sound, legal discretion of the court to be exercised with caution, and from its nature attended

with the highest responsibility of the judges, which did authorize them, by the process of attachment, to prevent and punish the publication of articles like the one before us; and in this case it would have been the imperious duty of this court to have brought their powers into action by granting this rule, if the legislative power had not taken it away. How far it would have been proper to exercise them would have depended on the cause shown. On the rule, it was a clear, prima facie case for some interference. But as congress has deemed such a power too dangerous to be entrusted to the discretion of judges on a motion, or of a court and jury on an indictment, and have not thought it expedient to give a remedy to a party who has been injured by a publication by authorizing him to bring a suit against the publisher for damages, we have no cognizance of the matter. The means of redress which had before existed have been taken away without the substitution of any other. The law has left the propriety of such publications to the discretion of the editors of public papers, after long experience of the effects of leaving it to the discretion of courts, who assumed high responsibilities in its exercise; while none is imposed on those in whose breasts it now rests. It is the duty of the court to give the law its full operation. It has been enacted deliberately, with full knowledge not only of the course of the common law, the act of 1789, but of the statute law of Pennsylvania on the same subject, passed in 1809, which gives the injured party a double remedy for any injury complained of in a case like this. After taking from the courts of the state the power to punish for contempt, except in certain cases, the law declares that no publications out of court, concerning any cause depending therein, shall be construed into a contempt, &c., "but, if such publication shall improperly tend to bias the minds of the public, the court, the officers, jurors, witnesses, or any of them, on a question pending before the court, every person feeling himself aggrieved by such publication shall be at liberty either to proceed by indictment, or to bring an action at law against the author, printer, publisher, or either of them, and recover thereupon such damages as a jury may think fit to award." 5 Smith, Laws, p. 55.

Thus it appears that, while suitors in the state courts can be protected against publications like this, they are without protection in the federal courts. The legislature of the state deem it both an indictable and an actionable offence. The legislature of the Union deem it neither a contempt of the law, of the court, an offence to the public, or an injury to a party. The rule must be refused, but it is hoped that an appeal to the sense of justice, the magnanimity of the press to abstain from any publication which shall improperly tend to bias the minds of the public, the court, the officers, jurors, or witnesses in any cause while actually under trial before a jury in this court, may not be in vain. Its conductors should remember that suitors stand unarmed and defenseless before them; that the hands of the court are manackled; that the law of 1831 has placed no arbiter between an editor and a party to a trial, whose life, character, liberty, or property may be put in jeopardy by the influence of the press. The law has taken from him a shield, and from the court the sword. Both must be submissive under the inflictions of the press, be they just or unjust. If it is conducted in the spirit of chivalry, and must be employed on cases depending in the courts, let it be on suitors in state courts, who can meet them in the panoply of the law; not on those who are helpless in this. It is neither manly or generous to assail those who can make no resistance, or inflict an injury for which the sufferer is left without a remedy.

Case No. 11,351.

POUNDER v. The CAROLINE V. CASEY. [See Case No. 2,421a.]

POUNDER v. PROCEEDS OF THE CAROLINE CASEY. See Case No. 2,421a.

POULSON, The (McCREADY v.). See Case No. 8,734.

Case No. 11,352.

POUSOT v. LAWRENCE.

[N. Y. Times, April 29, 1857.]

Circuit Court, S. D. New York. April 28, 1857.

CUSTOMS DUTIES — PROTEST — SCOPE AND SUFFICIENCY—ROSEWOOD FURNITURE.

[Under a protest against paying a given duty on "rosewood furniture," the rates levied on furniture in the same entry made only in part or not at all of rosewood cannot be considered.]

[This was an action at law by George Pousot against Cornelius W. Lawrence to recover back duties illegally exacted by defendant as collector. Verdict was given for plaintiff, subject to the opinion of the court.]

Mr. McCulloh, for plaintiff.
Mr. McKeon, for defendant.

Before HALL, District Judge. The only question was as to the sufficiency of the protests. There were five entries of goods. The first one embraced "rosewood and mahogany furniture, common wood furniture, rosewood furniture, and silk and worsted goods." The protest annexed is "against paying" 40 per cent. duty on rosewood furniture, as specified in his entry, believing it should pay 30 per cent. as cabinet furniture. The other entries and protests are similar.

HELD BY THE COURT: That these protests related to a specific article embraced in the entries. "Rosewood furniture" is a well-known and specific term, and the protests

cannot be extended beyond what is properly and specifically embraced within them. Furniture of other woods, silk and worsted goods, and furniture of rosewood and common wood together, or rosewood and mahogany together, must be excluded from their operation.

Judgment for plaintiff, for the sum appearing to be due on these principles; the amount to be ascertained by adjustment at the custom-house, or as the parties may otherwise prefer.

Case No. 11,353.

POWDEN v. JOHNSON.

[2 N. J. Law J. 48; 7 Reporter, 294.] [1]

Circuit Court, D. New Jersey. 1878.

EQUITY PLEADING—RESPONSIVE ANSWER—HOW OVERCOME.

The old rule that two witnesses are required to overcome the denial of responsive answer has been modified. A single witness must be corroborated by additional testimony or by circumstances. If the complainant produces a defendant as a witness, he must accept the whole of his evidence.

The complainant's bill was filed by a receiver of an insolvent national bank to hold the defendant, Johnson, personally liable as a stockholder. It alleged that the defendant, Johnson, in January 10th, 1870, became the owner of 130 shares of the capital of the First National Bank of Norfolk, Va.; that the bank failed to honor its notes May 26th, 1874, and that the complainant was appointed receiver June 3d, 1874; that the defendant, Johnson, visited Norfolk in January, 1874, for the purpose of examining into the affairs of the bank, and becoming satisfied that it was in a critical condition, and that a suspension was inevitable, he returned to New Jersey, and immediately thereafter, to wit, on the 15th of January, 1874, in order to exonerate himself from liability to the creditors of the association, transferred or caused to be transferred his 130 shares of stock to the defendant Valentine, and that the pretended transfer was made without legal consideration, and with a view of releasing himself from his liability, and to one who was known to be insolvent. The bill prays that the transfer may be set aside. A joint and several answer was filed by the defendants, in which they deny all the material allegations of the bill, and assert that the transfer was made by said Johnson to said Valentine (who was his mother-in-law) in good faith and for a valuable consideration, without knowledge of the failing condition of the association. Testimony was taken on the part of the complainant.

Thomas D. Hoxsey and L. G. Lewis, for complainant.

Thomas N. McCarter, for defendant.

[1] [Reprinted from 7 Reporter, 294, by permission. It contains only a partial report.]

NIXON, District Judge, after stating the case, said the question was whether the evidence in the case overcomes the force of the defendant's denial in the answer, and proceeded as follows: The old rule in equity that, where a matter of fact is directly put in by the answer, the evidence of two witnesses is required as the foundation of a decree, has been modified in modern practice. But a single witness is still insufficient. He must be corroborated either by additional testimony, or by circumstances, before a decree can be entered for the complainant. 1 Greenl. Ev. § 260; Cooth v. Jackson, 6 Ves. 40; Heffner v. Miller, 2 Munf. 43; Smith v. Brush, 1 Johns. Ch. 460; Clark v. Van Reins Dyk, 9 Cranch [13 U. S.] 160; 2 Story, Eq. Pl. § 1528; Brown v. Bulkley, 14 N. J. Eq. 294. Upon what evidence does the complainant rely to overcome the answer? It must be borne in mind that the bill charges fraud. The burden of proof rests upon the complainant, and, the fraud being disavowed by the answer, the complainant must maintain his suit by his own strength. The late Mr. Justice Story, in considering a very similar case,—Phettiplace v. Sayles [Case No. 11,083],—says: "It is necessary to consider whether the circumstances relied on as presumptive of fraud are of such a nature as to outweigh the positive denials of the answer. It is not sufficient for the plaintiff to show circumstances of suspicion or doubt. He must go further, and establish beyond a reasonable doubt that the weight of evidence and circumstances are so decisively in his favor as to destroy the ordinary credit of the answer." The court then discusses at length the evidence of the officers of the bank and of one of the defendants, Mrs. Valentine, who was produced on the part of the complainants. In speaking of the testimony of this witness the court said: She was placed on the stand by the complainant. He was not compelled to make her his witness; but having voluntarily done so, he must accept her evidence as true unless she has been contradicted by others. The law does not permit litigants to experiment with interested parties, allowing them to call their adversaries to testify, and then to take such portions of their testimony as happens to be in their favor, and reject such as seems to bear against them. The court considered the evidence of Mrs. Valentine favorable to the defendants, and concluded as follows: This is the testimony of a witness on the part of the complainant, and it stands uncontradicted, except by inferences to be drawn from suspicious conduct and acts on the part of the defendant. There are doubtless circumstances in the case which cast over it a cloud of suspicion and doubt; but these are not sufficient to establish bad faith or fraud in the transfer, or to negative the positive denials of the answer. Gould v. Gould [Case No. 5,637].

We are quite clear that upon the merits of the case, as exhibited in the pleadings and the proofs, the complainant's bill should be dismissed; and it is ordered accordingly.

Case No. 11,354.

In re POWELL.

[2 N. B. R. 45 (Quarto, 17).] [1]

District Court, D. New Jersey. 1868.

BANKRUPTCY — ACKNOWLEDGMENT OF POWER OF ATTORNEY—QUALIFICATION OF ASSIGNEE.

1. An acknowledgment of a power of attorney authorizing a person to appear for a creditor is not necessary. An objection to the appointment of assignee, for the reason that he is related to the bankrupt, is well taken.

[Cited in Re Wetmore, Case No. 17,466.]

2. Where director of a bank, to which bank the bankrupt had shortly before confessed judgment, had been appointed assignee, *held*, that an objection to the assignee acting as such, grounded on the above facts, was well taken.

[In the matter of Allen F. Powell, a bankrupt.]

FIELD, District Judge. In this case the register certifies that at the first meeting of the creditors of the said bankrupt, powers of attorney were produced, executed by several of the creditors, authorizing the persons to whom they were given to vote for an assignee. They were objected to by the counsel for some of the creditors, upon the ground that they had not annexed to them certificates of acknowledgment of the due execution thereof. The register overruled the objection, and allowed the attorneys named in the said powers to vote thereon in the election of an assignee. In my opinion the ruling of the register was right. The twenty-third section of the bankrupt act [of 1867 (14 Stat. 523)] provides that "any creditor may act at all meetings by his duly constituted attorney, the same as though personally present." I am at a loss to imagine upon what ground it could be supposed that an acknowledgment was necessary to the validity of a power of attorney. The act does not require it, and the form number fourteen contemplates only that the power of attorney should be signed in the presence of a subscribing witness, and endorsed by the register as having been exhibited to him. An acknowledgment is never necessary to the validity of a written instrument, unless required by some positive law. It might be asked, too, if an acknowledgment is required in this case, before whom is it to be made? But the question is too clear to make any argument necessary.

The register further certifies that, of the votes given for assignee, Allen Fennimore received a majority in number and in value of the creditors who voted; and that thereupon the counsel for certain of the creditors objected to the confirmation of the choice of the said Allen Fennimore as assignee, for two reasons: First. Because he was related to the bankrupt, being the brother of his mother, and, Second. Because he was a director of a bank to which the bankrupt had, just previous to the filing of his petition, confessed a judgment, by virtue of which all his property had been sold. Both these objections are, I think, well taken; certainly, as a general rule, it is better that the assignee should not be in any way connected with the bankrupt. And as to the second objection, the eighteenth section of the bankrupt act expressly provides that "no person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee." The director of a bank to which a judgment had been confessed by the bankrupt, shortly before the filing of his petition, comes within the spirit if not the letter of this clause of the act. The thirteenth section provides that all elections or appointments of assignees shall be subject to the approval of the judge; and when, in his judgment, it is for any cause needful or expedient, he may appoint additional assignees or order a new election. I shall decline to approve of the said choice of assignee, and will order a new election.

[1] [Reprinted by permission.]

POWELL (ABBOTT v.). See Case No. 13.

Case No. 11,355.

POWELL et al. v. The BETSY.

[2 Browne (Pa.) 335.]

District Court, D. Pennsylvania. Jan. 10, 1813.

SEAMEN'S WAGES — CAPTURE AND CONDEMNATION OF SHIP—SEAMEN AS WITNESSES.

[1. When the ship is captured and carried into a foreign port, the seamen are bound by their contract to remain with her until she is condemned in a tribunal of first resort. By such condemnation, however, the voyage is broken up, which subjects them to loss of wages, unless restoration ultimately takes place. They are not bound to remain after such condemnation, but they may do so at the master's request, awaiting the issue of an appeal; but this must be considered as under a new contract, and, if no terms are mentioned, it will be considered that they are the same as in the old contract.]

[2. Where a vessel bound from Philadelphia to a Danish port was captured by a French privateer, carried into a French port, and there condemned by the court of first instance, and afterwards, upon appeal, was ordered to be restored, and the proceeds of cargo sold were paid into the hands of the supercargo, except one-fifth thereof, which was retained as a pledge that the proceeds of certain colonial produce should be exported in the productions of France, *held*, that this was in legal effect a restoration such as would enable the seamen to maintain a libel for wages up to the time of the condemnation of the vessel and cargo in the court of first instance, although the agent of the owners, for reasons connected with a contemplated suit against the captors, had not yet in fact resumed possession of the ship.]

[3. Seamen joining in a common libel for wages have not a common interest in such sense as to render them entirely incompetent to tes-

tify in behalf of each other, but in such cases the court is inclined to adopt the rule of the civil law, which requires at least two witnesses.]

"To the Honorable Richard Peters, Judge of the District Court of the United States in and for the Pennsylvania District.

"The libel of William Powell, Charles Flexon, John Harris, and George Middleton, late seamen of the ship Betsey, of Philadelphia (Guier & Diehl and others, owners, and John Risbrough, master), respectfully sets forth: That your libellants shipped at the port of Philadelphia on the twenty-ninth day of August, one thousand eight hundred and ten, on board the said ship Betsey, to perform a voyage from the said port to Keihl, in Denmark, for which said port the said ship sailed from the said port of Philadelphia on the thirteenth day of August. Your libellants being on board the said ship, the said ship, proceeding on the said voyage, was captured by a French privateer, and carried into Dieppe, in France, where she arrived on the nineteenth day of October in the year aforesaid. From the time of the arrival of the said ship as aforesaid until the fifteenth of May, one thousand eight hundred and twelve, your libellants remained, by order of the captain, at Dieppe, with the said ship, and during which time no condemnation of the said ship took place; and on the said fifteenth day of May in the said year your libellants were ordered to leave the said ship, no provision for their support being made or provided; and, with the consent of the said captain, they left the said ship, and embarked for the United States. Your libellants respectfully say that there is due to them, from the said owners and master of the said ship, a considerable amount of wages, the same to be allowed to them accordingly to the rate per month at which they severally shipped, up to the said fifteenth of May in the year one thousand eight hundred and twelve, a particular account of which said wages will be found in a certain schedule hereunto annexed, and which they pray may be taken as a part of this their libel; and your libellants further respectfully represent that they have been informed and verily believe that since their return as aforesaid to the United States the said ship Betsey and her cargo, or the proceeds thereof, have been restored to and have come into the possession of her said owners or their agents, or that a decree for the restoration has been made by the government of France. Your libellants therefore pray that the said master and owners of the said ship Betsey may be required to inform this honorable court, on their respective oaths or affirmations, whether the said ship Betsey has been at any time, and when, condemned as forfeited, and they have thus been deprived of the same; and also whether the said ship Betsey and her cargo have been restored, or ordered to be restored, to the said owners, and when the said order for her restoration was made, and if the same have come into the possession of the said owners or their agents, and whether they are in possession of any and what information relative thereto.

"And your libellants further pray, that this honorable court will order such further proceedings in this case as may seem just and proper, and that by a decree of this court there may be adjudged to them their respective wages, according to the accounts stated and set forth in the schedule aforesaid. And they will, etc.

"(Signed) Peters and Delany,
"Attorneys for Libellants."

"To the Honorable Richard Peters, Judge of the District Court of the United States for the District of Pennsylvania.

"The answer of William Guier and Thomas Diehl, of the city of Philadelphia, merchants, to the libel of William Powell, Charles Flexon, John Harris, and George Middleton, respectfully sheweth: That your respondents, saving to themselves all and all manner of benefit or advantage to be had from the manifold errors, uncertainties, and imperfections in the libellants' said libel contained, for answer thereto, or to so much thereof as is material and necessary for them to answer unto, they answer and say: That true it is, the libellants shipped as seamen on board the ship Betsey, at the time and in the manner, and sailed upon the voyage, set forth in the said libel. That, at the time of said shipment and commencement of said voyage, the said ship was owned by the respondent and Jacob Sperry, F. W. Sperry, and Elisha Kane. That true it is, that the said ship, while proceeding on her voyage, was captured by a French privateer, and carried into Dieppe, in France, where she arrived as is stated in the said libel. That the respondents do not admit to be true, as stated in the libel of the libellants, but do deny, that the said libellants remained by order of the captain at Dieppe, with the said ship, from the time of her arrival to the fifteenth day of May, one thousand eight hundred and twelve; that during that time no condemnation of said ship took place; and that on the fifteenth day of May in the said year the libellants were ordered to leave the said ship, no provision for their support having been made or provided, and, with the consent of the said captain, left the said ship, and embarked for the United States. But of these allegations the respondents pray that the libellants may be directed by your honor to make full and clear proof. And, further answering, the respondents answer and say that as they have been repeatedly informed, and fully believe, the said ship Betsey and her cargo have been condemned as forfeited and the owners deprived of the same; that said

condemnation was approved by the French emperor on the 9th day of January, A. D. 1812; and the respondents do aver that the said condemnation was made known to the libellants, as they are informed and believe, on or before the twenty-fourth day of January, one thousand eight hundred and twelve. And, further answering, the respondents answer and say that all the information they have received and all the knowledge they possess on the subject of a restoration of the said ship and cargo, and of the proceedings to obtain the same, has been derived from letters received by them from John Diehl, the supercargo of said ship, of which letters true copies are hereunto annexed, and which they pray may be taken, as a part of this, their answer. And your respondents do aver and say that the libellants are not entitled to have and receive the wages demanded by their said libel, because they say that by the capture aforesaid the said wages are lost to the libellants, or, if not wholly lost, that the right of the libellants to have and demand the said wages, or any part thereof, is, according to the due course of admiralty law and the practice of this honorable court, by reason of the said capture, suspended until the said ship, or the freight or earnings of the said ship, is fully and effectually restored to the owners thereof; and that upon such restoration, whenever this honorable court shall adjudge or decree that due proof thereof has been made, the said libellants would be entitled to their wages only to the time of the condemnation of said ship and their receiving notice thereof. And therefore the respondents pray that this honorable court will proceed no further with respect to the residue of said libel, praying that the court will adjudge the said libellants, the wages demanded; and that the libel of the libellants may be dismissed with costs, etc.

"(Signed) Thomas Diehl,
"For Self and William Guier.
"Chauncey Proctor,
"For Respondents.

"Thomas Diehl, one of the respondents, being duly sworn, saith that the facts set forth in the foregoing answer, are, to the best of his knowledge and belief, true.

"(Signed) Thomas Diehl.

"Sworn to in open court November 26th, 1813.

"(Signed) D. Caldwell,
"Clerk of the District Court."

"Paris, 30th January, 1812.

"Messrs. Guier and Diehl—Gentlemen: Since mine of yesterday, I have obtained from the council of prizes the enclosed certificate, by which you will perceive the villainous and absurd plea made use of in the condemnation of the Betsy and cargo. I have not, nor do I believe that I shall be able to obtain, a copy of the condemnation. I shall, however, do everything in my power to procure it, but, if I should not succeed, hope the enclosed certificate will be proof sufficient to enable you to recover from the underwriters. No news with regard to the subject of my letter of yesterday. Inclosed you have a copy of a letter from the director of the customs at Abbeville, to the receiver principal at Dieppe.

"Yours, &c., &c., &c.

"(Signed) John Diehl."

"Custom House Imperial.

"Abbeville, 12th February, 1812.

"Sale of the Betsy.

"The Director of the Customs to M. M. Lagrine, Principal Receiver at Dieppe.

(Copy.)

"Sir: The emperor has ordered that the proceeds of the sale of The Betsy, condemned by a decision of the 9th of January, shall not be paid to the captors, but shall be provisionally placed in the case of ammortisement. The minister of marine who gave orders for the execution of the condemnation has been advised of the new intention of his majesty, and has, in conformity thereto, transmitted his instructions to M. the commissary of marine. They will not, however, charge anything in regard to the nankeens, except that the director general has observed to me, by his letter of the 10th inst., that he has ordered them to be detained in the public stores until a definite decision, and that they cannot be given to the captors, even if they should offer to re-export them.

"(Signed) Boucher."

"Paris, April 16th, 1813.

"Dr. Brother: In my last to you, on the 25th of March, ultimo, I forwarded you a copy of a letter from the Duke of Bassano to M. Florrest, and it is with infinite pleasure I am permitted to inform you that I received yesterday the pleasing information of the restitution of the Betsey and cargo, by a decree of his majesty, on the 13th inst. I am not informed yet whether there are any or what are the conditions of this restitution, but shall probably be able to write you more fully in a few days; in the mean time, please have the goodness to inform those interested, of this desirable event. I shall be extremely at a loss to determine in what manner to remit the funds of G. and D., as well as my own, as the risk of shipping at this season of the year is very great, and probably insurance could not be effected. To remit at this moment to England, would afford but little profit, and probably not enough to cover the loss in drawing from the United States, as bills cannot be had here for less than twenty francs, for the pound sterling. In your last letter, you speak of remittance to Amsterdam, but as

no profit can be made in placing the funds there, and as I am informed the exchange in America, in favor of the drawer, is very trifling, I cannot conceive that measure would be practicable. It is very possible that I shall meet with considerable delay before I shall be able to receive the funds. You will probably have it in your power to give me particular instructions on that head, before I shall have it in my power to make the remittance. When you write I would advise you, by all means, to give your letters to some person who will put them in the post office, as our captains, in general, deliver them to the police, and not one in fifty ever comes to hand. In my letter to you, on the 20th October, 1812, I requested you to give me instructions relative to the manner you wished the ship employed in case of restitution. Am still, however, without any reply on the subject, but, as the Rattlesnake has arrived within a few days from Philadelphia, I hope I shall receive full instructions on that head, as also some information relative to the license.

"Yours, &c., &c.

"(Signed) John Diehl."

"Paris, 23d April, 1813.

"Messrs. Guier and Diehl—Gentlemen: I had the pleasure to address your Mr. J. Diehl on the 16th inst. advising him of the restitution of the Betsey and cargo, at which time had it not in my power to make known to him the condition of the said restitution, since which am informed that I shall be obliged to export the proceeds of the colonial produce in the productions of France, but in what articles am not yet instructed. The expences on this affair will be enormous, and the best invoices will not, most probably, produce more than 10 pr. cent profit, but when we consider the situation in which it was twice placed, first by a decision of the council of prizes, and secondly by a decree of his majesty which confiscated the whole to the benefit of the captors, the owners ought to think themselves very fortunate to receive the principal without profit or interest. I am extremely at a loss what to do with the ship, as the situation of the port of Dieppe renders it very difficult to escape the British cruisers, which are continually cruising in the channel, and unless I can succeed in getting her to some other port (in ballast), from which there will be less risk, I shall be extremely loth to ship the whole by her, especially in her present situation, and have some idea of taking off her upper deck, and rigging her into a brig, which will improve her sailing greatly, and render her chance of escaping much more probable. As I have reason to believe you are still interested in the ship, and as it is probable I shall be detained six months yet, expect your instructions, relative thereto: be particular to give your letters to some person who will put them in the post office, or they will most probably never come to hand. I have had proposals to fit the ship out as a privateer, which might probably be done by giving one-half against the equipment. Your ideas on that subject. Relative to the segars, of your T. D., shall be obliged to sell them to the government, and am fearful the price will not be very advantageous, as they are not fond of paying dear for anything they buy. Notwithstanding the numerous arrivals from the United States, I am without a line from any of the owners for several months.

"Yours, &c.,

"(Signed) John Diehl."

"Inform Mr. Ralston and Nathans, that I shall be obliged to re-export their nankeens, as the government will not allow them to be sold in France. and that I shall do the best in my power for their interest."

"Paris, 23d June, 1813.

"Mr. Thomas Diehl—Dr. Brother: Since my last to you on the 16th April, which I forwarded by several different occasions I have received from the treasurer of the custom house here, four hundred and ninety thousand francs, less one fifth, which is held as a guarantee for the exportation, conformably to the decree of restitution, the difference between which sum and the amount of sales (say sixty-eight thousand francs) has been paid, without my knowledge or approbation, by the director of the marine at Dieppe, who was charged with the execution of the sale, for sundry expences, the legality of which, am about disputing, as I cannot conceive that such a sum can be composed entirely of just charges. It is also my intention to prosecute the captors for the loss sustained on the 183 boxes of sugars, damaged by their neglect, and it is the opinion of my attorney that I shall recover, as the decree of restitution orders that the cargo should be restored to me without depriving me of the right of prosecuting the captors for property destroyed. The segars belonging to you and Mr. Kintzing are not sold, nor have I it in my power to inform you what I shall be able to obtain for them, as I am not permitted to sell them but to the government, who have not yet said what price they will allow me. With regard to the nankeens, I lately applied to the minister of commerce for permission to transport them into Switzerland by land, where I could have obtained six or seven francs, but unfortunately it was refused me, and I am informed by the said minister that they must be exported from the port of Dieppe by sea. What I shall do with them I do not know. In my letter to G. and D. on the 23d April, ult. (forwarded by six different occasions), I have requested instructions relative to the ship. As to dispatch her in her present situation, she would stand but little chance to arrive in the United States, and to rig her into a

brig would cost so much that I do not like to undertake it without the particular instructions of the owners, but which, in my opinion, would be the best method that could be adopted, as the expence would not be more here than in the United States, and would render her, in case of the continuation of the war with England, a very valuable vessel. It would be imprudent to make any shipment at this season of the year, and shall defer doing anything to the ship for two months, in hopes of receiving the particular orders of proprietors. I shall not commence my shipments until about the commencement of November, and for the government of those concerned, shall give the earliest information possible of my operations, on their account. Inclosed I send you the first of Mr. Archibald Woodruff's draft, dated 22d inst. on M. Lodowick Sharpes, for four hundred dollars, which you will please to collect, and pay to Mrs. Diehl, or place it to the credit of my account with G. and D. or yourself, as circumstances may require.

"Yours, &c.,

"(Signed) John Diehl."

"P. S. Make every necessary communication to those interested in this affair."

"Paris, 19th August, 1813.

"Mr. Thomas Diehl—Dr. Brother: Since my last to you on the 23d June, ult., I am sorry to be obliged to say that I have made but little progress toward the conclusion of my affairs here. I have not as yet taken possession of the ship or segars and nankeens, as in order to hold the captors responsible, if possible, for the damage which the ship and cargo has sustained by their fault, it is necessary that surveyors should be appointed by the court (before I take possession). Contrary to all reason and common sense, the tribunal at Dieppe, has refused to allow me a survey; this is, however, not extraordinary, as it is not so easy matter to obtain a judgment against privateersmen, when it is from privateersmen you are obliged to solicit that judgment. I have appealed to the court of Rowan, where I shall hear my fate in six or eight days. I shall regret much to be obliged to abandon this claim, inasmuch as I perceive more and more every day that the voyage will end in a loss to those interested. Relative to the settlement made by the commissary of marine at Dieppe, in which he has, as I have already advised, passed expences to the amount of sixty-eight thousand francs, I do not think it possible, but that I shall be able to obtain a deduction of at least thirty thousand francs, at all events, if I do not succeeed, it shall not be for want of attention or exertion. By a letter from the minister of commerce, some days since, I am informed that the exportations for the proceeds of the ship Betsey and cargo must consist of one-third in silks, and the other two-thirds of articles at my choice, which I shall endeavor to accomplish by the first of November, if possible, and it is my intention to make my exportations from Bordeaux or Nantz. If I can find suitable vessels,—that is to say, fast sailing schooners,—that will take freight, and of which I shall give the earliest information possible. It is with pleasure I have learnt, sometime since, the arrival in the United States of the Bellona, as she was the bearer of my first letter to you, after the restitution of Betsey and cargo, and have been for some time expecting particular instructions relative to the ship. Permit me to observe that it appears to me very extraordinary that I have not received a line from you since the 28th November, 1812; as I had written you several letters, the answers to which are, to me, of the greatest importance. In order to avoid any difficulty with Mr. George Smith, or his creditors, it would perhaps be well to cancel the policy which he underwrote on my commissions, even if you should be obliged to lose the premium. Yours, &c.

"(Signed) John Diehl.

"P. S. Please to make every necessary communication to those interested, as have not written to the different concerns, nor shall I until it is necessary to advise them relative to insurance, as I have it not in my power to forward their respective accounts.

"(Signed) J. D."

"To the Honorable Richard Peters, Judge of the District Court of the United States in and for the Pennsylvania District:

"The replication of William Powell, Charles Flexon, John Harris, and George Middleton to the answer of William Guier and Thomas Diehl, filed in this court to the matters stated and set forth in the libel of your replicants, respectfully sets forth: That your replicants, William Powell, John Harris, Charles Flexon, and George Middleton, saving to themselves all benefits and advantages arising, or which may arise, to them from the contradictions and imperfections in the said answer so manifest, do say that although it may be truly alleged and set forth in the said answer that the said ship Betsey and cargo were condemned by the order of the tribunal of prizes in France, yet the said ship, and almost the whole of the cargo, has since, by the order of the emperor of France, been directed to be restored, and the agents of the owners have, in consequence of such order, actually received a greater portion of the said cargo, or the proceeds thereof, and may at any time receive the residue thereof, as well as the said ship. Your replicants, in support of this allegation, beg leave respectfully to refer to the answer of the said Guier and Diehl, and the papers thereto annexed. And the said William Powell and others, in further reply to the matter set forth in the said answer, do aver and say that it is truly alleged in the said libel filed by them in this honorable court that they remained in Dieppe, in France, waiting the restoration of the said ship, by order of the captain thereof; and they do fur-

ther say that after the capture of the said ship, and her arrival in Dieppe, under the charge of her captors, and before your replicants left the said ship, as stated in their libel, they severally and together made frequent application to the master of the said ship for his permission to return to the United States, which applications were always without success, and this as well as all the matters stated and set forth in the said libel, as well as in this replication, they are ready to make out to the satisfaction of your honor by proof.

"Your replicants do therefore pray, that inasmuch as it is shown and fully proved, by the answer of the said Guier and Diehl, that the said ship Betsey and her cargo, have been restored, and are either in the possession of the agents of the said respondents, the said Guier and Diehl, or may be taken into their possession at any time, that your honor will decree the payment of so much of the wages of your replicants as are due to them up to the period, when notice of the condemnation of the said ship was given to your replicants, as set forth in the said answer of the said Guier and Diehl, viz.: The twenty-fourth day of January, one thousand eight hundred and twelve; and, as to the residue of their wages, they pray that on your replicants making the proof aforesaid the payment of the same may be decreed to them.

"And they will, &c.

"(Signed) R. Peters & W. Delany,
"Proctors."

PETERS, District Judge. The ship sailed from Philadelphia, after the libellants had shipped as mariners, on the 30th of August, 1810, bound for Kiehl, in Denmark; she was captured by a French privateer, and carried to Dieppe, in France, where she arrived on the 19th October, ensuing. The libel states that they remained on board, by order of the captain, at Dieppe, until the 15th of May, 1812, during which time no condemnation took place; on the said 15th of May, they were ordered to leave the ship, no provision for their support having been made, and, with the consent of the captain, embarked for the United States. They demand wages up to the time of their leaving the ship.

They allege that this ship and cargo, or their proceeds, were restored and came into possession of the owners, or their agent, and pray that the master and owners, may be required on oath, to inform the court: 1st. Whether the ship had been, and when, condemned? 2nd. Whether the ship and cargo had been restored? And when the order for the restoration was made? The respondents agree in the facts of shipment, capture, and carrying into Dieppe; but they deny that the libellants remained in and with the ship until the time stated, to wit, the 15th of May, 1812, and pray that they may be directed to make full proof of this allegation. They allege that the ship and cargo were condemned as forfeited, and the owners deprived thereof. This condemnation they allege was made known to the libellants, as they are informed and believe, on or before the 24th day of January, 1812. They annex true copies of letters from the supercargo, John Diehl, containing all the information they possess. They further allege that the wages were lost by condemnation, or at least their right of recovery suspended until complete restoration, and even then the libellants are only entitled to receive wages to the time of condemnation. The libellants reply that although it may be true that the ship and cargo had been condemned by order of the tribunal of prizes in France, yet the ship, and almost the whole of the cargo, has since, by order of the emperor, been restored, and the agents of the owners have actually received the greater portion of the cargo, or its proceeds, and may at any time receive the residue thereof, as well as the ship. For proof whereof, they refer to the answer of the respondents and the papers annexed thereto. They persist in their allegation that they remained at Dieppe, by order of the captain, waiting the restoration of the ship, and that they made repeated applications to the master for leave to return home, without success. They finally pray that wages be paid up to the period when it appears by the respondents' own showing that notice of the condemnation was given, to wit, the 24th of January, and that they may be permitted to make proof as to the residue, and on such proof being made the same may be decreed, &c.

By the letters from the supercargo, Diehl, it plainly appears that, after many delays and difficulties, the ship and cargo, or its proceeds, were directed to be restored, and that a sum equal to about four-fifths of the proceeds of the cargo has actually been paid into the hands of the supercargo. The residue is retained as a pledge that the proceeds of the colonial produce shall be exported in the productions of France. The ship, it also appears, might at any time be taken possession of by the supercargo. But he did not choose to take such possession until certain arrangements (in which he found difficulties) were made to enable him to sue the captors for damages, so that there is no doubt in my mind that, so far as relates to the mariners, who are not concerned in the effect of any ultimate measures the owners or their agents may choose for their own objects to adopt, the restoration of the ship and cargo, or the proceeds of the latter, are to be considered as complete, to all legal intents. I therefore have no hesitation in decreeing, that the wages, up to the 24th of January, 1812, be paid with costs. The additional claim for wages to the 15th of May, 1812, must remain for further proof. The seamen were bound to remain with the vessel until the first decree for condemnation, under their old contract, and there is no

doubt of their having so remained. But I have always considered the first contract at an end, when the vessel is condemned in the tribunal of the first resort, because the voyage is then broken up by a misfortune, which subjects the seamen to loss of wages; if restoration does not ultimately take place. The seamen are not bound to remain longer than the time of notice of the first decree, at the risk of further loss. But they may remain at the master's request, waiting for the issue of an appeal. This is under a new contract entered into by both parties, and if the request to remain be general, that is, without prescribing new terms, it must be understood, that their abidance is under the terms of the old contract. I need not, therefore, consume any time in showing that proof of this new engagement must be as full as that for the establishment of the first contract. In this new contract, as well as in the old one, every man's agreement is distinct; though all are named in the same instrument.

I do not know that the admiralty law is different in the principles of evidence from the common law, which has borrowed, without acknowledging its obligations, many of its best principles from the civil codes of ancient nations. When I endeavored to establish some rules on the subject of admitting seamen to be witnesses for each other, I had no particular view to the creation of a difference between the admiralty and common-law principles in this regard; yet the civil law requires two witnesses in cases where the common law is satisfied with one. The practice of civil law courts is indubitably most congenial with admiralty and maritime proceedings. On this account I shall think myself warranted in cases wherein I think it necessary for the objects of justice to adopt the civil law rule, though I have not generally attended to it. In the Admiralty Decisions,—page 211, vol. 1 [Thompson v. Philadelphia, Case No. 13,973],—the general principles I laid down on this subject will appear. But I do not perceive in them anything bearing particularly on this case. A seaman is produced (not one joining in the libel) to prove the new or supplemental engagement by the captain of the Betsey with the mariners, inducing their stay at Dieppe, after the condemnation. It is not proved, on the contrary, it is denied, that this mariner was collusively omitted in the libel, for the purpose of giving evidence, or under an expectation of being served by those mentioned in the libel, when he shall sue for his wages. This could not be permitted; nor have I ever allowed mariners, joined together in a libel, to be witnessses for each other. At common law, persons joined in a suit, such as trespass, &c., for the purpose of excluding them as witnesses, have nevertheless been admitted. But seamen voluntarily connect themselves in a libel, and do not stand on the like ground. But where many enter into a contract, not joint, but several, as all ship's articles are, I see not that one mariner may not be a witness, to prove the contract of his shipmate, when unconnected in a suit brought for the recovery of wages, according to the strict principles of law. I do not recollect the point having before this time been made. In common law courts, suits are always separate, on the claims of the mariners, who have not the privilege there of joining in the same suit, which they enjoy in maritime courts. The judges of common law courts do not feel the embarrassments of one who must decide both on competency and credit. On the latter, the jury have the exclusive decision. I have therefore reluctantly admitted one mariner in any case to prove the contract of another, though I believe it has been done. In 3 Johns. p. 513 it is truly said by Chief Justice Kent that "where seamen having a common interest in the point in contest are admitted as competent witnesses, the fact would, no doubt, work strongly against the credit of their testimony." Of this opinion I have always been. Having to decide on their credit, I have avoided, rather than pointedly refused, admitting their testimony, to save myself the pain of disregarding their allegations on oath, in cases (and they are too common) in which I deem them careless, or worse. I know not how to relieve myself where points of this sort are pressed on me (and counsel by so doing may serve a turn which may reverberate on themselves in some future cases) but by establishing a rule that the civil law practice, of two witnesses, shall in the case in question, and others similar, be adopted; and I request that this may be considered as the practice here. I do not deem the interest of the seamen in the present case so connected as that some may not have separate circumstances attending their claims. Part of the original crew may be retained, and others discharged. Whatever the predominant interests may be, it is neither greater nor less, in this supplemental or protracted contract, than that which prevailed in the original agreement, or shipping articles; and I think that, as it regards their contracts, their interests may be more correctly styled similar than common. I admit the seamen as competent, but I shall expect further testimony. For the satisfaction of my mind on the point of credit, no specific rule can be established in any case.

I have considered the certificates of Captain Risbrough, exhibited in this case, which strongly imply that the seamen were retained by his consent, and at his request. It is scarcely probable that they would have remained if he had discharged them and assisted in the means of their return, as he did when the minister of the United States would no longer permit them to be supported at public expense. But there is no direct proof of this part of the case.

Charles Flexon is certified by Captain Risbrough to "have waited the decision of the said ship, until the 6th of May, 1812, when

he was ordered by Joel Barlow, American minister in Paris, to embark for the United States, as he could not be supported at the expense of the American government any longer. Dated at Dieppe, May 15th, 1812." John Harris has a similar certificate. George Middleton has also a like certificate. I see no such paper relating to William Powell. If the seamen were detained by the consent of the captain, they should have been supported at the expense of the ship; but it appears as soon as their support by the government of the United States or its agents was withdrawn, the sailors were ordered to return. This creates an ambiguity in the certificates, and requires explanation, which either party may give.

POWELL, The (MAXWELL v.). See Case No. 9,324.

Case No. 11,356.

POWELL et ux. v. MONSON & BRIMFIELD MANUF'G CO.

[3 Mason, 347.] [1]

Circuit Court, D. Massachusetts. May Term, 1824.

DOWER—HOW EXTINGUISHED IN MASSACHUSETTS—RELEASE—TRUST ESTATE—IMPROVEMENTS—INCREASE IN VALUE.

1. A bill in equity lies for dower. A deed of land executed by husband and wife, but containing no words of grant by the wife, does not convey her estate in the land, nor her dower.

[Cited in Bruce v. Wood, 1 Metc. (Mass.) 543; Chauvin v. Wagner, 18 Mo. 534; Flagg v. Bean, 25 N. H. 63. Cited in brief in Grant v. Parham, 15 Vt. 652. Cited in McFarland v. Fediger, 7 Ohio, 195; Smith v. Handy, 16 Ohio, 233. Cited in brief in Yocum v. Lovell, 111 Ill. 213.]

2. A release of dower, executed by the wife alone, long after the conveyance of the land by her husband, and for a new consideration, is not, in Massachusetts, an extinguishment of the dower.

[Cited in Lane v. Dolick, Case No. 8,049.]

[Disapproved in Albany Fire Ins. Co. v. Bay, 4 N. Y. 17. Cited in Dickinson v. McLane, 57 N. H. 32; Page v. Page, 6 Cush. 198; Teaff v. Hewitt, 1 Ohio St. 543.]

3. Semble, that an implied or express assent of the husband to the release, without joining in the deed, is not sufficient to give the release effect.

4. The parties to a deed are estopped to deny the consideration stated in it. But, it seems, another auxiliary consideration may be proved.

[Cited in Goward v. Waters, 98 Mass. 599; Livermore v. Aldrich, 5 Cush. 435.]

5. If a joint purchase be made in the name of one of the co-purchasers, parol evidence is admissible to prove the fact, and he will be held a trustee of a moiety for the other. Such a case is not within the statute of frauds, and is a resulting trust.

[Cited in Hoxie v. Carr, Case No. 6,802.]

[Cited in Bean v. Bean, 33 N. H. 284; Brooks v. Fowle, 14 N. H. 259; Depeyster v. Gould, 3 N. J. Eq. 480; Farrington v. Barr, 36 N. H. 88; Gove v. Lawrence, 26 N. H. 492; Hall v. Young, 37 N. H. 148; Hayward v. Cain, 110 Mass. 277; Hill v. McIntire, 39 N. H. 417; Page v. Page, 8 N. H. 195; Pembroke v. Allenstown, 21 N. H. 110; Tebbets v. Tilton, 31 N. H. 283.]

6. Dower is not allowable of an estate, of which the husband is trustee only.

[Cited in Prescott v. Walker, 16 N. H. 343.]

7. Where there have been improvements made upon an estate by the purchaser, dower is to be of the estate according to the value, which it would have had at the time of the assignment, if no such improvements had been made.

[Cited in Johnston v. Vandyke, Case No. 7,426; Thornburn v. Doscher, 32 Fed. 813.]

[Cited in brief in Hayden v. Weser, 1 D. C. 459. Cited in Smith v. Addleman, 5 Blackf. 408. Cited in note in Wilson v. Oatman, 2 Blackf. 226.]

8. Dower is to be according to an increase of value not arising from the improvements of the purchaser, but from the general growth of the country, or other general causes.

[Cited in Johnston v. Vandyke, Case No. 7,426; Thornburn v. Doscher, 32 Fed. 813.]

[Disapproved in Allen v. McCoy, 8 Ohio, 486; Cited in Baden v. McKenny, 18 D. C. 272; Dunseth v. Bank of U. S., 6 Ohio, 79; Quick v. Brenner, 101 Ind. 237; Sturtevant v. Phelps, 16 Gray, 52. Cited in brief in Tod v. Baylor, 4 Leigh, 506.]

[9. Cited in brief in Lyman v. Gedney, 114 Ill. 393, to the point that possibility of dower in land is not an incumbrance.]

[10. Disapproved in Fitts v. Hortt, 17 N. H. 534, and Fletcher v. State Capital Bank, 37 N. H. 396, to the point that an inchoate right of dower is not an incumbrance, within the meaning of a covenant against incumbrances.]

This was a bill in equity, brought by the plaintiffs, Ellick Powell and Elizabeth, his wife, praying for an assignment of her dower, in certain lands, now owned by the defendants, and which formerly belonged to one Roswell Merrick, the former husband of the said Elizabeth. The defendants resisted the claim, upon the ground, that the said Elizabeth had legally relinquished and conveyed away her dower in the several parcels of lands described in the bill, by good and sufficient instruments, and that the same are now held by the defendants, free from such incumbrance.

George Blake, Dist. Atty., and Mr. Blair, for plaintiffs.

Mr. Prescott, for defendants.

STORY, Circuit Justice. This is a bill in equity, for an assignment of dower. I pass over, without observation, any defects in the bill and answers, which might raise a question as to the sufficiency and accuracy of the proceedings, because I understand it to be the wish of all the parties to have the case finally adjudged upon the merits, as they have been stated and relied on at the argument. There are various parcels of land, of which dower is claimed, and it is conceded on all sides, that as to one parcel, designated as lot No. 7, which was conveyed in 1812 by Lavina Utley to Roswell Merrick (the former husband of Mrs. Powell,) to some extent, she

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

is entitled to dower. It is unnecessary to take any farther notice of this part of the case at present, because it is understood, that the parties can ascertain the portion subjected to her claim, by an amicable arrangement.

The principal points arising in the case depend upon local law, and are involved in some obscurity. I would gladly follow the doctrine of the supreme court of the state, if any case had completely decided them. But, unfortunately for the cause, some of the points have never undergone any direct adjudication, and the court is left to grapple as it may with the difficulties presented by a new posture of facts, and with very imperfect lights to direct it.

The first question arises in respect to a parcel of land conveyed by Thomas Riddle to the husband of Mrs. Powell, in 1808. Riddle was seized of the land in right of his wife, who was owner of the fee, and she has signed and sealed the deed, but the husband alone is named as grantor in the deed, and there are no words in the body of the deed, containing a grant or release on her part. Under these circumstances, it is very clear, that nothing passed by the deed but the life estate of Riddle; for, though by our local law, a wife, by joining with her husband in the deed, may convey her estate, yet the deed must contain apt words to make her a grantor, otherwise the deed conveys only the right of the husband. This point has been expressly decided by the supreme court of the state (Fowler v. Shearer, 7 Mass. 14; Lithgow v. Kavenagh, 9 Mass. 161; Catlin v. Ware, Id. 218; Lufkin v. Curtis, 13 Mass. 223), and in my humble judgment, with entire correctness. We may then dismiss any farther consideration of this point.

The next question in the case turns upon the same principle. Mrs. Powell signed and sealed certain deeds executed by her late husband, conveying certain parcels of the demanded premises in fee, but no words of relinquishment of her dower, or any other interest, are found in the deeds. The case, therefore, is precisely that of Catlin v. Ware, 9 Mass. 218, and Lufkin v. Curtis, 13 Mass. 223, where the court held, that the deeds did not bar the wife of her dower, upon the plain reason that a deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound.

The most important question in the case remains to be considered; and in order to present it with accuracy, it is necessary to state the leading facts. Mr. Merrick (the late husband of Mrs. Powell) being seized in fee of a number of parcels of land (embracing the principal closes now in controversy), in common with two other persons, by deed, dated the 10th of January, 1816, conveyed the same for the asserted consideration of $50,000 to the Union Cotton Manufacturing Company, since, as it is admitted, known by the corporate name of the Monson & Brimfield Manufacturing Company, with covenants of seisin, and against incumbrances, and of general warranty. To this deed Mrs. Powell is not a party. Subsequently, on the 2d of April, 1816, the Union Cotton Manufacturing Company, for the asserted consideration of $20,000, duly conveyed the same lands to one Henry Mellen in fee. On the 26th of August of the same year, Mellen, for the like consideration, duly conveyed the same land back to the company. On the same day Mrs. Powell, and Mrs. Pearce (the wife of one of the cograntors with Merrick) signed, sealed, and executed on the back of the original deed of the 10th of January, 1816, an instrument in the following words. "Monson, August 26th, 1816. In consideration of two hundred dollars to us paid by the Union Cotton Manufacturing Company, we, Elizabeth Merrick and Lucretia Pearce, relinquish and quitclaim all our right, title, and interest of dower, to the within described premises." Then follow their signatures and seals, with an attestation of two witnesses. The execution of the instrument is proved by one of the attesting witnesses, who states, that Mr. Merrick, sometime before, requested him to take the deed to his wife, and obtain her release; that he did not pay any money to the releasors; that the instrument was read over to them, and they were requested to sign it, and it was stated to them to be necessary in order to complete the title; and that it was understood, when the deed itself was originally executed, that they should become parties to it. To this instrument, as a sufficient release, several objections have been taken on behalf of the plaintiffs. First, it is said, that there is no grantee named in the deed, and therefore it cannot operate as a release. But the consideration is admitted in the deed to be paid by the company; and therefore, however inartificially drawn, the deed must be construed as a release to the company. Next, it is said, that it is not proved, that the company was then in possession of the land, because they had parted with the title to Mellen, and though his deed was executed on the same day, non constat, that it was prior in point of execution, so as to revest the fee. But to this it is a sufficient answer, that the court, in order to give validity to the deed, is bound to presume the prior execution of the conveyance of Mellen, as best agreeing with the acts of the parties; and, what is not unimportant, the release being for a valuable consideration, which the releasors are estopped by their deed to deny, it might, if necessary, be made to operate as a bargain and sale, in order to effectuate the intention of the parties. See Shove v. Pincke, 5 Term R. 124; Coventry v. Coventry, 1 Strange, 596; Jackson v Fish, 10 Johns. 456; Marshall v. Fisk, 6 Mass. 24, 32; Gibson v. Minet, 1 H. Bl. 614, 615, per Eyre, C. J.

The great objection, and which presses heavily on the cause, is, that the deed itself is utterly void for want of the husband's being joined in it. At the common law the

deed of a married woman is ipso facto void, and she is incapable of passing her estate, except by fine, or some other equivalent act of record. But in Massachusetts, from the earliest times, a different rule has prevailed. Fines, as conveyances, have never been in use in this state; and the doctrine is established, that a married woman may convey her estate, and extinguish her dower, by joining her husband in the deed of conveyance. When this doctrine was first adopted, it is not now possible to ascertain with entire certainty; and by some of our ablest lawyers and judges, it has been resolved into New England common law. It is not improbable, that it took its rise from the colonial act of 1644, which secured to the wife her dower, unless barred "by some act or consent of such wife, signified by writing under her hand, and acknowledged before some magistrate or others, authorized thereto." Colon. & Prov. Laws (Ed. 1814) p. 99, c. 37; Doe v. Salkeld, Willes, 673. After the charter of William and Mary, the provincial act of 9 Wm. c. 7, —Colon. & Prov. Laws (Ed. 1814) p. 308, c. 48 (1697),—for registering of deeds and conveyances, may be thought to have recognized the validity of this mode of releasing dower, by providing, "that nothing in this act shall be construed, deemed, or extended, to bar any widow of any vendor, or mortgagor, of lands or tenements from her dower, or right in or to such lands or tenements, who did legally join with her husband in such sale or mortgage, or otherwise lawfully bar or exclude herself from such her dower or right." This provision has been in terms incorporated into our statute of 1783, c. 37 (1 St. Mass., Ed. 1823, p. 111), respecting conveyances of real estate, and constitutes a part of the existing law upon the subject. But as the clauses, with the exception of the words "vendor" and "sale," is a mere transcript of a proviso in the English statute of 4 & 5 Wm. & M. c. 16, § 5, passed only five years before, to prevent frauds by clandestine mortgages, it is to be considered as referring, not so much to any local mode of barring the wife's estate, as to the extinguishment of her dower in any legal manner whatsoever.

The construction put upon the last words of the clause, "or otherwise lawfully bar or exclude herself from such dower," has never been, that it let in any usage, or practice, not consonant with the principles of the common law. On the contrary, it has, as far at least as decisions have gone, been always limited to such bars of dower, as were recognized by the common law. Chief Justice Parsons, (and no man was better acquainted with our local law,) in commenting on this very proviso in Fowler v. Shearer, 7 Mass. 14, 20, plainly understands the words in this sense. His language is, "when therefore the widow is not barred by a jointure, and does not join with her husband in the sale, she shall have her dower." The question, therefore, is narrowed down to the interpretation of the other words of the clause, or what is a joining with her husband in the sale, within the sense of the statute. Now, we have the exposition of the same learned judge upon this part of the statute in the same case. "The usual mode," says he, "by which a wife is joined, is by introducing her in the close of the deed, as expressly relinquishing all claim to dower in the premises sold, and by executing the deed with her husband." This is perfectly plain and unambiguous. But he adds, "and has been sometimes done by her separate deed, subsequent to her husband's sale, in which the sale is recited as a consideration, on which she relinquishes her claim to dower." It is this sentence, which creates the whole difficulty in the argument at the bar. If it means, that it may be done by a separate deed of the wife, executed after the deed of her husband, but on the same day, or as a part of the same transaction, then there is no difficulty in reconciling it with the language of the statute, for the wife may be truly said to join in the sale, when she is a party to it, at the time when it is made, whether she join in her husband's deed, or execute a separate deed. And the words of the learned judge are not inconsistent with this construction. Although he speaks of a separate deed of the wife, subsequent to the sale by her husband, this may well be limited to mean, that the husband's act of sale must have a legal priority to satisfy the words of the statute. And the words, "in which the sale is recited as a consideration," favour the notion, that the learned judge had in view such cases only, in which the sale was the moving consideration, and the act was part of the res gestæ,—in the contemplation of all parties. But the argument at the bar assumes a much broader construction, and asserts, that the words are intended to include all cases of the subsequent execution of a separate deed, at however distant a period, where the assent of the husband may be presumed, and there is, in fact, no other consideration, but what passed originally to the husband. If this be so, then the departure from the language, and apparent intent of the statute is very striking; and it ought to be justified by some usage so extensive and so fully recognized, as to have become a part of the law. Now the learned judge himself asserts no such fact; his language is, "it has been sometimes done," not that it is commonly done, or has been received as a legitimate mode of conveyance, by the general practice and sense of the profession. If mere irregularities, even to a great extent, could make or change the law, the deeds of femes covert joining with their husbands in the execution of the deeds, but without any words of release to bind them, would have been held as a bar; for the practice is shown to have been very extensive and ancient in the western part of the state. And yet the court did not hesitate to overrule it, as founded in a clear mistake of law. But if we assume the broad-

est construction of the language in Fowler v. Shearer, it does not come up to the present case. If it did, though I might hesitate as to its being a just interpretation of the words of the statute, I should not scruple to follow it, until an opportunity was given to the state court itself to reconsider and examine the extent of that dictum, in a case directly bringing it in judgment. But the present case falls far short of it. Here, the deed is executed after the lapse of seven months, and after two intermediate conveyances, upon a new consideration, not in the original deed, and not reciting the original sale as the leading consideration. So that the court is called upon, not only to desert the plain import of the statute, but to take a new course, which shall remove the limitations hitherto affixed to the departure.

First, it is argued, that it is sufficient to satisfy the statute, that there is an assent of the husband to the deed, and that assent may be implied, as well as expressed by his joining in the conveyance. Now, how does this stand with the text of the statute? It is nowhere said, that the wife shall be barred of dower, if she releases with the consent of the husband; the words of the statute are, that she shall not be barred if she "did not join with her husband" in the sale. It is his sale, therefore, in which she is to join, and not her subsequent deed, to which he is to assent, that constitutes the bar.

Then, again, as to the assent of the husband. It is inferred, from the fact of a full consideration paid upon the sale, and the covenant against incumbrances, and especially against dower, and the covenant of general warranty in the deed. But it is too much to infer from these facts any intention or contract, to procure the wife to release her dower. Creditors often take deeds of this sort without any notion, that the dower is to be relinquished; and though cases may not be very frequent, in which upon a fair purchase, this possible incumbrance is not stipulated to be released, yet it is within the experience of all of us, that cases of this sort do arise, and the title is thought worth the purchase. Nor am I prepared to admit the doctrine contended for at the bar, that a covenant against incumbrances is broken by the mere existence of a possible incumbrance; and that, therefore, every deed containing such a covenant imports a contract to procure its extinguishment. A possibility of dower is not, within the sense of the covenant, an incumbrance, for that means a settled, fixed incumbrance; and if the result of the Massachusetts authorities on this point has not been mistaken by me, taking them collectively, they do not sustain the doctrine now contended for. See Marston v. Hobbs, 2 Mass. 433; Bickford v. Page, Id. 455, 461. But it may be urged, that the parol proof helps this presumption, by its direct and positive declarations. And so it would, if it stood alone. But here, if it was originally designed, that the wife should execute a release of dower, why was not her name inserted in the deed? Why was no conveyance written or insisted on for seven months, or until two mesne conveyances? Why, if she originally agreed to join in the sale, for that is the material fact, why was it necessary to employ a person to explain the nature of the title to her, or to persuade her to execute the release under the suggestion, that her husband wished her so to do? Why was not the husband present at the execution of the deed, and himself made the medium of explanation to his wife? It appears to me, that these questions are not easily or satisfactorily answered by the circumstances now in evidence. For aught that appears, the original consideration was fully paid before the release of dower was demanded. There is another fact bearing upon this point. I mean the alleged consideration of $200 paid for the release. It is said, that this was never paid; but can the parties be let in by parol evidence to contradict the admission in their own instruments of title? And if they could be so let in, still does not the insertion of a new consideration in the release repel the presumption, that the original sale was understood by the parties to include a relinquishment by the wife of her right to dower? It appears to me, that it would be extremely dangerous to bolster up imperfect instruments in this way, by conjectures and inferences, and parol evidence, standing in the way of the written acknowledgment of the parties. The cases cited at the bar to show that the consent of the husband is equivalent to joining in certain acts of his wife, to give them validity at the common law, are inapplicable. They turn upon principles or practices in peculiar and limited proceedings, and not upon the construction of a statute. Portington's Case, in 10 Coke, 36, 43, decides only, that a fine, levied by a feme covert, shall bind her and her heirs, if her husband doth not enter and avoid the estate of the conusee; and the reason given is, because she is examined in court, and has a power over the land. The court went no further in Moreau's Case, 2 W. Bl. 1205, than to suffer a fine to be levied by his wife, when the husband was abroad, and had covenanted, that such a fine should be levied. Compton v. Collinson, in 1 H. Bl. 334, adjudged, that the wife may surrender her copyhold without the husband's joining, where he had covenanted under articles of separation, that she should enjoy all her estate during coverture to her separate use. It is sufficient to say, that the present is not the case of a fine or surrender, but an act, which, at the common law, would be held utterly void; and is supported only by the authority of our statute, and local usage.

But if the objection, as to the consent of the husband, was wholly removed, still there is the lack of the ingredient mentioned by the chief justice in Fowler v. Shearer, that there should be a recital in the separate deed of the wife, that the release is in consideration

of the sale. This is not a merely formal clause, but is introduced as the record proof, that she joins in the sale with her husband, so as to bring the case within the proviso of the statute, such a recital being conclusive of such a joinder. But it is said, that in point of fact the consideration of $200 was not paid, although so stated in the release; and, at all events, parol evidence is admissible, to show the auxiliary and real consideration. It appears to me, that in this case, the parties are not at liberty to deny, that the consideration money stated in the deed was actually paid, or constituted the foundation of the release. Parol evidence is generally inadmissible, to contradict the statements contained in a deed; and this very point, as to the consideration, has been directly adjudged to fall within the rule. Shep. Touch. 222, 510; Wilkes v. Leuson, Dyer, 169a; Fisher v. Smith, Moore, 569; Smith & Lane's Case, 1 Leon. 170; Mildmay's Case, 1 Coke, 176; Bac. Abr. "Bargain and Sale," D; Lord Cromwel's Case, 2 Coke, 70; Bedell's Case, 7 Coke, 40; Com. Dig. "Bargain and Sale," B, 11; Wilt v. Franklin, 1 Bin. 502; Doe v. Salkeld, Willes, 673; Stevens v. Cooper, 1 Johns. Ch. 425; Botsford v. Burr, 2 Johns. Ch. 405, 415.

Indeed, in some cases, a distinction prevailed, that excluded all parol evidence to establish any consideration consistent with, but additional to that expressed in the deed, unless in cases where the deed purported also to be for other considerations. Lord Hardwicke, in Peacock v. Monk, 1 Ves. 130, recognized that distinction. In that case, evidence was offered of a consideration aliunde the deed. His lordship admitted it, because there was no consideration expressed in the deed, saying, "To be sure, where any consideration is mentioned, as love and affection only, if it is not said also, and for other considerations, you cannot enter into proof of any other; the reason is, because it would be contrary to the deed, for when the deed says it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed." The master of the rolls, in Clarkson v. Hanway, 2 P. Wms. 203, manifestly inclined to the same opinion. Sheppard's Touchstone (Shep. Touch. 222, 510) contains the elements of a like distinction; and it has been enforced on various occasions by the supreme court of New York, without hesitation (Howes v. Barker, 3 Johns. 506; Schermerhorn v. Vanderheyden, 1 Johns. 139; Maigley v. Hauer, 7 Johns. 341). The solid influence of these authorities cannot be overlooked; and if they stood alone, they would be decisive. But they are encountered by weighty opinions in an opposite direction. The point arose in Villers v. Beamont, 2 Dyer, 146, and was decided in favour of the admission of the parol evidence, notwithstanding the omission in the deed of other considerations, by three judges against one. The correctness of that decision was recognised in Bedell's Case, 7 Coke, 40, and in Vernon's Case, 4 Coke, 3. Lord Chief Justice Willes has given it the sanction of his own great authority in Doe v. Salkeld, Willes, 673, and Lord Kenyon and the court of king's bench acted upon it in King v. Inhabitants of Scammonden, 3 Term R. 474. The preponderance of authority is, therefore, perhaps, in favour of the admissibility of the evidence. Assuming it to be so, still as the parties are estopped to deny the consideration stated in the deed, the prior sale cannot be admitted to be the sole consideration. How then can the release be deemed a joining in the original sale, since it stands on the footing of a new auxiliary consideration? How can we infer, that it was a part of the original contract of sale, when it purports to be a distinct transaction? There is no parol proof of any admission by the wife, that she originally agreed to join in the sale. The whole inference rests upon the fact, that she agreed in August to execute the deed, upon being told by a witness, that it was necessary to complete the title.

I confess myself unwilling to take another step, involving a plain departure from the language of the statute; and the danger of admitting parol proof to support the infirmity of deeds is a good deal strengthened by the knowledge that married women are not often sufficiently well acquainted with the practical business of life, to guard themselves from mistake or imposition. If the supreme court of the state had sustained such a release, I should have followed them upon a point of local law. As they have not, I stand upon the text of the statute.

But it is urged, that this is a case in equity, and that the court will grant great indulgences to the imperfect acts of parties to sustain their intentions; and that it will not lend its aid to enforce any inequitable claim. But in a case like the present, equity necessarily follows the law. The parties stand upon their legal rights, and what is not a bar of dower at law ought not, under the circumstances of the case, to be held a bar in equity. Here, no fraud or imposition is set up. The case stands upon its naked rights; and the relief asked, is not rebutted by any counter equity against Mrs. Powell.

Another question, of a different sort, arises from the following transaction. In July, 1813, David L. Shields conveyed to Roswell Merrick, in fee, a lot of four acres, for the consideration of $120. At the time of the purchase, Merrick was in partnership with one George N. Pearse, under the firm of Merrick, Pearse & Co. Merrick gave his own note for the purchase-money, but it was paid out of the partnership fund. Immediately after the purchase, the lot was divided, and Merrick occupied and built a house upon the southern half; and his possession remained ever afterwards several and exclusive in the premises. The firm became insolvent in 1816, and Pearse then absconded, and being in bad

habits, he enlisted in the army, and has never since been heard of; and his papers have been lost or destroyed. There is no positive proof, that any conveyance was ever made of the northern half by Merrick to Pearse. But the answer (after disclaiming on the part of the defendants any interest in the southern half,) sets up the purchase as an original purchase, jointly for account of Merrick & Pearse, and that therefore there was a resulting trust in the one half for the use of Pearse, so that Mrs. Powell is not dowable of it, it being a mere trust estate in her husband. Supposing parol evidence to be admissible to prove the joint purchase, it appears to me, that the fact is made out in the most satisfactory manner. The original bargain is stated by the vendor, to have been made by both partners, and admitted by them to have been on joint account, and the consideration was paid out of the joint funds.

The objection taken at the bar is, that parol evidence is not admissible to establish the trust, because it trenches upon the statute of frauds of Massachusetts. That statute (Act 1783, c. 37, § 3) is, on this subject, in substance a transcript of the statute of 29 Car. II. c. 3, and excepts from its operation any conveyance, "by which a trust or confidence shall or may result by the implication or construction of law, or be transferred or extinguished by an act or operation of law."

The objection is certainly not without countenance from highly respectable elementary writers. Mr. Roberts (1 Rob. Frauds, c. 2, p. 95, note 39) and Mr. Saunders (Saunders' note to Lloyd v. Spillet, 2 Atk. 150; Saund. Uses, p. 212, c. 3, § 5) appear to have been strongly impressed with the notion of the general inadmissibility of parol evidence to raise a trust in cases of this nature. The latter contends, that, at all events, it is inadmissible after the death of the nominal purchaser. And Mr. Sugden (Sugd. Vend. 414), although he is in favour of its admissibility generally, doubts if it can be admitted, where the answer of the supposed trustee denies this trust.

The general principle has long since been settled in equity, that if one person purchase land in the name of another, the latter, the deed being taken in his name, shall, without any declaration in writing, be held a trustee of the former. The ground of this doctrine is, that he, who pays the consideration, is to be deemed the owner of the land in equity, unless other presumptions arise (as may from the consanguinity of the parties) to repel the conclusion. And it was decided in a very short time after the passing of the statute of frauds of 29 Car. II., in an anonymous case in 2 Vent. 361, that this was a resulting trust, and not within the purview of that statute. The doctrine of this case has never been departed from, but has been recognized in a great variety of decisions. Ambrose v. Ambrose, 1 P. Wms. 322; Kirk v. Webb, Finch, Prec. 84; Ex parte Vernon, 2 P. Wms. 549; O'Hara v. O'Neil, 21 Vin. Abr. "Trust," E, pl. 6, note; Pelly v. Maddin, Id. pl. 15; Smith v. Baker, 1 Atk. 385; Ryall v. Ryall, Id. 59, Amb. 413; 1 Eq. Cas. Abr. p. 232, § 7; Lane v. Dighton, Amb. 409; Withers v. Withers, Id. 151; Smith v. Lord Camelford, 2 Ves. Jr. 699, 713; Lloyd v. Spillet, 2 Atk. 150; Willis v. Willis, Id. 71; Lever v. Andrews, 7 Brown, Parl. Cas. (Tomlin's Ed.) 288; Knight v. Pechey, 1 Dickens, 327; Bartlett v. Pickersgill, 4 East, 577, note; Id., 1 Eden, 515; 1 Cox, Ch. 15; 2 Fonbl. Eq. p. 116, c. 5, § 1, and note; Rider v. Kidder, 10 Ves. 360; Young v. Peachy, 2 Atk. 256; Crop v. Norton, Id. 74, 9 Mod. 233; Finch v. Finch, 15 Ves. 50; Bac. Abr. "Uses and Trusts," I, c. 3; Woodeson, 439. But the point, whether proof of such a purchase could be made out by evidence aliunde the deed, or other written evidence, or in other words, whether parol evidence is admissible to establish the manner of paying the purchase money, has been involved in some doubt. Some of the earlier cases, such as Kirk v. Webb, Finch, Prec. 84, Newton v. Preston, Id. 103, and Skett v. Whitmore, Freem. Ch. 280, appear rather to lean against it. But the more recent authorities have gradually settled in its favour. On the present occasion I have examined the subject at large, and am not aware, that any important case has escaped my researches. The result of that examination is, that the question is no longer fairly open to debate; and whatever difficulty I should have had in the first instance in adopting the rule, it appears to me now firmly established, that parol evidence is admissible to ascertain the trust. I should have gone somewhat into a commentary upon the leading cases, tracing them in their historical order, if that excellent and laborious Judge, Mr. Chancellor Kent, had not, in two recent cases, Boyd v. McLean, 1 Johns. Ch. 582, and Botsford v. Burr, 2 Johns. Ch. 405, —with great care and accuracy, collected and reviewed them. I have followed in his path, and find nothing to subtract from, and nothing to add to, what he has stated as the result of his investigation, with which my own entirely coincides. The same doctrine has been maintained on various occasions by the supreme court of New York (Jackson v. Sternbergh, 1 Johns. Cas. 153; Foote v. Colvin, 3 Johns. 216; Steere v. Steere, 5 Johns. Ch. 1, 19; Jackson v. Matsdorf, 11 Johns. 91; Jackson v. Morse, 16 Johns. 197; Jackson v. Mills, 13 Johns. 463) and of Pennsylvania (Lessee of German v. Gabbald, 3 Bin. 302; Gregory's Lessee v. Setter, 1 Dall. [1 U. S.] 193); and although there is a dictum in the case of Northampton Bank v. Whiting, 12 Mass. 106, 109, which appears to limit the rule to the admission of parol evidence, where it is not inconsistent with the deed, that is, where the consideration is not stated in the deed to have been paid by the nominal purchasers, I persuade myself, that if all the authorities had been brought under the re-

view of the court, the general conclusion would not have differed from that of Mr. Chancellor Kent (see Gascoigne v. Thwing, 1 Vern. 366, 1 Eq. Cas. Abr. 232; Willis v. Willis, 2 Atk. 71; Knight v. Pechey, 1 Dickens, 327; Bartlett v. Pickersgill, 4 East, 577, note, 1 Eden, 515; 1 Cox, Ch. 15; Ryall v. Ryall, 1 Atk. 59; Lane v. Dighton, Amb. 409; Ex parte Vernon, 2 P. Wms. 549; Sowden v. Sowden, 1 Brown, Ch. 582; Rider v. Kidder, 10 Ves. 360; Lench v. Lench, Id. 511; Finch v. Finch, 15 Ves. 50; Mackreth v. Symmons, Id. 350; Wray v. Steele, 2 Ves. & B. 388; Taylor v. Plumer, 3 Maule & S. 562, 579; 3 Woodes, 439). The latest English authorities seem to leave the point entirely at rest; and I have not the courage to undertake to disturb it.

Supposing this point out of the case, there is another connected with it, that requires observation; and that is, whether the doctrine, however true as to an entire, applies to a joint-purchase. Lord Hardwicke is represented in Crop v. Norton, reported in 2 Atk. 74, and more fully if not more accurately in 9 Mod. 233, to have said: "Where a purchase is made, and the purchase money is paid by one, and the conveyance taken in the name of another, there is a resulting trust for the person, who paid the consideration; but this is, where the whole consideration moved from such person; but I never knew it, where the consideration moved from several persons, for this would introduce all the mischiefs, which the statute of frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase money appears by the deed to be paid by him only, I do not know any case, where such persons shall come into this court and say, they paid the purchase money; but it is expected there should be a declaration of trust."

In Wray v. Steele, 2 Ves. & B. 389, the vice chancellor said: "Lord Hardwicke could not have used the language ascribed to him. What is there applicable to an advance by a single individual, that is not equally applicable to a joint advance under similar circumstances?" And in that case, which was of a joint purchase in the name of one, he overruled the distinction, and decreed in favour of the trust. I follow this authority, from the persuasion, that it is perfectly within the principle of the general doctrine.

The remaining inquiry under this head is, it being established, that this was a joint purchase, in trust as to the northern half for Pearse, whether dower lies of such an estate in favour of the wife of the trustee. In Noel v. Jevon, Freem. Ch. 43, that point was decided against the right of dower, notwithstanding the opinion in Nash v. Preston, Cro. Car. 191; and it was then said to be the constant practice of the court. See, also, Rop. Husb. & Wife, p. 353; Bevant v. Pope, Freem. Ch. 71; Contra, 1 Rolle, Abr. p. 678, pl. 36. This was a suit in equity, and would be decisive in this court, whatever might be the course of proceeding in a court of law; though I presume even at law in Massachusetts, there being no state court of equity, the doctrine would be fully recognised. Upon the whole, upon this point, my opinion is, that Mrs. Powell has no claim of dower in the northern half of the four acre lot.

There is another question of great practical importance in all cases of this nature; I mean, whether dower is to be assigned to the widow according to the value at the time of the alienation of her husband, or at the time of the assignment of the dower. This is a point, upon which there has been a good deal of argument at the bar, and upon which the American authorities are not agreed. It is necessary, therefore, to give it a fuller discussion, than might otherwise seem necessary.

In Co. Litt. 32a, it is laid down, "that if the wife be entitled to have dower of 3 acres of marsh, every acre of the value of 12 pence, and the heir, by his industry and charge, maketh it good meadow, every acre of the value of 10 shillings, the wife shall have her dower of the improved value, and not according to the value as it was in the husband's time; for her title is to the quantity of the land, viz. one just third part. And the like law it is, if the heir improve the value of the land by building; and on the other side, if the value be impaired in the time of the heir, she shall be endowed according to the value at the time of the assignment, and not according to the value in the time of her husband." The learned author quotes no authority for these positions, except a case in 30 Edw. I., reported in Fitzh. Abr. tit. "Voucher," 298. The report is very short and obscure, but it seems to have been a case of dower, where the widow demanded a place, which, at the time her husband sold it, was without a dwelling-house; but she demanded dower of the one third of the messuage, or of the value, against the heir, who was vouched. The case was put, if the husband sells a site, and afterwards the purchaser builds a castle on it, whether she should have dower of the third part of the castle, and it was denied. And thereupon it is said, that by the award of the court she recover the third part of the place (de la place). Mr. Hargrave gives from the manuscripts of Lord Hale the following note on the passage (note 193): "Vide 1 Hen. V. 11; 17 Edw. III. If feoffee improves by building, yet dower shall be as it was in the seizin of the husband. 17 Hen. III. 'Dower,' 92; 31 Edw. I. 'Voucher,' 288. For the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee, than he could recover in value, which is not reasonable." The case 1 Hen. V., 11, does not

appear to me, on examining it in the Year Books, to have any application. The principal point there litigated was upon special pleading, the widow demanding dower of two mills, and the tenant pleading in abatement, that at the purchase of the mill, it was two tofts only, on which the parties were at issue. The citation 17 Edw. III. has escaped my researches. The case of 17 Hen. III. is taken from the report in Fitzh. Abr. tit. "Dower," 192; and that of 31 Edw. I. from the same work, tit. "Voucher," 288. The former stands thus: "E., who was the wife of R., demands one third part of three acres of land with the appurtenances in E., as her dower, against W. And W. comes and says, that he bought the land of her husband, naked and unbuilt upon, and he built upon it; and he willingly allows to her her third part, saving the buildings to himself. And, therefore, she had her seizin, saving to the said W. the houses built by him, &c., because he had, without the buildings, where she might have her land &c." The other stands thus: "Dower and demand of the third part of a mill, and the tenant vouches, and the vouchee comes and demands what he had to bind him, and the tenant shows a charter conveying a certain place; upon which the voucher demands judgment, if he ought to warrant; the tenant says, that after the gift he built a mill; judgment if of such he ought not to be warranted; and the case was, that in the seizin of the husband the place was but a vacant place. Herle. He might have abated the writ. Hingham. You ought to have discovered the matter when you vouched, and it was not done, for which award, &c." These cases seem in substance to support Lord Hale's position, and establish a distinction between the case of the heir, and a purchaser, in favour of the latter. Perkins (Dower, § 328; Bac. Abr. "Dower," B, 5) recognises the distinction, and puts the case, where there are buildings on the land at the time of the alienation of the husband, and afterwards during the life of the husband, the feoffee pulls down the buildings; and he holds, that the wife shall, in such case, have dower only according to the value of the land as it was at the death of her husband; and he doubts, if she has any remedy for the taking away of the buildings, because her title to dower is not consummate before his death. Perk. Dower, § 329. It has been said in some modern cases (Thompson v. Morrow, 5 Serg. & R. 289, 291) that the reason why, when the heir builds upon, or otherwise improves the estate, the widow shall have her dower of the improvements, is, because it is his folly to make the improvements before assigning her dower. This may be the true reason; but neither my Lord Coke, nor, as far as I can trace, do any of the old authorities assign this as the ground of the rule. And if it be, how does it happen that if the heir impairs the value, still her dower is only of the value at the time of the assignment, thus permitting him to derive benefit from his folly or his wrong. If I were allowed to hazard a conjecture, it would be, that the rule proceeded upon grounds somewhat more artificial and technical. In case of a disseisin, if the disseisor build upon the land, which he hath by disseisin, and the disseisee afterwards enter, the latter shall have the buildings as well as the land. The reason is, that the title and seizin of the soil, upon recovery by the common law, carry every thing annexed to the freehold as an incident; "cujus est solum, ejus est usque ad cœlum." The title to dower is consummate, by the husband's death, of all things of which he had a seizin, and which were then in existence. The tenant in dower, therefore, like any other tenant of the freehold, takes upon a recovery whatever is then annexed to the freehold, whether it be so by folly, by mistake, or by the purest innocence. If a recovery be upon a title paramount against any person, though he may be a bona fide purchaser, and have made improvements on the land, yet the common law gives the demandant a perfect title to all the improvements, as well as to the land. And if, in the hands of such a purchaser, the lands are deteriorated, still the recovery is confined to the land, in its actual state at the time of the recovery; for at the common law no damages were given in real actions.

It is true that, in the case of the heir, he is in by descent; and so his possession, being cast upon him by the law, may seem rightful; but when the wife is endowed upon a recovery from the heir and assignment of dower, she is in from the death of her husband, and the heir's possession is avoided, and by consequence, there is no right of possession as to this third part acquired to the heir, since the law doth not place him in such third part after the death of the father. Gilb. Ten. 26, 27; Co. Litt. §§ 393, 394. The rule therefore, that subjected the improvements as well as the land in the possession of the heir to the claim of dower, seems a natural result of the general principles of the common law, which gave the improvements to the owner of the soil. See Bac. Abr. "Dower," B, 5.

It is not quite so easy to ascertain upon what ground the exception in favour of purchasers was first admitted to prevail. The reason assigned in Lord Hale's manuscripts, already cited (for it is not assigned in the Year Books), is not, as Mr. Chief Justice Tilghman (Thompson v. Morrow, 5 Serg. & R. 289) has with great force and acuteness shown, a satisfactory reason. Admitting, what is certainly true, that upon a feoffment with warranty the heir is not bound to warrant, if he specially show the matter, except according to the value of the land at the time of the feoffment (Jenk. Cent. 34, 35, case 68. The citation there of 47 Edw. III. 22, seems a mistake. 19 Hen. VI. 46; 46 Edw. III. 28b;

Godb. 151; Pitcher v. Livingston, 4 Johns. 1), this establishes no more than that a covenant of warranty, in construction of law, extends only to the recovery of such value. It does not touch the point, whether any contract between third persons ought to prejudice the right of dower, or whether the tenant in dower ought to be abridged of the general rights, which attach to other persons entitled to the freehold. If there be no warranty upon the alienation, there is no pretence to say, that that fact could operate as a just bar to dower, because the feoffee could not recover over. How then can the case be varied by the fact, that there is a warranty to a limited extent and value? Nor can the exception be explained by considering the improvements as not falling within the dowable estate, not being part of any lands or tenements which were the husband's at any time during the coverture, for that is equally true of improvements by the heir. I do not find that in respect to purchasers, any distinction is admitted, whether the improvements are made with or without notice of the right to dower, or before or after the husband's death. See 1 Rop. Husb. & Wife, 346. And yet if the improvements are made after the husband's death, with knowledge of the right of dower, it is as much the folly of the purchaser to build without assigning dower, as it would be of the heir. The only difference is, that the heir must be presumed to know whether there are other lands sufficient for the dower; the purchaser may not.

The rule may have originated, as has been supposed (Gore v. Brazier, 3 Mass. 533, 544; Thompson v. Morrow, 5 Serg. & R. 289) in the policy of promoting the prosperity of the country by encouraging improvements in agriculture and building; though so wise and philosophical a spirit seems scarcely to belong to so early an age, fettered with feudal tenures and military services. The anxiety to promote alienations and subinfeudations, and thus to disentangle inheritances from some of their numerous burthens, may have induced the courts to adopt the rule, as founded in general justice. Be this as it may, it is now admitted to constitute a fixed maxim of the common law; and in all the American cases, in which it has been brought into controversy, its obligatory force has been fully established. The decisions (Gore v. Brazier, 3 Mass. 544; Libbey v. Swett, Story, Pl. 365, note; Catlin v. Ware, 9 Mass. 218; Ayer v. Spring, Id. 8, 10 Mass. 80) in the supreme court of Massachusetts are directly in point. I have no difficulty, therefore, in affirming, that by the local law the dower must be assigned to the widow, exclusive of any improvements made by the purchasers since the alienation.

But the next point is, whether, excluding the improvements on the land, the dower is to be assigned according to its present value, or that at the time of the alienation; or, in other words, whether the dowress, or the tenant, is now to have the benefit of any enhanced value of the land, between the alienation and the assignment of dower, arising from the general progress and population of the country. In Gore v. Brazier, 3 Mass. 544, Mr. Chief Justice Parsons said: "If the husband, during the coverture, had aliened a real estate in a commercial town, and at his death, the rents had trebled from various causes unconnected with any improvements of the estate, and the widow should then sue for her dower, perhaps it would be difficult for the purchaser to maintain, that one ninth only, and not one third part, should be assigned to her." The counsel on both sides quote this language as decisive in their favour. On the one hand it is said, that the expression "unconnected with any improvements of the estate," demonstrates, that any increase of value, which results to the land, from the existence and proximity of the improvements, (as, in the present case, by the establishment of a flourishing manufactory), is to be excluded from the dower, as well as the improvements themselves. On the other hand it is said, that the learned judge did not intend any such thing. He meant merely to distinguish generally between the increase of value from the improvements, and from general causes, without entering into the consideration, how far those improvements may have collaterally increased the value of the land. It would be unjust to the memory of the learned judge, to give to any language used by him, in a case not before him, and introduced merely by way of argument, any more authority than what belongs to a dictum, expressing a general truth. I am not quite satisfied, that a case, like that now presented, was then in his mind; a case, where the erection of a manufacturing establishment on the premises has given an increased value to all the land in the neighborhood; a value which does not grow out of the mere erection, but out of the nature of the employment, and the capital connected with it. If a dwelling-house of the like extent had been erected, the value would not have been materially enhanced. If the manufacture of cloths were now discontinued, there would be an immediate and serious diminution of value.

In the case of Libbey v. Swett, decided in 1804 (Story, Pl. 365, note), with a manuscript copy of which I was favoured by the late Mr. Chief Justice Sewall, the only point was, whether the widow was entitled to dower of the mills newly erected by the alienee, the other part of the premises remaining in the same state as before the alienation. In Catlin v. Ware, 9 Mass. 218, the land had been improved by ditching, making walls, and erecting and repairing buildings, and the court held, that the widow was "entitled to her third part of the land, in the condition it was in at the time of the alienation by her husband." The same point was subse-

quently ruled in Ayer v. Spring, 9 Mass. 8, 10 Mass. 80. In neither of these cases did the precise question arise, whether, if the land was enhanced in value by causes unconnected with the direct improvements by the alienee, since the alienation, that value was to be excluded in the assignment of dower. Nor does the more difficult question appear to have been presented in the argument, whether an increased value of the unimproved part of the land, arising collaterally from improvements on another part of the land, varies the claim of dower. Suppose a farm of 100 acres, on one acre of which a manufacturing establishment is erected, and this gives an enhanced value to the remaining 99 acres of 33⅓ per cent., is the dower to be reduced one third on the 99 acres, or is it to be of one third of the 99 acres, and of such portion of the other acre, as is equal to its value deducting the improvement?

In Humphrey v. Phinney, 2 Johns. 484, the supreme court of New York decided, that dower was to be assigned according to the value of the land at the time of the alienation by the husband, and not according to its improved value at the time of the assignment. But there, upon the special pleadings, the only point seems to have been, whether dower should be of improvements made upon the land by the alienee. The court founded itself upon a statute of the state, which was construed to restrain the dower to the value at the alienation; but at the same time asserted, that the same was the rule of the common law. In Dorchester v. Coventry, 11 Johns. 510, the point as to the increased value of the land, independently of the improvements, was distinctly considered, and the court decided, that the dower was to be of the value of the land at the time of the alienation, and that the legislature did not intend to make any distinction between improvements and the increased value of the land. This doctrine was again followed in Shaw v. White, 13 Johns. 179, where the conveyance was of new and unimproved lands, which had been highly improved by the purchaser. In Hale v. James, 6 Johns. Ch. 258, the same question arose before Mr. Chancellor Kent, upon a somewhat different state of facts, for, independently of the improvements, the land had diminished in value since the alienation. That learned judge went again elaborately into the doctrine, and adhered to the rule already laid down, viz. the value of the land at the time of the alienation, acting upon it as a clear rule of the common law. With the most profound respect for so great a judge, I must be permitted to doubt, if there be any such doctrine in the common law. The authorities referred to do not, (though Mr. Roper, in his late work thinks otherwise, 1 Rop. Husb. & Wife, c. 9, § 2, p. 3, p. 346, 347) in my humble judgment, warrant the conclusion. It is true, that Perk. Dower, § 328, states, that where the alienee of the land hath made improvements, "the wife shall not have the dower, but according to the value it was at in the time of the husband;" and for this he cites Fitzh. Abr. "Dower," 192, already quoted. But in that case the widow had dower of the land, saving to the alienee the houses built by him, as there was land enough for it without touching them. And probably Perkins had no reference in this paragraph to any increase of value, except by the buildings. The language from Lord Hale's manuscripts admits of the same interpretation; and he relies upon no other authorities than those which have been already commented on.

It is a great consolation to me to find my own views of the doctrine supported by the high authority of Mr. Chief Justice Tilghman; and I should have been spared some research, if his very learned judgment in Thompson v. Morrow, 5 Serg. & R. 289, had earlier fallen under my observation. I entirely accede to the general reasoning by which he supports his opinion, and have nothing to add to what he has, with so much accuracy and clearness, collected. In his own language I can state, that "with respect to dower, I have found no adjudged case in the Year Books confining the widow to the value at the time of the alienation by her husband, where the question did not arise on improvements made after the alienation; and that having considered all the authorities which bear upon the question, I find myself at liberty to decide according to what appears to me to be the reason and the justice of the case, which is, that the widow shall take no advantage of the improvements of any kind made by the purchaser, but throwing those out of the estimate, she shall be endowed according to the value at the time her dower shall be assigned to her." This doctrine appears to me to stand upon solid principles, and the general analogies of the law. If the land has, in the intermediate period, risen in value, she receives the benefit; if it has depreciated, she sustains the loss. Her title is consummate by her husband's death, and, in the language of Lord Coke, that "title is to the quantity of the land, viz. one just third part." If, on the other hand, the value of the land has increased solely from the improvements made upon it, and without those improvements it would have remained of the same value as at the time of the alienation, the old value, and not the improved value, is to be taken into consideration. For practical purposes, it is impossible to make any distinction between the value of the improvements, and the value resulting from the improvements; between improvements, which operate on a part of the land, and those, which operate upon the whole.

Upon the whole, my judgment is, that the dower must be adjudged according to the value of the land in controversy at the time of the assignment, excluding all the increased

value from the improvements actually made upon the premises by the alienees; leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements.

Decree: This cause came on to be heard at the last May term, on the bill and answer, and was argued by counsel. Whereupon, it is ordered, adjudged, and decreed, that the said Ellick and Elizabeth, in her right, have as her dower, of the endowment of Roswell Merrick, her late husband, now deceased, one just third part of the lands, tenements, and hereditaments, herein after mentioned, exclusive of the increased value of the same, arising from, or caused by the buildings erected, and improvements made upon said lands and tenements, &c., or any one of them, since the alienation thereof by the said Merrick, viz., of one certain tract of land, &c., &c.

And it is further ordered and decreed, that the said Ellick and Elizabeth have and recover their reasonable damages by reason of the detention of her dower in the premises, from and after the 3d day of March, in the year of our Lord 1823, when they demanded of the defendants, that they should assign and set out to the said Elizabeth her said dower in said lands, tenements, and hereditaments, until the present time. And that the plaintiffs recover of the defendants their legal costs of this suit, to be taxed by the court. And it is further ordered and decreed, that this bill be dismissed as to all the other lands and tenements mentioned in said bill, and the said Ellick and Elizabeth's claim, in her right, of dower in the same, or any, or either of them.

And it is further ordered and decreed, that commissioners be appointed to inquire, ascertain, act, and report, as soon as may be, on the matters following, viz.:

1. The several and respective times when the said Roswell Merrick alienated the above described lands, tenements, and hereditaments, and any parcels or undivided parts thereof.

2. The present value of said lands, tenements, and hereditaments, exclusive of the increased value, occasioned by the buildings and improvements on the premises, since the alienation thereof by the said Roswell Merrick; and also the reasonable damages by reason of the detention of her dower in the premises from and after the third day of March in the year of our Lord 1823 to the present time.

3. If the commissioners shall find, that one third part of said lands, tenements, and hereditaments can be assigned, set off to said Elizabeth, by metes and bounds, without great prejudice to the same, then, that they proceed to assign and set off to the said Elizabeth one just third part of said lands, tenements, and hereditaments, exclusive of the increased value thereof, occasioned by the buildings erected, and improvements made thereon since the alienation thereof by said Roswell Merrick, meaning so much and such part of said lands, tenements, and hereditaments, as would be equal in value to one just third part thereof at the present time, in case no buildings had been erected or improvements made thereon since the alienation thereof by the said Roswell Merrick.

4. If the commissioners shall find, that one third part of said lands, tenements, and hereditaments cannot be assigned and set off to said Elizabeth, as aforesaid, to hold in severalty by metes and bounds, without inconvenience and prejudice to the same, then, that they inquire, and ascertain, and report to the court, the true yearly amount and value of the rents, profits, and income of said lands, tenements, and hereditaments, exclusive of the increased value arising from, and occasioned by the buildings erected, and improvements made thereon since the alienation thereof by said Merrick, meaning the true yearly amount and value of the rents, profits, and income, which the said lands, tenements, and hereditaments would now yield, in case no buildings had been erected, or improvements made thereon since the alienation thereof by the said Roswell Merrick.

[NOTE. On the coming in of the commissioner's report, the cause came on for argument upon the question of confirming the report. Two exceptions which were taken to it by the defendants were overruled, and the report confirmed. Case No. 11,357.]

Case No. 11,357.

POWELL et al. v. MONSON & BRIMFIELD MANUF'G CO.

[3 Mason, 459.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1824.

DOWER—MORTGAGED ESTATE—IMPROVEMENTS.

1. Dower is assignable of real estate, mortgaged by the husband after the marriage without the wife's joining in the deed, and subsequently aliened by him, but in the meantime improvements made thereon by him, according to the value at the time of the alienation including the improvements. A mortgage is not an alienation so as to preclude dower from attaching to such improvements.

2. The main mill-wheel and gearing of a factory, attached to the factory and necessary for its operation, are fixtures, and real estate, to which the right of dower attaches.

[Cited in Dudley v. Hurst (Md.) 8 Atl. 903; Freeman v. Lynch, 8 Neb. 196; Gray v. Holdship, 17 Serg. & R. 418; Hancock v. Jordan, 7 Ala. 448; Parsons v. Copeland, 38 Me. 544; Strickland v. Parker, 54 Me. 265; Winslow v. Merchants' Ins. Co., 4 Metc. (Mass.) 314.]

[This was a bill in equity by Ellick Powell and Elizabeth, his wife, against the Monson & Brimfield Manufacturing Company.]

The commissioners appointed to assign dower according to the interlocutory decree

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

of the court [Case No. 11,356], having made a report of their doings, the cause came on again for argument upon the question of confirming that report. Two exceptions were taken to it by the defendants; first, that the commissioners had decided, that the mortgage of Roswell Merrick (the husband of the dowress) to Rufus Flint, of the 21st of October, 1808, in the pleadings mentioned, was not an alienation by the husband, so as to affect the right of his wife to dower. Secondly, that in estimating the value of the property and the income thereof, the commissioners considered the water-wheel and the main gearing of the factory or mill as real estate.

These points were argued by Mr. Prescott, for defendants, and by Mr. Blake, for plaintiffs.

On the first point, the defendants' counsel contended, that by the foreclosure the mortgage became, by relation, a complete alienation from its date; that the claim of dower arises from the seisin of the husband, which, as to the mortgagee and his assigns, did not exist after October, 1808. He cited 15 Mass. 278; 7 Mass. 138; 6 Mass. 53; 1 Brown, Ch. 326; 2 Schoales & L. 388; 5 Johns. Ch. 454; Co. Litt. § 32a, and note, 193; Id. § 36; 9 Mass. 8, 221.

On the second point, he contended, that the wheel and gearing were not to be considered as fixtures; but were to be deemed entitled to as favourable a construction, as is allowed between landlord and tenant. He cited 3 Esp. 11; Bull. N. P. 34; 2 East, 88; 3 Atk. 13; 2 Johns. 418; 7 Mass. 432; 17 Johns. 116; 3 East, 38; 6 Johns. 5; 14 Mass. 352; 20 Johns. 29.

For the plaintiff, e contra, the argument of the defendants was on both points denied; and on the first was cited St. Mass. 1783, c. 37; 2 Bl. Comm. 128, 157; Pow. Mortg. 248; Shep. Touch. 117; Caines, Cas. 67; 11 Johns. 538; 4 Johns. 42; 12 Mass. 388; 7 Johns. 388; 17 Mass. 566; 11 Mass. 12, 473; 16 Mass. 346; 1 H. Bl. 119; 1 Pick. 88; 3 Atk. 244; Doug. 21, 438; 2 Burrows, 978; 1 Mass. 473; 4 Johns. 42, 538.

On the second point was cited 3 Dane, Abr. 147, 152, 153.

STORY, Circuit Justice. In October, 1808, Roswell Merrick mortgaged the estate in controversy to Rufus Flint. Subsequently, in 1812, he made such an alienation as completely to part with his estate in the equity, so far as dower is concerned. In the intermediate time he made great improvements on the estate, the dower in which is claimed, and forms the present subject of contestation. He died in 1819; and afterwards, in April, 1820, Rufus Flint took possession of the mortgaged premises under process of law; and his interest therein by mesne conveyances has since come to the Brimfield Manufacturing Company.

The first exception presents the question, whether the mortgage constitutes such an alienation of the husband, as by law estops the right of dower in any subsequent improvements made by the husband upon the estate before an entry or foreclosure under the mortgage. I say in improvements by the husband, for the point does not arise as to improvements made by the mortgagee. This question must be settled by the local law of Massachusetts, although material lights may be borrowed from other sources to illustrate the doctrines of the common law, so far as they have been adopted here.

It is very clear, that at common law a widow is not entitled to dower in any equity of redemption belonging to her husband during the coverture. This doctrine resulted from the principle, that, by the mortgage, the whole legal estate and seisin were gone from her husband, and that dower could not arise, except in cases, where the husband had a legal seisin of the estate at some time during the coverture. Co. Litt. 31–33; Id. § 36. Courts of equity in this respect followed the rule at law, and refused to create an equitable title to dower, where a legal title was denied to exist. Dixon v. Saville, 1 Brown, Ch. 325; D'Arcy v. Blake, 2 Schoales & L. 387; Titus v. Neilson, 5 Johns. Ch. 453, 454. But this has always been considered a hard and harsh rule, and against the general spirit prevailing in the construction of mortgages. In the state of New York an early struggle commenced, and the doctrine finally prevailed, that, at law, the mortgagor in possession was to be considered as seised at law of the estate for all purposes, except as against the mortgagee and those claiming under him; and, that his wife was dowable of an equity of redemption in fee. Titus v. Neilson, supra, and cases there cited. The same doctrine has been successfully and conclusively established in Massachusetts. The mortgagor is here considered as the real owner in seisin of the estate against all persons but the mortgagee and persons claiming under him. If disseised by a stranger he may maintain a writ of entry sur disseisin; and a purchaser of the equity either from him, or under an execution, acquires a like legal seisin, and may maintain a like writ. Groton v. Roxborough, 6 Mass. 50; Willington v. Gale, 7 Mass. 138; Goodwin v. Richardson, 11 Mass. 469; Wilder v. Houghton, 1 Pick. 88. The very point, that a widow is dowable of an equity of redemption against every person not claiming under a prior mortgage, was decided in Snow v. Stevens, 15 Mass. 278, and was subsequently recognised in Barker v. Parker, 17 Mass. 564. The latter case was a very strong application of the doctrine, for the wife had joined in the mortgage, and afterwards the husband's equity was sold by process of law, and before the purchaser had redeemed, the mortgage was discharged by a third person; and it was held, that the wife was thereby let in to dower against the-

purchaser of the equity. See Hildreth v. Jones, 13 Mass. 525; Bolton v. Ballard, Id. 227; Snow v. Stevens, 15 Mass. 278.

The present, however, is not the case of a widow claiming dower of an equity of redemption. Her husband was seised of the estate during the coverture, and afterwards mortgaged the estate to Flint, in which she did not join. She is of course, as has been already decided, entitled to dower in the premises; and the question is as to the improvements made after the mortgage. As against the heirs of her husband she would unquestionably be dowable of the improvements, or she would be dowable even of improvements made by the heir himself. If the mortgage had been redeemed, she would have been so entitled. See Hildreth v. Jones, 13 Mass. 525; Bolton v. Ballard, Id. 227; Snow v. Stevens, 15 Mass. 278. What reason is there, why she should not be entitled as against the mortgagee? The improvements were not made by him; and he has therefore no equity in that respect. If it be said, that the improvements, being made after the mortgage, attached to the estate of the mortgagee for his benefit; it may with as much truth be stated, that the wife also had an inchoate right of dower, to which as an accruing benefit they ought to attach. But I put the case upon this, that here there was not, in the sense of our law, an absolute alienation of the estate by the husband, until after these improvements were made. A mortgage is not an absolute alienation. In Goodwin v. Richardson, 11 Mass. 469, 473, the court said, that "the foreclosure (of a mortgage) operates as a new purchase by the mortgagee." See, also, Ex parte Quincy, 1 Atk. 477. If by such foreclosure the title is to be considered as relating back to the time of the original mortgage, it is so in a limited extent, and not to cut out the rights of third persons. And it would require great consideration, before it could be decided, that, if after the foreclosure the title to the estate had failed by an ouster under a superior title, the mortgagee, upon the covenants of warranty in the mortgage, could have recovered damages to the full value of the improvements made afterwards by the mortgagor.

There is no case, in which it has been held, that the widow is excluded from dower in improvements, unless made by a purchaser after an alienation. The court is now called upon to go beyond that exception without any peculiar equity to justify it. I cannot but consider, that all the improvements made by the husband are to be considered as made for the benefit of the estate, and of all persons having an interest therein and according to such interest. These improvements were annexed to the freehold, and became a part of it to all intents and purposes. If a recovery had been had under a superior title, they would have passed to the recoverer. The title of the dowress is superior to that of the mortgagee in the premises; and I know of no rule of law, that restrains her from taking her third part of the freehold with all the improvements on it antecedent to the alienation of the husband in 1812. The same point came before my learned friend, Mr. Chancellor Kent, in Hale v. James, 6 Johns. Ch. 258, and was by his cautious judgment decided in the same way; and I derive no small confirmation of my opinion from finding it coincide with his. The report of the commissioners on this point must be confirmed.

The other exception presents the question, whether the water-wheel and mill-gearing of the factory, without which it cannot be put in operation, are fixtures annexed to the freehold, and so real estate, or are to be deemed mere personalty. The general rule undoubtedly is, that whatever is once annexed to the freehold becomes parcel thereof, and cannot be afterwards severed but by him, who is entitled to the inheritance. Therefore it is laid down in Co. Litt. 53a, that if glass windows, though glazed by the tenant himself, be broken down or carried away, it is waste, for the glass is part of the house. And so it is of wainscot, benches, doors, windows, furnaces, and the like annexed or fixed to the house, either by him in the reversion or the tenant. The same doctrine is laid down by Lord Coke in the close of Herlakenden's Case, 4 Coke, 63, where he refers to a case, then recently decided, in which it was held, that waste might be committed in glass annexed to windows, for it is parcel of the inheritance, and shall descend, as such, to the heir, and the executors shall not have them; and although the lessee himself, at his own costs, put the glass into the windows, yet being once parcel of the house, he could not take it away or waste it. It was likewise then resolved, that wainscot, be it annexed to the house by the lessor or lessee, is parcel of the house; and there is no difference in law if it be fastened by great nails or little nails, or by screws or irons put through the post or walls. The like was adjudged in Cooke's Case, Moore, 177, where a tenant took away doors and cheek posts of a house, which he had added during his tenancy. Indeed, the doctrine is to be found in the Year Books. In 17 Edw. II. 518, it was held waste for a tenant to pull down a house erected by him during the term. In 20 Hen. VII. 13b, and 21 Hen. VII. 26b, 27a (which I incline to think different reports of the same case), it was decided, that a furnace erected by the ancestor in his house was parcel of the inheritance, and passed to the heir and not to the executor; and that the same rule would apply, where the ancestor had fixed vats in a brew-house or dye-house. Kingsmil, J., on that occasion said, that after it was once fixed to the freehold, it was incident to the freehold, so that it was parcel thereof, and would go and pass at all times with the freehold. This doctrine is fully recognised by Lord Chief Baron Comyns in his

Digest (Biens, B.), who lays it down (which is very applicable to the present case), that mill-stones, fixed to a mill, belong to the heir and not to the executor. It is also recognised by the Lord Chancellor in Cave v. Cave, 2 Vern. 508; and by Lord Mansfield in Lawton v. Salmon, 1 H. Bl. 259, note, who applied it in favour of the heir as to salt-pans, which were fixed in salt-works by the ancestor, and fastened by mortar to a brick floor. Indeed, as between heir and executor the rule has never been relaxed, unless the case of the cider-mill, cited in Lawton v. Lawton, 3 Atk. 13, is an exception, which may, perhaps, as the note there suggests, have turned upon a custom, or as Lord Ellenborough, in Elwes v. Maw, 3 East, 38, considers it, may be deemed a mixed case between enjoying the profits of land and carrying on a species of trade.

In modern times a relaxation has, indeed, taken place in cases between tenant for life and remainder-man, and still more favourably in cases between landlord and tenant for the benefit of trade. The authorities are most ably summed up and commented on by Lord Ellenborough, in Elwes v. Maw, 3 East, 38; and it would be a useless labour to review them. See, also, Shep. Touch. 470; 3 Dane, Abr. 147, 153; Woodf. Landl. & Ten. c. 9, § 1; Bull. N. P. 34; Toll. Ex'rs, bk. 2, c. 4, § 2; Holmes v. Tremper, 20 Johns. 29; Lawton v. Lawton, 3 Atk. 13; Dudley v. Warde, 1 Amb. 113; Beck v. Rebow, 1 P. Wms. 94; Ex parte Quincy, 1 Atk. 477; Penton v. Robart, 2 East, 88; Poole's Case, 1 Salk. 368; Lee v. Risdon, 7 Taunt. 188; Butler's note 34b to Co. Litt. 53. In that case the court decided, whether rightly or not I am not called upon to decide, that the relaxation as between landlord and tenant was confined to erections for the benefit of trade, and did not extend to those for agricultural purposes.

It is the less necessary to consider the nature and extent of these exceptions, because they steer wide of the present case, and all proceed upon the ground, that such fixtures are annexed to the freehold, and would, under the general rule, form a parcel of the inheritance. See Lee v. Risdon, 7 Taunt. 188. In Lawton v. Salmon, 1 H. Bl. 259, note, Lord Mansfield, with reference to the salt-pans, said, "that the salt spring is a valuable inheritance, but no profit arises, unless there is a salt-work, which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessaries, necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance." Every word here used is equally applicable to the case now before the court. The water-wheel and gearing are necessary for the use of the factory. They were placed there by Merrick, when owner, for the purpose of being used as parcel of the factory. The mill could not operate without them. They were never disannexed by Merrick. They passed, or might have passed by the alienation of Merrick, as parcel of the factory mill. That has not been, as I recollect, directly denied; and if denied, it is clearly well founded in law. The citation from Comyn's Digest, already made, shows it. In Shep. Touch. 90, it is laid down, that "that, which is parcel or of the essence of a thing, albeit at the time of the grant it be actually severed from it, does pass by the grant of the thing itself. And therefore by the grant of a mill, the mill-stone doth pass, albeit at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks and keys do pass, as parcel thereof, albeit at the time of the grant they be actually severed from it." See, also, Colegrave v. Dias Santos, 2 Barn. & C. 76; Union Bank v. Emerson, 15 Mass. 159. These are stronger cases, than the present, for here there was no severance at any time before the dower absolutely attached to the estate. Fixtures of this nature pass also, as parcel of the inheritance, under a levy by execution. This was so held in conformity to the rule of the common law in Goddard v. Chace, 7 Mass. 432. Nor is there any thing in Gale v. Ward, 14 Mass. 352, which interferes with its authority; for the machines there described were not, strictly speaking, fixtures. The same answer may be given to Cresson v. Stout, 17 Johns. 117.

Upon the plain principles of the common law, then, the water-wheel and its gearing were fixtures annexed to the freehold. They were necessary to the beneficial use of the factory, and could not be removed without prejudice to it. They were so annexed, not by a tenant for life or for years, or for a limited purpose, but by the owner for the permanent enjoyment of the inheritance. They would have passed as appurtenances or incidents to the heir by descent, to a purchaser by sale, and to an execution creditor, who should levy on the estate, as parcel of the factory. Nothing has been done to disannex them from the freehold. I cannot therefore perceive any ground, upon which the court can declare them not to be parcel of the inheritance for the purpose of dower. Against the heir they would clearly be parcel, and I think they must be so as to purchasers. They do not fall within any exception, in favour of which the ancient rule of law has been relaxed.

I was desirous of having somewhat more full knowledge of the nature and position of the water-wheel and gearing, than the report furnished; and the information has been furnished by the intelligent gentleman whose statement has been used by the consent of the parties. He clearly shows them to be fixtures in the correct sense of the term. The water-wheel is indeed movable, and hung on gudgeons, and has a head-stock not fixed; and the gearing consists of upright shafts and horizontal shafts, on which are drums, and on these are belts. All these are connected with cog-wheels, and the belts carry the motion

from one to another. The ends of the shaft of the wheel rest of course on permanent fixtures in the building; and it cannot be taken out without removing a part of the building, and being separated into pieces.

The exception, therefore, as to the fixtures, is also overruled, and the report is confirmed.

Decree accordingly.

Second decree: This cause coming on again to be considered upon the report made by the commissioners appointed to assign dower in the premises, two exceptions were taken in behalf of the respondents to the said report, viz. 1st, That the commissioners erred in not considering "the mortgage to Rufus Flint of October the 21, 1808, in the pleadings mentioned as an alienation by the said Roswell Merrick, so as to affect the right of his wife to dower." 2d. That the commissioners erred in considering "the water-wheel and the main gearing of the factory as real estate." The exceptions were thereupon argued by counsel for both parties. On consideration thereof, and of the premises, it is ordered, adjudged, and decreed by the court, that the said exceptions be and they hereby are overruled; and that the same report do, in these respects, stand confirmed. And further, that the dower therein assigned to the complainants by the commissioners, firstly in their report, upon the ground, that they were right in their opinion on the points above excepted to, be, and hereby is confirmed and assigned to the complainants accordingly; and that the same report do, in all other respects, stand confirmed. And it is further ordered, adjudged, and decreed, that the respondents do deliver possession of the premises so assigned to the complainants accordingly, and do in all other respects perform this decree; and that the complainants do recover their reasonable costs in the premises, taxed at $345.75.

Case No. 11,358.

POWELL v. PAYNE.

[Cited in Hall v. Savage, Case No. 5,944. Nowhere reported; opinion not now accessible.]

Case No. 11,359.

POWELL et al. v. REDFIELD et al.

[4 Blatchf. 45.] [1]

Circuit Court, S. D. New York. April 21, 1857.

EQUITY—BILL TO COMPEL ELECTION AS TO WHICH OF TWO SUITS WILL BE PROSECUTED — SUIT ON REDELIVERY BOND — CONDEMNATION PROCEEDINGS AGAINST GOODS—UNDERVALUATION.

1. Semble, that, on a redelivery bond, given to the United States, under section 4 of the act of May 28, 1830, (4 Stat. 410), in the penalty of $20,000, on which the estimated value of the entry is endorsed as $3,357, and by a stipulation in which its penalty is to be deemed double that sum, it is not necessary that the United States should recover $20,000, if entitled to recover at all, where the goods not redelivered are worth less than such estimated value.

2. Where a suit on such a bond is pending in the district court, this court has no authority, on a bill filed by the obligors in the bond, against the collector and the district attorney, to restrain them from prosecuting that suit, or to determine in advance how much may legally be recovered in it.

3. Nor, on such a bill, can this court interfere with another suit pending in the district court to condemn the goods specified in the entry, as forfeited to the United States, because of fraud or undervaluation in their invoice.

4. Nor, on such a bill, can this court compel the defendants to elect between such two suits, on the apprehension that there may be a recovery in the suit on the bond, for the non-delivery of goods which may be condemned as forfeited in the other suit.

5. A court of equity has no right to interfere with the strict legal rights of the United States under the revenue laws. Relief against the injustice of enforcing their provisions in respect to penalties and forfeitures, must proceed from the treasury department.

This was a bill in equity, to compel the defendants, [Heman J. Redfield and John McKeon,] the one as collector of the port of New York, and the other as district-attorney of the United States for the Southern district of New York, being the district in which that port is situated, to elect which one of two actions, now depending in the district court for that district, they would prosecute, and to abandon the prosecution of the other. The defendants demurred to the bill, and a motion of the plaintiffs [Alexander Powell and others] for a preliminary injunction, and the demurrer, were argued together. The first suit was upon a redelivery bond in the penalty of $20,000, on which the estimated value of the entry, out of which these three suits arose, was indorsed as $3,357; and, by a stipulation in the bond itself, its penalty was, for the purposes of these suits, to be deemed double that sum.

John S. McCulloh, for plaintiffs.

John McKeon, Dist. Atty., for defendants.

HALL, District Judge. It was assumed by the plaintiffs' counsel, that the United States, if they recovered at all, must recover the full amount of the $20,000 stated in the bond referred to in the pleadings, although the goods not redelivered, and the non-delivery of which constitutes the breach of the condition of the bond, were worth only one or two thousand dollars. This bond was taken under the fourth section of the act of May 28, 1830 (4 Stat. 410). Although the condition is not in strict accordance therewith, I do not perceive any reason for supposing that the United States must recover the sum of $20,000, if entitled to recover at all on the bond. But, however that may be, the plaintiffs have voluntarily assumed all the obligations which the bond imposes, and I do not understand that this court has any jurisdiction or authority to restrain the defendants from prosecuting in the district

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

court, in the proper and regular discharge and course of their official duties, for the purpose of recovering whatever the United States have a legal right to recover on such bond; or any jurisdiction or authority to determine, in advance of the decision of the suit there commenced, the amount which may be legally recovered therein. The right to recover, if any, is a strict legal right; and, whatever of hardship there may be in the case, this court has no power to remit or mitigate any forfeiture which has been incurred. The extent of such recovery is a proper subject for the decision of the district court, so far as it depends upon any question which is not a question of fact merely; and, as a pure question of law, is a proper question for the determination of that court, rather than of this court, sitting as a court of equity. If the decision of that court shall not be satisfactory, the party can present the questions involved, to this court, upon an appeal; but they cannot be determined in this court, in this suit.

It is also assumed that, in addition to the recovery of the whole value of all the goods mentioned in the invoice and entry referred to in the pleadings, or much more indeed than their whole value, in the suit on the redelivery bond, the whole of the goods mentioned in such invoice may be condemned as forfeited to the United States, in the other suit which is being prosecuted in the district court, and that the probability of such injustice will justify the interference of this court. I do not understand how the goods not redelivered, and which, of course, were never seized, can be condemned in that suit; for a seizure must necessarily precede such a condemnation. If they have not been seized, they cannot be condemned, unless the plaintiffs, by giving a bond, or by their form of pleading, or by an omission to plead properly, in the suit for their condemnation, or otherwise, have admitted such seizure, or precluded themselves from denying it. But, if this has occurred, their proper remedy is by application to the district court, to amend their pleadings or proceedings. Certainly, they cannot make any such mistaken action of theirs the basis of this suit in this court. Therefore, the bill in this suit cannot be sustained on that ground.

But it is sought to sustain it on the further ground that, in the suit for condemnation, the United States seek to forfeit all the property mentioned in the invoice—the 42 casks of salted hides, as well as the 2 casks of skivers—whereas they had a legal right, under the true construction of the statute, to seize and condemn only the two casks of skivers, the fraud or under-valuation complained of being confined to those casks alone. I do not see how this claim on the part of the United States, even conceding it to be excessive and unauthorized, can confer jurisdiction upon this court. It presents a simple and pure question of legal interpretation and construction, as applied to the revenue laws; and the district court is the court by which, under the acts of congress, these questions must, in the first instance, be decided. If the whole invoice be legally forfeited, I can find no authority for this court to restrain the condemnation of the whole; and, if the whole be not forfeited, I am bound to presume that the district court will so determine. The question is, most clearly, a proper question for the district court, as a court of law, and not one which this court, sitting as a court of equity, can decide, as peculiar to the exercise of its equitable jurisdiction.

But, it is assumed that, if the revenue laws have given to the United States a remedy on the bond, and also a farther remedy in the suit for a condemnation, in such manner that there may be a recovery in the suit on the bond, for a nondelivery of goods which may be condemned as forfeited in the other suit, this court may interfere and compel an election between the two suits. I am unable to see that this court could interfere even in that case. Suppose there had been a refusal to deliver each and every parcel of the goods invoiced, according to the condition of the redelivery bond, that they had been fraudulently removed and secreted, and that the officers of the customs had followed them, ferreted them out, and seized them, could this court interfere to prevent a prosecution upon the bond, in addition to the suit for the condemnation of the goods seized? Or, suppose that a suit for the duties due upon the importation, another suit for a penalty for smuggling the goods, or an indictment for the same act, and another suit for the condemnation of the goods smuggled, were all brought, under the statutes authorizing such proceedings, could this court interfere and compel an election? I think not. The rights accruing to the United States under the revenue laws are strict legal rights, arising from positive provisions of acts of congress, frequently cumulative in their penalties and sanctions; and it is not infrequently the case, that their stringent enforcement operates harshly, and even unjustly, upon those who have inadvertently or unwittingly violated their provisions, and incurred the penalties and forfeitures and other punishments for which they provide. But this gives a court of equity no right to interfere, and, by injunction or decree, to virtually repeal the express provisions of a positive statute, or defeat their operation in the particular case. The remedy for these inevitable consequences of the strict and general provisions of those laws, which frequently impose a penalty or create a forfeiture where the party who is to suffer thereby has been innocent of all intention to defraud the revenue or evade the laws, is by an application to the secretary of the treasury, and not to the equitable jurisdiction of this court.

Whatever defence the plaintiffs have in

either of the actions mentioned in the bill, can be made in the district court, and, if they seek any equitable interference, they must seek it at the treasury department. The preliminary injunction must be denied and the demurrer be allowed, with costs.

POWELL (UNITED STATES v.). See Case No. 16,079.

Case No. 11,360.

POWER v. SEMMES.

[1 Cranch, C. C. 247.] [1]

Circuit Court, District of Columbia. July Term, 1805.

WITNESS FEES—SERVICE OF SUBPŒNA.

Witnesses are entitled to their fees, although the summons be served by a private person. In a judgment upon an attachment, interest cannot be added.

A summons for witnesses in Virginia, on the part of the plaintiff, was issued and directed to the marshal of Virginia. It was served by a private person who made affidavit that he read it to the witnesses and required their attendance, and that he believed they attended in consequence of such summons.

THE COURT allowed them to prove their attendance, and directed their fees to be taxed in the bill of costs in the same manner as if served by the marshal of Virginia.

On foreign attachment, the interest was calculated up to the time of the affidavit made before the justice who issued the warrant. At the time of condemnation, the plaintiff's counsel, (Mr. Howitt,) moved for interest to be added to the time of the judgment.

THE COURT refused.

POWER (UNITED STATES v.). See Case No. 16,080.

Case No. 11,361.

POWERS et al. v. BARNEY.

[5 Blatchf. 202.] [2]

Circuit Court, S. D. New York. Dec. 1, 1863.

CUSTOMS DUTIES—CONSTRUCTION OF TARIFF ACT—AMBIGUITY—REPUGNANT PROVISIONS.

1. Where, in the 19th section of the tariff act of March 2, 1861 (12 Stat. 188), a duty of 10 per cent. ad valorem was imposed on "Peruvian bark," and, in the 23d section of the same act, the same article was exempted from duty. *Held*, that, as the two provisions were repugnant, the last one must prevail, as speaking the final and latest intent of the law makers.

[Cited in Re Davis, Case No. 3,615; Arthur v. Sussfield, 96 U. S. 130; Dieckerhoff v. Robertson, 40 Fed. 569.]

[Cited in State v. Silver, 9 Neb. 89, 2 N. W. 215; State v. City of Toledo, 48 Ohio St. 130, 26 N. E. 1061.]

2. In cases of serious ambiguity in the language of a tariff act, or doubtful classification of articles, the construction must be in favor of the importer, as duties are never imposed upon the citizen upon vague or doubtful interpretations.

[Cited in U. S. v. Ullman, Case No. 16,593; Rice v. U. S., 4 C. C. A. 104, 53 Fed. 912; Hartranft v. Wiegmann, 121 U. S. 616, 7 Sup. Ct. 1244.]

[Cited in Re Will of Enston, 113 N. Y. 178, 21 N. E. 87; State v. Pullman's Palace Car Co., 64 Wis. 101, 23 N. W. 872.]

This was an action [by Thomas H. Powers and others] against [Hiram Barney] the collector of the port of New York, to recover back an alleged excess of duties paid, under protest, on an article invoiced as "Bark, Peruvian," imported from Southampton into the port of New York. The duties were paid on the 31st of July, 1861.

Andrew R. Culver, for plaintiffs.

E. Delafield Smith, Dist. Atty., for defendant.

NELSON, Circuit Justice. The importation in this case was made under the act of March 2, 1861 (12 Stat. 178). The goods were charged by the collector with a duty of ten per cent. ad valorem. The plaintiffs insist that they were exempt from any duty. The 19th section of the act imposes a duty of ten per cent. ad valorem upon the articles enumerated in it, and, among others, "Peruvian bark." If this section stood alone, the right to impose the duty in question would be plain. But the 23d section of the same act, which exempts articles enumerated in it, embraces in the list the same article—so that each party finds an authority for his claim in the same act of congress. In this difficulty of conflicting claims, I know of no other way of solving it, than by applying the well settled rule of construction, in the case of two repugnant provisions of the same act, which is, that the last provision shall prevail, as speaking the latest and final intent of the law makers.

Another principle may also be invoked, which is, that in cases of serious ambiguity in the language of the act, or doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations. There must be a judgment for the plaintiffs.

POWERS (LANSTRAAZ v.). See Case No. 8,078.

Case No. 11,362.

POWERS v. MORTEE et al.

[4 Am. Law Reg. 427.]

Circuit Court, E. D. Louisiana. 1855.

GUARDIAN AND WARD — AUTHORITY TO TAKE MINOR'S PROPERTY IN ANOTHER JURISDICTION —DOMICIL OF MINOR.

1. Where a resident in Louisiana died intestate, leaving two minor children surviving him,

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

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

who had been placed, in the father's lifetime, in the care of an uncle in the state of New York, and he having, after the father's death, been duly appointed their guardian there, an application made in Louisiana by the uncle to set aside proceedings in that state appointing the grandmother tutrix will be refused; neither will the court decree a sum of money to be paid to the New York guardian for the support and education of the children.

2. Authority conferred on a guardian in New York can give him no right to come into Louisiana, and take the minor's property there, which is already in the possession of a legal tutrix.

3. The rights and duties of guardians are strictly local.

4. The domicil of the minor must follow the domicil of the father.

[This was a proceeding by Charles Powers, guardian of the children of James Brown, Jr., deceased, against Anna Olivia Mortee and Thomas J. Mortee, her husband, to set aside proceedings of the Eighth district court of Louisiana appointing defendants tutrix and co-tutor of the minors, as illegal, and therefore null and void, and seeking to recover as much of the property of James Brown, Jr., as belongs to the children.]

McCALEB, District Judge. The late James Brown, Jr., who was for many years a citizen of this state, and a resident of the parish of St. Tammany, departed this life on the 16th of September, 1853. He died intestate, leaving two children, viz: Adelaide Clare, aged ten years, and Emma Eliza, aged eight years, who were the only children born of his marriage with his first wife, Eliza Hosmer. He also left as widow in community Rosa Ginault, his second wife, who was pregnant at the time of his death, and who has since been delivered of a female child, named Louisa Laura. The first wife of Brown died several years before her husband. After her death, her surviving children were committed by their father to the care of their grandmother, Mrs. Mortee, one of the defendants in this action. They remained under her charge for seven or eight years, and were then taken to New York, and placed by their father under the care of the plaintiff, Charles Powers and his wife (the latter being the sister of the said James Brown), where they now remain. Since the death of the father, their grandmother, Mrs. Mortee, has demanded the possession of the children; but the plaintiff refuses to comply with the demand, upon the ground that it was the wish and request of their father that they should remain under the care and protection of himself and wife. He alleges "that after the decease of the father, at the request of the grandfather and uncle and aunt of the said children, he applied to the surrogate's court, in the state of New York, and was legally appointed the guardian of the said children, who now reside with him and his wife in that state, and are supported and educated out of their own funds. The relatives at whose request this proceeding was resorted to, are the paternal grandfather, uncle and aunt of the children. The letters of guardianship were granted by the surrogate of Richmond county, in the state of New York, on the 16th of January, 1854. Immediately after the death of James Brown, Jr., his succession was opened in the parish of St. Tammany, and an administrator appointed. The defendant, Mrs. Mortee, being the grandmother of the minor children, and the only ascendant residing in the state of Louisiana, was by law entitled to the tutorship, and was, by an order of the Eighth district court, appointed tutrix on the 29th of November, 1853. Her husband, by the same authority, was appointed co-tutor. They both aver that they have complied with all the requisites of the law, and have given bond and security to the satisfaction of a meeting of the friends of the family of the minors, in a sum sufficient to cover their interest in their father's estate, as well as the property they inherited from their mother. They further aver that they have thus been legally appointed to the tutorship of the said minors, and are now in the discharge of their duty in that capacity. They deny that the plaintiff, Powers, has any right to control or interfere with the persons or property of the said minors in any manner.

The avowed object of this action, as appears from the plaintiff's petition, is to set aside the proceedings of the Eighth district court, appointing the defendants tutrix and co-tutor of the minors, as illegal, null, and void, and to recover possession of the property belonging to the succession of James Brown, Jr., or as much thereof as legally belongs to these two children. In the event of a refusal on the part of this court to grant to the plaintiff the possession of the property, he prays that the court will award a sum of money to be paid to him, from time to time, for the support and education of the children. We have seen that the father died intestate; that, although he placed the children under the care of his brother-in-law and sister in New York, there is nothing to show that he ever intended to remove to that state, and fix his permanent residence there; nor does it appear that it was his wish that the children should reside there for any other purpose than to obtain an education. The correspondence introduced in evidence, certainly exhibits great solicitude on his part, that his children should continue to remain under the care of his sister. But as this solicitude was only expressed in reference to their education, and evidently did not relate to their permanent residence, either during his own life, or in the event of his death, it is impossible to say that any change of domicil was ever contemplated. It is clear, in point of fact, that the domicil of the father was in Louisiana; and it is equally clear, in point of law, that the appointment of a tutor or curator to a minor, belongs to the judge of probates of the place of domicil, or usual residence of the father and mother of such minor, if they or either

of them be living. If the father and mother be dead, the appointment shall be made by the judge of probates, at their last place of domicil; or, if they had no domicil, of the minor's nearest relations. The place of birth of a person is considered as his domicil, if it is at the time of his birth the domicil of his parents, "patris originem unusquisque sequitur." The domicil of birth of minors continues until they have obtained a new domicil. Minors are generally deemed incapable of changing their domicil during their minority, and therefore they retain the domicil of their parents; and if the parents change their domicil, that of the children follows it; and if the father dies, his last domicil is that of the infant children. Dig. lib. 50, tit. 1, l. 3, 4; Story, Confl. Laws, 44. It is wholly inconsistent with our law, that any one not resident in the state should be appointed a tutor to a minor whose domicil is within the state, and whose interests or property may be here situated. Civ. Code, art. 351; 9 Mart. (N. S.) 382. And it is quite unnecessary, therefore, to discuss the claims of the plaintiff, or of any other relative or connection of these minors residing in New York, to be appointed their tutor; nor is it necessary, for the purposes of a correct decision of this case, to inquire into the legality of the appointment of the plaintiff as guardian, by the surrogate of Richmond county, New York. The question for this court simply is, can the authority thus conferred upon the plaintiff, as guardian of these minors in the state of New York, give him a right to come into this state, and take the property already in the possession of a tutrix appointed at the place where that property is situated, and administer it for the benefit of those minors? It is clear to my mind that he has no such right. He could not by the laws of Louisiana claim the tutorship of these minors at all, and for the simple reason that he does not reside within the state where the minors have their legal domicil, and where their property is situated; and even if he were a resident of the state, his claims would not, under our law, be preferred to those of their grandmother. I am called upon to decide a question involving the right to the possession of property, according to the law of Louisiana, and not according to that of New York. Whatever may be the rights the appointment of guardian would confer in the latter state, it is clear that it confers no extra-territorial authority to perform acts directly opposed to the whole policy of our own laws; for who can doubt that it would be at war with the express provisions of our Code, to permit a guardian residing in the state of New York to assume the administration of minors' property in Louisiana; our own legislature has prescribed rules and regulations upon this subject. It has thought proper to say how and by whom such property shall be administered; and it is sufficient to say that the plaintiff has not shown that he is within the requirements of the law.

It is well established in our jurisprudence, that when the father and mother of the minor are dead, the grandfather is entitled of right and by law, to the tutorship of the minor; and no supposed aversion of the minor towards him, can deprive him of it, that it may be given to a brother of the deceased. It is equally well established that when no tutor has been appointed by will, it is the duty of the judge of the court of probates, to give the tutorship to the nearest ascendant of the minor. 10 La. 541, 542. In such a case, where both parents are dead, the grandfather is entitled to letters of tutorship; and it is unnecessary to call a family meeting to authorize or sanction his appointment. Civ. Code, art. 281. In the case now before the court, it is unnecessary to consider the claims of the grandfather, inasmuch as it is not shown that either paternal or maternal grandfather has asserted any claims to the tutorship. The latter is dead, and the former is a resident of the state of New York, and could not for the reasons already adduced, from Louisiana law, receive the appointment of tutor even if he had demanded it. Under such circumstances, the grandmother, being the nearest ascendant in the direct line of the minor, residing within the state, and where the property is situated, had a clear right to claim the tutorship by the effect of the law. Id. arts. 281, 284.

It is impossible to perceive upon what solid grounds the claims of the plaintiff in this case can rest. The rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators. Morrell v. Dickey, 1 Johns. Ch. 153; Story, Confl. Laws, § 499. To authorize the plaintiff to take charge of the property of these minors, whether to administer it within this state, or to sell it and remove it beyond the reach of the lex rei sitæ, some higher powers than those which are necessarily incidental to his appointment of guardian, under the laws of New York, should be exhibited. If the legal domicil of these minors was in New York, there would perhaps be some ground for the claims he has asserted before the court; but we have seen that there has been no change of domicil since the death of the father, for the reason that it is not in the power of the children, during their minority, to make such a change. We have also seen that the person designated by our laws as entitled to the tutorship, has actually been appointed; and our Code expressly declares that the domicil of a minor not emancipated, is that of his father, mother, or tutor.

But the plaintiff contends that no tutrix has been legally appointed; that the powers exercised by the clerk, as they appear from the mortuary proceedings in the court having

charge of the settlement of the succession of James Brown, Jr., were illegal and unconstitutional. Let us admit for a moment that this position were strictly correct—in what possible mode would the alleged irregularities operate in favor of the plaintiff? Let us suppose that Mrs. Mortee were now deprived of her tutorship, would he, under any circumstances, be entitled to demand of this court an order to put him in her place? From the view we have already taken of the law of this case, it is clear that the statement of the question would necessarily call for a negative reply.

Here I might with propriety leave the case; but my respect for the argument of the counsel for the plaintiff, has induced me to examine the act of the legislature of Louisiana, approved April 30th, 1853, entitled "An act to prescribe the powers and duties of clerks of courts, the parish of Orleans excepted." The seventy-sixth article of the constitution of Louisiana declares that "the legislature shall have power to vest in clerks of courts authority to grant such orders and do such acts as may be deemed necessary for the furtherance of the administration of justice; and in all cases the powers thus granted shall be specified and determined." Among the powers specified and determined in the act above referred to, we find the power to administer oaths in all cases; to grant orders for affixing seals, taking inventories, and making petitions, and to order the execution of wills; to confirm testamentary executors; to confirm and appoint tutors and under-tutors; to order family meetings, and homologate their proceedings, if no opposition is made thereto; to grant orders for the sale of succession property, &c. The powers here granted by the legislature were sufficiently ample to authorize the acts of the clerk of the Eighth district court, in reference to the appointment of the tutrix; and so far from the legislature having transcended its constitutional authority, it seems to have possessed full power over the subject, in virtue of the constitution itself. The whole policy of the law is apparent. It is to prevent delays in the settlement of successions: to facilitate the ordinary proceedings for that purpose, in the absence of the judge, who is compelled to hold court in the different parishes composing his district, and who cannot, therefore, be present at the various places where the courts are held, to grant such orders as are indispensably necessary for the speedy and proper administration of justice. If the clerk should commit errors and irregularities, in the exercise of the powers specifically conferred by law, the parties aggrieved have their remedy by an opposition, which would bring the errors complained of before the judge for revision.

A full consideration of the merits of this case, has led me to the conclusion that the plaintiff is not entitled to the relief he seeks at the hands of this court, and that his petition must be dismissed with costs. A judgment of dismissal must be entered accordingly.

POWERS (WEBB v.). See Case No. 17,323.

Case No. 11,363.

POWHATTAN STEAMBOAT CO. v. APPOMATTOX R. CO.

[4 Quart. Law J. 100.]

District Court, E. D. Virginia. Feb., 1859. [1]

CONTRACTS MADE ON SUNDAY.

1. A promise to do what is forbidden by law, or a promise made in consideration of an act done in violation of law, is void; and the infliction of a penalty for the doing of any act is an implied prohibition of it.

2. The statute against laboring on the Sabbath applies to corporations.

3. A common carrier is not responsible for the failure to deliver goods delivered to him on Sunday.

The plaintiffs offered in evidence a statute of the state of Maryland, incorporating them in the name of the Powhattan Steamboat Company, and further introduced evidence tending to prove that for many years prior to the 26th day of June, 1853, they had run a weekly line of steamboats, for the transportation of goods and merchandise between the city of Baltimore and the city of Richmond, in the state of Virginia, which boats were accustomed on each trip to stop at City Point, on James river, for the purpose of landing goods and merchandise, destined for Petersburg, Virginia, and of receiving goods and merchandise sent from Petersburg; that the said goods and merchandise were conveyed between City Point and Petersburg in both directions, by means of a railroad between those places; that on the said 26th June, 1853, and for several years previously, the said railroad was the property of and operated by the defendants, a corporation created by the state of Virginia; that on the said 26th June, 1853, and during the whole period previously that the said railroad was owned and operated by the defendants, there was an arrangement and contract between the plaintiffs and defendants, for the transportation of goods and merchandise, by their respective lines of conveyance, between Baltimore aforesaid, and Petersburg aforesaid; that under the provisions of said arrangement and contract, goods and merchandise destined to be transported from Baltimore to Petersburg, were to be delivered in Baltimore to the plaintiffs, whose agent there was to give receipts therefor, promising to deliver such goods in Petersburg, and the said goods were to be carried by the plaintiffs upon their steamboats to City Point, and there delivered to the defendants, and by them transported on their railroad to Petersburg, and

[1] [Reversed in 24 How. (65 U. S.) 247.]

that the freight for the entire distance should be collected in Petersburg, by the agent of the plaintiffs, and one-fourth part thereof paid to the defendants; and that the plaintiffs and defendants entered upon the said course of transportation, and prosecuted the same regularly until the said 26th June, 1853; that according to the regular course of the transportation, one of the steamboats of the plaintiffs left Baltimore every Saturday, in the afternoon, and arrived at City Point at or shortly after noon on Sunday, and there, on the same day, delivered the goods and merchandise destined to Petersburg to the defendants, by depositing the same in the warehouse of the defendants, located on the wharf at City Point, adjacent to the road of the defendants, the agent of the defendants opening the warehouse for the purpose of enabling the plaintiffs to deposit the said goods and merchandise therein, and closing the same after the said goods and merchandise had been so deposited—the whole labor of landing the goods and merchandise, and depositing them in the warehouse, except the opening and closing the warehouse being performed by the plaintiffs; that according to the usual course of said transportation such goods and merchandise remained in the said warehouse until Monday morning, when they were transported by the defendants to Petersburg, and the steamboat of the plaintiffs, after so delivering the goods to the defendants, proceeded on Sunday up the river to Richmond; that on Saturday, the 25th of June, 1853, one of the steamboats of the plaintiffs left Baltimore as usual, having on board goods and merchandise destined for and to be conveyed in said boat to Richmond, and having on board also other goods and merchandise destined for Petersburg, for which the said plaintiffs had given their receipts in Baltimore to be delivered in Petersburg according to the contract and course of transportation aforesaid; that the said steamboat reached City Point about noon on Sunday, the 26th of June, 1853; that the agent of the defendants unlocked and opened the warehouse of the defendants to enable the plaintiffs to deposit therein the goods and merchandise destined for Petersburg, and that the plaintiffs on the same day landed the goods and merchandise destined for Petersburg, and deposited them in the said warehouse, which was thereupon closed by the said agent of the defendants—the whole labor of landing and depositing the goods except the opening and closing of the warehouse being performed by the plaintiffs, and that the said steamboat proceeded up the river to Richmond on the same day, and as soon as the said goods and merchandise destined for Petersburg had been landed and delivered as aforesaid, all which were according to the usual course of the said business; that on the same day the said warehouse and all the goods and merchandise aforesaid were destroyed by fire; that actions were instituted by sundry parties owning the said goods and merchandise against the said plaintiffs, in the circuit court of Petersburg, to recover the value of the said goods and merchandise; that immediately after the institution of the said actions, the plaintiffs gave notice to the defendants of the institution and pendency thereof, and that in case the plaintiffs should be held liable therein for the said goods and merchandise, they would claim reimbursement from the said defendants of the amount which they might be compelled to pay, and calling upon them to come in and defend the said actions; that the said actions were fully defended by the said plaintiffs, and verdicts and judgments rendered against them for the value of the said goods and merchandise, which said verdicts and judgments proceeded and were founded upon the ground of negligence and want of due care in the custody and preservation of the said goods and merchandise, in the warehouse aforesaid; that by the said verdicts and judgments the said plaintiffs were held liable for the sum of $12,000 and upwards, and were compelled to pay and did pay the same, for the recovery of which from the defendants, the present action is brought. And the plaintiffs further introduced evidence tending to prove that it was a part of the contract between plaintiffs and defendants, that in case the agent of the defendants should not be present at City Point, to open the warehouse, on the arrival of the steamboat on Sunday, the agents of the plaintiffs were authorized to open the said warehouse themselves, and deposit the said goods therein; that the usual time for the steamboat to leave Richmond on her return to Baltimore was in the afternoon of Tuesday, and that it was necessary for her to leave at that time, so as to reach Baltimore in time to discharge her cargo and take in another by the usual time of departure on Saturday; that unless the said boat reached Richmond by an early hour on Monday morning, it was necessary, to enable her to leave on Tuesday afternoon, that she should work all Monday night in discharging and receiving cargo; and that such extra labor on Monday night would have required the plaintiffs to employ a larger force, and subjected them to largely increased expenditure; and that the distance between City Point and Richmond could be run by said boat in some four or five hours. And it was proved that the president, directors, and stockholders of the plaintiffs' corporation are, and always heretofore have been, citizens of the state of Maryland, and that the president and directors of the defendants' corporation are, and have always heretofore been citizens of Virginia, and that the road and all the property of the defendants' corporation belong, and have always heretofore belonged, to the city of Petersburg, in Virginia.

The defendants, to sustain the issue on their part, introduced evidence to prove that, though the plaintiffs delivered the goods

from their boat into the warehouse of the defendants on Sunday, the 26th day of June, 1853, and had been in the habit of doing so on previous Sundays, they were allowed to do so only for the convenience and accommodation of the plaintiffs, and upon an understanding and agreement between the said plaintiffs and defendants that the said goods should, until Monday morning, be at the risk of the plaintiffs, the said defendants not doing any work on Sunday. And thereupon the defendants, by their counsel, moved the court to instruct the jury as follows: "If the jury believe from the evidence, that at the time of the fire in the declaration mentioned, the plaintiffs and defendants were engaged in the business of carrying goods and merchandise between Baltimore and Petersburg, in two steamboats, which plied between Baltimore and Richmond, conveying the goods and merchandise to City Point, and there delivering the same to the defendants, who carried them thence to Petersburg, over their railroad, and that in the usual course of transportation, the plaintiffs delivered from one of their steamers to the defendants at City Point, on Sunday of each week, the goods and merchandise which had been brought in the same from Baltimore, and was to be carried by the defendants from City Point to Petersburg, and that in accordance with that usage, the plaintiffs, who have carried the goods and merchandise in the declaration mentioned from Baltimore to City Point in their transit to Petersburg, delivered the same to the defendants on Sunday, the ——— day of June, 1853, on Sabbath day, and that the said goods and merchandise were burned on the same day, Sunday, June —, 1853, that they must find for the defendants."

Macfarland & Roberts, Mr. Joynes, Mr. Tucker, and Mr. Patton, for plaintiffs.

Robinson & Jones and Mr. Gholson, for defendants.

HALLYBURTON, District Judge. The question for the decision of the court in this case is, whether the railroad company are liable, as common carriers, for the loss of goods delivered to them and accepted by them as such carriers, on a Sunday, to be carried by them on the following day, from City Point to Petersburg, which goods while in the warehouse or depot of the railroad company, were consumed by fire on the day on which they were delivered. It is too well settled as a principle of the common law to require discussion, that a promise to do what is forbidden by law, or a promise made in consideration of an act done in violation of law, is void; and it seems to be now equally well settled that the infliction of a penalty for the doing of any act is an implied prohibition of it. The rule is stated by Holt, Chief Justice (Bartlett v. Vinor, Carth. 252) in the following words, quoted by Tindal, C. J., in De Begnis v. Armistead, 10 Bing. 107: "Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be void, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." And it is said in Cope v. Rowlands, 2 Mees. & W. 149, to be "perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is, expressly or by implication, forbidden by the common or statute law, no court will lend its assistance to give it effect;" and that "it is equally clear that a contract is void, if prohibited by a statute, though the statute inflicts a penalty, only, because such penalty implies a prohibition." The general principle above laid down, has also been sanctioned by the supreme court of the United States in the cases of Armstrong v. Toler, 11 Wheat. [24 U. S.] 258; Groves v. Slaughter, 15 Pet. [40 U. S. 449]; and Harris v. Runnels, 12 How. [53 U. S.] 80. And a great number of cases, both in England and the United States, have decided that contracts and agreements to do what is forbidden by the statutes enacted for the purpose of enforcing the observance of the Sabbath, and contracts made in consideration of acts done in violation of those laws, are utterly void. The statute of Virginia, in relation to labor on Sunday, to be found in Code Va. 1849, pp. 740, 741, is in the following words: "If a free person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices, servants or slaves in labor, or other business, except in household or other work of necessity or charity, he shall forfeit two dollars for each offence; every day any servant, apprentice or slave is so employed, constituting a distinct offence. No forfeiture shall be incurred under the preceding section for transportation on Sunday of the mail, or passengers, or their baggage. And the said forfeiture shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath and actually refrains from all secular business and labor on that day, provided that he does not compel a slave, apprentice or servant, not of his belief, to do similar work or business on Sunday, and does not on that day disturb any other person."

And the court has now to inquire whether such a contract as that to which we have above referred, between the steamboat and railroad companies, is annulled by the statute above recited or not. That for one carrier to deliver goods to another, to whom by his contract he is bound so to deliver them, is to labor in his calling, is clear. It is said, however, that the parties to this suit are incorporated companies, and that our act of assembly does not apply to corporations, nor to vessels engaged in the carrying trade between different states of the Union; and

moreover, if it did, that such a delivery of goods as has been supposed, is a work of necessity within the meaning of the act; but we have a statute which expressly declares, that "the word 'person' may extend and be applied to bodies politic and corporate, as well as individuals"; and without referring to that, I have no doubt that the legislature intended to prohibit corporations, which are only associations of individuals, as well as to prohibit individual persons, from engaging in their ordinary business on the Sabbath. It will not be seriously affirmed that our banks may open their doors, and discount notes, and carry on their usual business on Sundays, without any breach of the law; or that our railroad companies may lawfully receive, and carry and deliver merchandise on Sundays, as on the other days of the week. As to steamboats and other vessels engaged in commerce between the states, or between the United States and foreign countries; although the power to regulate such commerce be conferred upon congress exclusively, by the federal constitution, yet the police regulations of the several states have never been held to be prohibited by that instrument; and the law in relation to the observance of the Sabbath is merely a regulation of the police. It was intended solely to promote good order, and morality and religion, and not at all as a commercial regulation, though like many other police regulations, it may indirectly affect commerce to some extent. Besides, the delivery of the goods and the receipt of them, in the case supposed, were acts done upon the land; and if it were conceded that the statute of Virginia was not meant to be applied to ships, while under weigh upon any bay or navigable river; or to meddle with any thing done on board of them within the admiralty and maritime jurisdiction of the United States, and before they have reached the shore; it would by no means follow, that it would not be applicable to such acts, such as we have mentioned, done on land. Many cogent, and perhaps conclusive reasons may be given why a vessel, coming in from sea, or that may be pursuing on Sunday, a voyage previously commenced, and when the labor of arresting her progress might be "as tedious" as going on, should not be required to come to anchor, as soon as she enters the limits of a state; and why the statute should not be held to apply to such a case; which would not be at all applicable to the case before the court.

The delivery of the goods may be justified, by necessity; but what is a work of necessity within the meaning of the act of assembly? For what end and purpose must the act be necessary, in order to be lawful? What is necessary for any purpose whatever may, in that point of view, be regarded as a work of necessity; but the question recurs whether it be necessary to an end which the law sanctions, and which is not attainable any other way; and for the attainment of which it may be fairly concluded that the law intended that labor might be done on Sunday. It might be very important to a merchant, so far as profit was concerned, that he should expose to sale on Monday goods, which he had received on Saturday; and in order that he should be able to do so it might be absolutely necessary that he should work on Sunday in opening and arranging them; but could he lawfully do so? Would that be the sort of necessity which the law contemplates? It might be of much pecuniary benefit to a farmer that he should ship a load of wheat, and send it to market, by a vessel which was to sail on Monday morning, and to accomplish that end it might be indispensably necessary that the wheat should be winnowed and prepared for market on Sunday; but would that be a work of necessity in contemplation of law? If, on the other hand, it be lawful to carry on commerce with foreign countries, it must also be lawful that seamen should work on Sunday in crossing the ocean; because otherwise such commerce could not possibly be carried on. Sunday labor is indispensable to the attainment of that end; and if the end be clearly a lawful one, the means must be so too. This would be true, even if our act extended over the ocean, which it does not. The charters and laws by which banks are created, and which permit the business of banking to be carried on, and large amounts of money to be deposited and kept constantly in them, allow, by necessary implication, that a watch may be kept on Sundays, as well as on other days, to guard the property of the banks, and of those who deal with them; as it could not be fairly and reasonably supposed that the legislature intended that such property should be left unprotected; but they may not transact their ordinary business on Sunday, because that is not necessary to the end for which they were established.

A person may lawfully employ a servant in driving his carriage, in order to convey his family to church on Sunday; because it would be unreasonable so to construe a law intended for the advancement of religion and morality in such a way as to hinder the performance of religious duties. So, if a house takes fire, the owner may extinguish it on Sunday, though the labor of doing so may be very great and fatiguing, because such labor cannot be in conflict with any rule of morality or religion, or any object which the law may be supposed to have had in view, and it is a work of necessity, since it must be done at once, or not at all. A common carrier, too, who may be obliged, in the course of a long journey, to retain in his possession, on Sunday, goods which have been entrusted to him, may certainly watch over them himself, and employ others in doing so, on that day; but to travel with them, and deliver

them out of his custody, on the Sabbath, though it may be convenient, is not a matter of necessity, in any sense, unless on an emergency, when it might be necessary for their safety to remove them; as, if the ships containing them were to take fire, or be in a sinking condition. If a steamer might deliver her cargo to the owners, or deposit it in a warehouse at City Point, on Sunday, in order that she might not be delayed in her voyage to Richmond, why might not the same steamer, and every other vessel that might arrive in the harbor of Richmond, and not have time to deliver her cargo sooner, unlade or continue the work of unloading on Sunday, in order that she might begin her return voyage on Monday? And if so, might not merchants receive the goods on that day, and send drays to convey them; and Sunday thus be made, instead of a day of rest, a day of as much business as any other day in the week? This consequence appears to me to follow irresistibly. The inconvenience of delaying steamers and other vessels may, in a commercial point of view, be very considerable; but the merchant, the mechanic, the farmer, and men of business of all sorts, may sustain great loss and inconvenience from not being permitted to engage in their usual occupations on Sunday. The results of a general suspension of labor throughout the land on every seventh day are immense; the diminution of the products of labor in that way may be enormous, but these results were in the contemplation of the legislature of the states, and the due observance of the Sabbath, thought to be an object worth them all.

It has been argued, further, that if the labor of delivering the goods were unlawful, the mere receipt of them and acceptance of their delivery by the railroad company was not a labor, in violation of law. The answer to this argument is, in the first place, that in the case supposed it forms a part of the contract that the goods shall be delivered and received on Sunday, and the carrier who, in pursuance of such agreement, merely unlocks his warehouse and allows the merchandise to be deposited there, and locks them up, is aiding and abetting another in doing an unlawful act, as much as one who watches whilst a burglar is breaking a house; and his contract to do so, and keep them afterwards, is therefore unlawful and void, even if his acts be not regarded as labor in his calling. Another answer is that, to be obliged to be present when the goods were delivered, and unlock the door, and remain until they were deposited in the warehouse, or return to lock the door, might be a very disagreeable and troublesome labor, requiring much time, and depriving the person who performed it of all the advantages of the Sabbath. And thirdly, it may be answered that, if the law allow a person to enter into a binding agreement to receive and keep goods on a Sunday, and makes him responsible as carrier for neglecting to keep them safely, it certainly must be lawful for him to protect himself from loss, not only by locking the door of his warehouse, but by taking an inventory of the goods delivered, and employing persons to guard them, and do all other acts which may be necessary to ensure their safety; in other words, to labor in his calling on the Sabbath.

Therefore, while I refuse to give the instructions asked for in the precise language in which they are written, I instruct the jury as follows: "The court instructs the jury, that if they shall be satisfied by the evidence in this cause that the plaintiffs and defendants were common carriers at the time of delivery and acceptance of the goods hereinafter mentioned; and that said goods were brought to City Point by the Powhattan Steamboat Company, or their lawful agents, as carriers, and were so delivered by them to the Appomattox Railroad Company, or their lawful agents, and accepted by them as common carriers; and that said railroad company unlocked their warehouse at City Point, in order that the goods might be stored therein, and afterwards locked them in, under a contract or understanding, express or implied, between said companies, that said goods were to be so delivered by the said steamboat company, and accepted and to be conveyed on the following day by the said railroad company, as common carriers as aforesaid, from City Point to Petersburg, and that said goods, after having been so deposited in said warehouse, and while remaining therein, were destroyed by fire, through the negligence and want of care of said railroad company, or its agents; yet, if they shall be further satisfied by the evidence that said goods were so delivered and accepted on a Sunday under a contract, express or implied, as aforesaid, that they might be so delivered, and would be so received and accepted on that day, between the said companies or their lawful agents, and were destroyed by fire on the day they were so delivered and received, to wit: on Sunday, the 26th June, 1853, then the jury should find for the defendants."

[NOTE. The jury brought in a verdict for the defendant. The plaintiff then took the case to the supreme court on writ of error, and the judgment of this court was reversed, and the cause remanded, with directions to issue a new venire. 24 How. (65 U. S.) 247.]

Case No. 11,364.

POWLING v. VARNUM.

[2 Cranch, C. C. 423.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

INDEBITATUS ASSUMPSIT—WORK AND LABOR DONE—FRAUD.

If the plaintiff does certain work for the defendant's intestate, under a special contract to

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

be paid for it by the conveyance of a lot of ground, it is not competent for him, in an action of general indebitatus assumpsit against the defendant for work and labor done in the lifetime of her intestate, to recover the value thereof, without showing fraud in the defendant's intestate in making the contract; and it is competent for the plaintiff's intestate never had a good title to the lot without evidence of such fraud, or other evidence showing that the plaintiff had a right to rescind the contract.

Indebitatus assumpsit, for work and labor done and materials furnished for the defendant's intestate by the plaintiff, who was a painter and glazier. The defendant produced a written contract, dated February 7, 1820, under the which the work was done, and in which the plaintiff, after that he had on that day leased a lot of the defendant's intestate, James M. Varnum, for the term of ten years, with the privilege of purchasing the same within that time, agrees to do work and find materials to that amount within two years, if required by the said Varnum. And by the lease, referred to in that agreement, the plaintiff had a right, during the ten years, to purchase the lot at the price of $474; and upon payment of that sum, over and above the rent, the said Varnum agreed to "make and execute a good and sufficient deed of conveyance of all his estate, right, and interest in and to the said lot, unto the said John Powling, his heirs and assigns forever." The plaintiff afterwards agreed not to require a deed of the lot until a note of $300, discounted for the plaintiff at the Bank of the Metropolis, and for which the said Varnum was guaranty, should be fully paid; which note was not paid at the time of the trial.

Mr. Key and Mr. Redin, for plaintiff, offered evidence to show that Mr. Varnum had not a good title to the lot. The defendant proved that the plaintiff had been in possession of the lot from the date of the lease.

THE COURT (nem. con.) refused the evidence offered by the plaintiff to show defect of title, unless accompanied by evidence of fraud in the original contract respecting the work and conveyance of the lot, or evidence showing that the plaintiff had a right to rescind the contract.

The plaintiff's counsel then, in order to show such fraud, offered evidence that Mr. Varnum bought the lot for $30 at a tax sale; that the price which the plaintiff was to allow him for it, in work, was the full value of a good title; that the title under the sale for taxes was worthless; that Mr. Varnum was a shrewd, speculating man, well acquainted with city titles, and the plaintiff was a plain, unlettered man; that the validity of the tax sales had been questioned in 1819, and a bill in chancery, in the case of Greenleaf v. Corporation of Washington [unreported], to set them aside, was pending at the time of this contract, and must have been known to Mr. Varnum, who was a member of the corporation.

Mr. Jones, for defendant, objected to the admissibility of the evidence so offered by the plaintiff in support of his allegation of fraud, and prayed the opinion of the court that it was wholly inadmissible as evidence to impeach the title of the said Varnum to the lot in question, and that it was incompetent and inadmissible as evidence of any fraudulent misrepresentation or concealment of the said Varnum, to the effect of avoiding the said contract between the said Varnum and the plaintiff.

Which opinion and instruction THE COURT gave as prayed. THRUSTON, Circuit Judge, contra.

Verdict for the defendant. A bill of exceptions was taken by the plaintiff's counsel, but no writ of error was prosecuted.

POYLLON (UNITED STATES v.). See Case No. 16,081.

Case No. 11,365.

The PRAIRIE BIRD

[Cited in Bowers v. The European, 44 Fed. 491. Nowhere reported; opinion not now accessible.]

PRANG (PARTON v.). See Case No. 10,784.

Case No. 11,366.

In re PRANKARD et al.

[1 N. B. R. 297 (Quarto, 51).] [1]

District Court, S. D. New York. Feb. 13, 1868.

BANKRUPTCY—PETITIONS BY PARTNERS—DISTRICT OF RESIDENCE.

A petition was filed by two partners, one of whom neither resided nor carried on business in the district where the petition was filed: *Held*, that such partner must file his petition where he resided. It appearing further, that a third party had been a partner at the time the partnership debts were contracted, and that the members thereof were bankrupt jointly and individually, the court intimated that no proceedings could be had in the other petition or petitions until the third partner joined or was brought in by proper notice.

By ISAAC DAYTON, Register:

I, Isaac Dayton, one of the registers of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following question arose pertinent to said proceedings. The petition having been referred to me by order of this court (form No. 4), and the same having come before me on the 1st inst., for adjudication of bankruptcy, and it appearing by said petition that Francis T. Prankard resides in the city of New York, and the petitioner, William C. Prankard, resides in the Eastern district of New York; that they are copartners, and were transacting business in the city of New York as such, at the times mentioned in the schedule marked "A," annexed to said petition, being in the year of 1860, the time when the debts set forth in

[1] [Reprinted by permission.]

said petition were alleged to have been contracted. And it further appearing by the schedules annexed to said petition, that there are no individual debts or assets of either of said petitioners, the register is of opinion that this court has no jurisdiction upon said petition to adjudicate the said petitioner, William C. Prankard, who resides in the Eastern district of New York, a bankrupt, the petition not showing that he resides or is now doing business in the Southern district of New York; and that section 36 of the bankrupt act [of 1867 (14 Stat. 534)], which provides that in case of bankrupt partner, if such copartners reside in different districts, the court in which the petition is first filed shall retain exclusive jurisdiction of the case, gives this court no jurisdiction to adjudicate the petitioner, William C. Prankard, a bankrupt, or any power or authority over his person until he shall have filed his petition for adjudication of bankruptcy in the district where he resides.

N. A. Chedsey, the counsel for the petitioners, insists, that where both the petitioners join in the petition, and there are no individual debts, and all the copartnership indebtedness was contracted in this city, and one of the petitioners resides in the city of New York, which facts appear in this case, it is necessary for the other petitioner to file his petition in the district where he resides, and that this court has no jurisdiction, as the case now stands, to adjudicate both petitioners bankrupts, and requests that the question be certified.

BLATCHFORD, District Judge. The register is correct. William C. Prankard must file his petition in the Eastern district of New York. I have referred to the petition on file in this case, and observe that it states that John S. Marshall was a copartner with the petitioners when the copartnership debts, set forth in Schedule A, were contracted, and that the members of the copartnership are bankrupts, jointly and individually. On this state of facts, no proceedings can be had on the petition or petitions of the Prankards, unless Marshall joins with them, until he is brought in by a notice and proceedings under general order No. 18. The clerk will certify this decision to the register, Isaac Dayton, Esq.

Case No. 11,367.

PRATHER v. BURGESS.

[5 Cranch, C. C. 376.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

DEED OF PERSONAL PROPERTY—RECORDING—CONVEYANCE OF SLAVES FOR SOLE AND SEPARATE USE, IN ANTICIPATION OF MARRIAGE.

1. A deed of personal property, not acknowledged and recorded according to the Maryland act of 1729, c. 8, is valid between the parties, and those claiming under them, although possession should not accompany and follow the deed.

2. A deed of bargain and sale of her slaves, by a feme sole, to a trustee for her separate use (notwithstanding her future coverture), and without any control of her husband (one slave being delivered to the trustee in the name of all), is a bar to the marital rights of the future husband, unless made without his privity or assent. But if made pending the treaty of marriage, without valuable consideration, and without the privity or knowledge of the husband, it is void as to him. The frequent declarations, however, of the husband, after the marriage, that the slaves were not his, but belonged exclusively to his wife, were evidence from which the jury might infer that the deed was made with his knowledge and assent.

Trover for slaves valued at eight thousand dollars. The defendant [Deborah Burgess] offered evidence that she owned the slaves before her marriage with the plaintiff's intestate [Burgess], and, while sole, conveyed them, by a deed of bargain and sale, to one Thomas Gassaway, in trust for her separate use, without the control of her future husband, notwithstanding the coverture; that the deed was delivered to Gassaway, but was not acknowledged or recorded according to the Maryland act of 1729, c. 8, but that one of the slaves was delivered, in the name of all, to the trustee; that at the time of executing the deed she resided in Washington, D. C., but the slaves were principally in Montgomery county, in Maryland; that the deed was made a few months prior to the marriage, but pending the treaty; that Burgess lived in Ann Arundel county, in Maryland, and was not present at the execution of the deed; that the witnesses never heard from him that he knew of the deed, but that after the marriage he was frequently heard to say that the slaves were the property of his wife, and he wished her to sell them, and sometimes drove them away from his plantation; that the deed was destroyed by fire, together with the dwelling-house of the trustee, who had become, and still remained, insane.

Upon this evidence THE COURT (THRUSTON, Circuit Judge, absent), at the motion of R. S. Coxe, for plaintiff, instructed the jury that if they should believe from the evidence that the deed was made without any valuable consideration passing from the grantee to the grantor, and before her marriage, without the privity or knowledge of her intended husband, then the said deed is void as to him and his administrator, the plaintiff, and does not constitute any bar to this action. To which instruction the defendant excepted. And at the prayer of Brent & Brent, the defendant's counsel, the court instructed the jury that if they should find from the evidence that the deed of trust was made by the defendant several months before her marriage, and that after her marriage her husband, the said Basil Burgess,

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

frequently declared that the slaves named in the deed of trust were not his, and that he had no control over or right to them, but that they belonged exclusively to his wife, it is competent for the jury to infer that such declarations were made in reference to the said deed of trust, and that it was made with his knowledge and assent. To which instruction the plaintiff excepted.

THE COURT, also, at the prayer of the defendant's counsel, instructed the jury that if they should be satisfied by the evidence that the defendant, before her intermarriage with the said Basil Burgess, and during the treaty for the marriage, executed and delivered a deed of bargain and sale to Hanson Gassaway, in the usual form, acknowledging the payment of a sum of money, and acknowledging that the defendant had, for such consideration, bargained and sold the said slaves to the said Hanson Gassaway, to have and to hold the same in trust for the separate use of the defendant, notwithstanding her coverture, and without any control of her husband, and that one of the said slaves was, at the time of executing and delivering the said deed, delivered to the said Hanson Gassaway, in the name of the whole, then the said deed is a bar to the marital rights of the said Basil Burgess, and the plaintiff cannot recover in this action, unless the said deed was made without privity or assent of the said Basil Burgess. To which instruction the plaintiff also excepted.

Mr. Coxe cited Clancy, Marital Rights, 62, 614; Carleton v. Dorset, 2 Vern. 17.

Mr. Brent cited Orr v. Pickett, 3 J. J. Marsh. 279; Jenkins v. Morton, 3 T. B. Mon. 30; 1 Tuck. Bl. Comm. 110; Countess of Strathmore v. Bowes, 1 Ves. Jr. 28.

Verdict for defendant.

Case No. 11,368.

PRATHER v. MICHIGAN MUT. LIFE INS. CO.

[7 Reporter, 293; [1] 7 Ins. Law J. 897.]

Circuit Court, D. Indiana. 1878.

LIFE INSURANCE—DEFENSE OF MURDER—QUANTUM OF PROOF.

Where the defense to a suit on a life policy is that the plaintiff murdered the insured to obtain money, the burden of proof is on the company. But quantum of evidence required is not the same as in a criminal prosecution; a fair preponderance of evidence is sufficient to sustain the defense.

[Cited in Bell v. McGinness, 40 Ohio St. 206.]

On the 31st day of December, 1875, the Michigan Mutual Life Insurance Company of Detroit issued a policy insuring the life of Mary Prather, of Jackson Co., Ind., in the sum of $3,000, payable to her husband, Jno. C. Prather, in case of death. On the 25th day of October, 1876, the insured was taken suddenly sick, and died in about six hours, and was buried the next day. Suspicious circumstances connected with the death coming to the knowledge of the company led it to investigate as to the cause of death. Analysis disclosed the presence of arsenic in the stomach; and, suspicious circumstances pointing to the husband as the poisoner, he was indicted and tried for the crime, but acquitted. This suit to recover the insurance was subsequently brought, and successfully defended, on the ground that the plaintiff has poisoned his wife to obtain the insurance.

Marshall & Brown and Finch & Finch, for plaintiff.

D. Overmeyer and McMaster & Boice, for defendant.

GRESHAM, District Judge (charging jury). This is an action brought by the plaintiff, John C. Prather, against the defendant, the Michigan Mutual Life Insurance Company, on a policy of insurance, issued by the defendant on the life of Mary C. Prather, on the 31st day of December, 1875, for three thousand dollars, for the benefit of the plaintiff. The defenses are: First, that Mary C. Prather died of arsenical poisoning, willfully administered by the plaintiff; second, that Mary C. Prather committed suicide. By these pleas the defendant admits the allegations of the complaint; and, unless it has proved one or both pleas by a fair preponderance of the evidence, you will find for the plaintiff.

The plaintiff is not on trial before you on a charge of murder by administering to his wife arsenical poison. There can be no finding against the accused in a criminal trial, unless the jury are satisfied beyond a reasonable doubt of his guilt. Even if you are not satisfied beyond a reasonable doubt that the plaintiff's wife died of arsenical poison administered by her husband, yet, if you think there is a fair preponderance of the evidence in support of that defense, your verdict should be for the defendant. But, while this distinction exists between criminal and civil cases as to the rule of evidence, it is well to bear in mind that the defense of wilful poisoning is a very grave charge, and should be supported by clear and satisfactory proof.

Certain facts and circumstances in this case seem to be conceded, viz.: That Mrs. Prather became suddenly ill early in the morning of the day of her death; that there was severe and painful vomiting, and some purging, before Dr. Davis arrived, about ten a. m., from which time until death, about one p. m., the patient remained in a collapsed state, pulseless, complaining of burning pains in the stomach, unquenchable thirst, nothing being raised by vomiting but a greenish glairy mucus; that at the post mortem, some ten days after death, after being ligated or tied at either end, the stomach was removed and placed in a glass jar; and that some three or four days later, Dr. Jameson, admitted to be a competent

[1] [Reprinted from 7 Reporter, 293, by permission.]

chemist, analyzed two-thirds of the stomach and contents, discovering therein 0.07 grains of arsenic; that upon opening the stomach for analysis it was found to contain a quart or more of greenish mucus in a jelly form; that the inner coating of the stomach was thickened, enlarged, with blood and grayish spots, scattered here and there over it. Dr. Jameson says these symptoms before death, and the appearance and condition of the stomach after death,—to say nothing of the arsenic found upon analysis,—were recognized evidences of arsenical or other poison. If you believe that Mrs. Prather died of arsenical poison, and that there was no arsenic in the medicine compounded on Dr. Charlton's prescription, how is the poison to be accounted for? The plaintiff testified that himself, his wife, and three small children, the oldest less than nine years of age, constituted the entire family; that there was no servant or other person in the house; that, with the assistance of the plaintiff, the deceased prepared and cooked the breakfast. The theory that the small children administered the poison you will hardly entertain; in fact, it is not relied on by the plaintiff. The plaintiff testified that his wife told him she took one of the pills prescribed by Dr. Charlton, and directly became ill. She said nothing about taking other medicine or drugs, by mistake or otherwise. Did Mrs. Prather commit suicide by taking arsenic without the knowledge of her husband? If she did not, who had the best opportunity to administer the poison to her that morning,—for you will hardly conclude, from the evidence, that the arsenic was taken as early as the evening before. In this connection, you will bear in mind Dr. Charlton testified that on his request the plaintiff, about the time of the post mortem, promised to bring or send to him the medicine he (Dr. Charlton) had prescribed, and that the promise was never kept.

This part of Dr. Charlton's evidence, however, was contradicted by the plaintiff; and the plaintiff further told you that he sent the medicine to his attorneys, Messrs. Finch & Finch, at Indianapolis. If the plaintiff did make this promise to Dr. Charlton, why did he fail to keep it? It is not unfair to assume that Messrs. Finch & Finch took proper steps to ascertain whether the medicine contained anything that would have caused the death of Mrs. Prather. If Messrs. Finch & Finch learned by analysis that this medicine contained arsenical or other poison in sufficient quantity to destroy human life, why was that fact not proved? The fact that all, or nearly all, the medical experts testify that there was nothing in the medicine prescribed by Dr. Charlton, if taken as prescribed, which could have caused death, will also be considered in this connection. Dr. Charlton's prescriptions were as follows: "Subnitrate of bismuth, 1 drachm. Sulphate of quinine, 2½ scruples. Extract of nux vomica, 10 grains. Extract of gentian, sufficient quantity to make a pill mass,—made into thirty pills,—one to be taken before each meal. Bromide of potassium, 1 oz. Mint water, 3 oz. Fluid extract of valerian, 3 oz. Tinct. of digitalis, 2½ oz. Dose: one half tablespoonful three times a day."

It was insisted during the progress of the trial, and also in the argument, that the post mortem and analysis were unfair to the plaintiff; that he should have been present on one or both occasions; that the agents of the defendant, including the attorney, had too much to do at the post mortem, and also with the analysis; and that there was too much opportunity for the introduction of arsenic into the stomach after its removal from the body. You will remember that the medical experts, with perhaps one exception,—Dr. Stevens,—testified that the thickened condition of the inner coating of the stomach, with the blood and grayish spots interspersed over it and the amount of jellied mucus found within it, all strongly indicated that arsenic had been introduced before death, and that the introduction of arsenic into the stomach after death could not have brought about those conditions. You heard the testimony of the insurance agents, the coroner and the physicians, including Dr. Jameson; and it is for you to say, even admitting that the post mortem was conducted in a somewhat irregular and careless manner, whether there is anything in the case which supports the belief that any one in the interest of the insurance company introduced arsenic into the stomach after death. The judgment of the state court granting the plaintiff's first wife a divorce, and allowing her two thousand five hundred dollars alimony, and the subsequent proceedings in the state court, including the sale of the plaintiff's real estate, and, finally, the judgment of ouster against him, and his subsequent letters to his relations, speaking of his embarrassments and need of money, were admitted as tending to show a motive for the crime. The circumstances that the deceased was living with the plaintiff at and before the time of the divorce, that the plaintiff made unsuccessful efforts to get her to leave, that she refused to go unless he paid her eight hundred dollars, and that they were subsequently married, were admitted in evidence as tending to show that the plaintiff was wanting in affection for the deceased. But you will not forget in this connection that a number of the plaintiff's neighbors, and some of the deceased's relations testified that the plaintiff and deceased, after their marriage, apparently lived happily together; that no discord or want of affection was ever observed; and that the plaintiff was liberal in providing for the deceased's wants and comforts. In addition to this, you have heard the testimony of the plaintiff, that he and the deceased lived together on terms of mutual affection, and that he never administered to her any arsenical or other poison.

Counsel for defendant referred to certain things in the conduct of the plaintiff tending

to show guilt: thus, his language at the time he was informed she was to be taken up, and his subsequent actions for some days following that event. It was said that the plaintiff's conduct indicated remorse, and dread of exposure and punishment; while, on the other hand, it was argued that men were not all alike, that some were naturally more affectionate than others, that some were less affected by the loss of mere friends and relations than others. We all know that it is not unusual to find people going about their ordinary avocations the next day after the burial of near relatives. It is for you to say whether there was anything in the conduct of the plaintiff at Seymour, when first informed that his wife's body was to be taken up for a post mortem examination, that indicated guilt or remorse for anything he had done. If you find from the evidence that the deceased committed suicide, or that her husband murdered her by poisoning, your verdict will be for the defendant. If, on the other hand, you are not satisfied that the defendant has a clear preponderance of the evidence in support of one or both of these defenses, then your verdict will be for the plaintiff for the amount of the policy, and interest at the rate of six per cent., after 60 days from the time proof of death was furnished to the company. If you find that Mrs. Prather committed suicide, there is no evidence which will warrant you in finding that at the time she was insane.

Mr. Finch: I wish your honor would instruct the jury that the presumption of law is that the plaintiff did not kill his wife, and that the presumption of law is that she did not kill herself.

THE COURT: I have instructed the jury that the burden is on the defendant; that the defendant has assumed the burden, and must satisfy the jury by a clear preponderance of the evidence that Mary Prather either committed suicide or was murdered by her husband.

Judge Finch: I wish to suggest this: That, if the jury cannot account for the death at all, then they must find for the plaintiff.

THE COURT: This is included in what I have already said. The plaintiff's position is, that before the policy was issued, his land had been sold, and a deed executed by the sheriff to the purchaser, and that therefore this debt of three thousand dollars, which it had grown to be, could have been no motive for the taking out of a policy and subsequent poisoning of the wife to get the money. I cannot give you that charge, for this reason: If, in fact, the plaintiff was anxious about the judgment, which had stood for some time, if during this time he remained in possession, refusing to quit, and was still in possession when the deed was made and policy taken out, I leave it to you to say whether the anxiety which had been created on his mind by this liability for the sum of three thousand dollars and the loss of his real estate might or might not have operated to induce him to get the insurance, and afterward take the life of his wife to get the money to reimburse himself.

Judge Finch: I want your honor to say to the jury, as a question of law, that, when that deed was obtained, the right of redemption was lost.

THE COURT: There is no doubt about that. Of course, there was no right of redemption any longer. He had lost his land, and the only question then was whether, having lost it on account of his relations with the deceased, that fact may have operated as a motive, and if so to what extent to commit the crime. If you find for the plaintiff, the form of your verdict will be: "We, the jury, find for the plaintiff, and assess his damages at $——." If you find for the defendant, the form of your verdict will be: "We, the jury, find for the defendant."

Case No. 11,369.

In re PRATT.

[6 Ben. 165;[1] 9 N. B. R. 47; 21 Pittsb. Leg. J. 82.]

District Court, S. D. New York. July, 1872.

NON-PAYMENT OF COMMERCIAL PAPER — INJUNCTION.

A petition in involuntary bankruptcy having been filed against P., an injunction was issued, which was served on him on December 6th or 7th, 1871, restraining him from making any disposition or transfer of his property. A subsequent petition was filed against him, the only act of bankruptcy alleged being the non-payment, for fourteen days, of a promissory note, which matured November 29th, 1871: *Held*, that, as the injunction on the first petition was in force when the second was filed, the debtor could not be said to have stopped or suspended, and not resumed payment, for fourteen days, of the note in question.

[Petition to have Edward D. Pratt declared a bankrupt.]

David Crawford, for petitioner.

G. A. Seixas and W. A. Coursen, for debtor.

BLATCHFORD, District Judge. The only act of bankruptcy alleged in the petition in this case is the non-payment for fourteen days of a promissory note, which matured November 29th, 1871. But it is shown in defence, that, on a petition in involuntary bankruptcy, filed against the debtor by another creditor, on the 5th of December, 1871, in this court, an injunction was issued, which was served on the debtor on the 6th or 7th of December, restraining him from making any transfer or disposition of his property. Under these circumstances, he could not apply any of such property to the payment of the note in question. The injunction continued to be in force when the petition in the present matter was filed. Consequently, the debtor cannot properly be regarded as hav-

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

ing, prior to the filing of such petition, stopped or suspended and not resumed payment, for a period of fourteen days, of the note in question. The petition is dismissed, with costs.

Case No. 11,370.

In re PRATT.

[1 Flip. 353;[1] 1 Cent. Law J. 290.]

District Court, W. D. Michigan. Feb. 4, 1874.

HOMESTEAD EXEMPTION—ABSCONDING BANKRUPT.

By the Michigan statute, "when a homestead is owned and occupied by any resident of this state," the same is protected against the assignee in bankruptcy of the husband, though he be absconding, if his family still reside thereon. This is so, unless the proof be clear that he has fixed his domicil in another state.

[Cited in McFarland v. Goodman, Case No. 8,789.]

[In the matter of Charles C. Pratt, a bankrupt.]

Joslin & Kennedy, for petitioner.

Norris, Blair & Kingsley, for assignee.

WITHEY, District Judge. Pratt, the bankrupt, absconded, and was subsequently proceeded against by petition of a creditor, and adjudged a bankrupt. The wife of Pratt presents a petition to have the homestead, which, by the laws of Michigan, is exempt "when owned and occupied by any resident of this state," set off to the bankrupt or his family. The assignee, assuming that the wife and children are not entitled to the exemption, has put a person in possession of a part of the homestead, threatens to deprive them of their home, and refuses to set off the premises as exempt.

An order to show cause has been served on the assignee, and the only cause shown is the homestead exemption statute of Michigan. The laws of Michigan declare that a homestead consisting of any quantity of land not exceeding forty acres, and the dwelling house thereon and its appurtenances, to be selected by the owner, and not included in any recorded town plat or village; or instead thereof, at the option of the owner, a quantity of land not exceeding one lot, being within a recorded town plat or city or village, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of this state, not exceeding in value $1,500, shall not be subject to forced sale on execution, etc. Such homestead is exempt also during the time it shall be occupied by the widow, or minor child or children of any deceased person who was, when living, entitled to the benefit of the act. Every alienation of such land by the owner, if a married man, is declared invalid, unless the wife joins in the conveyance.

The homestead in question was owned by Pratt and occupied by his family up to the time he absconded, and his wife and children have continued to occupy it since. The value of the premises is $2,000, on which there is a mortgage-lien amounting to something over $700. I have, in another case—In re Leavitt [Case No. 8,168]—held that when the owner's interest does not exceed $1,500 in the homestead it is exempt, subject to any encumbrance there may exist upon it. When the premises do not exceed in quantity the exemption, no selection is required by the statute to be made. Ownership and occupancy in such case are sufficient; the exemption attaches as a right unless waiver is affirmatively shown by operation of the statute. Such is, in substance, the ruling of the supreme court of the state, Beecher v. Baldy, 7 Mich. 488. See pages 503, 508.

The object of the statute was as much to protect the wife and children as the husband. This is seen in the protection to the wife against alienation by the husband without her signing the conveyance, and in case of his death, the provision for the widow and children. This view is uniformly held by the courts.

There is nothing shown as to the intention of Pratt in reference to returning or not returning, nor do I think that fact at all controlling, but certainly nothing will be presumed in favor of a fixed intention not to return. He left his family in the occupancy of his home, and they have continued there. He may return. His residence is where his family reside, and where he and they have resided for years. He is the owner, and while his family occupy he may be truly said to occupy the premises. He is a resident of Michigan until he is shown to have gained a residence elsewhere; and while his family reside in Michigan, his residence continues until the contrary is clearly established.

While the family remain in the state occupying the premises as a home, the exemption is secured by the statute, inasmuch as it continues to be owned and occupied by Pratt while his family reside on it; their occupancy is his occupancy. His claim of a homestead exemption will be presumed in the absence of a distinct disclaimer, or some act amounting to that. Shepherd v. Cassiday, 20 Tex. 24; Gouhenant v. Cockrell, Id. 96; Mills v. Van Boskirk, 32 Tex. 360; Locke v. Rowell, 47 N. H. 46.

The last case (47 N. H. 46) holds that where the wife and family continue to occupy, any presumption of intention to abandon from absence of the husband is rebutted. Other cases consulted, and aiding to illustrate and enforce the views expressed, are White v. Clark, 36 Ill. 285; Titman v. Moore, 43 Ill. 169; Bonnell v. Smith, 53 Ill. 375; Booker v. Anderson, 35 Ill. 66; Pardee v. Lindley, 31 Ill. 174; Moore v. Dunning, 29 Ill. 130; Cox v. Wilder [Case No. 3,308]; Bartholomew v. West [Id. 1,071]; Taylor v. Hargous, 4 Cal 268; Vogler v. Montgomery [54 Mo. 577].

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

Should Pratt return, I think there can be no doubt he could recover the property from any one holding through the bankruptcy proceedings; and if so, the assignee has no power to sell or convey the property. My opinion is, that the property is exempt as a homestead, subject to the mortgage encumbrance of over $700.

Let an order be entered directing the assignee to set off the premises in question as exempt to the bankrupt, and that he yield possession of any part of the premises he now occupies, directly or indirectly, to the bankrupt or his family, and that he report to the court within twenty days his action in the premises under this order.

Ordered accordingly.

Case No. 11,371.

In re PRATT.

[2 Lowell, 96; [1] 6 N. B. R. 276.]

District Court, D. Massachusetts. Jan., 1872.

ACT OF BANKRUPTCY—INSANITY—DISCHARGE.

A person cannot commit an act of bankruptcy while insane; but if when sane he has committed such an act, he may be made bankrupt upon a petition in invitum, after he has become insane. Whether he can obtain a discharge, quære?

[Cited in Re Weitzel, Case No. 17,365.]

In bankruptcy.

H. M. Rogers, for petitioner.

LOWELL, District Judge. Pratt committed an act of bankruptcy and afterwards became insane, and a petition for adjudication is filed against him by one of his creditors. A guardian has been duly appointed for him under the laws of Massachusetts, who appears, and consents to the adjudication. So far as any cases are reported which touch the standing of a lunatic in a court of bankruptcy, they decide that such a person cannot commit an act of bankruptcy while lunatic; but that if while sane he has committed such an act, he may be made bankrupt after he has become lunatic. Rob. Bankr. (1st Ed.) 84; Anon., 13 Ves. 590, and Mr. Sumner's note; Ex parte Stamp, De Gex, 345; In re Marvin [Case No. 9,178].

This appears to be a reasonable distinction, and conformable to the law in civil matters generally. It is highly important to the bankrupt's creditors that they should not be left to a race of diligence, which has all the objections which can be found to a proceeding in bankruptcy, besides others of its own; and the rights of the bankrupt will be fully protected by his guardian. Whether he can obtain a discharge, if unable to take the oath prescribed by the statute, and unable to submit himself to examination, I will not now say. If not, he will be no worse off than if he had not been made bankrupt, while his creditors generally will be much better off. Decree of adjudication.

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

PRATT (BENTALOE v.). See Case No. 1,330.

Case No. 11,372.

PRATT et al. v. BURR et al.

[5 Biss. 36.] [1]

Circuit Court, D. Wisconsin. Sept. Term, 1857.

HOMESTEAD EXEMPTION—WRIT OF ASSISTANCE.

1. Homestead exemption does not protect a defendant, in property taken in exchange for goods transferred in fraud of his creditors.

[Cited in Kelly v. Sparks, 54 Fed. 72.]

[Cited in Long v. Murphy, 27 Kan. 380; Comstock v. Becktel, 63 Wis. 661, 24 N. W. 466.]

2. The privileges of a homestead act may be forfeited by fraud.

3. Writ of assistance will be granted when the defendants refuse to surrender under the decree.

[This was a bill in equity by Samuel F. Pratt and others against John C. Burr, Morgan Craig, William D. Mead, and others. Heard on application for a writ of assistance.]

MILLER, District Judge. The complainants recovered a judgment in this court against John C. Burr and Morgan Craig, on which a fi. fa. was regularly issued. After the return of the execution unsatisfied, a judgment creditor's bill in equity was filed. In said bill it is charged, in substance, that the defendants had been merchandizing in Beloit, in this state, and while so engaged they contracted this debt in the purchase of goods, which were by them put into their store; that the defendants, in order to hinder or delay their creditors, transferred their stock of goods, including the goods so purchased of the plaintiffs, or such part of them as were then remaining, and received in part payment a house and lot and premises in Beloit; and that those premises are claimed by the defendants to be exempt from sale, under the homestead exemption law of the state. The bill was taken as confessed against the defendants for want of an answer. The receiver, in pursuance of an order of court for that purpose, sold the premises, which sale was confirmed by the court, with an order that possession be delivered to the purchaser. The family of Burr are in possession, and refuse to surrender the possession, claiming to hold under the exemption law. Application is made for a writ of assistance.

It is contended that the premises are exempt from sale under any circumstances, by reason of the peculiar phraseology of the law. The law reads that "a homestead shall

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

not be subject to forced sale on execution or any other final process from a court." This is an exemption from sale of a homestead, and is literally the same, and is to have the same force and effect as if the law read that "a homestead shall be exempt from sale on execution or any other final process." The legislature certainly did not intend that the law should be so administered that a party could not waive this exemption as a personal privilege, either by contract or by a surrender to the officer, or by neglect to claim it before sale, or forfeit it by a fraudulent reduction of visible property to an amount within the limit of exemption. If such a construction of the law as is contended for in this case should prevail, its title should be read, "An act for preventing the payment of honest debts, and for the promotion of frauds upon creditors by debtors." It is unnecessary to refer to authorities to prove that exemption laws are grants of personal privileges to debtors which may be waived by contract, or surrender, or neglect to claim before sale, and may be forfeited by fraud, but I will merely refer to Hewes v. Parkman, 20 Pick. 90; McKinney v. Reader, 6 Watts, 34; Hutchinson v. Campbell, 1 Casey [25 Pa. St.] 273; Laucks' Appeal, 12 Harris [24 Pa. St.] 426; Hammer v. Freese, 7 Harris [19 Pa. St.] 255; Bowyer's Appeal, 9 Harris [21 Pa. St.] 210; Case v. Dunmore, 11 Harris [23 Pa. St.] 93; Brackett v. Watkins, 21 Wend. 68.

It is contended that the construction here put on the law is not according to its intent and meaning, by reason of the provision that, "such exemption shall not affect any laborer's or mechanic's lien, or extend to any mortgage thereon lawfully obtained; but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same." This, in my opinion, does not require a different construction of the law from that here given. The legislature could not, by a law, prevent the acquisition of property directly, nor can they do it indirectly, by a legal prohibition of sale. This provision is intended to protect the wife and family of a mortgagor in a home. Without this law, the mortgage of a married man without his wife's signature did not affect her dower right, this mortgage being good against the mortgagor. Under this law a mortgage would be valid against the husband, the mortgagor; but the court, in a decree, would not disturb the occupancy of the wife and the family, nor of the mortgagor as long as claimed, and might not possibly decree a sale during such occupancy. The provision only means that a mortgage without the signature of the wife, shall not be valid against the exemption of a homestead; which is the subject of the law. With the exception of a mortgage or other alienation, the debtor is left free to waive, or claim, or forfeit the exemption, the same as if this provision had not been incorporated into the law. The following section requires the debtor claiming the exemption to demand a survey at the time of making the levy. If such duty should be neglected by the debtor before a sale, the exemption should be considered as waived; for the court could not prejudice the interests or affect the rights of a judgment creditor and of a purchaser by setting aside a sale for such neglect of the judgment debtor. This section sustains the construction here given of the first section of the law.

The defendants were merchants, in possession of a stock of goods, and in that character and under those circumstances, replenished their stock by the purchase of goods of the plaintiffs upon credit. After acquiring possession of the goods so purchased they transferred their whole stock in fraud of their creditors, and took in exchange therefor these premises. The mere statement of the facts decides this case in the conscience of every honest man; that neither in law nor justice the exemption should be allowed. The defendants cannot expect the court to assist them in consummating the intended fraud. A party cannot turn that which is granted him for the comfort of himself and family into an instrument of fraud.

It is declared in the bill of rights, as part of the constitution of the state, that "the privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of every debt incurred." This general declaration is proper and right; but the policy and moral effect of the law under consideration exempting property of unlimited amount are, at least, questionable. In many instances, the law amounts to a prohibition of the collection of a debt, while the debtor enjoys the occupation of premises amounting to a fortune. But be the effects of the law what they may, this court has administered it according to its true intent and meaning, giving to every one such rights under it as its terms and conditions plainly direct. But a defendant cannot expect this court to consent that he may use the law as an instrument of fraud by claiming a homestead which he has fraudulently acquired in the manner presented in this case, or by voluntarily reducing his visible property to the amount of the exemption allowed by the law. The writ of assistance will be issued.

[NOTE. For a hearing on the question whether Mead were relieved of liability to the complainants by reason of the judgment against him in favor of one Maynard, see Case No. 11,373.]

In a case, however, where a deed of the homestead was set aside on bill filed by the assignee, as having been fraudulently made, Hopkins, District Judge, held that the homestead right re-attached. McFarland v. Goodman [Case No. 8,789], July, 1874. See Freeman v. Stewart [Id. 5,088].

Case No. 11,373.

PRATT et al. v. BURR et al.

[5 Biss. 50.] [1]

Circuit Court, D. Wisconsin. April, 1858.

PAYMENT TO ASSIGNEE—WHEN NO PROTECTION.

1. Where a bill was filed by the payees against the assignee and maker of a note to set aside the transfer and recover the note, the summons being duly served on the maker, the payment by him of a judgment in favor of the assignee rendered in another court on a suit subsequently commenced, does not discharge his liability to the payees.

2. To protect himself, he should have given the payees notice of the second suit and required them to defend it, or have paid the money into court on the first suit.

[This was a bill in equity by Samuel F. Pratt and others against John C. Burr, Morgan Craig, William D. Mead, and others. It was formerly heard upon the question of homestead exemption. Case No. 11,372.]

MILLER, District Judge. The bill in this case was filed on the 7th of August, 1856. A subpœna was issued and an injunction was allowed. William D. Mead acknowledges in his answer that he gave promissory notes to Burr & Craig, in part for the consideration of their store goods sold him. Two of these notes passed from Burr & Craig to R. H. Maynard, and to which he, Maynard, under the circumstances, did not acquire title in the usual course of commercial business, and he was not a bona fide holder as settled in this court. These complainants had an equitable lien on the notes or the money secured by them, in the hands of Mead, by virtue of this creditors' bill. The only question submitted is: "Is Mead relieved of liability to these complainants by reason of the judgment against him in Rock county circuit court, in favor of Maynard, on the note, and by his subsequent payment of that judgment?"

By inspection of the record, it appears that Maynard commenced suit on the note, against Mead, by serving a declaration on the 14th of January, 1857, with a rule to plead. Afterwards Mead filed a plea of the general issue with notice of the issuing and service of the injunction in this case; and that it was known to Maynard when he purchased or received the note of Burr & Craig. On the 2d of July, 1857, the parties appeared in court, by their counsel, and the cause came on to be tried before the court, the jury being waived; and the finding of the court and judgment were for the plaintiff for the amount of the note and interest. And on the 15th day of October, 1857, at Erie county, in the state of New York, the plaintiff executed a satisfaction piece of the judgment. It was stated at the argument that Mead's counsel several times spoke to complainants' counsel on the subject of that suit, and what was best to be done, and complainants' counsel concluded not to interfere in the suit. These complainants were not placed under any obligation to defend that suit either by a notice from Mead or by a bill of interpleader. They had no notice of the trial; nor are we informed by testimony what evidence was offered, admitted, or rejected at the trial. If notice had been served on the complainants of the pendency of the suit, requiring them to appear and make defense, possibly they would be bound by that finding and judgment. In August last, that court decided that the two notes (of which the note in this suit is one) were transferred by Burr & Craig in fraud of these complainants and in contempt of this court, and that Maynard was not entitled to the money as a bona fide holder without notice. The first note was sued in this court, on which judgment was rendered against Mead, who paid the amount into court for distribution; the day after Maynard brought suit on the second note in the circuit court of Rock county. These plaintiffs were not parties to that suit in Rock county, and it is not in any way binding on them. So far as they have a lien on the money, and have a right to demand it in equity, they are not concluded. Judgments are only conclusive between parties and privies. At the trial of that case, these complainants had no notice nor opportunity to put in proof to show that Maynard was not a bona fide holder of the note. The trial was exclusively between Maynard and Mead. Maynard had a legal right to bring his suit against Mead in the state court, and to have it tried there; but Mead owed a duty to himself, before that trial and plea filed, to notify these complainants of the suit and to require them to make defense in his name and to furnish the evidence to defeat Maynard's recovery. Mead should have served the notice on these complainants or their attorneys and placed it on the files of that case, before filing plea. Nothing short of this can conclude these complainants. They were not bound to appear, nor could they appear or interfere with the suit without Mead's consent or requirement.

This suit in equity was pending against Mead a considerable time before the suit in Rock county. This suit prevented Mead from paying the amount of the note until it was ascertained whether it was negotiated and in the hands of a bona fide holder. The answer of Mead that he gave the notes but does not know whether they were negotiated or not, raised the question. If Mead had paid into this court the amount of the notes, Maynard might have appeared here and claimed this money, when his claim would have been disposed of by the court on evidence submitted, or upon an issue tried by a jury. Instead of doing that, Maynard took his suit out of this jurisdiction where the question was pending, into another jurisdiction where he and Mead had the matter tried in their own way without legal notice to these complainants.

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

This creditors' bill is an attachment in equity of the money in the hands of Mead owing by him on a negotiable promissory note. An attachment is unavailable against a bona fide holder for value, of negotiable paper, who obtains it after attachment, before maturity, and without notice. Kieffer v. Ehler, 6 Harris [18 Pa. St.] 388, and cases cited. The only question, as I remarked before, to be tried here was whether Maynard was a bona fide holder of the note.

In Kennedy v. Brent, 6 Cranch [10 U. S.] 187, the service of a subpœna in chancery, in a case of chancery attachment, will make the garnishee liable, if he pays the money after the notice of the subpœna. Such is the case in every attachment. An attachment in a state court, commenced after the institution of an action to recover a debt in a court of the United States, cannot be pleaded as a defense to the latter, either in whole or in part. Wallace v. McConnell, 13 Pet. [38 U. S.] 136, 151. This decision is upon the reverse order to the state of the case here. The attachment here was the first. In the opinion in that case it is remarked: "The jurisdiction of the district court, * * * and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question;" and if such could be pleaded in bar, "the same principle would support a plea in abatement of an attachment pending prior to the commencement of the present suit. The attachment of the debt in such case in the hands of the defendant, would fix it there in favor of the attaching creditor, and the defendant could not afterward pay it over to the plaintiff. The attaching creditor would in such case acquire a lien upon the debt binding upon the defendant, which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; * * * the maxim, 'Qui prior est tempore, potior est jure,' must govern the case. This is the doctrine of this court in the case of Renner v. Marshall, 1 Wheat. [14 U. S.] 216; and also in the case of Beaston v. Farmers' Bank of Maryland, 12 Pet. [37 U. S.] 102." In Hacker v. Stevens [Case No. 5,887], the money owing on a note was attached in the hands of the debtor. The note was indorsed or assigned and the assignee brought suit against the maker, who pleaded in abatement the attachment, which plea was sustained, although the two suits were not in the name of the same parties. In that case the note was transferred to one of the firm to whom the note was payable. In this case the note was transferred to a brother-in-law of one of the payees, under very suspicious circumstances. There is no doubt but Maynard knew of the pendency of this suit in this court before he commenced his suit in the state court. He should have come here and through Mead, as a defendant, have had his right to the money tried. From the situation of that case in the state court as placed by Maynard and Mead by their pleadings, the court might have continued the trial if asked by Mead until a reasonable time for the trial of this case. This court would in the exercise of its discretion have done so, under like circumstances, but there is nothing on the record showing that such application was made, or that a plea in abatement was filed.

The satisfaction piece attached to the record of the judgment in Rock county is no evidence of payment except as between the parties to the judgment. It satisfies the judgment, but it is not evidence affecting these complainants of the absolute, bona fide payment of money. It is nothing more than a mere declaration of a party not under oath, as to the rights of these complainants. Lloyd v. Lynch, 4 Casey [28 Pa. St.] 419, and cases cited. But from the view taken of this case it makes no difference whether the judgment has been satisfied or not. Mead should have taken some of the means here pointed out to prevent the judgment being rendered against him in the circuit court of Rock county.

The proof clearly showing that Maynard was not a bona fide holder of the note, and that the title still remains in Burr & Craig, reference will be made to a master to ascertain the amount due.

Case No. 11,374.

PRATT v. CAMPBELL.

[See 2 Pet. (27 U. S.) 354.]

Case No. 11,375.

PRATT v. CURTIS et al.

[2 Lowell, 87;[1] 6 N. B. R. 139.]

District Court, D. Massachusetts. Dec., 1871.

BANKRUPTCY—RIGHTS OF ASSIGNEE—SUIT TO SET ASIDE DEED FOR FRAUD—JURISDICTION OF FEDERAL COURTS — CONVEYANCE FOR BENEFIT OF WIFE AND CHILDREN OF BANKRUPT.

1. An assignee in bankruptcy succeeds to the rights of creditors, and may maintain a suit to set aside a deed for fraud, actual or constructive, though the fraud be not one mentioned in section 35 of the bankrupt act [of 1867 (14 Stat. 534)].

[Cited in Flanders v. Abbey, Case No. 4,851; Cady v. Whaling, Id. 2,285.]

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

2. The courts of the United States have jurisdiction in equity to set aside such a deed, though there may be concurrent jurisdiction at law, the remedy at law not being considered in all cases adequate and complete.

[Cited in Mattocks v. Rogers, Case No. 9,300; Lee v. Hollister, 5 Fed. 757; Orendorf v. Budlong, 12 Fed. 25.]

3. A bill in equity by an assignee in bankruptcy, which charged that a debtor made a conveyance for the benefit of his wife and children at a time when he was much embarrassed, and that some of the creditors, at the date of the deed, were still creditors at the date of the bankruptcy, was *held* good on demurrer, though it did not charge that the debtor was insolvent when he made the deed.

[Cited in Smith v. Kehr, Case No. 13,071; Platt v. Mead, 9 Fed. 98; Warren v. Moody, 122 U. S. 132, 7 Sup. Ct. 1065.]

[Cited in brief in Cook v. Whipple, 55 N. Y. 156; Norton v. Elk Horn Bank, 55 Ark. 59, 17 S. W. 363.]

4. It seems, that to render a voluntary deed for the benefit of wife and children fraudulent as to creditors, it would be enough to prove that the grantor was in a doubtful position in respect to solvency.

5. An assignee in bankruptcy is the proper party plaintiff to impeach a deed given by the bankrupt, though only one class of creditors is interested to set it aside.

[Cited in Warren v. Moody, 122 U. S. 132, 7 Sup. Ct. 1065; Re Thomas, 45 Fed. 792.]

6. If a subsequent purchaser of land, said to have been fraudulently conveyed, is made defendant to a bill to set aside the conveyance, he should be charged to have had knowledge of the fraud.

[Cited in Myers v. Hazzard, 50 Fed. 162.]

Two bills in equity by [Isaac Pratt, Jr.] the assignee of the firm of [Francis] Curtis & Collamore, asking that certain conveyances made by Mr. Curtis about fifteen months before his bankruptcy should be set aside, and for other relief. The first suit related to certain lands in Charlestown, settled in trust for the children of the settlor, and alleged that the deed was voluntary; that Curtis, at the time of the settlement, was indebted to the plaintiff and others, who were still his creditors, and was embarrassed in his circumstances, and that the deed was made with intent to delay and defraud his creditors. The second bill was similar, excepting that it related to other lands, and that the conveyance was alleged to be for the benefit of the wife of Mr. Curtis, and that a purchaser of the lands from the trustees was made a party defendant. Demurrers were filed to both bills.

H. C. Hutchins and H. H. Currier, for defendants.

1. The bill does not allege the particular provision of the bankrupt act on which the plaintiff relies. Nor does it allege title in the assignee. Both of these things are essential in good pleading. In re Broome [Case No. 1,966]; Bean v. Brookmire [Id. 1,168].

2. A conveyance is not fraudulent or void simply because it is voluntary. nor because the grantor is more or less indebted. The bill should show that the property conveyed was unreasonable in amount, or that the remaining assets were not sufficient to pay the debts existing at the time of the conveyance, or some other kindred allegation. Sexton v. Wheaton, 8 Wheat. [21 U. S.] 229; Hinde v. Longworth, 11 Wheat. [24 U. S.] 199; Babcock v. Eckler, 24 N. Y. 622; Sedwick v. Place [Case No. 12,620], and cases there cited; Salmon v. Bennett. 1 Conn. 525; Thacher v. Phinney, 7 Allen, 150; Lerow v. Wilmarth, 9 Allen, 386; Winchester v. Charter, 12 Allen, 606; Id., 97 Mass. 140; Id., 102 Mass. 272.

3. The assignee in bankruptcy represents all the creditors, and there is nothing in the bills to show that many of the debts are not subsequent in date to the deeds. If they are, the allegations ought to be sufficient to avoid the deed as against the creditors who hold these debts, or the assignee has nothing to do with the fraud.

4. There is no allegation that Wiswall was not a bona fide purchaser without notice. If he was, the action cannot be maintained against him. 3 Washb. Real Prop. 226, 296, 297; 1 Story, Eq. §§ 432b, 434; Enders v. Williams, 1 Metc. (Ky.) 346; Salmon v. Bennett, 1 Conn. 525.

5. The remedy is at law. Woodman v. Saltonstall, 7 Cush. 181.

M. F. Dickinson, Jr., for plaintiff.

LOWELL, District Judge. 1. In the courts of this state an assignee in insolvency must proceed at law for lands conveyed in fraud of creditors, unless the rights of more than two parties are involved, or some peculiarly equitable relief is required. But the equitable jurisdiction of the courts of the United States does not depend altogether upon the remedies given by the state courts. It is substantially the same throughout the country, and very nearly the same now that it was in 1789; and nothing is better settled than that this jurisdiction exists in those cases in which the chancery courts in England have concurrent jurisdiction with the courts of common law, and notably of bills by creditors to set aside deeds said to be voidable by them. Shelton v. Tiffin, 6 How. [47 U. S.] 163; Bean v. Smith [Case No. 1,174]; Hagan v. Walker, 14 How. [55 U. S.] 29. In respect to the second bill, it was admitted at the bar that the remedy at law might not be adequate; because, if Mr. Wiswall was a bona fide purchaser without notice, the trustees might still be held to account in equity for the purchase-money, though the land would be beyond their reach. Hubbell v. Currier, 10 Allen, 337. But the decisions in the federal courts do not turn on any such distinction.

2. The objection that the bill ought to point out the particular section of the bankrupt law which gives the plaintiff a right to set aside the deeds, is not sound. The plaintiff is to set out facts, and it would be bad pleading to allege the law. Perhaps the meaning of the objection is that the assignee in bankruptcy cannot avoid any transfers of property, but

such as come within section 35, which these deeds do not, because they were made more than six months before the bankruptcy. This is a mistake. That section refers only to frauds on the act itself; but the assignee can, as a general rule, avoid any conveyances which the creditors could avoid. Thus in Carr v. Hilton [Case No. 2,436], it was decided that an assignee under the bankrupt act of 1841 [5 Stat. 440] could maintain a bill of this kind relating to lands conveyed by fraud before the passage of the act, although that act did not mention conveyances in fraud of creditors. So, under an insolvent law which had no express provision on the subject, Parke, B., said, "A deed which is void as against creditors is void as against those who represent creditors." Doe v. Ball, 11 Mees. & W. 531. [That decision would govern this case, even if the law of 1867 was silent.] [2] The bankrupt act, at section 14, vests in the assignee "all the property conveyed by the bankrupt in fraud of his creditors,"—being intended, I suppose, to meet any possible doubt that might remain, notwithstanding the decisions.

3. Does the bill state a case of fraud on creditors? The defendants, very justly, draw a distinction between creditors at the time of the conveyance and those who become such afterwards. Under our laws, which require the recording of deeds for the very purpose of notifying creditors as well as purchasers, this general distinction, which is admitted in England, is highly just and equitable. It has been fully adopted by the courts of the United States in the cases cited. It is, however, the statute of 13 Eliz., as adopted and construed in Massachusetts, which governs this case; and I have, therefore, examined the decisions of the state with some care. From them I derive the following propositions: 1. A voluntary conveyance to a wife or child is not fraudulent per se; but it is a question of fact in each case whether a fraud was intended. 2. Such a deed made by one who is considerably indebted is prima facie fraudulent, and the burden is on him to explain it. 3. This he may do by showing that his intentions were innocent, and that he had abundant means, besides the property conveyed, to pay all his debts. 4. If the deed was not in fraud of existing creditors, the burden of proof is on the subsequent creditors to show a fraud on them. Thacher v. Phinney, 7 Allen, 146; Lerow v. Wilmarth, 9 Allen, 382; Winchester v. Charter, 12 Allen, 606; Id., 97 Mass. 140; Id., 102 Mass. 272.

These bills do not allege the facts which would be necessary to show a fraud on subsequent creditors only; but the rule is, that, if a deed is avoided by antecedent creditors, the land or its proceeds goes to creditors generally. Walker v. Burrows, 1 Atk. 94; Townshend v. Windham, 2 Ves. Sr. 11; Jenkyn v. Vaughan, 3 Drew. 419; Whittington v. Jennings, 6 Sim. 493. The case last cited went this length,—that a creditor whose account had been running when the voluntary settlement was made might set it aside, though the items of debt at the date of the deed had all been paid, the balance having always been increasing. I am not aware that the precise point has arisen in Massachusetts; but the dicta support the plaintiff's view, that if a conveyance is fraudulent as to existing creditors, it is so as to all. Winchester v. Charter, 12 Allen, 609, per Bigelow, C. J. In England, there appears to be another rule in equity, that if there be nothing to impeach the settlement, excepting that it is voluntary, and no intent to defraud subsequent creditors is proved, they will not be permitted to impeach the deed, without showing one or more antecedent debts outstanding when the bill is filed. Holloway v. Millard, 1 Madd. 414; Lush v. Wilkinson, 5 Ves. 384. This doctrine is not easily to be reconciled with the other, nor with principle; because it makes the validity of the conveyance depend on matters arising ex post facto. It probably gained a footing in the courts at a time when all such conveyances were held to be absolutely fraudulent in law as against existing creditors, and was a sort of equitable mitigation of the rigor of that doctrine. Whether this is the law here I do not now inquire, because this bill alleges the existence of antecedent debts. Whether the grantor must be actually insolvent at the time, in order to render the conveyance fraudulent against existing creditors, has been disputed. In Winchester v. Charter, 12 Allen, 609, Bigelow, C. J., says that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate "or barely sufficient" for the payment of his debts, would furnish strong presumptive evidence of fraud. At another place on the same page, he says it is necessary to show that he was indebted beyond his probable means of payment. In Parish v. Murphree, 13 How. [54 U. S.] 100, McLean, Circuit Justice, says, that, in case of a merchant, insolvency need not be proved; it is enough to show that his situation was such that a prudent man, with an honest regard to the rights of his creditors, could not have made such a settlement. I am much inclined to believe that if insolvency were distinctly proved as matter of fact, the intent to defraud existing creditors would follow as matter of law, because one who undertakes to make a voluntary conveyance must be presumed to know the state of his affairs. Christy v. Courtenay, 13 Beav. 96. It has been so held even in cases of preference; but the argument applies much more strongly to a gift, because a trader may often make payments of just debts in the ordinary course of business without any thought of his standing in respect to other creditors; but in making a gift, he undertakes to say that he is in a position to make it with justice to them. On the other hand, if insolvency is not clearly shown, the true inquiry, perhaps, is that put

[2] [From 6 N. B. R. 139.]

by Mr. Justice McLean, whether a prudent man, having a just regard to the rights of his creditors, would have permitted himself to do the act. These bills do not allege insolvency; but all the cases agree that if the grantor is much indebted, or is embarrassed, the burden of proof is on him to explain the transaction, if questioned by existing creditors; and these facts are alleged. It follows that the bills are sufficient to require the respondents to answer, unless their objection, that the deeds can be set aside only to the extent that may be necessary to pay antecedent debts, and that the assignee cannot work out this equity, is well taken. We have already seen that the doctrine of courts of equity in England is, that if the deed is set aside the property becomes assets. I do not decide this point, however, because, in my opinion, the assignee in bankruptcy, and he only, has the right to impeach the deed in the interest of any class of creditors. Many cases might arise in which the only difficult point to be decided would be whether all the creditors, or only certain of them, were interested; and, upon the theory of the defence, it would depend upon the decision of that point whether the suit should stand or fall, though it was clear that the deed was fraudulent as to some creditors; while, if the assignee can bring the suit in either event, that difficulty is obviated. Assuming, therefore, that the law will only require antecedent creditors to be indemnified, for which I have not yet seen the authority, I rule that the assignee in bankruptcy is the only proper party plaintiff to impeach the deed. Beals v. Clark, 13 Gray, 18.

The second bill is defective, so far as Mr. Wiswall is concerned, in not alleging distinctly his participation in or knowledge of the fraud. He is not a necessary party to the bill; because the other defendants may be required to account for the proceeds of the sale to him, although his title should be found or be admitted to be unimpeachable. Indeed, Marshall, C. J., has said, in such a case, that no decree ought to be made against a purchaser, so long as there were volunteers before the court who were able to pay the debt. Hopkirk v. Randolph [Case No. 6,698]. The demurrer is sustained as to the defendant Wiswall, with costs, unless the plaintiff chooses to amend within ten days, upon the terms of paying his costs up to this time. The other defendants are to answer over in two weeks, their demurrer being overruled.

PRATT (FOGERTY v.). See Case No. 4,896.

PRATT v. The HEROINE. See Case No. 6,417.

PRATT v. The KENTUCKY. See Case No. 7,717.

PRATT (LIVINGSTON v.). See Case No. 8,417.

PRATT (MITCHELL v.). See Case No. 9,668.

Case No. 11,376.

PRATT et al. v. NORTHAM et al.

[5 Mason, 95.] [1]

Circuit Court, D. Rhode Island. June Term, 1828.

FEDERAL COURTS — JURISDICTION — SUIT BY LEGATEE—JUDGMENT IN STATE COURT—ADMINISTRATOR GUARDIAN—LIMITATIONS—PARTIES.

1. The courts of the United States, as courts of equity, possess jurisdiction to maintain suits in favour of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be, by the local jurisprudence, a remedy at law on the administration bond, in favour of the party. This class of cases is of concurrent and not of exclusive jurisdiction.

[Criticised in Pierpont v. Fowle, Case No. 11,152. Cited in Mallett v. Dexter, Id. 8,988; Segee v. Thomas, Id. 12,633; Gould v. Gould, Id. 5,637; Payne v. Hook, 7 Wall. (74 U. S.) 430; Chapman v. Borer, 1 Fed. 275. Quoted in Rich v. Bray, 37 Fed. 274. Cited in Domestic & Foreign Missionary Soc. P. E. Church v. Gaither, 62 Fed. 423; Walker v. Brown, 11 C. C. A. 135, 63 Fed. 209.]

[Cited in Wallace v. Harris, 32 Mich. 392.]

2. A judgment in the court of probate of a state, is not conclusive, where it has been obtained by fraud. The settlement of an administrator's account in the probate court, procured by fraud, is not conclusive.

[Cited in Mallett v. Dexter, Case No. 8,988; McDermott v. Copeland, 9 Fed. 538; Pulliam v. Pulliam, 10 Fed. 56.]

[Cited in Williams v. Herrick (R. I.) 25 Atl. 1,100; Adair v. Cummin, 48 Mich. 378; Holden v. Meadows, 31 Wis. 290. Cited in brief in Maloney v. Dewey, 127 Ill. 398, 19 N. E. 848. Cited in Phillips v. Kuhn, 35 Neb. 195, 52 N. W. 881.]

3. A bill for a discovery of assets lies in equity, notwithstanding a remedy at law.

[Cited in Pierpont v. Fowle, Case No. 11,152.]

4. If an American administrator procure an auxiliary administration in England, and receives from the administrator there, the assets collected under such administration, he is chargeable here for the assets so received as administrator.

5. If an administrator be at the same time guardian of the legatees or distributees, and receive foreign assets as abovesaid, and do not inventory or account for them, or procure any settlement of them in the probate court, and a distribution of them according to law, he will be deemed to receive them as administrator, and not to retain them as guardian. Some act or admission, showing a retainer as guardian, as an accounting in the probate office as guardian for the same, is necessary to exonerate him from liability as administrator.

[Cited in Bell v. People, 94 Ill. 237; Board of Education of Spencer Dist. v. Cain, 28 W. Va. 770; Morrow v. Peyton, 8 Leigh (Va.) 76; Paxton v. Steele, 11 Hans. [86 Va.] 314, 10 S. E. 1. Cited in brief in Smith v. Lamberts, 7 Grat. 141; Swope v. Chambers, 2 Grat. 321, 322.]

6. The sureties of an administrator are liable, in the same manner as their principal, for assets so received, until some act or admission establishing a retainer as guardian. A fortiori the rule is so, where the administrator has never admitted the receipt of such assets as

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

guardian or administrator; but fraudulently concealed the fact from all the parties in interest.

[Cited in Ridenbaugh v. Burnes, 14 Fed. 94.]

[Cited in Adair v. Cummins, 48 Mich. 378, 12 N. W. 497.]

7. The statute of limitations binds courts of equity as well as law, in cases of concurrent jurisdiction; and sometimes, by way of analogy, binds equitable titles.

[Cited in Hall v. Russell, Case No. 5,943.]

[Cited in Fowler v. True, 76 Me. 45; Randall v. Peckham, 10 R. I. 546; Webster v. American Bible Soc., 50 Ohio, 11, 33 N. E. 297.]

8. The statute of limitations of Rhode Island, of suits brought against executors and administrators, is a good bar in equity as well as at law.

[Cited in Sugar River Bank v. Fairbank, 49 N. H. 140.]

9. Where an administrator and his sureties die, a suit brought by a legatee or distributee to recover for the default of the original executor in not paying the same, must be brought against the administrator of the executor, or the executor of his sureties, within three years after the last administration is taken out; otherwise it is barred

10. Who are proper parties to be made in such a case?

[Cited in Miner v. Aylesworth, 18 Fed. 201.]

Bill in equity. The facts of the case were as follows: Adam Ferguson of Newport, Rhode Island, made his will, bearing date April 12, 1797, giving all his property, real and personal, to his only child, Isabella Ambrose, and appointing her executrix to his will. Some time in July, 1800, said A. Ferguson died, (his daughter Isabella having died before him,) leaving his will unrevoked. By the laws of Rhode Island (St. 1798, p. 282), when any devisee of personal or real estate dies before the testator, leaving lineal descendants, such descendants shall take under the will in the same manner as the devisee would have done, had he or she survived the testator. Isabella Ambrose left two children, Ann F. Pratt, and Robert J. Ambrose, plaintiffs in the present bill. On the 14th of July, 1800, the will of A. Ferguson was approved by the court of probate of the town of Newport. On the 21st of the same July, Robert M. Ambrose, the husband of the said Isabella, and the father of the said Ann F. and Robert J., was appointed administrator on the estate of A. Ferguson, with the will annexed, and gave bond according to law, with William Langley and Israel Ambrose as sureties. On the 4th of August, 1800, an inventory of the personal estate of the said A. Ferguson was returned to the court of probate, amounting to $311.60. On the 9th of May, 1808, R. M. Ambrose rendered his account of administration, bearing date April 25th, 1801, which was received, examined, and allowed by the court of probate. The bill charges, that the decree of the court of probate allowing this account was obtained by fraud. This account credits the estate of A. Ferguson with the amount of the inventory, being $311.60, and exhibits a balance in favour of the administrator against the estate, of $636.83. This is all the inventory or account of the property of A. Ferguson, ever rendered by the said R. M. Ambrose.

A. Ferguson, at the time of his death, had a balance of account due him from the firm of Mitchell & Cockburn, who were established, and transacting business, in the city of London. This firm was composed of George Hanbury Mitchell and James Cockburn, was formed in January, 1800, and was dissolved in September, 1802, by the death of Cockburn. Upon the death of Cockburn, Mitchell continued the business of the firm, under a new firm, composed of himself and others, under the style of Mitchell, Lindsay, & Co. and the balance due A. Ferguson from Mitchell and Cockburn was transferred to the firm of Mitchell, Lindsay, & Co. A. Ferguson, at the time of his death, also owned stock in the English funds, which stood in the name of William Innes, merchant, of the city of London. Said Innes died before A. Ferguson, and George Hanbury Mitchell, James Innes, and John Nicholl, were the executors of his will. On the 26th of June, 1801, R. M. Ambrose wrote Innes and Mitchell, executors, stating the decease of A. Ferguson, that he was administrator on his estate, with the will annexed, &c., and requesting information of the balance due, and the amount of the stock, &c. To this letter, Mitchell & Cockburn reply, under date of September 3, 1801, in which they state the amount of the balance in their hands, also the value of the stock, and advise, that R. M. Ambrose should send out a power to some one in England to take letters of administration; that such person being appointed administrator on the effects in England, would be authorized to receive the balance, and the proceeds of the stock or the stock itself, and to pay it over to him, R. M. Ambrose. On the 21st of December of the same year, R. M. Ambrose sent out a joint and several power to Mitchell & Cockburn to take out letters of administration for him in England, and requested, that the executors of William Innes would transfer the stock to the names of Mitchell & Cockburn, which was accordingly done by the two surviving executors, George Hanbury Mitchell and John Nicholl.

Mitchell & Cockburn supposed, that Isabella Ambrose had died after her father. Under this impression, letters of administration, bearing date February 27, 1802, were granted to James Cockburn, one of the firm of Mitchell & Cockburn, on the property of A. Ferguson, with the will annexed, and on the property of Isabella Ambrose, all for the use of R. M. Ambrose. On the 23d of February, 1803, this stock was sold by Mitchell for £374. 4s. 3d. (Cockburn having died September, 1802;) and this sum was placed to the credit of R. M. Ambrose in the hands of Mitchell, Lindsay, & Co. by him the said Mitchell. The balance due from Mitchell & Cockburn, and transferred to Mitchell, Lindsay, & Co. as before stated, together with the proceeds of the

stock, amounted to the sum of £644. 12s. 8d., and was drawn for by R. M. Ambrose by bills of exchange, from January 28, 1803, to October 16, 1804. The balance which was transferred from Mitchell & Cockburn, to Mitchell, Lindsay, & Co. was increased in the hands of the latter, by the receipt of the dividends on the stock, until the same was sold. The transfer of said balance to Mitchell, Lindsay, & Co.; the transfer of said stock to Mitchell & Cockburn, by the executors of William Innes; and the subsequent sale of the same by Mitchell; were all done by the direction and at the request of R. M. Ambrose.

R. M. Ambrose, on the 6th of April, 1801, was appointed guardian of the said Ann F. Pratt and Robert J. Ambrose, and gave bond in the penal sum of $4,000 for the faithful performance of the trust, but never rendered any guardianship account whatever, and the sureties on this bond are both dead and left no estate. R. M. Ambrose is dead, leaving no property, and no administration has ever been taken on his estate; Israel Ambrose, one of the sureties on his administration bond, is also dead, leaving no property, and no administration has ever been taken on his estate, neither of them leaving any estate to administer upon. Some time in 1817, William Langley, the other surety on the administration bond of R. M. Ambrose, died, leaving a large real and personal estate, which he disposed of by will. Stephen T. Northam, and Sarah Langley, defendants in this suit, are his executors. The will was approved July 9, 1817, the executors accepted of the trust, and gave bond according to law. The will contains the following provisions: "The whole of my bank stock shall be kept sacredly for the purposes expressed in this my last will and testament, and to that end, if my personal estate over and above said bank stock last mentioned, should be insufficient for the payment of my just debts and the expenses of settling my estate in manner provided by law, and for the raising and disposition of said sum of $3,000 as herein above ordained, then my will is, and I hereby authorize and order my said executors, to make sale of so much of my real estate, at their discretion, as may be necessary to make up the deficiency, and the proceeds thereof to apply for the purpose of making up said deficiency; and to execute and deliver all necessary deeds and grants of the said real estate, so to be sold by them as aforesaid. Provided, however, that if it should be necessary to make sale of any of my real estate for the purposes aforesaid, that part thereof now occupied by my said daughter Sarah R. Ambrose and her husband shall not be sold, excepting, that the other parts of my real estate should prove deficient for the purposes aforesaid." The Sarah R. Ambrose herein mentioned, was the second wife of said R. M. Ambrose, and the daughter of the said William Langley. The executors possessed themselves of ample personal estate, exclusive of the bank stock, to pay all the debts of the testator, including the debt due the plaintiffs, and expenses of settling the estate. The said Ann F. Pratt became of age in March, 1818; the said Robert J. Ambrose, November, 1820; and no evidence or information of the property in England belonging to Adam Ferguson, and received by R. M. Ambrose, ever could be obtained by the plaintiffs, until October, 1825, although much expense had been incurred for that purpose, and a commission had been sent to Mr. Aspinwall, to take the testimony, in 1817, to be used in a suit in the state court, who returned, that after making the most diligent inquiry, he could discover no traces of the property.

The bill charged, that all the debts of William Langley, except the debt due the plaintiffs, were paid, and prayed for an account of the personal estate of William Langley, and that if the same, exclusive of the bank stock and legacy of $3,000, was sufficient to pay the plaintiffs, that the executors might be decreed to pay accordingly; or in case of a deficiency of personal estate, that the executors might be decreed to sell enough of the real estate to make up the deficiency; and for general relief.

Mr. Pearce and Mr. Greene, Dist. Atty., for plaintiffs.

Hunter & Hazard, for defendants.

STORY, Circuit Justice. This is a bill in equity, brought under the following circumstances. The plaintiffs, Ann F. Pratt, (wife of the plaintiff, Thomas Pratt,) and Robert J. Ambrose, are children of Isabella Ambrose deceased, and her only lineal descendants. In April, 1797, her father, Adam Ferguson, made his will, and after payment of his debts &c. he devised and bequeathed all his real and personal estate to the said Isabella, and made her executrix of his will. She died before her father, leaving her children above named. Her father then died, viz. in 1800, and in July of the same year, Robert M. Ambrose, the husband of Isabella, and father of her children, took administration with the will annexed of Ferguson's estate, and gave a bond to the court of probate in the usual form, for a faithful administration of the estate. The sureties upon the probate bond were Israel Ambrose and William Langley, both of whom are since deceased. Langley made his will, and appointed the defendants, S. T. Northam and Sarah Langley, his executors, who took upon themselves the trust. The other defendants named in the bill, are the present judges of the probate court of Newport, who, as successors in office of the former judges, are regularly entitled to the custody and controul of the bond, and to institute proceedings thereon, for the due settlement of the estate. The reason assigned in the bill for making them parties is, that they have confederated and combined with the other defendants, to

deprive the plaintiffs of the benefit of the bond, and have refused to deliver the same, or an authenticated copy thereof, to the plaintiffs, though often requested and urged so to do. No proceedings seem however to have been had against them, and no decree is now sought against them.

By the laws of Rhode Island, "when any child, grandchild, or other relation, having a devise or bequest of real or personal estate, shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, in the same way and manner such devisee would have done, in case he (or she) had survived the testator." St. 1798, p. 282, § 6. Consequently the children of Isabella are entitled to take the same as their mother would have done. The bill charges, that Robert M. Ambrose, after so taking administration, received sundry sums of money belonging to the estate, and particularly some money due to Ferguson in England, where he caused an auxiliary administration to be taken out, under which the money was received for, and by, him. It farther charges, that he never brought into account, or in any proper manner administered upon, the assets so received, but fraudulently concealed the receipt of the same from the court of probate; that in May, 1808, he settled an account of his administration in the probate court, without giving any credit for such assets, and there charged a balance due to himself of $636.83, which account was duly allowed and ordered to be recorded. It farther charges, that the decree of allowance was procured by fraud. It then proceeds to state, that Israel Ambrose, the surety, died intestate, leaving no estate, and that no administration has been granted on his estate. That R. M. Ambrose, (the administrator,) in September, 1815, died intestate, leaving no estate, and that no administration has been granted on his estate. That in June, 1815, William Langley (the other surety) died, leaving a large estate, having first made his will, and that S. T. Northam and Sarah Langley are his executors, and have possessed themselves of a large estate, more than sufficient to pay all his debts, and to pay the plaintiffs, &c. And the bill insists on the right of the plaintiffs to receive payment, from Langley's estate, of the sums due them, in virtue of the bequest to their mother by Adam Ferguson. And a discovery is prayed for, and a decree of payment, out of the personal assets, of the sums due them as aforesaid, and that if they are insufficient, out of the real estate of Langley, which by his will is specially charged with payment of his debts. There is also a general prayer for relief.

Many of the facts, stated in the will, are admitted by the answer of Northam and Langley, executors; and indeed the other facts put in issue, seem substantiated, far enough to lay a ground work for relief, if the plaintiffs are otherwise entitled to any, upon a survey of the whole merits, and according to the principles of a court of equity. But a very important fact disclosed in their answer is, that in April, 1801, Robert M. Ambrose, the administrator, took out of the probate court letters of guardianship upon the persons and estates of his children, the plaintiffs, who were then minors, and did not come of age until after his death. He gave bonds in due form of law, in the penalty of $4,000 with sureties, for the faithful performance of his duties as guardian. The bond, by the laws of Rhode Island, like that in cases of administration, is taken in the names of the judges of probate, for the time being, payable to them and their successors in office. The sureties on the guardianship bond are both dead; one of them leaving his estate insolvent; and the other leaving an estate inventoried at $1,082.90, of which no administration account has yet been settled. No guardianship account was ever rendered by R. M. Ambrose, the guardian, to the probate court; and the minors came of age in 1818 and 1820. Upon the settlement of the administration account of R. M. Ambrose in 1808, a quietus in common form was granted to him by the court of probate.

The answer of the executors sets up several matters of special defence, which I shall by and by consider in the progress of the present judgment.

Upon this posture of the case, presenting somewhat of novelty in its outlines, several questions have been argued at the bar, upon which, perhaps, it might not be necessary to pass an ultimate judgment, if it were not of some importance to close this unpleasant controversy. I will proceed, therefore, in the first instance, to consider the objections insisted on by the defendants' counsel, reserving the consideration of some others, until they shall have been first disposed of.

The first objection taken, is to the jurisdiction of this court, as a court of equity, to entertain the suit, for two reasons. The first is, that the plaintiffs have, if entitled to any, a complete remedy at law, upon the administration bond, according to the laws of Rhode Island. The second is, that by the same laws, the decree of a quietus operates as a final and conclusive bar to any farther proceedings upon the bond. The last reason is founded on the 25th section of the act respecting intestate estates (St. 1798, p. 304), which enacts, "that the settlement of the accounts of any executor, administrator, or guardian, by the court of probate, or in case of appeal, by the supreme court of probate, shall be final and conclusive on all parties concerned therein, and shall not be subject to re-examination in any way or manner whatsoever." This language cannot be considered as giving any higher or stronger efficacy to a probate decree, than a judgment possesses at the common law.

Upon general principles, fraud avoids the

latter, and the same doctrine has been uniformly applied to all instruments and proceedings, however solemn. The cases of Sims v. Slocum, 3 Cranch [7 U. S.] 307, and Ammidon v. Smith, 1 Wheat. [14 U. S.] 447, admit the general principle, and turn upon distinct considerations. There is the more stringent reason for applying the doctrine in the present case, because the administrator, at the time of the settlement, united in himself also the character of guardian of the plaintiffs, and as minors, they had no means of redress except through him. To say, therefore, that his own fraud should, under such circumstances, bind them, would be to subvert the very foundations of justice. The money received by him through the instrumentality of the auxiliary administration in England, was clearly assets in his hands, of the testator, Ferguson, and ought, as such, to have been accounted for in his administration account, settled in 1808. The omission so to do was a plain departure from his duty, a breach of the condition of his probate bond, and an inexcusable fraud.

As to the other ground, it is true, that by the laws of Rhode Island (St. 1798, pp. 307–309, &c.), creditors, devisees, and legatees, may have remedy by a suit commenced for their use on the administration bond, in the name of the court of probate, where there is a mal-administration; and legatees also have a direct remedy at law against the administrator, for their legacies, whether they be specific, or general, or residuary legatees. In many cases, the remedy, thus provided, may be adequate and complete. In many, however, the statute provisions do not reach the whole mischief. They are not adapted to a case like the present. They presuppose, that the debt or demand of the party has been already ascertained by a judgment at law on a decree in the probate court; that proceedings for this purpose have been had while he was living; and also for the most part, that he is personally sued on the administration bond. In a case circumstanced like the present, I am by no means satisfied, that there is any plain, adequate, or complete remedy at law under the statutes of Rhode Island. They do not seem to contemplate such complicated and special cases.

But if it were otherwise, the conclusion to which the objection seems to arrive, would not be attained. It has been often decided by the supreme court, that the equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different states; that it is the same in all the states; and is the same, which is exercised in the land of our ancestors, from whose jurisprudence our own is derived. Robinson v. Campbell, 3 Wheat. [16 U. S.] 212; U. S. v. Howland, 4 Wheat. [17 U. S.] 108, 115.

There are many cases where there exists a concurrent jurisdiction in courts of law and equity. Such are cases of account, of fraud, of partition, of dower, &c. See Smith v. McIver, 9 Wheat. [22 U. S.] 532; Coop. Eq. Pl. 28. The existence of such legal remedy has never been supposed to oust the jurisdiction of a court of equity.. On the contrary, the jurisdiction has been constantly maintained. And a fortiori, where the original remedy exists in equity, as in cases of fraudulent affirmations of credit, and of legacies, the subsequent assumption of jurisdiction at law ought not to be held to oust that which has already vested. It has been for a great length of time settled, that in cases of the administration of assets, courts of equity have a concurrent jurisdiction with courts of law. The original ground seems to have been, that a creditor or other party in interest, had a right to come into chancery for a discovery of assets; and being once rightfully there, he should not be turned over to a suit at law for final redress. See Jesus College v. Bloom, 3 Atk. 262, 263; Yates v. Hambly, 2 Atk. 360, 363. And for the purposes of complete justice, it became necessary to conduct the whole administration and distribution of the assets under the superintendence of the court of chancery, when it once interfered to grant relief in such cases. This whole subject is investigated with great care and clearness by Mr. Chancellor Kent, in Thompson v. Brown, 4 Johns. Ch. 619, 631, &c., and his elaborate judgment spares me the necessity of any attempt farther to illustrate or confirm it. The plaintiffs, then, would be here rightfully in court, if for no other purpose, for a discovery of assets in the hands of the executors of Langley. The jurisdiction too might be fortified by considerations derived from the doctrines of this court, in U. S. v. Aborn [Case No. 14,418].

It has also been suggested, that the present is a bill for discovery and relief, and that as no discovery has been obtained, no relief can be granted. And the language of the chief justice in Russell v. Clarke's Ex'rs, 7 Cranch [11 U. S.] 89, has been relied on for this purpose. That was a case where the remedy was exclusively at law; and the discovery sought was that alone, which could give jurisdiction to a court of equity. It was, as a bill of discovery, wholly unproductive, and therefore properly dismissed. Here, the jurisdiction was not exclusively at law; and the discovery of the assets has been complete. The executors answer as to them; and only deny possession of other vouchers, papers, and documents, belonging to the estate of Ferguson or his administrator.

Then again it is objected, that here there is no sufficient charge or proof of fraud. Certainly there is none proved against the present defendants; they are innocent, and so was Langley, their testator. But there is a direct charge in the bill, that the decree of the court of probate in 1808 was obtained by the fraud of R. M. Ambrose, the administrator, which, as I have already intimated, is sufficiently established. And if there were

no actual fraud, still if the assets have been wrongfully withheld from the representatives of the legatee, so that the administrator would be liable therefor, it would be difficult to perceive how an omission to account for them would escape from the imputation of being a breach of the administration bond. There is certainly no pretence to say, that the court of probate participated in the fraud; and if the judges of that court had so participated, and in their judicial character sanctioned it, I am far from asserting the least right to controul, or overreach, or review their judicial acts. But it is unnecessary to touch such a point. It would be an indecorum to that court, far removed from my habits and feelings, to discuss what might be the possible effects of their misdeeds, when there is not the slightest evidence to bring into suspicion the purity or fidelity of their judgment.

Another objection is, that the assets fraudulently suppressed were received after the administrator was appointed guardian, and therefore might properly be considered as received on guardianship account. It appears to me, that this objection is not supported either in law or fact. The administration in England was granted professedly at the request, and upon the authority, of the American administrator. It was auxiliary to the American administration; and the proceeds were not only drawn for by the American administrator, but were received by him, as assets of his testator. It is true, that the English administration was granted upon the supposition, that Isabella survived her father; and that her husband was entitled to the beneficial interest in the legacy as her representative. But this does not vary the legal result, for the money received was clearly assets. It is an entire mistake to suppose, that the Rhode Island laws (see St. 1798, pp. 276, 294, 295) in force, at this period, do not authorize the administrator there to receive any debts or property which, at the time, were not locally due or existing, within the state. Whatever property was received by him as belonging to the testator, and as part of his assets, he was bound to administer, wherever it might have been at the time of the death of the latter. The condition of the bond contains a clause, that he shall well and truly administer all the goods, chattels, rights, and credits of the testator, which at any time shall come to his hands and possession. It is one thing, whether he could, without a new administration, recover by suit any debts or property in a foreign country; and quite another thing, when he obtains a possession of them, whether he must not account for them as assets. A voluntary payment by a debtor to a foreign administrator is a good discharge of the debt; and the latter holds the same as assets. See Williams v. Storrs, 6 Johns. Ch. 353; Doolittle v. Lewis, 7 Johns. Ch. 45. This can only be upon the principle, that the administrator may rightfully receive them as assets in virtue of his authority as administrator, and give a competent discharge.

What, then, was the duty of the administrator upon the receipt of these assets? It was plainly his duty to inventory them, and account for them, as part of the testator's estate in his hands and possession; and upon the settlement of his accounts in the probate office, he ought to have procured a decree directing a distribution of the balance between his wards, in equal moieties. Had he so done, there would have been no question, upon the principles settled by this court in Taylor v. Deblois [Case No. 13,790], that the administration bond would have been discharged, and by operation of law he would have been deemed to possess the balance, in his character as guardian.

This leads me to the consideration of another objection of a more grave complexion. It is, that, though the property was received by R. M. Ambrose in his character as administrator; yet as he was at the same time guardian of the parties entitled to the proceeds upon a decree of distribution, by the mere operation of law, and without any act done by him, it was instantaneously transferred to his account as guardian, and so all responsibility under the administration bond is extinguished. If any act had been done by R. M. Ambrose, by which he elected to pass the property to his guardianship account; or if he had charged himself with it in the probate court as guardian, there would be little difficulty in adopting this conclusion. The real question on this part of the case is, whether, without any such act, without any admission of assets, or any admission of responsibility as guardian for the amount, a court of equity is bound to make that application for the party, which he has not made for himself. In this respect, it differs materially from Taylor v. Deblois [supra], and therefore is not necessarily governed by it. In that case the court said: "The general principle in cases of retainer is, that where the party unites in himself, by representation or otherwise, the character of debtor and creditor, inasmuch as he cannot sue himself, he is entitled to retain, and the law will presume a retainer in satisfaction of the debt, if there are assets in his hands." I see no reason, upon a review of the authorities, to doubt the accuracy of this statement; and it is supported by Burnet v. Dix, 1 Rolle, Abr. "Executors," (L.) par. 3, pl. 45, 2 Brownl. & G. 50, and Woodward v. Lord Darcy, 1 Plowd. 184. See Toll. Ex'rs, bk. 3, c. 3.

Ordinarily, such a presumption of retainer by way of satisfaction, may properly arise, because the party may be presumed to do his duty, and to elect to have payment made, of any debt due to him by representation or otherwise, in consonance with his duty. But such a presumption may be rebutted by circumstances, or controlled by the acts of the party. In most of the cases of retainer, the

party avails himself of his right by plea or otherwise; or it is made available by some act of his representative. And there is no presumption of an intentional breach of duty, or of an abandonment of the right of retainer. But in cases, like the present, where the rights of third persons are concerned, as of the sureties on the administration bond, and of the sureties on the guardianship bonds, a distinction may properly arise. Some act or election to hold the property in a different character from that in which it is received, may justly be insisted on, before the responsibility is shifted from one class of sureties to the other. Besides, here the administrator never admitted the assets to be in his hands. He held them secretly as his own, without acknowledgment, and settled his probate account without any admission of them. If he meant to apply them to the guardianship account, his plain duty was, in the settlement of 1808, to have credited the estate of Ferguson with the amount, and thus discharged himself as administrator, by charging himself as debtor on the guardianship account. His omission to do this appears to me to afford strong presumption, that it never was his intention to pass the proceeds to the guardianship account. And unless such was his intention, this court cannot now, upon principles of law, direct it to be done. He had a right to hold the property as administrator, until a settlement in the probate office, if such was his choice; and at all events as between the sureties to the different bonds, there is no ground upon which the court can say, that the law has changed the character, on which the assets are to be accounted for, since they were received. I cannot but have a strong suspicion, that the real intention of the party was, silently to appropriate the proceeds to his own use, in the same way as he would have been entitled to do, if his wife Isabella had survived her father, and not have died before him. The form in which the administrations are taken out in England, demonstrates a studious desire to hold up the impression, that Isabella died after her father, and that her husband was her sole legal representative as to this property. The mistake could hardly have found its way into the administration by mere accident. If it did, however, it does not change the posture of the inferences deducible from the other facts.

No case has been cited, which comes up to the present in its circumstances. The nearest approach, which I have met with, is the case of Weeks v. Gore, cited in Mr. Cox's note B to 3 P. Wms. 184. But there, though the creditor-administrator had made no election to retain his debt during his life, it was presumed, that he intended to pay his own debt first out of the assets, and his executors set up the right of retainer accordingly.

It appears to me, that in the present case there is no ground upon which the court can say, that by operation of law, or otherwise, the assets have passed from the administration account to the guardianship account.

Another ground of defence, which is relied on in the answer, and has been strenuously argued at the bar, is the statutes of limitations of Rhode Island. The lapse of time, too, since the giving of the administration bond, is relied on, to establish a presumptive extinguishment of liability under it. It may well be doubted, under the circumstances of this case, where there has been a fraudulent concealment of the assets, the existence of a long minority, and as far as the evidence goes, an entire ignorance on the part of the minors of their own rights, and of the facts leading to them, whether the mere lapse of time ought to furnish any bar to relief in a court of equity, without some other controlling equities on the part of the defendants to fortify it. But this need not be decided, for reasons hereafter stated.

The bar under the statutes of limitation is twofold: (1) It relies on the common statute (St. 1798, p. 471) limiting personal actions, and especially actions on the case, to six years. This statute is, for the most part, a transcript of the statute of 21 Jac. I. c. 16. Upon this part of the defence, it is unnecessary to say more than that the present suit is brought to enforce a right growing out of a bond or specialty, and is not, either in terms, or by implication, an action within the scope of that statute.

The other statute relied on, is the act for limiting suits against executors and administrators. St. 1798, p. 300. That act provides: "Nor shall any action be brought against any executor or administrator in his said capacity, unless the same shall be commenced within three years next after the will shall be proved, or administration shall be granted; provided such executor or administrator shall give notice of his appointment," &c. Now the defendants aver due notice of their appointment according to the statute, and that more than three years have elapsed since they took the administration upon themselves. The bar, then, is complete, by the express language of the statute. Why then should it not avail in a suit in equity, as it most assuredly would in a suit at law? It is said, in the first place, that the statute of limitations does not bind courts of equity. That position, certainly, cannot be maintained in the broad extent in which it is stated; for in cases of concurrent jurisdiction it is clear, that courts of equity are bound by the statute equally with courts of law. That was the doctrine of Lord Redesdale in Hovenden v. Lord Annesley, 2 Schoales & L. 607, 630, and Mr. Chancellor Kent, in Kane v. Bloodgood, 7 Johns. Ch. 90. There are other cases, not of concurrent jurisdiction, in which the statute of limitations is applied by courts of equity by way of analogy to the law, in which courts of equity follow the law, and

give effect to its regulations upon equitable titles. Bond v. Hopkins, 1 Schoales & L. 413, 428; Cholmondeley v. Clinton, 2 Jac. & W. 1; Kane v. Bloodgood, 7 Johns. Ch. 90, 110; and Murray v. Coster, 20 Johns. 576, 582,—expound and illustrate the reasons of the doctrine with great ability. In this last class of cases, equitable exceptions may well be admitted and justified, because the bar is furnished by the court itself, and stands upon no positive legislation.

Now, in the present instance, the suit is strictly an action against the executors, and it is in a case where the foundation laid, as against them, rests solely on a bond, which is suable at law. Independent of that bond no contract exists, by which they are bound; and no equity is stated in the bill against them or their testator, except the naked obligation arising from the suretyship of the latter. It is strictly a case, therefore, as to them, of concurrent jurisdiction.

But it is said, that here is a case of fraud, and that fraud, even at law, constitutes a good exception to the statute of limitations; and a fortiori has been often admitted in equity. This, in a general sense, is true as to the common statute of limitations. But then the fraud must be the fraud of the party, setting up the bar of the statute. This statute of limitations, as to executors and administrators, is not created for their own security or benefit; but for the security and benefit of the estates, which they represent. It is a wholesome provision, designed to produce a speedy settlement of estates, and the repose of titles derived under persons who are dead. If this statute could be avoided by any fraud, (on which I give no opinion,) it must be a fraud of the executors or administrators themselves, and not of third persons, with whom they have no connexion or privity. There is no pretence of any such fraud in this case on their part, or the part of their testator. All of them are innocent, both in fact, and in construction of law. How, then, can the fraud of a third person avoid a plea of this nature? It is also material to state, that if fraud be set up to a bar of the statute, the fraud so operating should be stated in advance in the bill, as an avoidance of it, so that thereby the fact may be put in issue. It is not sufficient to prove such a fraud in evidence, for the decree must be not only secundum probata, but also secundum allegata. If the plea is nakedly pleaded, and the bill does not set up the fraud, to avoid it, nothing is in issue but the truth of the plea itself.

If then the debt be barred, and is no charge on the executors, it can be no charge on the estate of the testator, either real or personal. It falls by its own infirmity, and attaches to nothing. If a testator charges his lands with payment of his debts, it is only with debts which are subsisting, and may be enforced against his estate, and not with debts not admitted, nor capable of being enforced against his assets. The trust is coextensive with the subsisting debts, and dies with them. See Burke v. Jones, 2 Ves. & B. 275; Fergus' Ex'rs v. Gore, 1 Schoales & L. 107, 109.

I may add, that in Massachusetts, where a like statute exists, the uniform construction has been, that the lapse of the prescribed term extinguishes the debt, so that even a subsequent acknowledgment by the executor or administrator will not revive it. Dawes v. Shed, 15 Mass. 6; Emerson v. Thompson, 16 Mass. 429; Thompson v. Brown, Id. 172. And in such case, a judgment against the administrator himself does not bind his sureties in a suit brought on the administration bond; but the extinction of the debt may be set up by them as a bar thereon. The obvious policy of the statute well warrants the conclusion indicated by these decisions.

The court has thus far travelled through the points made and argued at the bar. But if the difficulty last suggested were not insuperable, there would remain for consideration a very important point, and that is, whether all the proper parties for a decree are before the court. The doubt with me is, whether there could be any decree, unless an administrator of R. M. Ambrose were before the court. His accounts as guardian have never been adjusted; nor, so far as respects the assets now in controversy, has there been any allowance or settlement of the charges accruing from the getting in of those assets. Yet it is obvious, that no decree could be equitably had against the executors of Langley, except for such a balance as should be due them on a settlement of both of their accounts. The court might, in consideration of the insolvency of R. M. Ambrose, and the want of an administration on his estate, get over the difficulty of refusing relief against a surety without bringing the principal before it, with a view to contribution over. But when it cannot render any just decree without the liquidation of demands, which cannot be brought before the court, without an administrator being appointed, can it be, that it ought to render a decree against an innocent surety, which it has no means of ascertaining to be founded either in law or equity? At present, the objection strikes me as very cogent, and well deserving of grave debate.

Upon the whole the bill must be dismissed.

Bill dismissed accordingly.

PRATT (ORME v.). See Case No. 10,578.

PRATT (POLLOCK v.). See Case No. 11,256.

Case No. 11,377.

PRATT v. THOMAS.

[1 Ware (427) 437.] [1]

District Court, D. Maine. Oct. 30, 1837.

PLEADING IN ADMIRALTY — OATH TO LIBEL — WAGES—BALANCE DUE—PLENARY AND SUMMARY CAUSES—JOINDER.

1. The oath of calumny anciently required of the libellant in the admiralty is not now in use. All that is required by the modern practice is a general verification of the cause of action by affidavit.

2. It is not necessary to annex to a libel for wages an account stating the rate of wages and the precise balance due. It is sufficient if the contract is stated and the service alleged in proper form.

3. If the libellant sets forth a particular balance as due, and it appears by the proofs that a larger sum is due, the court is not limited to the precise amount claimed in the libel.

[Cited in The Atlantic, Case No. 620.]

4. Under the prayer for further relief a larger sum may be decreed if justice requires it.

5. The distinction between plenary and summary causes has not been adopted in the practice of the admiralty in this country.

6. Of the joinder of actions. An action of damages as for assault and battery against the master, cannot be joined in the same libel with an action for wages, if it be excepted to.

[Cited in New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. (47 U. S.) 434. Approved in The Guiding Star, 1 Fed. 348.]

7. Quære, if not excepted to, whether the court may not adjudicate upon both in one libel, making in each case a separate decree.

This was a libel for subtraction of wages, and in a cause of damage for alleged personal wrongs and injuries. The libellant alleged in his libel, that he shipped on board the schooner David Pratt, of which the respondent was master, at Wilmington, in North Carolina, some time in May, 1837, for a voyage from that place to divers ports in the West Indies, and back to her port of discharge in the United States, for wages at the rate of fourteen dollars a month; that he faithfully served until the arrival of the vessel at North Yarmouth, where he was discharged on the 14th day of August; that five dollars was all the master paid him for the balance of wages, whereas there was in fact twenty-seven dollars unpaid and justly due. The libel states the day of his discharge, but does not state the day that his services commenced. In another article the libellant set forth several personal injuries done to him by the master, while he was in the service of the vessel, and concludes with a prayer that process may issue according to the course of the court, and that the court would pronounce for the wages and damages, and for such further relief as to justice shall appertain, and for costs. There is a general verification of the truth of the facts stated in the libel by the libellant's oath. The master appeared and put in a dilatory exception to the libel in the nature of a demurrer, and says: "That he is under no obligation or necessity by law to answer the same, in this court, and that this court has no proper authority to hear and try the same, and that process in the case issued improvidently, and in particular he excepts thereto. 1st. That the said libel endeavors to unite and mix up distinct, heterogeneous, and multifarious matters which cannot be joined in the same complaint: namely, matter in alleged subtraction of wages and matter of damage, assault and battery, and wrongful imprisonment." 2d. That there is no proper account or exhibit of the pretended demand for a claim for wages; and, "3d. That there is no proper oath or attestation in due form of law to the truth of the facts undertaken to be set forth in said libel."

Codman & Fox, for libellant.

C. S. Daveis, for respondent.

WARE, District Judge. The pleadings, in this case, present a number of preliminary questions, not indeed touching the merits of the case, but which are important to be considered as affecting the practice of the court and its course of proceeding. For though the course of courts of admiralty is remarkable for its simplicity, and its freedom from artificial and technical forms, yet no court can be entirely without them. To a certain extent they are necessary to the regular, safe, and orderly administration of justice. As far as they are established the court is bound to observe them. In considering the causes of the respondent's exception, I shall invert the order in which they are presented in the pleadings.

One cause assigned for exception to the maintenance of the action is, "that there is no proper oath or attestation in due form of law, to the truth of the fact set forth in the libel." It is the practice of the admiralty, before issuing process of attachment, to require the libellant to verify the claim or cause of action on which the libel is founded by oath. This practice is consonant with that of the civil law, and is supposed to have been derived from it. That law required of the parties and their advocates what was called the oath of calumny. The oath appears to have contained several clauses, binding the parties to act generally with good faith in the management of the cause; but the principal and most important clause, in the oath taken by the actor or plaintiff, was that the action was not commenced, "calumniandi animo sed existimando se bonam causam habere." Just. Inst. 4, 16, 1; Vinn. in loc. Gaius' Comm. L. 4, 176; Heinn. Recit. lib. 4, tit. 16, 1. He was required to swear that he believed his cause of action to be just, and that he did not prosecute it for the purpose of vexing and harassing the opposite party. It appears that formerly the

[1] [Reported by Hon. Ashur Ware, District Judge.]

oath required by the admiralty was substantially the same as that required by the civil law, and like that, was called the oath of calumny.[2] But admiralty courts in this country, I believe, at least in this district, have required nothing more of a libellant than a general verification of the cause of action by his affidavit. The clauses in the oath of calumny, relating to good faith and probity in the conduct of the suit, are substantially comprehended in the official oath which every proctor and counsellor takes on his being admitted to practice in the court.

The oath of calumny has sometimes been derided by common lawyers as a useless and unmeaning formality, and as giving occasion to perjury rather than affording any substantial security against groundless and vexatious suits. And see 3 Principia Juris Civilis, Dupin, p. 347. "De lubricitate jurisjurandi sappletorii." That it does not in all cases prevent litigious men from prosecuting vexatious suits is undoubtedly true. That a party swearing to his belief in the justice of his cause, does not always weigh the matter with all the scrupulousness that may justly be expected of an upright and honorable and conscientious man on the occasion of so solemn an appeal, may be admitted; and still it may with great appearance of reason be supposed to have no inconsiderable influence in checking the temerity of litigation. The experience of the common law courts has taught them the advantage of introducing into their practice something very analogous to the oath of calumny. The affidavits required of parties in the progress of a suit, as that of a plaintiff to hold the defendant to bail, that required of a party in support of a motion for a continuance, that of the loss of a written instrument as a ground for admitting secondary evidence of its contents, and many others are only particular cases included in the general terms of the oath of calumny. Besides it does not seem unreasonable that a party should be required to swear to his own belief in the justice of his cause before he is permitted to bring another into court to defend himself against it, and before he should be authorized to require a court to investigate the grounds of it. This, at least, seems to be the view which courts of admiralty have taken of the subject. The objection in this case is, that the verification of the cause of action is not sufficiently formal and exact. In the affidavit annexed to the libel, the libellant swears, "that the facts set forth in his libel are to the best of his belief true." The rules of the court do not require any particular form of affidavit. It is sufficient if the cause of action be substantially verified by the oath of the party; and I do not see that the form in which it is done in this case, is open to any particular objection. It is a sufficient compliance with the rules of the court.

Another cause of exception is, "that there is no proper account or exhibit of the pretended demand or claim for wages." It is usual to annex to the libel, in a suit for wages, an account stating the time of the service, the rate and amount of wages, with a credit for the amount advanced during the voyage. But this account is no part of the libel, nor is it necessary that any such account should be annexed to it. It is sufficient if the libellant states the contract and avers the service with proper certainty, and that there is a balance of wages remaining due. It is not, that I am aware, absolutely necessary that he should aver any precise balance to be due. The contract upon which his claim is founded always remains in the hands of the other party, who is bound to produce it on trial. If he does not, the seaman may state the terms of the contract, and his statement is held to be conclusive until it is disproved by the master. Act July 20, 1790, c. 56, § 6 [1 Story's Laws, 105; 1 Stat. 133, c. 29]. When the contract is produced, that must prevail, and if it is found that the seaman has alleged the rate of wages to be less than what he in fact contracted for, or the balance less than that really due, the court has authority under the prayer for further relief, to award to him the sum justly due, even if it exceeds the amount demanded in the libel. A court of admiralty is not limited in its decree to the precise amount for which the libel is entered. When it appears on investigation that the libellant has merits, and that justice requires a larger remuneration than he has demanded in his libel, the court is not precluded by any technical forms from doing full justice. In a case of salvage before Sir William Scott, which was entered for £800, it appearing at the trial to be a case of extraordinary merit, he decreed two thirds of the whole amount to the salvors, amounting to more than £2,100, nearly three times the sum demanded by the libel. The objection was taken by counsel that no more could be decreed by the court than had been demanded by the parties in the libel. But he overruled the objection. "The whole matter," says he, "is before the court, and I think the court is by no means limited by any particular demand of the parties." The Jonge Bastiaan, 5 C. Rob. Adm. 322. The want of an exhibit, or a particular specification of the claim, is no sufficient cause of exception to the sufficiency of the libel.

The remaining cause of exception relied upon presents a question of more gravity and importance, and requires a more careful consideration. It is, that the libellant has mixed up distinct and multifarious matters in his libel, which cannot be united in the same complaint; namely, matters of alleged subtraction of wages, with matter of damage and personal wrongs; and it raises the question how far different and unconnected causes of action may be united in one libel. The counsel for the

[2] The form of the oath is given in Hall, Adm. tit. 45, additions, taken from Clerke's Practice of the Ecclesiastical Courts. See, also, 4 Reeves, Hist. Eng. Law, 16.

libellant referred to Dunlap's Admiralty Practice as an authority for uniting in one libel two causes of action entirely distinct and independent of each other. It is there said that in admiralty suits in personam, all causes of admiralty cognizance existing between the same parties, whether founded on contract or tort, may be joined in the libel and stated in distinct articles. Pages 88, 89. The principle here laid down is certainly true in a limited extent, but it may be doubted whether it is correct in the broad and unlimited terms in which it is expressed. It is a common practice in the admiralty to proceed in the same libel for wages earned in a particular voyage, and for damages for a tortious discharge in the same voyage. Emerson v. Howland [Case No. 4,441]; The Exeter, 2 C. Rob. Adm. 261; The Beaver, 3 C. Rob. Adm. 92; Mahoon v. The Glocester [Case No. 8,970]. A seaman may also recover, in the same libel, wages and the statute allowance made to a mariner who is discharged from a vessel in a foreign country with his own consent. Orne v. Townsend [Id. 10,583]. But these claims have been allowed rather in the nature of additional wages, or as claims legally connected with and growing out of the principal claim, than as distinct and independent causes of action. It is not, however, intended to be denied that if they are considered as independent causes of action, a court of admiralty might not pronounce for them when set forth in a separate article in a libel for wages. But a claim of damages for a personal wrong is an entirely independent claim, and perfectly unconnected with that for wages. How far separate and unconnected causes of action, that is to say, distinct and independent actions, may be united in a single suit and prosecuted together in the admiralty, is not, that I am aware, very clearly defined by any settled rule of jurisprudence. Phebus v. The New Orleans, 11 Pet. [36 U. S.] 175. It appears, however, to be the established practice in the high court of admiralty in England, that a cause of damage, as a suit for a personal tort is technically called, cannot be united with an action for wages. The reasons are said to be, that a cause of damage is not of so favored a nature as a suit for wages, and that it is a plenary action, while an action for wages is summary. The Jack Park, 4 C. Rob. Adm. 308. The distinction between these two kinds of action, as stated by Brown, is, that in plenary actions the order and solemnities of the law are exactly observed. There is a formal contestation of suit, a regular term to propound, and solemn conclusions from the facts; and if there is the least infringement of the regular order, the whole proceedings are annulled. In summary cases this order and solemnity are dispensed with. These causes proceed more rapidly, and without all these technical formalities, and the libel and all the proceedings, it is said, may be viva voce. Browne, Civ. & Adm. Law, 413, note; Hall, Adm. tit. 19, note.

I am not aware that the distinction between plenary and summary causes has ever been adopted in the practice of the admiralty in this country. In our practice all causes are summary, and the habit of the court is to proceed in all alike, with as much expedition, and with as little of the delay and embarrassment of artificial forms as is compatible with the safe and orderly administration of justice. If in a cause of damage and in one for wages there is no difference in the course of proceedings, there does not seem to be any insurmountable objection to their being united in the same suit. In the practice of the common law courts, several distinct and independent causes of action may be united in one suit, provided the causes of action are all of the same nature, and the course of proceeding is in all the same. 1 Chit. Pr. 196. And the civil law, at least according to the modern practice of that law, allows, under the name of cumulation of actions, the consolidation of distinct and unconnected actions upon the same principles. An indefinite number of actions, it appears, may be united in one suit, provided they are all of the same general nature, and they do not occasion a confusion in course of proceeding. If this effect is produced, the libel is liable to the dilatory exception ineptæ cumulationis (Schaumburgh, Princip. Prac. Jur. lib. 1, cc. 1, 10; Id. lib. 1, Membr. 2, cc. 4, 5; Gail, Pract. Obs. L. 1, Obs. 63; Voet ad Pand. L. 2, 13, 14; Vinnius, Select Quæst. Jur. lib. 1, c. 39; 2 Browne, Civ. & Adm. Law, 363) in the nature of a demurrer for want of form. But the danger of confusion in the processes is not perhaps the only reason for limiting the indefinite liberty of uniting different actions in one suit. The technical and artificial rules of proceeding in courts of justice are devised to promote the cause of justice, by producing clearness and certainty in its course, by limiting its expense, and by hastening the progress of suits to an early decision. The consolidation of a number of actions into a single suit saves the parties the expense of a plurality of actions, and in courts of the common law this is not only allowed but favored, when the causes of action are of the same nature, and no confusion is thereby introduced into the processes of the court. The simplicity and directness, and more especially the artificial formulas of pleading at the common law, enable the courts to embrace several causes of action in the same suit without inconvenience. But a court of equity will not allow a plaintiff to bring every matter of controversy, cognizable in that court, which he may have with the defendant, into a single bill. If he introduces matters which are entirely independent, which have no connection or relation to each other, the bill will be demurrable for multifariousness. Ward v. Duke of Northumberland, 2 Ansr. 472; West v. Randall [Case No. 7,424]. The difference of the modes of proceeding in the two jurisdictions may acount for the difference of practice in this respect. A prac-

tice which may be found convenient and beneficial, in proceeding according to the course of the common law, might prove not only inconvenient but embarrassing to the course of justice in a court whose modes of proceeding are widely different. The course of proceeding in the admiralty bears a much closer analogy to that of a court of equity than to that of the common law, and the objections to admitting multifarious and unconnected matters into a suit apply with nearly the same force in the admiralty as in equity.

But there is another objection to the indefinite liberty of cumulating actions as a matter of right, which applies with particular force to the jurisdiction of the admiralty; it is its unavoidable tendency to delay the progress of suits. In maritime causes, and particularly in those to which mariners are parties, it is of primary importance that justice should be promptly administered. Men whose occupation is upon the sea, and who are dependent on the opportunities of the wind and weather, have but little time to give to their business on shore. They cannot, without great inconvenience and loss, remain at home to await the slow progress of a lawsuit in the ordinary courts of justice. In most maritime nations special courts are established to hear such causes, which proceed summarily, that the interests of navigation may not suffer from the delays of the law. It is from this motive, as Kuricke informs us, that an appeal is not allowed by the Hanseatic law in maritime causes, and in all courts instituted for the trial of these causes, the proceedings are summary and the process short. Kuricke, Quæst. Illust. 27. The action of courts of admiralty, in which these causes are usually heard, is prompt. It is always open to suitors, and does not require them to await its regular terms, but takes up causes when the parties apply, and hears them as soon as they are prepared. "Ut levato velo istæ causæ cognoscantur" (Code 11, 5, 5) is the order of the civil law in causes of wreck; and the expression is often applied to all summary causes in the admiralty. Its modes of proceeding are plain, simple, and direct, and it studiously excludes from them everything that tends to prolixity. It is obvious that nothing could tend more directly to draw suits out to an inconvenient length than the allowing as a general practice, independent actions, each depending on its own proper evidence, to be consolidated into one suit, by which each cause must necessarily await the slow progress of all the rest. If the libellant as a matter of right may unite in one suit independent and unconnected actions, a mariner may join in a libel for wages earned in one voyage a cause of damage in another. It is easy to see the oppressive use that might be made of the process of the court in this way, and that masters of vessels might be subjected to most inconvenient embarrassments in their business, or be obliged to buy their peace when there is no just ground of complaint. "Mare frequentantium ventisque commodis utentium intersit, controversias eorum quantum fieri potest celerrime expediri." Locenius, De Jure Mar. lib. 3, cap. 10, 2.

But there is one objection to the union of these two actions in one libel founded on the different qualities of the master's liability. It is true that he is personally liable for the wages, but he is not liable for them as for his own proper debt. He is liable in his quality as master, and if he pays them, he has his remedy against the owners. But the damages which are recovered against him for a personal wrong are his own proper debt. There is a manifest irregularity and impropriety in mixing up, in one suit, actions to which a party is liable in different characters. The common law will not allow the joinder of actions against the defendant to which he is liable in different characters, as his own proper debt, with one which he owes as executor or administrator. My opinion is, that these two actions cannot be united in one libel, at least, if the master excepts to the union. I do not say that if no objection was made the court might not adjudicate on both actions in one suit, making separate decrees in each case. But if the objection is taken, my opinion is that it must be allowed. In Ryan's Case, referred to as having been decided in the district court of Massachusetts, it is not stated whether there was an exception to the joinder. The statement is that the joinder is allowed but not required. I presume allowed when no exception is taken.

The exception of the respondent is allowed for the first cause assigned in support of it.

[Upon an amended libel the plaintiff recovered $27.65 for wages. Case No. 3,597.]

PRATT (UNITED STATES v.). See Case No. 16,082.

Case No. 11,378.

PRATT et al. v. WILLARD et al.

[6 McLean, 27.] [1]

Circuit Court, D. Michigan. June Term, 1853.

TRIAL—PROOF OF PARTNERSHIP—ACTION UPON NOTE.

This action was brought on a promissory note, no affidavit by defendants [Willard & Sweet], denying their signatures, having been filed. A question to the court was made, whether the partnership of the plaintiffs must be proved. The court held that such proof was not necessary. The note was given to the plaintiffs as partners, and the defendants, by not filing an affidavit, have admitted their signatures, under the rule of court, and such admission extends to the facts which appear on the face of the note.

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

Therefore proof of the partnership of plaintiffs is unnecessary.

[Cited in Ames v. Quimby, 106 U. S. 346, 1 Sup. Ct. 120.]

[Cited in brief in Locke v. Leonard Silk Co., 37 Mich 480.]

Mr. Walker, for plaintiffs.

Backus & Harbaugh, for defendants.

[Nowhere more fully reported; opinion not now accessible.]

PRATT, The ANN C. See Case No. 409.

PRATT, The DAVID. See Case No. 3,597.

Case No. 11,379.

PRAY et al. v. The RECOVERY.

[Bee, 393.] [1]

Admiralty Court, Pennsylvania. 1780.

PRIZE—VESSEL IN SIGHT—CLAIM OF SHARE—COMMISSION.

1. The right, under which a vessel in sight may claim a share of the prize taken by another vessel, is founded in a presumption of law, which supposes a vessel so in sight, and armed, and prepared for battle, to have induced a surrender.

2. A vessel not commissioned, must be considered as a mere merchantman.

HOPKINSON, J.

Job Pray and Aaron Stockholm engaged and took as prize, the brig Recovery, a vessel belonging to the enemy; the schooner Livingston, a vessel belonging to Robert Morris, the claimant, being in sight at the time of the capture. Pray and Stockholm were duly commissioned by congress to cruize as privateers against the enemy; but Kelly, the master of the Livingston, had no such commission. The counsel for the claimant urged, that it was a principle of law—that prizes taken by vessels not commissioned, inured to the sovereign power, and exhibited a transfer from congress, of all their title to any share in this prize to Robert Morris; empowering him to prosecute a claim, in the name of the United States, but for his own benefit. And the authorities cited in support of this doctrine were Carth. 474, and 12 Mod. 134. But neither of these authorities apply strictly to the present case. In the one, the prize was a wreck, stranded on the shore, and great part of the booty was taken on shore by the crews of vessels not commissioned; in the other, a vessel without a commission, took a prize, and carried her into a foreign port, where the captor sold her, and converted the money to his own use. In both cases, the booty was taken by persons not commissioned to take; no vessels duly commissioned assisting in, or being present at the time of the capture. But in the present case, the prize was in fact taken by vessels regularly authorized for the purpose, and the noncommissioned vessel only in sight at the time of the battle. In the cases cited, no persons were present or assisting to whom the booty could be legally adjudged. Here the libellants, the real captors, were duly commissioned to take, and empowered by their commissions, and the resolves of congress, to possess and enjoy the property so legally taken. A vessel not commissioned must be considered as a mere merchantman; and according to Lee, 237, if a merchant vessel meets an enemy in the course of the voyage, and takes her, the prize shall belong to the captor; but if she goes out of her course to seek plunder, she may be deemed a pirate. Now, it is not pretended that the Livingston took the prize in question; on the contrary, it is in testimony, that she was running away whilst the libellants were engaged with the enemy; and now claims a share of the prize, as having been in sight at the time of the capture. The right under which a vessel in sight may claim a share of a prize taken, is founded in a presumption of law, which supposes a vessel so in sight, and armed, and prepared for battle, to have induced a surrender. A presumption of law is a legal indulgence, and ought to be strictly confined within the reason of the presumption. But no authority has been adduced to shew that this indulgence has been extended to a vessel not commissioned to take, unarmed, and flying from the scene of action. The Livingston cannot claim under the presumption of law, not being within the description; nor the United States under the general doctrine; because the prize was in fact taken by vessels duly authorized to take, which the Livingston was not. I adjudge, therefore, that the claim in this cause be dismissed, and that the brig Recovery be condemned as prize to the libellants.

[1] [Reported by Francis Hopkinson, Esq.]

PREARY (TUNNO v.). See Case No. 14,238.

Case No. 11,380.

PREBLE v. PORTAGE COUNTY.

[8 Biss. 358.] [1]

Circuit Court, W. D. Wisconsin. Dec., 1878.

MUNICIPAL BONDS — BONA FIDE HOLDER — LIS PENDENS—RES JUDICATA.

1. The mere fact that some of the interest coupons were overdue at the time of plaintiff's purchase, is not sufficient to put him upon inquiry, or charge him with notice of any defenses to the bonds, especially, where, during the time these coupons were running, the negotiation of the bonds had been restrained by an injunction which was finally dissolved.

2. The pendency of a suit is not constructive notice to purchasers of negotiable paper, which is the subject of the suit.

3. Where a county had filed a bill against a railroad company and its trustee to restrain the negotiation of bonds issued by the county to the

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

company in aid of its construction, and the case had been decided against the county, it is estopped from setting up, against subsequent purchasers of such bonds, any grounds of illegality which might have been set up in the bill.

[Cited in Ashton v. City of Rochester, 133 N. Y. 193, 30 N. E. 967; Harmon v. Auditor of Public Accounts, 123 Ill. 134, 13 N. E. 162; Mt. Mansfield Hotel Co. v. Bailey, 64 Vt. 151, 24 Atl. 139.]

[There were actions by John Q. Preble against the board of supervisors of Portage county upon certain coupons cut from bonds issued by the county in aid of railroad construction. There were verdicts and judgments in favor of plaintiff. Heard on motion to set the same aside.]

Edwin H. Abbott, for plaintiff.
G. W. Cate, for defendant.

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

BUNN, District Judge. This motion is to set aside verdicts and judgments in this and seven other cases, all alike, rendered at the present term of this court, upon coupons for interest upon railroad bonds issued by the defendant to aid in the construction of a railroad.

The cases being at issue upon answers put in by the defendant setting up fraud by illegal voting in the issuing of the bonds, and being called in their order for trial, the defendant did not appear at the trial, but made default, and inquests were duly taken, and verdicts and judgments rendered against the defendant in each of said cases upon the coupons in suit.

It being agreed that defendant has satisfactorily excused its default in not appearing at the trial, the only question submitted for the consideration of the court is, whether the defendant in its answer and proofs, makes a prima facie defense on the merits to the action.

If it does, then we cannot try the issue on the merits, but must vacate the judgments and set the cases down for trial by jury. But we are of opinion that the defendant does not make a prima facie defense to the actions.

Allowing that the certificate of the canvassers is not conclusive, and that the defendant has set up a good defense as against the original holders of the bonds, still we think there is nothing, either in the proofs or allegations, to destroy or in any way affect the position of the plaintiff as a bona fide holder for value, without notice, of the coupons in suit.

Without claiming that there is any evidence of actual notice of fraud or illegality, or that any such evidence can be produced, but on the contrary, the defendant's counsel conceding that no such evidence exists, he relies upon two circumstances as destroying the bona fide character of the plaintiff as holder for value of the coupons: First, that three of the coupons were overdue when the bonds were purchased by the plaintiff; second, that the pendency of the Felch suit in Portage county, brought to prevent the issuing of the bonds, was constructive notice to the purchaser of the bonds, of any infirmity existing at the time of their issue.

We think neither of these positions is maintainable.

The mere fact that coupons for interest upon bonds of municipal corporations are overdue and unpaid, is not of itself, without other circumstances to put the purchaser on his guard, sufficient to dishonor the bonds, which are, to the full measure of the commercial law, negotiable paper. And especially in this case, where the record shows that the sale of the bonds during all the time when these three coupons were maturing, was restrained by an injunctional order issued by the supreme judicial court of Massachusetts, in a suit brought on the chancery side of that court by the defendant in this action, to restrain and prevent the negotiation of the bonds, we think the purchaser, upon a dissolution of that injunction and final determination of that suit, in favor of the legality of the bonds, by the highest court of the state, might fairly presume that but for such suit and injunction the interest may have been paid. We think the existence of these facts shown by the record of the Massachusetts case sufficient to rebut any presumption of dishonor of the bonds or coupons arising from the bare fact of the coupons being overdue and unpaid, if such presumption would otherwise have existed. Upon the second point, it is quite clear that the pendency of a suit is not constructive notice to purchasers of negotiable paper, which is the subject of it. The rule has never been applied to suits respecting this species of property, and could not be without greatly trenching upon its value as a medium of commercial exchange.

We are also inclined to think that the record of the suit in Massachusetts, between the same parties and their privies, is a bar to the matter of fraud set up in the answer, in respect to all such matters as had come to the knowledge of the defendant at the time of the commencement of that suit.

That suit was brought to test the legality of the bonds and to restrain their negotiation in the hands of the trustee of the railroad company, the original payee and holder; and the rule is, that the party is concluded, as well in respect to all those matters and things which might have been litigated under the issues, as to those which were actually litigated and decided in the former suit.

The suit was brought to test the validity of the bonds and restrain their sale by the company. The whole question respecting the validity of the bonds in the hands of the original holder was in issue. The county of Portage, the defendant in this action, was complainant, and the trustee selected to hold the

bonds, and the railroad company, were defendants.

The complainant could not divide his cause of action, setting up one ground of illegality in that suit, and if he failed in that, bring a second suit for the like purpose, setting up another ground of illegality.

He should disclose the entire wealth of his case at once. Undoubtedly the suit would not be a bar to frauds discovered after the litigation took place, but there can hardly be any presumption that the frauds complained of here were subsequently discovered without some allegation or showing to that effect.

But, however this may be, we are clear that there is nothing in the case to affect the character and standing of the plaintiff as bona fide purchaser, for value, of the bonds before due.

Motion denied.

Case No. 11,381.

PRENTICE et al. v. BETTELEY.

[2 Lowell, 289.] [1]

District Court, D. Massachusetts. Dec., 1873.

REAL PROPERTY — AGREEMENT TO CONVEY — TIME LIMIT — RULE IN EQUITY.

1. The general rule, that in cases of contract for the sale of land, equity does not consider time to be material, holds to a certain extent and in a general sense.

2. But the exceptions are numerous, and include cases in which the contract or the remedy is not reciprocal, or in which there has been a considerable change in the value of the land.

3. A. agreed to convey real estate, if certain conditions were complied with before the end of six months; the other party was not bound to fulfil the conditions, and did not do so within the time; and, meanwhile, the property had risen considerably in value. *Held*, that A. was not bound to convey, after the six months.

Bill in equity seeking a reconveyance of certain lands. William H. Prentice and his two sons, George and Theodore, carried on business as coal merchants on the land and premises known as "Prentice's Wharf," in Boston, for many years ending with 1850, when Theodore, the plaintiff, retired from the firm. The father died in 1853, and afterwards George carried on business alone, under the old name of William H. Prentice & Sons, and Theodore was his chief clerk, and drew money from time to time, which was charged to him on the books, and he was credited with his salary at the rate of $1,200 a year. Each of the brothers owned an undivided tenth part of Prentice's wharf. In 1869, George and Theodore joined in a mortgage of their shares to the Delaware & Hudson Canal Company, to secure the payment of George's debt of $20,000, of which $15,000 and interest is still unpaid. In 1872, George W. Prentice failed, and certain informal meetings of his creditors were held, to see if a compromise could be effected. Among the assets exhibited to the creditors at one of the meetings, at which Theodore was present, was a statement from the books of George, showing Theodore to be very largely indebted to him. No compromise with the creditors was made, and George Prentice filed a petition in bankruptcy. About the same time the mortgagees had advertised the land for sale, and it was feared that, if sold in that way, it would not produce much more than the mortgage debt, though a much larger sum could probably be realized from it by care and good management. The defendant, Albert Betteley, was agent for one of the creditors of George Prentice, and expected to be the assignee of his estate. He had several conversations with Theodore Prentice concerning the land, and the mode of saving it from the foreclosure; and Theodore expressed his willingness to give up all his interest in the land to aid the creditors in redeeming it, provided he could be released from all indebtedness to George's estate, though he did not admit the correctness of George's account. The defendant consulted with some other creditors, who agreed with him that the proposal was a good one for the estate. Theodore accordingly made a deed to Betteley, in fee, of all his interest in the wharf and lands adjoining, which were all the property he had. When the deed had been drawn it was suggested that some evidence ought to be preserved of the purposes for which it was given, especially as Betteley might not be chosen assignee; and Betteley accordingly gave back to Theodore a paper, in which, after reciting the deed and that George W. Prentice was bankrupt, and that he claimed that Theodore was indebted to him, it was declared that the conveyance was in trust for the creditors of George, and that if his assignee or trustee, thereafter to be chosen, should, within six months from the date of the declaration, make and deliver to Betteley, for the use of Theodore, a full and complete release from all claims, debts, and demands which Theodore owed to George, then it should be lawful for Betteley to convey the estate to said assignee or trustee, to hold as part of the bankrupt's assets. But if the assignee or trustee should refuse or neglect to execute and deliver the release, then Betteley should reconvey the estate to Theodore, subject only to the mortgages already existing thereon, and the effects of any foreclosure thereof. The deed and declaration of trust were both dated June 26, 1873. Betteley was afterwards chosen assignee of the estate of George W. Prentice, but did not execute to Theodore any release from the debts due from him to the estate, until some time after the lapse of the six months, and Theodore then refused to receive it. Early in March, 1873, Betteley, as assignee, obtained leave of the district court to make the release, and he then tendered a formal

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

deed to that effect. This was after he had received notice that Theodore considered the agreement at an end, and had sold his interest to the person for whose benefit this suit is brought. Betteley, shortly before applying for leave to release Theodore from his debt to George's estate, had conveyed the land to one Armstrong, who had reconveyed to him as assignee in bankruptcy of George's estate. The estate in the mean time had risen very largely in value. The bill charged fraud on the part of Betteley in obtaining the deed, and a breach of the condition by not releasing the debts within six months. It denied that Theodore was indebted to George, and offered to pay whatever might be found to be due, and prayed that upon payment of the debt, if any, a reconveyance should be ordered. The answer denied the fraud, and denied that time was of the essence of the contract, or of any importance to the parties. It further gave certain reasons, not connected with the plaintiffs or their conduct, for the failure to make the offer of release sooner, admitting, however, that it was not made within the time limited in the declaration of trust.

J. A. Loring and J. D. Bryant, for plaintiffs.

H. C. Hutchins and A. S. Wheeler, for defendant.

LOWELL, District Judge. I leave out of view all question of fraud, because it is clear, and is not now denied, that no imputation whatever can be made on the good faith and honest dealing of the defendant. There is little difficulty in ascertaining most of the facts of the case. George W. Prentice was in bankruptcy; his assets, according to his own account, consisted largely of his interest in the wharf, and his claim against Theodore. One of the motives for giving the joint mortgage for the separate debt of George probably was that Theodore had been receiving advances from George. The mortgagees were threatening a foreclosure. The creditors had no one to represent them, and found it not easy to raise the money to redeem the estate. Theodore had no means for that purpose. Under these circumstances, it would not have appeared an unreasonable contract, if the parties had been in a position to make it, that Theodore should relinquish his equity, in consideration of a release of his indebtedness to George. This would give the creditors the whole equity to work with in raising money to redeem the mortgage, instead of only one-half of it, and would free Theodore from his debt. Such a contract as the parties contemplated would not have been unreasonable at the time. But, as I shall presently show, they made a unilateral contract, by which Theodore alone was bound.

In the mean time, the immediate exigency has passed, and the land has risen so much in value, that there is not only ample security for the mortgage debt, but more than enough beyond it to pay the largest amount that the creditors can possibly claim of Theodore. The prayer for a reconveyance is resisted, on the ground that equity does not regard time as essential in a contract for the conveyance of land. This is true to a certain extent and in a general sense; but the exceptions are numerous, and include cases in which the contract or the remedy is not reciprocal, or in which a considerable change in the value of the land has taken place. Both these circumstances are found in this case.

First, as to mutuality. Here was no complete contract of sale, so much land for so much debt. The amount of the debt was in dispute, though it was not then denied by Theodore that he owed something considerable, perhaps $8,000 or $9,000, instead of the $15,000 which George's books charged him with. He appears to have been willing to make such a sale, but the defendant was not ready to bind himself absolutely, and the whole transaction amounted to an offer on the part of Theodore to convey his land at any time within six months, in discharge of the debt, if the creditors of George, acting by the assignee, chose to discharge him. This offer he might have retracted at any time before the other party had accepted it, if he had not bound himself at law by giving a deed of the land; and even after that he might, perhaps, retract in equity. But this is unimportant, because the offer was neither accepted nor retracted within the six months. I am not aware that a court of equity has ever extended the time for the acceptance of an offer.

Granting that the plaintiff was bound for six months, as he held himself to be, the other party was bound to nothing excepting to return the land if the release were not furnished. It was argued that when Betteley himself became the assignee, and the six months had elapsed, the plaintiff was ipso facto discharged of his debt. If Betteley had been acting in his own right, there would be force in this argument; but I am not ready to decide that an assignee in bankruptcy can bind the assets entrusted to him, by any mere neglect of this sort. If, therefore, the situation had been changed in the reverse direction,—that is, if the land had fallen in value, and Theodore had become possessed of other property, so that a debt against him would be valuable,—there is no authority under the bankrupt act for holding that the assignee would have lost his remedy against Theodore, by his merely retaining the land beyond the six months.

This unilateral arrangement was made by Theodore Prentice for the convenience of the creditors, to enable them to avail themselves of his offer immediately, or at any time within the period agreed on. The time given was enough, and more than enough, for a decision; and the creditors did not bring themselves within the exact terms of the offer. As values stand now, the offer was one which

would not be made by a prudent man. I see no reason why a court of equity should refuse to carry out the exact agreement of the parties, especially as the plaintiff offers to pay all the pecuniary consideration there ever was for his offer. He asks that his conveyance may be treated as a mortgage to secure his debt to the estate, which is all that equity can ask under the circumstances.

It is by no means accurate to say that equity takes no note of time. The general rule in equity, as at law, is, 'that parties may make their own bargains, and must keep them'. Equity is very unwilling that an estate should be forfeited by mere neglect to keep an appointment for the payment of money at the day agreed on. The early application of this doctrine to mortgages, by which an equity of redemption was created, was eminently just, and was acquiesced in; though of late years all persons have agreed on a form of mortgage which very much modifies this equity, by giving the mortgagee a power of sale on short notice. Its application to a failure to pay rent at the day was just, and was adopted by the common-law courts in Massachusetts, when there was no court of chancery in this state. Equity carries its objections to a forfeiture so far, that, in an ordinary contract to buy and sell land, it is unwilling that a good bargain shall be lost by unpunctuality; but, in this class of cases, the exceptions embrace more cases than the rule. Indeed, the doctrine itself is exceptional, and is explained by Mr. Justice Story, quoting and approving Baron Alderson, as being only this, that equity has power to carry out what seems to be the true intent of the parties; and if there are no circumstances to show that either party would suffer any hardship, or that any equitable consideration existed against it, the court will presume that the sale was the main thing, and the precise time of completing it was not essential. Story, Eq. Jur. § 776, note 1. "But, then, in such cases," the learned author proceeds to say, "it should be clear that the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract; that compensation for the delay can be fully and beneficially given," &c. Section 776.

That time was not considered very material by the parties when they made this arrangement, I think highly probable. If either party had preferred to fix five months or seven months, rather than six, no doubt the other would have agreed to it. In that sense, time was not essential. But the change of values is so very considerable, that it has become inequitable for a court to make a new contract for the parties, and no court will do so after such a change. Brashier v. Gratz, 6 Wheat. [19 U. S.] 528; Barnard v. Lee, 97 Mass. 96, per Gray, J., explaining Goldsmith v. Guild, 10 Allen, 239; Story, Eq. Jur. § 776; Adams, Eq. 88.

Decree for an account and reconveyance, on the plaintiff's paying what may be found due by Theodore Prentice to the bankrupt's estate.

PRENTICE v. LANE. See Case No. 11,383.

Case No. 11,382.

PRENTICE et al. v. NOE.

[See Case No. 10,284.]

PRENTICE (UNITED STATES v.). See Case No. 16,083.

Case No. 11,383.

PRENTICE et al. v. ZANE.

[11 Law Rep. 204.]

District Court, W. D. Virginia. Sept. 9, 1846.

NOTES—FRAUDULENT CONSIDERATION — BONA FIDE HOLDER FOR VALUE.

1. If the consideration of a note be fraudulent between the original parties, a subsequent holder will be held to strict proof that he paid value for it.

2. The exposition of the statutes of any state, by the courts of that state, is always regarded as of binding authority in the construction of such statutes by courts of other states.

3. The case of Swift v. Tyson, 16 Pet. [41 U. S.] 18, explained.

4. A promissory note or bill of exchange, which is made negotiable by the law of Pennsylvania, and is transferred to the holder as collateral security, merely for an antecedent debt or liability, without notice of fraud, will not confer such a title on the holder as will exclude all equities between the maker and the payee, or any previous holder.

This was an action of debt brought on a promissory note, made by the defendant, payable to the order of James H. Johnson, in the following words: "$5437.50. Philadelphia, Nov. 28, 1836. Five years after date I promise to pay to the order of James H. Johnson, five thousand four hundred and thirty-seven dollars and fifty cents, without defalcation, for value received. Platoff Zane." The suit was brought by the plaintiffs as indorsees of the payee; Johnson and the defendant pleaded nil debet, in which the plaintiffs joined. Upon the trial of the cause, the jury found, by a special verdict, that the note was made in Philadelphia; that the consideration was fraudulent; that it was indorsed in blank, in Kentucky, by the payee and delivered before maturity, to one Stivers, and by him delivered without indorsement to the plaintiffs, before maturity and without notice of the fraudulent consideration; and that there was a statute in Pennsylvania which declared that a promissory note "shall be held by the indorsee, discharged from any claim of defalcation or set-off by the drawers or indorsers thereof; and the indorsee shall be entitled to recover against the drawer and indorser, such

sum as on the face of said note, or by indorsements thereon, shall appear to be due." The other pertinent facts found by the special verdict appear in the decision of the judge. The parties further consented that the court should look to and regard the decisions of the courts of Pennsylvania, as found in the printed reports of that state, to avail as much, as if the same were found by the special verdict, and to have such weight as in the opinion of the court they were entitled to. They further agreed, in the same form, to waiver all objections to the verdict on account of its findings, in part evidence, and not facts, and that the court, in deciding thereon, may make all just inferences and conclusions of fact and law from the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom, if the same were submitted to them upon the trial of the cause. And, finally, that the above agreement should be made a part of the record in this suit.

Moses C. Good, for plaintiff.

Z. Jacob and Daniel Lamb, for defendants.

BROCKENBROUGH, District Judge. It will be seen, from the condensed statement of the propositions established by this special verdict, that the jury have submitted to the court, as conclusions of fact and law, to be deduced from the deposition and record referred to in the fourth and fifth propositions stated above, the important question whether any, and if any, what valuable consideration was paid: (1) by Stivers to the payee, Johnson, for the indorsement of the note to him, and (2) by the plaintiffs to Stivers for the delivery of the note, without indorsement, to them. Inasmuch, therefore, as the special verdict is incomplete until the conclusions of fact and law are drawn by the court, I will, in the first place, state those conclusions, and will then treat them as a part of the finding of the jury, in discussing the important and interesting legal questions presented by this record.

1. And, first, as to the question of consideration for the transfer of the note by the payee, Johnson, to Stivers, the first holder. The jury have found by their verdict that no evidence was submitted to them that Stivers paid any consideration for the indorsement of the note to him unless the same should be inferred from the matters stated in the verdict; or, in other words, unless the law requires that the payment of value by Stivers should be inferred from the mere fact of the indorsement. Now, while it is a perfectly well-established principle of the law merchant that every indorsement of commercial paper does, prima facie, import that it was made for value, the exception to the principle is equally well settled that this presumption of law ceases when it is shown that the consideration was fraudulent between the original parties, and, in such case, the holder is held to strict proof that he paid value for it. Story, Prom. Notes, § 196; Chit. Bills, 69. The case here comes fully within the operation of the exception. The verdict finds that the consideration was fraudulent between the original parties, and the onus was thus cast upon the plaintiffs to show by positive evidence that Stivers did, in fact, pay valuable consideration for the indorsement to him. The plaintiffs having failed to adduce such proof, I am bound to draw the conclusion that the indorsement of this note by Johnson to Stivers was without consideration. "De non existentibus et non apparentibus eadem est lex."

2. As to the question of consideration paid by the plaintiff to Stivers for the delivery of the note to them, the deposition and record, which are incorporated with the special verdict, establish that no present value was paid by the plaintiffs to Stivers in consideration of the delivery and transfer of the note to them; that the note in question was delivered by Stivers to the plaintiffs, along with other securities to a large amount, as collateral security to indemnify said plaintiffs on account of antecedent debts of Stivers, paid by plaintiffs as his sureties, and antecedent liabilities, for the discharge of which they were also responsible as sureties of Stivers, and that said note was not delivered by Stivers to them in payment of any such debts and liabilities.

The first question which presents itself upon the record for the consideration of the court is,—By what law are the rights of the parties to this controversy to be governed? Are they to be governed by the laws of Pennsylvania, where the contract was made?—by the laws of Kentucky, where the note was indorsed? or, by the laws of Virginia, where the action is tried? Upon this preliminary inquiry I feel no difficulty whatever in determining that the law of Pennsylvania must govern; for it is clear that the rights of the holder are not governed by the law of the place where the indorsement is made, or the law of the forum where the action is brought, but by the law of the country where the bill is drawn, if it is either payable there, or payable generally. Story, Confl. Laws, §§ 317, 332, 333; Story, Bills, §§ 161, 163, 164, 167–169. It is needless to multiply authorities upon this point since it is conceded by the counsel on both sides that the law of Pennsylvania must determine this controversy. If it were not so, indeed, the claim of the plaintiffs to recover could not be entertained a moment here, for the fact that this note was fraudulently, and without consideration, obtained by the payee from the maker, having been found by the verdict, this original taint would, by the laws of Virginia, and I presume of Kentucky also, adhere to it into whatever hands it might pass, the note sued on not being commercial paper by the laws of those

states, but a mere chose in action, subject to all the equities of the antecedent parties. If the plaintiffs can recover here, therefore, it must be in virtue of the negotiable character imparted to this instrument by the Pennsylvania statute, and of their having acquired it for valuable consideration, without notice of the fraud, before its maturity, in the usual course of business.

How, then, are we to determine what is the law of Pennsylvania as applicable to the case at bar, and where are we to look for it? It is contended by the counsel for the plaintiffs, that we must seek for it alone in the statute itself, and that this statute having made such instruments as that sued on negotiable, they become ipso facto subject to the law-merchant, as that law is expounded and enforced by the courts of law throughout the commercial world, and that the decisions of the courts of Pennsylvania in exposition of this statute are only entitled to respect so far as they are in conformity with these universal principles of commercial law. This proposition is controverted by the counsel for the defendant, and they insist that inasmuch as the commercial character of the note, which is the foundation of this suit, is imparted to it exclusively by an express statute of Pennsylvania, the construction and exposition of that state, given by the courts of that state, must be received, in every other forum, as part of the law itself. If this question were now presented for the first time in a court of justice, I could feel no difficulty in recognizing the doctrine contended for by the counsel for the defendant. But it is in truth no longer an open question, and has been repeatedly decided by the supreme court of the United States, as I will now proceed to show.

In the case of Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 159, Marshall, C. J., says: "This court has uniformly professed its disposition, in cases depending upon the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If then this question has been settled in Kentucky, we must suppose it to be rightly settled." In the case of Green v. Lessee of Neal, 6 Pet. [31 U. S.] 296, a summary of the decisions of the supreme court on this question is given by McLean, J. He says: "It may be proper to examine in what light the decisions of the state courts, in giving a construction to their own statutes, have been considered by this court. In the case of McKean v. De Lancy's Lessee, reported in 5 Cranch [9 U. S.] 22, this court held that the acknowledgment of a deed before a justice of the supreme court, under a statute which required the acknowledgment to be made before a justice of the peace, having been long practised in Pennsylvania, and sanctioned by her tribunals, must be considered as within the statute." The chief justice, in giving the opinion of the court in the case of Bodley v. Taylor, 5 Cranch [9 U. S.] 221, says, in reference to the jurisdiction of a court of equity: "Had this been a case of the first impression, some contrariety of opinion would, perhaps, have existed on this point. But it has been sufficiently shown, that the practice of resorting to a court of chancery in order to set up an equitable against the legal title, received in its origin the sanction of the court of appeals, while Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions as to be incorporated into their system, and to be taken into view, in the consideration of every title to lands in that country, such a principle cannot now be shaken. In the case of Taylor v. Brown, 5 Cranch [9 U. S.] 255, the court say, in reference to their decision in the case of Bodley v. Taylor: 'This opinion is still thought perfectly correct in itself. Its application to particular cases, and, indeed, its being considered as a rule of decision in Kentucky titles, will depend very much on the decisions of that country. For, in questions respecting titles to real estate, especially, the same rule ought to prevail in both courts.' In [Polk v. Wendal] 9 Cranch [13 U. S.] 87, the court say: 'That in cases depending on the statute of a state, and, more especially, in those respecting titles to lands, the federal courts adopt the construction of the state where that construction is known, and can be ascertained. And in [Mutual Assurance Society v. Watts] 1 Wheat. [14 U. S.] 279, it is stated that the supreme court are uniformly under a desire to conform its decisions to those of the state courts, on their local laws.'" In [Shelby v. Guy] 11 Wheat. [24 U. S.] 361, the court again declare that "the statute laws of the states must furnish the rule of decision to the federal courts, as

far as they comport with the constitution of the United States, in all cases arising within the respective states; and a fixed and received construction of their respective statute laws, in their own courts, makes a part of said statute law. In a great majority of the causes brought before the federal courts, they are called on to enforce the laws of the states, and it would be a strange perversion of principle if the judicial exposition of those laws by the state tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope."

Many other decisions of the supreme court to the same point, might be cited, but those already referred to are quite sufficient to show, that in construing the statute law of a state, the exposition given of it by the courts of the state, is always regarded as of binding authority; or, to use the emphatic language of some of the cases, is always regarded as part of the law itself. I have been more full in my citations upon this point because it was seriously contended by the counsel for the plaintiffs, that in the case at bar, the exposition given of this particular statute for a long series of years, by the courts of Pennsylvania might safely and properly be rejected by this court; and, especially, because the counsel supposed that he was sustained in this position, by certain expressions quoted from an opinion delivered by the late distinguished Justice Story, in the case of Swift v. Tyson, 16 Pet. [41 U. S.] 18. I do not, however, so read the opinion of Judge Story. In that case, a holder of a bill of exchange, who had received it in payment and in extinguishment of an antecedent debt, brought a suit against the acceptor in New York. The consideration on which the bill was accepted had failed, but the plaintiff had received it bona fide, and without notice of the fraud before its maturity, and it appeared that some of the New York cases denied that an antecedent debt was a sufficient consideration to shut out the equities of the original parties in favor of the holder. And the question discussed by Judge Story on this branch of the case was, whether in such a case as that, resting, not on the construction of a local law of New York, by the courts of the state, but on the general principles of commercial law, the decisions referred to, in conflict as they were, with the later decisions of their own courts, and with the weight of authority elsewhere, were binding upon the supreme court? In discussing this question, the judge says: "But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law." And, again, on the same page he says: "The laws of a state are most usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section" (referring to the judiciary act of 1789 [1 Stat. 92]) "limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and infraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply to questions of a mere general nature, not at all dependent upon local statutes, or local usages of a fixed and permanent operation." Now these expressions of Judge Story, so far from sustaining the position contended for by the plaintiff's counsel, do unquestionably "exclude the conclusion" that this court can, in construing this Pennsylvania statute, reject the exposition given of it by her own courts. They do, by necessary intendment and inevitable implication, declare that that exposition is obligatory upon this court. Here we have what was wanting in the New York case, "a positive statute of a state," to direct us; here we have "the construction of the local tribunals thereof" to guide us, and to reject that guide would not only be unreasonable and presumptuous in itself, would not only be inconsistent with the often promulgated opinions of the supreme court of the United States, but in derogation of the very authority cited by the plaintiff's counsel, to justify us in shutting our eyes to the steady lights which glow on so many pages of the Pennsylvania Reports.

Having thus established, as I think, that in construing the act of Pennsylvania, I am bound to adopt the exposition given of it by her own courts, I will now briefly review some of the leading cases decided in the Pennsylvania courts on this subject, and in doing so, I shall limit myself to an examination of such cases as involve the precise question presented by this record, viz., whether a promissory note, or bill which is made negotiable by the law of that state, and is transferred to the holder as collateral security merely, for an antecedent debt or liability, without notice of fraud, confers such a title on the holder as will exclude all equities between the maker and payee or any previous holder? The case of Petrie v. Clark, 11 Serg. & R. 377, was this. A prom-

issory note was indorsed in blank to executors for goods purchased of them, which were part of the assets in their hands. One of the executors, without the knowledge of the other, being indebted to the plaintiff on his own promissory note of nearly the same amount, after his own note became due, made an arrangement with the plaintiff, by which his own note was taken up by a new note, and the note which had been received by the executor for the goods of his testator, was handed over with the blank indorsement of the payee as a collateral security for the payment of this debt. The plaintiff was entirely ignorant of the circumstances under which the latter note came into the hands of the executor. As the case presents nearly the identical question involved here, and as the opinion covers the whole ground, I shall present the view of Judge Gibson in his own language. He says: "In regard to a pledge there is a decisive difference between the pawning of a security for an antecedent debt, and the pawning of it for money advanced at the time. As to the first, all the cases agree that the interest of the pawnee is defeasible by creditors, or legatees; and as to the second, the validity of the contract depends on all those considerations, that would affect an absolute sale under like circumstances; that is, where it appears the pawnee knew that the money was obtained for purposes foreign to the executor's duty, the transaction is to be regarded as collusive. Then to come to the facts of the case before us: The note, on which suit is brought, was indorsed to the executors in blank, for goods purchased of them, which were part of the assets, and the note itself was, consequently, assets in their hands. The executor who had this note in possession, was indebted to the plaintiff on his own promissory note, to nearly the same amount, and after his note became due, made an arrangement with the plaintiff by which it was taken up, and a new note at five months substituted in its stead, and as the note on which the suit is brought was handed over with the blank indorsement of the payee as collateral security for the payment of this debt, the other executor being no party to the transaction, and the plaintiff being entirely ignorant of the circumstances under which the note in question came to the hands of the executor. On this naked statement of facts it will be seen that collusion is altogether out of the case, and that the question is, whether the plaintiff is to be considered a holder for value. If the note had been delivered to him in discharge of the debt, there would be no difficulty in saying, in the absence of collusion, that taking it in the usual course of business as an equivalent for a debt that is given up, would be a purchase of it for valuable consideration. But as it appears in the bill of exceptions, that it was given in pledge for securing an antecedent debt, which was not discharged but suffered to remain, and as it does not appear that money was advanced, or any act done, that would in law be a present consideration, the case presented was against the plaintiff. The evidence therefore, prima facie, made out a defence; although it might, I apprehend, have still been shown on the other side, that the plaintiff had a right to recover, provided he had been able to prove that time was given in consideration of obtaining the note in question, as security for the debt, and that in consequence, the debt was lost. The giving of time would be a present, and a valuable consideration, and a pledge in these terms would be the same as a pledge for money paid down. There is nothing in the commercial nature of the security to vary the nature of the transaction. Where the holder of a note or bill has not paid value for it, he is in privity with the first holder. Collins v. Martin, 1 Bos. & P. 651. There is a difference, too, between a note regularly negotiated, which always supposes a consideration, and a note placed like the present, in the hands of a creditor merely as a security, which, in this respect, stands exactly as it would if it were a bona, that is, as a mere pledge subject in the hands of the holder to every equity that could be set up against it in the hands of the person from whom he obtained it. Roberts v. Eden, Id. 398. In this respect, equity and the commercial law perfectly agree, both being founded in principles of reason as well as convenience. The question then is, whether the plaintiff is a holder for value; and as the case stands on the bill of exceptions, the evidence went directly to prove that he was not." This doctrine is fully recognized in the case of Walker v. Geisse, 4 Whart. 258. In Depeau v. Waddington, 6 Whart. 233, the doctrine is again affirmed, and the leading case of Petrie v. Clark is cited and approved. In delivering the opinion of the court, Judge Rogers says: "It has been repeatedly held, that a collateral security for a pre-existing debt, without more, is not such a consideration as will give title to the holder; yet if there is a new and distinct consideration, the holder is a purchaser for value, and as such protected from a defence which would have been available between the original parties. It seems to me, there would be no great difficulty in proving that it would have been better not to have restrained the negotiability of paper bona fide pledged as a collateral security for a debt; but on this point the law is settled. Without making a parade of learning and research by the citation of numerous authorities, foreign and domestic, ancient and modern, it is sufficient to refer to Petrie v. Clark, 11 Serg. & R. 377, where both points are ruled." The same point is said to be again affirmed in Jackson v. Polack, 2 Miles, 362, decided in 1840, but the book is not in the state library at Lewisburg, and I have not had access to it elsewhere.

From the review of the Pennsylvania cases, it is clear that the law, as there settled, entitles the defendant here to the benefit of his original equities against the payee; and since the fraudulent procurement of this note by the payee is a fact found by the special verdict, I must render judgment thereon for the defendant. I should not hesitate to do so in this case, even if it were true, as contended by the plaintiffs' counsel, that the case of Swift v. Tyson [supra] was in direct opposition to the proposition established by the series of Pennsylvania cases, for I insist that if the point had been ruled differently by the supreme court, in reference to a New York contract, that court would yet be constrained, by the principles admitted by Judge Story, cited elsewhere in this opinion, to conform their decision, in a case arising under a local statute of Pennsylvania, to the decisions of the courts of that state in exposition of that statute. But there is in truth, no such conflict as is supposed. The point settled by the supreme court in Swift v. Tyson, is simply this, that a bona fide holder of an accepted bill of exchange, who receives it from his immediate indorser in payment of an antecedent debt, and who, in receiving the bill, surrenders the security for the old debt, (and in that case another party was bound for the debt,) is a purchaser of the bill for value, and is entitled to recover the amount thereof from the acceptor, to the exclusion of all equities against the drawer. This is admitted to be clear law by the Pennsylvania cases themselves, and I have certainly no disposition to controvert it. It is true, that in delivering his opinion in the case of Swift v. Tyson, Judge Story affirms the law to be, "that a bona fide holder, taking a negotiable note in payment of, or as security for, a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties," but the alternative branch of the proposition applied to a question dehors the record, and is clearly an obiter dictum. It was so regarded by Mr. Justice Catron, who, while he concurred in the conclusion of Judge Story, protested against committing himself to a point not made by the record. It is believed that no adjudged American case goes the length of deciding that the transfer of a negotiable instrument as collateral security merely, confers such a title on the holder as will bar the equities of the maker against the previous parties. None such are cited by Judge Story, and he refers to some modern English cases in support of this extension of the doctrine which, however, seem to rest rather on the usages of the bankers of London than on the general principles of commercial law. If the reasoning above presented is sound as to the binding character of the decisions of the courts of Pennsylvania on the principal point involved in this record, then there is absolutely an end of the question, since it has been shown that those decisions are entirely uniform and consistent in denying that a transfer of commercial paper, not in payment of an antecedent debt, but merely as collateral security for it, constitutes the creditor a holder for value so as to exclude the equities between the antecedent parties; and I may add, that I the more cheerfully defer to the authority of those decisions, that I am persuaded they rest on grounds of the most solid reason. But even if they did not possess any such high claim to the respect of this court, and it were conceded that the question must be determined here by the general principles of commercial law, as expounded by the courts of England and the United States, other than Pennsylvania, it is not perceived that the concession would benefit the plaintiffs. Without entering here upon a tedious analysis of the numerous authorities cited in the argument of this cause, it is deemed sufficient to state, that the cases of De la Chaumette v. Bank of England, 17 E. C. L. 101, and Bell v. Lent, 24 Wend. 230, are precisely in point, to show that the law, as settled in Pennsylvania, is in perfect harmony with the principles of commercial law, as those principles are understood and expounded in the highest courts of England and New York. The authority of these cases is not impugned by any of the authorities cited by the counsel for the plaintiffs. The same doctrine is fully recognized in Clark v. Flint, 22 Pick. 243; Dickerson v. Tillinghast, 4 Paige, 221; Bay v. Coddington, 5 Johns. Ch. 56; Coddington v. Bay, 20 Johns. 643; Wardell v. Howell, 9 Wend. 170; and the very modern case of Stalker v. McDonald, 6 Hill, 93.

The only remaining authority which I propose to cite in support of the views taken of this case, is the decision of the court of appeals of Virginia, in the very case at bar. The action on this note was originally brought in the circuit superior court for Ohio county; and it affords me pleasure to add that, in pursuing my investigations of the questions of law arising on this record, I have derived much aid from the luminous and well-reasoned opinion of Judge Fry, in the state court. It is true, that the court of appeals reversed the decision of Judge Fry, and set aside the special verdict found by the jury; but the decision of the appellate court turned alone upon the supposed defect of the special verdict, in not finding whether the indorsement from the payee to Stevens, was for value. It is believed that the defect, if it be one, in the special verdict found in the state court, is remedied by the finding of the evidence, in the case at bar, from which, by an agreement between the parties, the court is authorized to deduce the conclusion of fact instead of the jury; a course which seems to be in conformity with the well-settled English practice. See the cases of Dixon v. Yates, 27 E. C. L. 137; Blanchard v. Bridges, 31 E. C. L. 94; Magrath v. Hardy,

33 E. C. L. 976; and Holderness v. Collinson, 14 E. C. L. 101. The court of appeals have not favored us with the reasons on which their judgment was based; but the conclusion is, I think, inevitable from the judgment itself, that the court was of opinion, that the fraud, having been established on the part of the payee, it was incumbent on the plaintiffs to show that Stevens paid value for the note; else the failure to show consideration, could not have been deemed a defect in the verdict.

My conclusion upon the whole case is, that the law arising upon this special verdict is for the defendant; and judgment is rendered accordingly.

[This judgment was affirmed by the supreme court, where it was carried on writ of error. 8 How. (49 U. S.) 470.]

Case No. 11,384.

PRENTISS v. BARTON.

[1 Brock. 389.] [1]

Circuit Court, D. Virginia. Nov. Term, 1819.

CITIZEN—WHAT CONSTITUTES—COURTS—FEDERAL JURISDICTION.

Question of jurisdiction. What constitutes citizenship in another state, in the sense of the constitution and judicial act, with reference to the jurisdiction of the federal courts.

[Cited in Sharon v. Hill, 26 Fed. 342, 343.]

The original bill in this case was filed by the plaintiff, Christopher Prentiss, trustee of William Prentiss, alleging himself to be a citizen of Maryland, in November, 1806, and the answer of the defendant, a citizen of Virginia, in June, 1808. In the progress of the suit, Seth Barton, the defendant, died, and the suit was revived against his executors. In December, 1816, the executors filed an amended answer, in which the question of jurisdiction is raised. They deny that the plaintiff was then, or at the time of suing out the original writ, or at the times of exhibiting the original or amended bills, a citizen of Maryland, but insisted that he was and had so continued from the institution of the suit, a citizen, either of the District of Columbia, or the state of Virginia, and called for strict proof of his citizenship. To this plea to the jurisdiction, the plaintiff replied generally. The state of facts to show or disprove the residence of the plaintiff in the state of Virginia, or District of Columbia, as developed by the depositions exhibited on the trial of the issue, together with the legal inferences from those facts, are presented and commented on in the following opinion.

MARSHALL, Circuit Justice. The jurisdiction of the court in this case depends on the citizenship of the plaintiff. If he was a citizen of the District of Columbia,[2] or of the commonwealth of Virginia, this suit cannot be maintained; if he was a citizen of any other state, he may sue in this court.

Before I proceed to examine the facts in this case, I will consider the principle which must govern it.

The constitution of the United States gives the courts of the Union jurisdiction over controversies arising "between citizens of different states" (article 3, § 2), and the judicial act [of 1789 (1 Stat. 73)] gives this court jurisdiction, "where the suit is between a citizen of the state where the suit is brought, and a citizen of another state." The constitution, as well as the law, clearly contemplates a distinction between citizens of different states; and although the 4th article declares, that "the citizens of each state, shall be entitled to all privileges, and immunities of citizens in the several states," yet they cannot be, in the sense of the judicial article, or of the judicial act, citizens of the several states. There is still a distinction between them, if in no other respect, in their right to sue in the courts of the Union. This distinction, although it may be clear enough in theory, cannot always be easily drawn in fact. In a government, composed like ours, of distinct governments, and containing the principle which has been stated, it cannot depend entirely on birth. A citizen living in a state, with all the privileges and immunities of a citizen of that state, ought to share its burdens also, and will be considered, to every purpose, as a citizen. Accordingly, the universal understanding and practice of America is, that a citizen of the United States, residing permanently in any state, is a citizen of that state. Otherwise, a citizen by statute could never belong to any state, and could never maintain a suit in the courts of the United States. In the sense of the constitution and of the judicial act, he who is incorporated into the body of the state,

[1] [Reported by John W. Brockenbrough, Esq.]

[2] Hepburn v. Ellzey, 2 Cranch [6 U. S.] 445; 1 Pet. Cond. R. 444; Westcott v. Fairfield Tp. [Case No. 17,418]. In the case first cited, Hepburn and Dundas, citizens and residents of the District of Columbia (and so averring themselves in the pleadings), brought suit against Ellzey, a citizen of Virginia, who was averred to be such in the pleadings, in the circuit court of the United States, from the district of Virginia, and the court, being divided in opinion on the question of jurisdiction, certified that question to the supreme court. Held: That although the District of Columbia was a distinct political community, and constituted "a state" according to the definitions of writers on general law, yet that the act of congress, giving to the circuit courts, jurisdiction in cases between a citizen of the state in which the suit is brought, and a citizen of another state, used the term "state" in reference to that term, as used in the constitution; and that the term "state," in the sense of the constitution, applied only to the members of the American confederacy. Suit dismissed for want of jurisdiction. Neither can the United States courts entertain jurisdiction of a case between a citizen of a territory and a state. Corporation of New Orleans v. Winter, 1 Wheat. [14 U. S.] 91; 3 Pet. Cond. R. 499.

by permanent residence therein, so as to become a member of it, must be a citizen of that state, although born in another. Or, to use the phrase more familiar in the books, a citizen of the United States must be a citizen of that state, in which his domicil is placed. What is permanent residence? This question must, in some cases, depend on a great variety of considerations; and as in all mixed and doubtful questions of fact, each circumstance must be allowed its due weight. Birth alone, undoubtedly, gives a man permanent rights as a citizen; and although those rights, so far as respects suits in the courts of the United States, may be changed by a change of residence, yet, in doubtful cases, birth will always have great influence.

This question has never come directly, so far as I can discover, before the supreme court of the United States. The cases rather prove, that the jurisdiction of the court must be shown, than determine what constitutes citizenship. The first is that of Bingham v. Cabot, 3 Dall. [3 U. S.] 382, which was decided in 1798. The declaration was in the name of John Cabot of Beverly, in the district of Massachusetts, merchant, and in the name of other plaintiffs, described in the same manner. The court were clearly of opinion, that it was necessary to set forth the citizenship, or alienage of the respective parties, in order to bring the case within the jurisdiction of the circuit court. In the argument, the attorney-general observed, "A citizen of one state, may reside for a term of years, in another state, of which he is not a citizen, for citizenship is clearly not co-extensive with inhabitancy." Mr. Dexter, in support of the jurisdiction, contended, that citizenship in a particular state, may be changed without going through the forms and solemnities, required in case of an alien; that, on the principles of the constitution, a citizen of the United States is to be considered, more particularly as a citizen of that state, in which he has his family, is a permanent inhabitant, and is, in short, domiciliated. This question came on again, in 1803, in the case of Abercrombie v. Dupuis, 1 Cranch [5 U. S.] 343. The suit was brought in the district of Georgia, and the plaintiffs averred, "that they do severally reside without the limits of the district of Georgia, aforesaid, viz.: in the state of Kentucky, therefore, they have a right to commence their said action," &c. The judgment was reversed on the authority of the case of Bingham v. Cabot. The question came on again, in 1804, in the case of Wood v. Wagnon, 2 Cranch [6 U. S.] 9, also from the district of Georgia. The declaration in that case, stated the plaintiff to be a citizen of Pennsylvania, and the defendant to be "of Georgia." The judgment in this case was also reversed. These cases all show, that the jurisdiction of the court must appear on the record; but the last shows, that jurisdiction is not given, by averring a party to be of a particular state. The plaintiff was a citizen of Pennsylvania, and had, consequently, a right to sue either an alien or a citizen of Georgia, in the circuit court of Georgia. The defendant must have been, either an alien, or a citizen. If an alien, the court had jurisdiction. The judgment, then, must have been reversed, because the defendant might be "of Georgia," and yet a citizen of another state. This, certainly, does not prove what residence will constitute domicil, or citizenship; but I think it does prove, that it is not constituted by every residence.

By the general laws of the civilized world, the domicil of the parents at the time of birth, or what is termed the "domicil of origin," constitutes the domicil of an infant, and continues, until abandoned, or until the acquisition of a new domicil, in a different place. As it gives political rights, which are not lost by a mere change of domicil, it is recovered by any manifestation of a disposition to resume the native character; perhaps, by a surrender of a new domicil. In fact, it may be considered rather as suspended, than annihilated. All agree, that a new residence is not acquired, by a residence for temporary purposes. It must be a permanent residence. Vattel defines it to be, "a habitation, fixed in any place, with an intention of always staying there." [3] The existence of this intention, must be manifested by overt acts, in explanation of which, if doubtful, the declarations of the party will, undoubtedly, be received. Let this rule be applied to the case at bar. Christopher Prentiss was born in Massachusetts, of which state his parents were citizens, and there he received his education, and married a wife. He appears to have continued to reside in Massachusetts, until the year 1801, when he came to Georgetown, in the District of Columbia, and joined Mr. Rind, in editing a paper published in that place. In 1802, he sold his interest in that paper to Mr. Caldwell, and removed to Baltimore, with his family, where he continued for some time, as the editor of a paper. In 1803, he returned to Massachusetts, and leaving his wife with her father, went himself to England. After his return in 1804, he was frequently in the District of Columbia, where he was employed to take the debates of congress, for a printer in Philadelphia. I think, there is not much difficulty in determining, that Mr. Prentiss was not a cit-

[3] "The domicil is the habitation fixed in any place, with an intention of always staying there. A man does not, then, establish his domicil in any place, unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration. However, this declaration is no reason why, if he afterwards changes his mind, he may not remove his domicil elsewhere. In this sense, he who stops, even for a long time, in a place, for the management of his affairs, has only a simple habitation there, but has no domicil. Thus, the envoy of a foreign prince, has not his domicil at the court where he resides." Vatt. Law Nat. p. 169, § 218.

izen of the District of Columbia. If he acquired a domicil in that place in 1801, he certainly abandoned it in 1802, when he sold his property, and removed with his family to Baltimore. Whatever might have been his character, when residing in Baltimore with his family, he certainly recovered his original domicil, when he returned with his family to Massachusetts, and there is no ground to believe, that his afterwards residing in the District of Columbia, for the purpose of taking the debates, was an abandonment of it.

It remains to inquire, whether, at the emanation of this writ, he was a citizen of Virginia? It appears, that he came to Richmond, in March, 1805, and engaged, generally, with Mr. Davis, as the editor of his paper. On the 18th of July, he returned to Massachusetts, where he continued, until the latter end of September, when he came to Virginia, and resumed his employment with Mr. Davis. About the last of November, in the same year, he left Mr. Davis, finally, and has since been, occasionally, in Massachusetts, where his family resides, and, occasionally, in other states. I cannot think this residence in Richmond, was "a habitancy, with an intention of staying here always." It continued for only a few months, a considerable part of which was passed in his native state, and his employment was one, which he could abandon at any time. Had he acquired any property in the paper, the case would have been more doubtful, or had he remained in Richmond, till this time, or until this question occurred, his residence would have assumed the appearance of permanence. Plea to the jurisdiction overruled.

NOTE. The chief justice at the conclusion of the above opinion, referred to the case of The Nereide, 9 Cranch [13 U. S.] 388; 3 Pet. Cond. R. 439. That case was decided at February term, 1815, and the chief justice delivered the opinion of the court. Among other points resolved in that case, it was decided, that a merchant, being a native of, and having a fixed residence, in Buenos Ayres, where he carried on business, did not acquire a foreign commercial character, by occasional visits to a foreign country. The case of Prentiss v. Barton, above reported, strikingly resembles the case of Cooper v. Galbraith [Case No. 3,193], decided by Judge Washington, in 1819. That was an ejectment for land in the state of Pennsylvania, and the defendant was a citizen of that state. Cooper, the lessor of the plaintiff, was a naturalized citizen of Pennsylvania, and resided in that state, until the year 1816. In September, 1815, he resigned his professorship of chemistry, in the college of Carlisle, with an intention, as he declared, of removing to New Orleans, with a view of engaging in the practice of law. About the same time, he broke up his family establishment, disposed of his furniture, and remained with his family for some time, at the house of a friend, as a visitor. He afterwards relinquished his intention of going to New Orleans, and in the autumn of 1816, he removed with his family, to Camden in New Jersey (on the opposite side of the river to Philadelphia), where he rented a house for a year, and he continued to reside there, until November, 1817. In December, 1816, he was appointed a professor in the college of Philadelphia, where he delivered a course of lectures, coming over to Philadelphia every morning for that purpose, and returning to his family in the afternoon in Camden. It appears, from the report of the case, though that fact is not distinctly stated, that the ejectment was brought after Cooper's removal to New Jersey, and while he was in the active and daily discharge of his duties of professor in the city of Philadelphia. Judge Washington, in delivering his charge to the jury, said: "The question of jurisdiction is first to be considered. It is composed of law and fact; and as soon as the latter is ascertained, the question is relieved from every difficulty. Citizenship, when spoken of in the constitution, in reference to the jurisdiction of the courts of the U. S., means nothing more than residence. The citizens of each state, are entitled to all the privileges and immunities of citizens in the several states; but to give jurisdiction to the courts of the U. S., the suit must be between citizens residing in different states, or between a citizen and an alien. If a citizen of one state, should think proper to change his domicil, and to remove himself and family, if he have one, into another state, with a bona fide intention of abandoning his former place of residence, and to become an inhabitant, or resident of the state to which he removes, he becomes, immediately, upon such removal, accompanied with such intention, a resident citizen of that state, and may maintain an action in the circuit court (of the U. S.) of the state which he has abandoned, or in that of any other state, except the one in which he has settled himself." Having thus stated the principles of law, which must govern the case, the judge told the jury, that they would decide, whether, upon the evidence, the removal of the lessor of the plaintiff to New Jersey, was bona fide, and with intention to become a resident and inhabitant of that state. In Rabaud v. D'Wolf [Id. 11,519], it is said, that to deprive an American citizen of the right to sue in the circuit court of the U. S., on the ground of his not being a citizen of any particular state, there ought to be very strong evidence of his being a mere wanderer without a home. A verdict cannot be excepted to, on the ground of the insufficiency of the evidence to establish the citizenship of the plaintiff, as averred in the declaration, because the question of such citizenship, constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement, in an earlier stage of the cause. D'Wolf v. Rabaud, 1 Pet. [26 U. S.] 498.

Case No. 11,385.

PRENTISS v. BRENNAN.

[2 Blatchf. 162.] [1]

Circuit Court, N. D. New York. Feb. 7, 1851.

COURTS—FEDERAL JURISDICTION—CITIZENSHIP—CITIZEN OF STATE.

1. Under section 11 of the judiciary act of 1789 (1 Stat. 78), construed in connection with article 3, § 2, of the constitution of the United States, it is not sufficient to give jurisdiction of a suit to a circuit court, that one of the parties to it is an alien.

[Quoted in Cissel v. McDonald, Case No. 2,729. Cited in State of Texas v. Lewis, 12 Fed. 3, 14 Fed. 66.]

2. The controversy, in order to give jurisdiction, must be one in which a citizen of a state and an alien are parties.

3. Where the plaintiff was a native of New-York, but had resided in Canada and been in business there for thirty years before bringing his suit, and resided there when he brought his suit, and had taken the oath of allegiance there to the queen of Great Britain, and the defend-

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

ant was a citizen of Canada and a subject of the queen of Great Britain: *Held*, that this court had no jurisdiction of the case.

4. Though the plaintiff might, for some purposes, be regarded as a citizen of the United States, he was not a citizen of the state of New-York, which was essential to give jurisdiction.

[Cited in Darst v. City of Peoria, 13 Fed. 564.]

[Cited in State v. Boyd, 31 Neb. 715, 48 N. W. 739, and 51 N. W. 602.]

In equity. The plaintiff [Douglass Prentiss] filed his bill in this case against the defendant [Charles W. Brennan] for the settlement of a partnership account, claiming a large balance due to him from the firm, charging that the defendant had wrongfully taken possession of the partnership books, papers and effects, and had absconded with them from Kingston, in the province of Canada, where the partnership business had been carried on, into the state of New-York, and praying for an account and an injunction, &c. The bill described the plaintiff as of the city of Kingston, in the province of Canada, and a citizen of the state of New-York, and the defendant as a citizen of the province of Canada, and a subject of the queen of Great Britain. The defendant put in a plea to the jurisdiction of the court, setting forth that the plaintiff was then, and had been for more than twenty years preceding, a resident of, and located and domiciled in Kingston, in the province of Canada West, and not in the state of New York, or in any one of the United States, and had become a naturalized citizen of the province aforesaid, and had taken the oath of allegiance to the sovereign of Great Britain. The plea was verified by the oath of the defendant.

Upon the facts set forth in the plea, supported by affidavits, a motion was now made by the defendant to vacate an order allowing a writ of ne exeat, made by NELSON, Circuit Justice, on the filing of the bill and on affidavits showing a case for the writ, and to discharge the writ issued by virtue of the order. The principal ground of the motion was, that this court had no jurisdiction of the case, on account of the residence and character of the parties. The affidavits on the part of the plaintiff showed that he was a native of the state of New-York, but that, some thirty years before, he removed to Kingston, in the province of Canada, and had since that time been a resident of that place, engaged in mercantile business, and had taken the oath of allegiance there, in order that he might be enabled to purchase and hold real estate in said province.

Selah Mathews, for plaintiff.
Albertus Perry, for defendant.

NELSON, Circuit Justice. The second section of the third article of the constitution of the United States provides, that the judicial power of the United States shall extend, among other things, to controversies between a state, or the citizens thereof, and foreign states, citizens or subjects; and the eleventh section of the judiciary act of 1789 (1 Stat. 78), in carrying into effect this provision, declares that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the United States are plaintiffs or petitioners, or an alien is a party, &c.

This act is defective in respect to the jurisdiction conferred upon the circuit courts in the case of aliens, as it would seem, from its language, that it might be sufficient to give jurisdiction to the court, if one of the parties was an alien. Construing it, however, in connection with the provision of the constitution, there can be no difficulty as to the meaning intended by congress. The controversy, in order to give jurisdiction, must be between a state, or a citizen thereof, and a foreign state, or a citizen or subject thereof; that is, speaking with reference to individual parties, the suit must be one in which a citizen of a state and an alien are parties. Jackson v. Twentyman, 2 Pet. [27 U. S.] 136.

The objection to the jurisdiction in the present case is, that the plaintiff is not a citizen of any particular state, and that this is essential to bring the case within the provisions of the constitution and of the act of congress made in pursuance thereof. If it had been shown that the plaintiff had returned to the state of New-York, and was a resident therein at the time of filing the bill, he would then have become redintegrated an American citizen, and entitled to the privileges belonging to that character; and then, being a resident of the state, he would have been a citizen thereof. But his residence and domicil are in the province of Canada, and not in this state; and hence, though for some purposes he may still be regarded as a citizen of the United States, he is not a citizen of the state of New-York, which is essential to give jurisdiction. Hepburn v. Ellzey, 2 Cranch [6 U. S.] 445; New Orleans v. Winter, 1 Wheat. [14 U. S.] 91; Gassies v. Ballon, 6 Pet. [31 U. S.] 761; Brown v. Keene, 8 Pet. [33 U. S.] 112; Picquet v. Swan [Case No 11,134]; Case v. Clarke [Id. 2,490]; Wilson v. City Bank [Id. 17,797]; Catlett v. Pacific Ins. Co. [Id. 2,517]; Cooper v. Galbraith [Id. 3,193]. The language of the constitution is explicit, that the controversy must be between a state, or the citizens thereof, and foreign states, citizens or subjects; and the above cases will show that the interpretation is in conformity therewith.

A person may be a citizen of the United States, and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad, and others that might be mentioned. A fixed and permanent residence or domicil in a state is essential to the character of citizenship that will bring the case within the jurisdiction of the fed-

eral courts, as will appear from the cases already referred to.

As I am satisfied that this court has no jurisdiction in the case, and that the bill must eventually be dismissed on that ground, the writ of ne exeat heretofore issued ought not to be continued The rule entered granting the writ must therefore be vacated, and the defendant be discharged from custody.

Case No. 11,386.

PRENTISS v. ELSWORTH.

[Mirror, Pat. Off. 35.]

Circuit Court, E. D. Pennsylvania. Oct., 1845.

JURISDICTION OF CIRCUIT COURTS — BILL TO COMPEL ISSUANCE OF PATENTS.

[The United States circuit courts have no jurisdiction either under the sixteenth section of the act of July 4, 1836 (5 Stat. 123), and the tenth section of the act of March 3, 1839 (Id. 354), or otherwise, to entertain a bill in equity against the commissioner of patents, to procure a decree compelling the issuance of a patent. The circuit court of the District of Columbia is the only court having jurisdiction to administer the remedy provided in those sections.]

[This was a bill in equity by Elijah Prentiss against Henry L. Elsworth, as commissioner of patents, to procure a decree ordering that letters patent be issued to him for an alleged invention.]

The complainant filed his bill complaining that the defendant, as commissioner of patents, had refused to grant him a patent for certain improvements made by him in the art of weaving goods of various kinds, and prayed the court should by decree order the letters patent prayed to be issued.

The defendant filed a plea to the jurisdiction and a general demurrer to the bill.

B. H. Brewster, for commissioner of patents, maintained that the court has no jurisdiction; that the defendant did not reside and was not within its jurisdiction at the time process issued. Act Cong. 1789, § 11 [1 Stat. 78]. The only court that can have jurisdiction at any stage of proceedings to obtain a patent is the circuit court of the District of Columbia. Acts 1801 [2 Stat. 103], and 1815; [Pollard v. Dwight] 4 Cranch [8 U. S.] 421; [Logan v. Patrick] 5 Cranch [9 U. S.] 288; [Gracie v. Palmer] 8 Wheat. [21 U. S.] 699; [Wilson v. Koontz] 7 Cranch [11 U. S.] 202; Harrison v. Rowan [Case No. 6,140]. Unless the court has jurisdiction under the patent laws, or by some other act of congress, the bill must be dismissed. [Kempe v. Kennedy] 5 Cranch [9 U. S.] 173; Ex parte Cabrera [Case No. 2,278]; [Turner v. Enrille] 4 Dall. [4 U. S.] 7. The patent laws contain no provision investing the circuit courts with such authority. The policy of the law is against the exercise of this authority. The commissioner would be exposed to endless trouble and inconvenience. He would be compelled to answer at the same time at different points of the Union; and if the prayer of the bill were granted, to carry with him the models, books, papers, and documents that are of record in the office at Washington, when thereby the public interests would require them to be in the custody of the department at the seat of government. 2 Kent, Comm. 355–372; Phil. Pat. 313, 57, 379. The law furnishes a remedy for the errors of a hasty examination of an application for a patent. Act 1836, § 7. The complainant must strictly conform to the provisions of that act before he can apply for the intervention of a court of equity, even had this court jurisdiction; and he must aver in his bill that he has conformed to the provisions of the law. That he has not done. The bill does not state that he has complied with the provisions of the act of 1839. Andrews v. Solomon [Case No. 378]; [Carroll v. Safford] 3 How. [44 U. S.] 441. The commissioner of patents is the judge created by law to decide upon these questions. To him must application be made, and renewed after a certain formal method laid down in the act; and this court could not now assume to decide the question, even had it concurrent jurisdiction, much less when the exclusive jurisdiction is vested in the commissioner. 9 Wheat. [22 U. S.] 532; The Robert Fulton [Case No. 11,890]. This court has no power to enjoin or command an officer of the general government residing at Washington to perform any act. How then could it enforce its decree? 1 Kent, Comm. 322; [U. S. v. Lawrence] 3 Dall. [3 U. S.] 42; [Life & Fire Ins. Co. v. Adams] 9 Pet. [34 U. S.] 574, 602; 8 Pet. [33 U. S.] 306; [Kendall v. U. S.] 12 Pet. [37 U. S.] 524; [Ex parte Hoyt] 13 Pet. [38 U. S.] 279; [Ex parte Bradstreet] 7 Pet. [32 U. S.] 634; [Livingston v. Dorgenois] 7 Cranch [11 U. S.] 577.

Mr. Waln, in reply, said: If the court has no jurisdiction, then the party aggrieved is without remedy. The argument ab inconvenienti can never be urged to deprive man of his rights and all legal protection. The jurisdiction is expressly given by the sixteenth section of the act of 1836, and tenth section of the act of 1839. The law provides that expenses shall be paid by complainant in contemplation of the inconvenience to which the commissioner might be subjected in complaints like this. If parties are confined to the courts of the District of Columbia, then they could not have the decrees of the courts enforced in any other part of the United States, except in their local jurisdiction. It is a narrow construction of the law to oust the jurisdiction.

RANDALL, District Judge. The bill in this case charges that on or about the 8th day of March, 1843, the complainant entered a caveat in the patent office of the United States, describing certain improvements made by him in the art of weaving, and that on or

about the 8th day of August, 1844, he preferred his petition to the commissioner of patents, wherein he represented that he had invented certain new and useful improvements in the apparatus for weaving goods of various kinds, and did therein claim as new ("as specified in the bill"). The bill further charged that the complainant, having in all things complied with the terms and conditions of the act of congress in such cases made, having furnished specifications, drawings and models, and paid into the treasury the legal fee, he did pray that letters patent of the United States might be granted, vesting in him and his legal representatives the exclusive right to the said invention, &c., and that the commissioner, intending, &c., absolutely refuses to comply with the said reasonable request. After stating the formal excuses or pretences, and propounding certain interrogatories, the orator prays that a copy of the bill may be served on the commissioner of patents, and that he may be required to answer, to produce the specification, model, drawing and claim, and that the court will order and decree, that the letters patent be issued as specified in his claim. To this bill the defendant has filed a special plea, denying the jurisdiction of this court, "because he says the supposed causes of complaint, and each and every one of them, accrued out of the jurisdiction of this court, and that the said defendant, commissioner, as aforesaid, was not found within the jurisdiction of the court at the time of serving the writ in this complaint, nor was he an inhabitant within the jurisdiction of this court at the time of serving the writ of subpœna on this defendant, and that he is not liable as commissioner as aforesaid, to the jurisdiction of this court. He has also filed a general demurrer to this bill. It is admitted that unless the jurisdiction is given by the sixteenth section of the act of July 4, 1836,—4 Story's Laws, p. 2511 [5 Stat. 123],—and the tenth section of the act of March 3, 1839,—9 Story's Laws, p. 1020 [5 Stat. 354],—the complainant cannot have the relief prayed for in this court.

By the seventh section of the act of 1836 it is enacted, that on the filing of any such application, description and specification, and the payment of the duty hereinafter provided, the commissioner shall make, or cause to be made, an examination of the alleged new invention or discovery; and if, on any such examination, it shall not appear to the commissioner that the same had been invented or discovered by any other person in this country, prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale, with the applicant's consent or allowance, prior to the application, if the commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor. But whenever, on such examination, it shall appear to the commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new had before been invented or discovered, or patented, or described in any printed publication in this or any foreign country aforesaid, or that the description is defective and insufficient, he shall notify the applicant thereof, giving him briefly such information and references as may be useful in judging of the propriety of renewing his application, or of altering his specification, to embrace only that part of the invention or discovery which is new. In every such case, if the applicant shall elect to withdraw his application, relinquish his claim to the model, he shall be entitled to receive back twenty dollars, part of the duty required by this act, on filing a notice in writing of such election in the patent office; a copy of which, certified by the commissioner, shall be a sufficient warrant to the treasurer for paying back to the said applicant the said sum of twenty dollars. But if the applicant, in such case, shall persist in his claim for a patent, with or without any alteration of his specification, he shall be required to make oath or affirmation anew, in manner as aforesaid; and if the specification and claim shall not have been so modified as, in the opinion of the commissioner, shall entitle the applicant to a patent, he may, on appeal and upon request in writing, have the decision of a board of examiners, to be composed of three disinterested persons, who shall be appointed for that purpose by the secretary of state, one of whom, at least, to be selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science to which the alleged invention appertains, who shall be under oath or affirmation for the faithful and impartial performance of the duty imposed upon them by said appointment. Said board shall be furnished with a certificate in writing of the opinion and decision of the commissioner, stating the particular grounds of his objection, and the part or parts of the invention which he considers as not entitled to be patented. And the said board shall give reasonable notice to the applicant, as well as to the commissioner, of the time and place of their meeting, that they may have an opportunity of furnishing them with such facts and evidence as they may deem necessary to a just decision; and it shall be the duty of the commissioner to furnish to the board of examiners such information as he may possess relative to the matter under their consideration. And, on an examination and consideration of the matter by such board, it shall be in their power, or of a majority of them, to reverse the decision of the commissioner, either in whole or in part; and, their opinion being certified to the commissioner, he shall be governed thereby in the further proceedings to be had on such ap-

plication: provided, however, that, before a board shall be instituted in any such case, the applicant shall pay to the credit of the treasury, as provided in the ninth section of this act, the sum of twenty-five dollars; and each of said persons so appointed shall be entitled to receive, for his services in each case, a sum not exceeding ten dollars, to be determined and paid by the commissioner out of any moneys in his hands, which shall be in full compensation to the persons who may be so appointed, for their examination and certificate as aforesaid.

The eighth section provides that whenever an application shall be made for a patent, which in the opinion of the commissioner would interfere with any other patent for which an application may be pending, or with an unexpired patent which shall have been granted, it shall be the duty of the commissioner to give notice thereof to such applicant or patentee, as the case may be; and, if either shall be dissatisfied with the decision of the commissioner in the question of priority of right or invention, he may appeal from such decision on the like terms and conditions as are provided in the preceding section.

The sixteenth section then enacts that whenever there shall be two interfering patents, or whenever a patent or application shall have been refused by an adverse decision of a board of examiners, on the ground that that patent applied for would interfere with an unexpired patent previously granted, any person interested in any such patent, either by assignment or otherwise in the one case, and any such applicant in the other case, may have remedy by bill in equity; and the court, having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge and declare either the patents void in the whole or in part, or inoperative and invalid, in any particular part or portion of the United States, according to the interest which the parties to such suit may possess in the patent or the inventions patented, and may also adjudge that such applicant is entitled, according to the principles and provisions of this act, to have and receive a patent for his invention, as specified in his claim, or for any part thereof, as the fact of priority of right or invention shall in any such case, be made to appear. And such adjudication, if it be in favor of the right of such applicant, shall authorize the commissioner to issue such patent, on his filing a copy of the adjudication, and otherwise complying with the requisitions of this act: provided, however, that no such judgment or adjudication shall affect the rights of any person, except the parties to the action, and those deriving title from or under them subject to the rendition of such judgment. This section gives the remedy, by bill in equity, to those cases only provided for by the eighth section of this act. But by the tenth section of the act of 1839, it is declared that the provisions of the sixteenth section of the before recited act shall extend to all cases where patents are refused for any reasons whatever, either by the commissioner of patents or by the chief justice of the District of Columbia, upon appeals from the decision of said commissioner, as well as where the same shall have been refused on account of, or by reason of, interference with a previously existing patent; and in all cases where there is no opposing party a copy of the bill shall be served upon the commissioner of patents, when the whole of the expenses of the proceeding shall be paid by the applicant, whether the final decision shall be in his favor or otherwise. The effect of this section is to give to all persons whose applications are refused under the seventh section (and who were concluded by the decision of the board of commissioners under the act of 1836) the same remedy as was provided for those who came within the provisions of the eighth section. The remedy is by bill in equity, in the court having cognizance thereof.

On the part of the complainant it is contended that inasmuch as the seventeenth section of the act of 1836, declares that all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court; that congress did not intend to give jurisdiction to the courts of the District of Columbia, where there is no district court having the power of a circuit court, but to the courts of the United States, established by the judiciary act of 1789, and, the complainant being a resident here, this court has the jurisdiction.

In the construction of statutes every part of the act and acts in pari materia are to be taken together for the purpose of discovering the intention of the legislature, which, when ascertained, is to prevail. It shall be so construed if possible that no clause, sentence or word shall be rendered superfluous or void. And when great inconvenience will result from a particular construction, that construction shall be avoided, unless the meaning of the legislature be plain, in which case it must be obeyed. 2 Cranch [6 U. S.] 386. With these rules in view let us examine the question presented for consideration.

By the section of the act of September 24, 1789, establishing the judicial courts of the United States it is enacted that no person shall be arrested in one district for trial in another in a civil action before a circuit or district court, and no civil suit or action shall be brought before either of the said courts against an inhabitant of the United States by any original process in any other

district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The third section of the act of February 27th, 1801, concerning the District of Columbia (3 Story's Laws, p. 2089, Append.) declares there shall be a court in the said District, which shall be called the circuit court of the District of Columbia; and the said court and the judges thereof shall have all the power by law vested in the circuit courts and the judges of the circuit courts of the United States. And by the fifth section the said court shall have cognizance of all cases in law and equity between parties, both or either of whom shall be a resident or found within said District. The fourth section of the act of March 3, 1815, vesting more effectually jurisdiction in state courts,—2 Story's Laws, p. 1531 [3 Stat. 244],—enacts that the district courts of the United States shall have cognizance concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, when the United States or any officer thereof, under the authority of an act of congress, shall sue, although the debt, claim or other matter in dispute shall not amount to one hundred dollars. Various other statutes have been passed either imposing penalties or providing relief, in which it is said the district or circuit courts of the United States shall have jurisdiction; but in all such cases it is understood the intention of congress was to give jurisdiction to those courts according to well-known and settled principles. These principles are that process for the institution of a suit, either at law or equity, in the district or circuit courts, shall not run beyond the limits of the district for which the court from which it issues is held, and that the circuit court for the District of Columbia has full equity powers where both or either of the parties shall be found within that jurisdiction. The prohibition of the service of process out of the jurisdiction is, however, a personal privilege, which may be waived; but in the present case the defendant has availed himself of the first opportunity to make the objections.

Another objection to the jurisdiction of this court is the mode of enforcing obedience to its decree. It is to be presumed that a court will not take cognizance of a cause, unless it can execute its judgment. Now, if this court should take jurisdiction of the complainant's bill, and decide that he is entitled to a patent, how can that decision be enforced if the commissioner should refuse to issue the patent? The proper remedy would seem to be by a mandamus, but the supreme court have decided that the circuit courts out of the District of Columbia have no authority to issue a writ of mandamus to an officer of the United States, commanding him to do a ministerial act, but that the circuit court for the District of Columbia has such power. Kendall v. U. S., 12 Pet. [37 U. S.] 525. In every aspect of the case it appears to me that this court has no jurisdiction of the complaint. By this construction, full effect may be given to every word of the section under consideration. Where there are two interfering patents, the circuit court of the district, whereof the defendant is an inhabitant or where he may be found, is the court "having cognizance," when an original application for a patent has been refused, and there is no opposing party, so that the process, a copy of which is to be served on the commissioner of patents, the circuit court of the District of Columbia, of which the commissioner is an inhabitant, and which can enforce its judgment, is the proper tribunal.

This view also avoids the great inconvenience which would result from the construction contended for by the counsel for the complainant. The bill prays that the commissioner be required to produce, on the hearing the specifications, models, drawings, &c., and these may be necessary to enable the court to determine upon the validity of the application for a patent. If the commissioner can be required to produce these in this court, he may with as much propriety be called on to answer similar applications in any circuit court of the Union,—an inconvenience, to say the least of it, which, if it had been intended by congress, they would have used plain, precise and clear language, such as would not leave the intention open to judicial construction, or leave it liable to be misunderstood.

This view renders it unnecessary to consider the argument urged in support of the demurrer. The plea to the jurisdiction is sustained, and the bill dismissed for want of jurisdiction.

Case No. 11,387.

PRENTISS v. ELLSWORTH.

[See Case No. 11,386.]

PRENTISS (ROSS v.). See Case No. 12,078.

PRENTISS (ST. JOHN v.). See Case No. 2,194.

PRESBYTERIAN CHURCH, BOARD OF FOREIGN MISSIONS OF THE, v. McMASTER. See Case No. 1,586.

Case No. 11,388.

Ex parte PRESCOTT.

[2 Gall. 146.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1814.

CLERK OF COURT—COMMISSIONS—MONEY DEPOSITED IN BANK.

Money deposited in a bank under a decree of the court, and subject to its order, is "money deposited in court" within the meaning of the act

[1] [Reported by John Gallison, Esq.]

of 1793, c. 20, § 2 [1 Stat. 332]. And the clerk is entitled to commissions upon such money in the same manner, as if it had actually been paid into his hands.

[Cited in Leech v. Kay, 4 Fed. 73; Thomas v. Chicago & C. S. Ry. Co., 37 Fed. 549; Easton v. Houston & T. C. Ry. Co., 44 Fed. 720.]

At this term a petition was filed by G. W. Prescott, Esq., the clerk of the district court of the district of New Hampshire, in behalf of himself and of the late clerk of said court, praying that a monition might issue to Messrs. Prince and Deland, prize agents of the private armed ship America, to bring into court, out of the prize proceeds of the ship St. Lawrence and cargo, the amount of the commissions, due to said clerk, of one and one quarter per cent. upon said proceeds, the same having been paid over to said agents upon a decree of final condemnation executed by this court in pursuance of the mandate from the supreme court. The agents, having appeared to the monition, which issued on this application, asserted in their defence, that under all the facts and circumstances of the case, no commissions were due, either to the present or former clerk, out of said proceeds; and that the sum of $2,317.15, and no more, now remained in their hands undistributed, which sum had been reserved to await the supposed claim in this case, under a notice that half per cent. commissions, and no more, would be insisted on. [Case No. 12,333.]

The facts alluded to are as follows: At the October term of this court in 1813, the ship St. Lawrence and cargo were condemned as good prize to the captors,—The St. Lawrence [Case No. 12,232],—and from the decree of condemnation the claimants appealed to the supreme court,—[8 Cranch (12 U. S.) 434]. At the same term, the captors moved the court to order the ship and cargo to be sold, and the proceeds to be deposited in the registry of the court, or delivered to the captors on bail. Upon this motion, after hearing the parties, the court by consent passed the following order: "Ordered, that the cargo of the ship St. Lawrence be unlivered by and under the direction of the marshal of this district, and after unlivery be sold by the marshal aforesaid at public auction at Portsmouth, the sale to be notified in some one or more public newspapers printed in Portsmouth, in Salem, in Boston, and in New York, at least twenty days before the sale, and the said cargo to be sold for cash only; and that the proceeds of the said cargo, after sale, be deposited one half in the New Hampshire Bank and one half in the New Hampshire Union Bank, in Portsmouth, subject to the order of this court in term, and in vacation to the order of the associate justice of the supreme court of the United States, assigned to the First circuit; and that a warrant issue to the marshal to execute this order." A warrant issued to the marshal in conformity with this order, and the cargo and the ship also, by consent of the parties, were sold, and the proceeds deposited by the marshal, in the name of the court, in the banks at Portsmouth, according to the order, and so remained deposited until the last May term of this court, when the decree of condemnation having been affirmed as to all the claims, but one, by the supreme court, in pursuance of a mandate of the same court, the proceeds were delivered over to the prize agents, and parties entitled thereto. It is unnecessary to state the facts, as to the relative rights of the present and former clerk, as it was conceded by the parties, that if either was entitled, the whole commissions might be paid to the present clerk.

Mr. Humphreys, Dist. Atty., and E. Cutts, for the clerk.

This is to be considered as an abstract question, without any regard to the quantum of money paid. The law, which regulates the clerk's fees, provides that "on all money deposited in court," or which is the same thing, "paid into court," he shall have one and a quarter per cent. It is said, that this commission is allowed him for his care and trouble in receiving, keeping and paying over money, which is actually paid into his hands, and therefore ought not to be given in the present instance, because he has had no trouble respecting it. What then is meant by paying money into court? Certainly not that it should be told and laid on the table, in sight of the court, or delivered from their servant the marshal to their servant the clerk. It is sufficient if it be placed completely in their power and control. If the marshal, for greater security, should pay it into a bank, and deliver to the court his check, the money would to all intents be paid into court, though never seen by them. This is confirmed by a subsequent order of the court, which, after directing payment of a portion of this money, speaks in express terms of "the balance of the money remaining in court." The order in the present case differs from that usually passed, only in directing payment into the bank. The control of the court is still the same. Ought the owners to misinterpret an unimportant deviation from the common form, as depriving an officer of the court of a commission, which he had a clear right to claim? The law respecting the clerk's emoluments is unambiguous. Those interested may, some of them at least, wish to make their great prize still greater by a diminution of these emoluments. They may persuade themselves, that though the law does not give them too much, when it enriches them by this capture, yet it gives the clerk too much. But it is not for them or us to judge of the reasonableness of the law. We are both confined to its meaning.

The duties of a clerk are arduous and responsible. In order to support the respectability of the office, and to compensate for

other low fees, congress added the commission as a perquisite, not as a quantum meruit for a particular service. The court, by its solemn acts and decrees, disposing of and distributing this money, has determined, that the money was deposited in court. And the owners and captors have as solemnly agreed in this determination. They confirmed it by their receipt now in court, by which they acknowledge, that they had received the specified sum "from the circuit court." Thus there has been no departure from the legal course, nor any material departure from the usual course. Nor indeed could there have been. For what would be the consequence? No less than this; if by an order to deposit the money in a bank, the clerk's commission was taken away, it would follow that the court could change the law respecting his commission, and take it away, by making such an order, in every case. But it is impossible to admit a construction, that might take away all his commission in every case, when both the first and last act give him a commission, and it seems admitted, that he would be entitled now to his half per cent. if the court, as in our case, should order the money, in the first instance, to be paid not to the court itself, but to a bank, subject to the court's order. It may be added, finally, that our construction is confirmed by the consideration, that it is the only one consonant with the distinguishing principle, that marks such admiralty or civil law proceedings, namely, that the court itself is the medium of transfer or distribution, whenever property decreed forfeited is ordered to be distributed.

Mr. Pitman, for the prize agents, argued to the contrary. But, as the reporter was not present, he is unable to state the argument. The opinion of the court was delivered at a subsequent day.

STORY, Circuit Justice. The act of the 1st of March, 1793, c. 20, § 2, revived by the act of 28th of February, 1799, c. 125, § 3 [1 Story's Laws, 570; 1 Stat. 625, c. 19], provides that in all cases of admiralty jurisdiction, the clerk of the district court shall, among other fees, be entitled to one and one quarter per cent. on "all money deposited in court." The single question presented for decision is, whether the proceeds of the St. Lawrence and cargo were, within the meaning of this clause, "deposited in court." If so, then the clerk is entitled to his commission; if otherwise, then his application must be dismissed.

It is argued by the counsel for the prize agents, that the money in this case never was deposited in court, because it never was brought into court, nor actually or constructively in the hands or possession of the clerk; that the commissions in the statute were intended as a remuneration to the clerk for the custody of the money, and for labor and care in its receipt and payment; and therefore, that the present case falls neither within the letter nor spirit of the provision. It is highly probable, when we consider the few banks existing at the passage of the statute, that the legislature contemplated the case of an actual custody by the clerk of money deposited in court. But it by no means follows, even admitting this argument to be correct, that this was the sole or governing motive for the fees allowed him. Other important considerations might well have weighed with a wise legislature, not only to provide a sufficient salary for its ministerial officers, but also a recompense for collateral services, pro opere et labore, in business incident to the disposal of the money of the court. Independent of the custody of money, the interlocutory orders, touching its receipt, deposit and distribution, may, and in fact do, in admiralty proceedings, often involve considerable detail and responsibility. The very case before the court is a proof of it; and if the captors, instead of a payment to the general agents, or to a few private agents, had required a distribution of their individual shares separately and singly from the court, as they well might, the compensation now sought would not have been so extravagant a reward, as it is now urged to be. Be these considerations as they may; it is not by conjecture, but upon legislative intentions apparent in the statute, that the words are to be construed. Where the language of an act is plain and clear, cases are not to be excepted from the generality of the expressions, unless such exceptions are fairly implied, or necessarily drawn from the purview. The statute does not speak of money coming into the hands or possession of the clerk, and to engraft such a qualification upon the language would be legislation, and not judicial construction. "Money deposited in court" cannot mean money brought in and deposited sedente curia, in the actual manual possession of the court. Such a construction would be against all practice, as well as all legal reasoning. It must therefore mean money, which is deposited subject to the order of the court, be it in whose actual possession it may, whether of a bank or of an officer of the court. In such a case, the bank or officer acts as the mere fiduciary, or depositary, of the court, and in legal contemplation the money is in the custody of the court. It would be a contempt of the court for any other person to intermeddle therewith. It is a mere substitute for the original property seized under the process of the court, and as much under its sole and exclusive direction, as the property itself. It is emphatically (what all property seized under admiralty process is) in the custody of the law. In this respect, it differs widely from the case of property delivered regularly and bona fide on bail. The latter is no longer subject to the control or custody of the court; and the parties to the stipulation are not the depositaries, but the debtors of the court.

On the whole, I am of opinion, that the

money in the present case was, in legal intendment, deposited in court; and, consequently, the clerk was and is entitled to the fees prescribed by law. This construction is, in my judgment, fully supported by the more recent acts applicable to this subject. I mean the Acts of 18th of April, 1814, c. 121 [2 Story's Laws, 1417; 3 Stat. 133, c. 79], and chapter 138 [2 Story's Laws, 1423; 3 Stat. 127, c. 62]. It is conceded, however, by the parties, that no more than one half per cent. can now be claimed from the prize agents, and with that the clerk is content. I shall therefore decree the money admitted to be in the hands of the prize agents to be brought into court, and paid over to the clerk.

Case No. 11,389.

In re PRESCOTT.

[5 Biss. 523; [1] 9 N. B. R. 385; 6 Chi. Leg. News, 151.]

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

BANKRUPTCY—PROOF OF CLAIM—USURY—FORFEITURE OF INTEREST.

1. A creditor offering to prove a debt against a bankrupt estate stands in the position of a plaintiff at law, and in Illinois if his debt is usurious, forfeits the whole interest.

2. The assignee can take advantage of usury, and the defense is good so long as any part of the principal debt remains unpaid.

[Cited in Beals v. Lewis, 43 Ohio St. 223, 1 N. E. 641.]

In bankruptcy. This was an exception by the assignee in bankruptcy of Martin Prescott to the decision of the register allowing the claim of J. W. Lawrence for $3,300. This claim was made up of two items. 1. A note for $300, which Lawrence had signed as surety with the bankrupt, and afterwards paid. 2. A claim of $3,000 for money loaned by Lawrence to the bankrupt at different times, on which he had received interest at the rate of two per cent. per month. The total amount of interest paid was $1,500. The statute of Illinois regulating the rate of interest is as follows: "If any person or corporation in this state shall contract to receive a greater rate of interest than 10 per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation." 1 Gross' St. p. 371, § 11.

E. Stanford, for assignee.

Hutchinson & Luff, for creditor.

BLODGETT, District Judge. When a creditor seeks to prove a debt against the estate of a bankrupt, he stands in the position of a plaintiff in a suit at law seeking to enforce such claim. In re Pittock [Case No. 11,189].

By the 3d section of the act of the legislature of this state, approved January 31, 1857, regulating rates of interest to be paid, which act was in force at the time of the transaction in question, any agreement to pay a greater rate of interest than ten per cent. works a forfeiture of all interest. Sess. Laws 1857, p. 46.

The supreme court of this state has construed this statute, holding that if the party who took usury is seeking to enforce his claim by suit, he forfeits all interest. Snyder v. Griswold, 37 Ill. 216; Cushman v. Sutphen, 42 Ill. 256.

It is very clear to me that Mr. Lawrence must be held by this court to be in the same position as if he had brought suit to recover this demand for $3,000 money loaned, to which the assignee may set up any defense that Prescott could have set up if bankruptcy had not intervened.

The defense of usury can be pleaded so long as any part of the debt for which the usury was paid, or agreed to be paid, remains unpaid. Farwell v. Meyer, 35 Ill. 40; Booker v. Anderson, Id. 66; Saylor v. Daniels, 37 Ill. 331; Parmelee v. Lawrence, 44 Ill. 405.

In the light of the rules laid down in these cases, there can be no doubt that the facts in this case show that Lawrence has given $1,500 for usurious interest on this $3,000 loan, and that the same should be applied to the extinguishment of the principal debt. This case is widely different from those cases where a debtor has sought relief in a court of equity from a usurious contract. In such cases, the courts, acting upon the principle that he who seeks equity must do equity, have generally required the payment of interest at the rate fixed by law where there was no special contract. Here the party seeks to enforce a contract on which he has received a large amount of usurious interest, which the debtor or his assignee may set off against the debt.

The exceptions to the filing of the register, so far as this $3,000 demand is concerned, will be sustained, and an order entered that the sum of $1,500 be deducted therefrom, leaving the claim fixed by the finding of this court on the facts at $1,800 instead of $3,300.

Case No. 11,390.

PRESCOTT et al. v. NEVERS et al.

[4 Mason, 326.] [1]

Circuit Court, D. Maine. May Term, 1827.

REAL PROPERTY—CLAIM UNDER DEED—DISSEISIN—TENANT IN COMMON—WASTE.

1. Where a person enters into possession under a recorded deed claiming title to the entierty, and exercises acts of ownership, it is a disseisin

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

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

of all persons who claim title to the same land to the extent of the boundaries in the deed.

[Cited in Dexter v. Arnold, Case No. 3,859; Ex parte McNiel, 13 Wall. (80 U. S.) 243.]

[Cited in Alexander v. Kennedy, 19 Tex. 488; Hicks v. Coleman, 25 Cal. 136; McCourt v. Eckstein, 22 Wis. 156; Martin v. Maine Cent. R. Co., 83 Me. 102, 21 Atl. 741; Minot v. Brooks, 16 N. H. 378; Rehoboth v. Carpenter, 23 Pick. 187; Rutter v. Small, 68 Md. 138, 11 Atl. 698; Smith v. McKay, 30 Ohio St. 417; Stevens v. Brooks, 24 Wis. 329; Tappan v. Tappan, 36 N. H. 112.]

2. One tenant in common may disseise another; and if a person enter into possession, claiming title to the entierty under a deed, and the title turns out to be defective as to a moiety, it is a disseisin of the parties entitled to that moiety.

[Cited in Dexter v. Arnold, Case No. 3,859; The Vidal Sala, 12 Fed. 208.]

[Cited in Bellis v. Bellis, 122 Mass. 415; Culver v. Rhodes, 87 N. Y. 354; Carpentier v. Mendenhall, 28 Cal. 487; Foulke v. Bond, 41 N. J. Law, 538; Oglesby v. Hollister, 76 Cal. 141, 18 Pac. 146; Parker v. Locks and Canals, 3 Metc. (Mass.) 101, 102; Richardson v. Richardson, 72 Me. 409; Warfield v. Lindell, 30 Mo. 286. Cited in brief in Wass v. Bucknam, 38 Me. 358.]

3. The act of March 15th, 1821, c. 35, § 2 [1 Smith's Laws Me. p. 137], which punishes waste and cutting down trees &c. by one tenant in common, without notice to the others, by treble damages, applies only to cases, where the tenancy in common is admitted, and not to cases, where the entierty is claimed by title, or disseisin, although it turns out defective as to a moiety.

Trespass for cutting down 4000 timber trees on lot No. 1, in the fifth division of lands drawn to the right of David Chandler, in the township formerly called New Suncook, now composing the towns of Lovell and Sweden, whereof the plaintiffs [James Prescott and another] and defendants are tenants in common, against the statute of the 15th of March, 1821 (chapter 35). Plea, the general issue of not guilty.

At the trial it appeared in evidence, that the township was granted to certain proprietors by resolves of the legislature of Massachusetts, passed on the 5th of February, 1774, and 13th of April, 1779, of which David Chandler was one, and in the first division of the lots, drawn by the proprietors on the 23d of March, 1780, he drew No. 14. The fifth division was not drawn until the 23d of September, 1817, when the lot now in controversy was drawn to the right of No. 14. David Chandler died about fifty years ago, leaving several children his heirs, whose title in the premises, excepting that of David Chandler, the eldest son (who took a double share or quarter part of the premises), was, in December, 1820, and January, 1821, conveyed to Samuel Farrar, one of the plaintiffs, and by him a moiety was conveyed to the co-plaintiff, Prevost, in March, 1822. This constituted the plaintiffs' title.

The defendant, Samuel Nevers (the other defendants being merely his servants) claimed title to the premises, as well as to all the other lands drawn to the proprietary right of Daniel Chandler, the father, under a sale for non-payment of taxes assessed by the proprietors in January, 1782, and conveyance to David Chandler, the son. The latter conveyed the same, in August, 1782, to Aaron Whittemore, through whom, by intermediate conveyances, the same came to Samuel Nevers, in October, 1817. None of the deeds were recorded before June, 1798. It was admitted, that the tax sale was not legal. In 1816, and again in 1818, Nevers authorized the hay to be cut, on a natural meadow on the premises, and in 1821, 1822, and 1823, he cut off the timber, claiming to be owner. Nevers, and those under whom he claimed, had paid taxes assessed on the proprietary right; but it did not appear that any taxes had ever been paid, or other acts done by the heirs of David Chandler, under whom the plaintiffs claimed their title, since the tax sale in 1782. An entry into the land in controversy was made in behalf of Farrar in the autumn of 1821.

Under these circumstances, Shepley & Longfellow, for defendants, made two points: 1. That there was an actual disseisin, by Nevers, of the heirs, under whom the plaintiffs claimed title, at the time of their conveyance to Farrar, in 1820 and 1821, and consequently their deeds were inoperative. Assuming the defendant, Nevers, to be a tenant in common only, and not entitled to the entierty, still he might disseise, and, as the facts proved, he had disseised the co-tenants. 2. That the statute action could not be maintained in a case like the present, where the defendant claimed to be sole owner of the premises by disseisin or by right, but it applied exclusively to cases where there was, at the time of the trespass, a recognised tenancy in common between the parties. On the first point, they cited Bracket v. Norcross, 1 Greenl. 89; Proprietors of Kennebec Purchase v. Laboree, 2 Greenl. 275; Farrar v. Merrill, 1 Greenl. 17.

Mr. Fessenden, for plaintiffs, argued e contra on both points. As to what constitutes seisin, he cited Co. Litt. 153a; Litt. § 681; Com. Dig. 15; Taylor v. Horde, 1 Burrows, 60; 1 Taunt. 569, in argument; Id. 589; 3 Bl. Comm. 176; Hargrave and Butler's notes to Co. Litt. 330b, note 285; 6 Johns. 197; Com. Dig. "Seisin," A, 2; 1 Mass. 483; 3 Mass. 219; 4 Mass. 416; 10 Mass. 146, 403. As to what constitutes disseisin, he cited Litt. § 279; Co. Litt. 181a; 3 Bl. Comm. 171; 12 East, 141; Com. Dig. "Seisin," F; Cro. Car. 303; 6 Mass. 229; 9 Mass. 96; 10 Mass. 93; 11 Mass. 163, 222; Little v. Megquier, 2 Greenl. 176; Little v. Libby, Id. 242. He farther contended, that an entry by the heirs might be presumed, if necessary to give effect to the deed to Farrar; and for this he cited Knox v. Jenks, 7 Mass. 488. Concurrent possession is no ouster. 2 Mass. 506; 10 Mass. 464. A deed by one tenant in common of the whole, is not an ouster of the others. 12 Mass. 348; 14 Mass. 434; 17 Mass.

74. As to the second point, he contended that the statute applied to all cases where the parties were really, in law, tenants in common, although one might claim the entierty. The mischief was the same, and the remedy ought to be the same.

In reply, the points made by the defendants' counsel were enforced at large.

STORY, Circuit Justice. Upon the first question, there does not seem to be any real ground for doubt. Notwithstanding the language of Lord Mansfield, in Taylor v. Horde, 1 Burrows, 60, what constitutes a disseisin is, at least in this country, well settled. I remember to have heard a learned judge (the late Chief Justice Parsons) say, that Lord Mansfield had not gone to the bottom of this matter, and had puzzled himself unnecessarily. This observation attracted my attention at an early period of my professional life, and I have made some researches to ascertain its accuracy. This is not, however, the proper occasion to investigate the subject at large. There is a distinction between disseisins, which are in spite of the owner, and disseisins at his election. But the distinction often turns upon other principles than those which have been stated. The owner cannot elect to consider himself disseised, where the act is not of such a nature as, in law, affords a presumption of a disseisin. But where an act is done, which is equivocal, and may be either a trespass or disseisin, according to the intent, there the law will not permit the wrongdoer to qualify his own wrong, and explain it to be a mere trespass, unless the owner elects so to consider it. See the cases of Jerritt v. Weare, 3 Price, 575; Proprietors of Number Six v. M'Farland, 12 Mass. 325.

In the present case the defendant, Nevers (for the other defendants are in no sense tenants in common, but mere servants), entered into the land, after it was divided in 1817, under title, and exercised all the acts of ownership of which it was capable, in its then state. He cut down the grass, and, subsequently, the trees, under a notorious and open claim of right to the entierty, under a conveyance then on record. He did not enter as a tenant in common, though, possessing the title of the eldest son as heir, he was certainly the true and legal owner of one quarter part. The possession, then, being, in the most favourable view to the plaintiffs, vacant, and the land wild, his title, under such circumstances, would without an entry have drawn to him the legal seisin of that part. But he made an actual entry into the whole, claiming the entierty, in fee and of right. His acts of ownership were such, as amounted to a disseisin of the co-tenants; for he entered as sole owner; his possession was open and notoriously adverse to them; and his acts went to a waste of the estate, and their utter disseisin. I take the principle of law to be clear, that where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have a seisin of the land co-extensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land, so described, in any other person. The seisin of Nevers, so acquired and continued, must be considered as subsisting, until an entry of the other persons, claiming title, interrupted it. No such entry is proved to have been made by the heirs, who conveyed to Farrar before their conveyance to him. Their deeds are therefore inoperative to convey the title, for they were at that time disseised. There can be no legal doubt, that one tenant in common may disseise another. The only difference between that and other cases is, that acts, which, if done by a stranger, would per se be a disseisin, are, in the case of tenancies in common, perceptible of explanation, consistently with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseisin. It depends upon the intent, with which they are done, and their notoriety. The law will not presume that one tenant in common intends to oust another. The fact must be notorious, and the intent must be established in proof. In the case at the bar, there can be no question of the intent. The title under which Nevers claims, originated under a tax sale in 1782. It embraced the whole lands belonging to the proprietary right of David Chandler, the father. Although it could not operate as a disseisin of any of the undivided lands, because the seisin of the co-proprietors of those lands was a seisin for all the proprietors; yet it establishes the fact, that Nevers, and those under whom he claims, have always since that period made an assertion of right to the entierty. His entry and possession must then be referred to that title. The heirs have never asserted any claim to the lands for fifty years by paying taxes or otherwise; and there is nothing in the case from which the court can presume an entry or seisin by them.

As to the second point, it appears to me plain that the statute meant to give the remedy, which it prescribes, only in cases of acknowledged tenancies in common. It declares, "that if any person, holding any lands in common and undivided, shall cut down &c. any trees &c. on such lands &c. or make any other strip or waste thereon, without first giving notice in writing under his or their hands unto all the persons interested therein, or to their agents &c., forty days beforehand, setting forth that he or they have occasion for, or shall enter upon and improve such lot or lots of land lying in common as aforesaid, he shall forfeit and pay treble damages, to be recovered &c. &c." The statute is highly penal, and ought not to be construed to embrace cases, which are not fairly within its terms. If it is susceptible of two interpretations, one of which satisfies the terms, and stops at the obvious mischief provided against, and the

other goes to an extent, which may involve innocent parties in its penalties, it is the duty of the court to adopt the former. What will be the result of the interpretation, for which the plaintiffs' counsel contends? It goes the length of maintaining, that an innocent person purchasing the entierty of an estate for a valuable consideration, and cutting down trees &c. in the perfect confidence of his title's being unimpeachable, might, if it should turn out defective to any, however minute an undivided portion, be subjected to the statuteable penalty. Such a result could certainly not be within the contemplation of the legislature, and would work mischiefs of a far more extensive nature, than the statute itself was designed to cure. The words of the statute are, "any person holding (that is, owning or possessing) any lands in common and undivided," which plainly suppose, that the party does not claim to hold or possess in severalty. It goes on to provide, that the notice shall be given in writing "unto all the persons interested therein." How can this be done, unless the party has knowledge that other persons have an interest in the land, and recognises their title? If the party holds, in fact, in severalty, and claims title to the entierty, it cannot be that the law compels him, at his peril, to take notice of titles of which he is ignorant, or which he utterly denies. It appears to me, that the statute remedy was meant to afford redress only in cases where the land is, in fact, held in common, and to punish any waste done by a co-tenant, who recognises the title, but wilfully does an injury to the common inheritance. Limited in this way, the language of the statute is satisfied; and construing this, as all other penal enactments are construed, I cannot perceive any ground for applying it to cases like the present. In no just sense can a disseisor, or other person holding the entierty under an adverse title, be deemed to be in privity with the other tenants in common. On both grounds, therefore, I am of opinion, that the plaintiffs are not entitled to recover; and I am authorized to say, that the district judge concurs in this opinion.

The plaintiffs, on this opinion, being delivered, asked leave to discontinue, which was accordingly granted.

PRESCOTT (UNITED STATES v.). See Cases Nos. 16,084 and 16,085.

PRESCOTT, The GEORGE. See Case No. 5,339.

PRESIDENT, ETC

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the banks, etc.; e. g. "President, etc., of the Bank of Columbia v. Jones. See Bank of Columbia v. Jones."]

PRESIDENT, The (ZANE v.). See Case No. 18,201.

Case No. 11,391.

PRESIDENT'S PROCLAMATION DECLARED ILLEGAL.

[2 Niles' Reg. 216.]

Circuit Court, D. North Carolina. May 30, 1812.

NON-INTERCOURSE—PROCLAMATION BY PRESIDENT.

MARSHALL, Circuit Justice, decided, in the circuit court of North Carolina, that the proclamation of the president of the United States of the 9th August, 1809 (after the disavowal of Erskine's arrangement), interdicting commerce with Great Britain, was not legal.

PRESSY (UNITED STATES v.). See Case No. 16,086.

Case No. 11,392.

In re PRESTON.

[3 N. B. R. 103 (Quarto, 27).] [1]

District Court, S. D. New York. July 14, 1869.

BANKRUPTCY—SCHEDULES—AMENDMENT.

Bankrupt may, by order of court, amend his schedules, even after the consideration of specification in opposition to his discharge.

[Cited in Re Heller, Case No. 6,339.]

[In the matter of Alvan B. Preston, a bankrupt.]

John Lyon, for bankrupt.

Charles A. Fowler, for creditors.

BLATCHFORD, District Judge. The specifications are none of them supported by the evidence, but the bankrupt must amend his schedule of assets by inserting his claim against the estate of John Turner. When that shall have been done a discharge will be granted.

Case No. 11,393.

In re PRESTON.

[5 N. B. R. (1871) 293.] [1]

District Court, Washington Territory.

BANKRUPTCY—CLAIM FOR COSTS—PROOF OF DEBT—WHAT COSTS ALLOWED.

A debt or principal must be proven or allowed before the costs made prior to the commencement of proceedings in bankruptcy can be proven and allowed. Costs are but incident, if there is no principal or debt there can be no incident. Where the original debt has been proved and allowed, attachment costs can be proved as a general debt against the estate of the bankrupt if made in good faith before the commencement of proceedings in bankruptcy without a knowledge of the insolvency of the party, and with no intention to defeat the operations of the bankrupt act [of 1867 (14 Stat. 517)]. Costs incurred after the commencement of bankruptcy proceedings, also costs for attaching and keeping the exempt property, disallowed.

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"On this twentieth day of July, eighteen hundred and seventy-one, before W. W. Theobalds, register in bankruptcy of said district, personally appeared John J. McGilvra, of Seattle, in the county of King and territory of Washington, attorney and agent of Benjamin Stretch, sheriff of Snohomish county, in said territory, and after by me being duly sworn, says that the said Charles H. Preston, the person by whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of the said petition, and still is, justly and truly indebted to the said Benjamin Stretch, in the sum of one hundred and ninety-eight dollars, for costs in two certain attachment cases as follows: One hundred and thirty-seven dollars and seventy-five cents, in the case of White v. Preston, and sixty dollars and twenty-five cents in the case of Waterman & Katz v. Preston, and both commenced in the said district court, and returnable at the August term, eighteen hundred and seventy-one, a copy of which said fee bills are hereunto attached and marked Ex. 'A and B,' and made a part hereof, for which sum of one hundred and ninety-eight dollars or any part thereof, this deponent says that the said Stretch, as affiant, is informed and believes, has not, nor has any person by his order had or received any manner of satisfaction or security whatever. And deponent further says that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt or demand was incurred as above stated, and that the same, to the best of his knowledge and belief, still remains unpaid and unsatisfied. Subscribed and sworn to, this twentieth day of July, eighteen hundred and seventy-one. John J. McGilvra.

"Before me, Wm. W. Theobalds, Register in Bankruptcy."

"Third Judicial District of Washington Territory—ss.

"[By WILLIAM W. THEOBALDS, Register:]

"I, William W. Theobalds, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: John J. McGilvra, who appeared for claimant, Benjamin Stretch, and George N. McCaraber, who appeared as assignee and for the creditor, and by A. N. Merrick, who represented the bankrupt and certain creditors. The question at issue was whether the claim of Benjamin Stretch be allowed, of one hundred and ninety-eight dollars, for costs as sheriff, in an attachment or attachments against certain property of said bankrupt, by him claimed as exempt, should be filed and allowed and paid to him as one of the creditors of the bankrupt's estate. Said claim of Benjamin Stretch appears more fully in paper marked 'A,' filed with me, and made a part of this statement, and was objected to, and the grounds of objection stated in paper marked 'B,' also filed with me by G. N. McCaraber, assignee, and by Charles H. Preston, through his attorney, A. N. Merrick, and made a further part of this statement. And the said parties did agree, on July twentieth, eighteen hundred and seventy-one, before me, and before Judge JACOBS, that the above question should be certified to said judge for his opinion thereon. Dated at Seattle, this July twenty-first, eighteen hundred and seventy-one."

"Comes now the assignee of the above-named bankrupt, George N. McCaraber, and objects to the proving and allowing of the claim of Benjamin Stretch, as a preferred or other claim against the estate of said bankrupt, on the following grounds: First. For the reason that the claims of the said Stretch constituted no part of the indebtedness of the said Preston at the time of filing said bankrupt's petition, March eighteen, eighteen hundred and seventy-one; and that being for costs incurred in attaching and holding property claimed as belonging to the said Preston, he has no lien under the provisions of the bankrupt act. Second. That if Stretch had a lien for his costs up to the time of filing of the petition in bankruptcy, March eighteen, eighteen hundred and seventy-one, he lost and parted with the same when he sued, and lost possession of the property, March twentieth, eighteen hundred and seventy-one. Third. That the claim of the said Stretch is not among those made provable under section nineteen of the bankrupt act, which section expressly excludes all others not mentioned in said section. Fourth. That the claim of the said Stretch cannot be admitted for this reason, that a greater part of the costs were created by attaching and holding property which was exempt under the laws of Washington Territory, and which has been set apart as exempt by the assignees for the benefit of said bankrupt. Fifth. That a part of said costs were incurred in an attachment suit of Waterman and Katz, which claim never was filed in the bankrupt court for proof. Sixth. That the bill of costs is so rendered that it is impossible to decide how much costs were incurred upon the raft of logs, (even if he had a lien,) separate and apart from the exempted property. Seventh. That a portion of said bill of costs was incurred after the filing of the petition of said bankrupt. G. N. McCaraber, Assignee."

"C. H. Preston, by his attorney, A. N. Merrick, objects to the proving and allowing of the claim of the said Stretch, on the grounds above stated; and the said A. N. Merrick also appears to raise the same objection, as the attorney in fact of the following named creditors of the said Preston, viz:—G. W. Preston, Rothschild & Co., J. F. Sheehan, C. Eisenheis, and D. N. Hyde. A. N. Merrick,

Attorney for Bankrupt and Above-Named Creditors."

George N. McCaraber and A. N. Merrick, for creditors and bankrupt.

John McGilvra, for Stretch.

JACOBS, J. Two bills of cost have been filed against the estate of said bankrupt by attaching creditors, and their allowance asked for; or rather, the claim is preferred by the sheriff who serves the attachments, and for a while kept the property in exoneration of the attaching creditors. The proof and allowance of these claims are objected to by the assignee, by the creditors who have proved their claims and by the bankrupt. The questions arising thereupon have been duly certified up by the register for decision.

1st. Then, as to the cost bill preferred by the sheriff, in the case of "Waterman and Katz," it is objected by the assignee, because the claim of "Waterman and Katz" has never been proven. In other words "Waterman and Katz," have neither presented nor proven any claim against the estate of the bankrupt. This objection is well taken, and conclusively disposes of the sixty dollars and twenty-five cents claim against the estate in that case. The debt or principal must be proven and allowed before the costs made before the commencement of proceedings in bankruptcy can be proven and allowed. The costs are but incident. If there is no principal or debt, there can be no incident.

2d. In the case of J. P. White's attachment costs, several objections are made by the assignee, and certified up by the register.

First. It has already been decided by Judge Grier, that the sheriff has no lien or preference in this cost bill.

Second. The question now is, White's debt having been duly proven and allowed, whether the attachment costs can be proven as a general debt against the estate of the bankrupt. I am of the opinion that they can be, if made in good faith before the commencement of proceedings in bankruptcy, and were made without a knowledge of the insolvency of the party and with no intention to defeat the operations of the bankrupt act. It is not objected in this case that the attaching creditor knew of the insolvency of the bankrupt, or that the attachment was made to defeat the operation of the bankrupt law. But it is objected that a part of these costs were made after the commencement of proceedings in bankruptcy.

I find in reference to the cost bill on file, that fifty-six dollars have been charged for service and return of attachment on a boom of logs, and for keeping the same to March twentieth, eighteen hundred and seventy-one. Proceedings in bankruptcy were commenced on the eighteenth, hence all attachments were dissolved at that date. Hence, I disallow two days keeping at the rate charged, (two dollars per day) and allow the rest, fifty-two dollars.

Third. The charge for attaching and keeping the oxen and camp gear turned over to the bankrupt as exempted property is all disallowed. The sale of said property was null and void. 1st, because it was made after the commencement of proceedings in bankruptcy, and 2d, because the property was not subject to attachment and sale under the laws of this territory or the bankrupt law.

The register is directed to allow, upon due proof, the fifty-two dollars specified herein, to be paid in the regular order of distribution.

[For subsequent proceedings in this litigation, see Case No. 11,394.]

Case No. 11,394.

In re PRESTON.

[6 N. B. R. (1873) 545.] [1]

District Court, Washington Territory.

BANKRUPTCY — COSTS IN ATTACHMENT — EXEMPTIONS — SETTING APART BY ASSIGNEE.

1. An attachment issued out of the state court is dissolved from the date of the filing of the petition where an order of adjudication is subsequently granted.

[Cited in brief in Goss v. Cardell, 53 Vt. 449.]

2. Costs that accrued under such attachment, prior to the filing of the petition in bankruptcy, are not a valid lien on the property unless incurred at defendant's request.

[Cited in Gardner v. Cook, Case No. 5,226; Re Hatje, Id. 6,215; Hatfield v. Moller, 4 Fed. 719.]

[Cited in Miller v. Mackenzie, 43 Md. 411.]

3. In setting apart for the use of the bankrupt exempt property, the assignee is not obliged to designate articles on which there is no lien.

[Cited in brief in Wooster v. Bullock, 52 Vt. 50.]

4. An assignee is chargeable personally with costs of the proceedings where he files a petition to have an attachment dissolved which covers property that has already been set apart by him as exempt.

In the matter of the petition of Geo. N. McConaha, assignee of the estate of C. H. Preston, bankrupt, praying that a sale made by Stretch, sheriff of Snohomish county, be set aside.

On a hearing before his honor, Judge Green, it was agreed by counsel that a statement of facts be prepared and submitted for his honor's decision, as a special case under the statute. The following statement of facts is herewith submitted and agreed to by the assignee and defendant's counsel:

First. That on the twentieth day of February, eighteen hundred and seventy-one, one-half interest in six work oxen was attached by Benjamin Stretch, sheriff of Snohomish county, in a suit brought by J. P. White, plaintiff, v. C. H. Preston, defendant. The one-half interest in said cattle was the property of the defendant in the suit. Preston and the defendant, Henry Mills, owned the other half interest. Second. That, on the

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fourth day of March, eighteen hundred and seventy-one, an order was made by the Hon. O. Jacobs, commanding the sale of said property by said sheriff (for the reason that the same was expensive to keep), and further ordered that the amount arising from said sale be deposited in the office of the clerk of the United States district court for the Third judicial district, viz., L. B. Andrews. Third. That said Stretch, in accordance with the provisions of said order, sold said property on the twentieth day of March, eighteen hundred and seventy-one, to Henry Mills, and deposited the money in the clerk's hands as directed. Fourth. That on the eighteenth day of March, eighteen hundred and seventy-one, said C. H. Preston filed his petition in bankruptcy against himself with the clerk of the supreme court, at Olympia, and on the twenty-fourth day of March, eighteen hundred and seventy-one, was adjudged as bankrupt. Fifth. That the transcript of the said petition of C. H. Preston was filed with the clerk of the Third judicial district, twenty-fourth day of March, eighteen hundred and seventy-one. Sixth. That, on the twentieth day of March, when said property was sold by said sheriff, Stretch, he had not had notice that said Preston had filed his petition in bankruptcy. Two hundred dollars was the amount realized from such sale, and was a fair price for the property sold. Seventh. The property in question has been set aside by the assignee, George N. McConaha, as exempt under the provisions of the bankrupt law.

Question 1st. Whether the filing of the bankrupt petition in the supreme court at Olympia, on the eighteenth March, dissolved the attachment and rendered null and void the sale and all proceedings subsequent at that date, or whether, under the whole circumstances of the case, the court will hold it valid. Question 2d. Whether or not the costs that accrued under the attachment, prior to the filing of bankrupt petition in the supreme court, are a valid lien upon the property in controversy, or upon the money arising from the sale thereof? If a valid lien, is it to be enforced in the bankrupt court? Or has the sheriff a right to retain the property or money until his costs are paid? Question 3d. Was the petition filed so as to work a dissolution of the attachment until the transcript was filed with the clerk of the district court and the fifty dollars paid as security for register's fees?

The judge is to pass upon the regularity of the proceedings in this matter thus far; if regular, then the costs to abide the final result, otherwise to be paid by plaintiff. No right of appeal is waived by either party.

G. N. McConaha, assignee.

McGilvra & Baxter, for defendants.

A. N. Merrick, for bankrupt.

GREEN, J. Under this special case, submitted to me on the twentieth day of June, eighteen hundred and seventy-one, it is assumed that the attachment proceedings were regular up to the time of the commencement of proceedings in bankruptcy; and that at the commencement of the latter proceedings the attachment suit had not proceeded to judgment.

I answer to the first question, that the attachment was dissolved from the date to which the assignment in bankruptcy relates —that is, from the time of the commencement of bankruptcy proceedings. The operation of the assignment in reference to the attachment was, not to avoid it ab initio, but to arrest all proceedings under it; to dissolve it as of the date of the filing of the petition in the supreme court; to leave untouched all previously accrued rights; to prevent the subsequent accrument of rights, under the attachment. From the date of the dissolution of the attachment the sheriff or other person having then actual possession of the attached property became divested of all official relation to that property, and became a simple bailee thereof to the use of the person by virtue of the bankrupt act entitled to the same. If he afterwards, by sale or in any other way, disposed of the property, otherwise than to transfer the bankrupt's estate in the same to him to whom by the bankrupt law it fell, his act had no official character, and needed to make it valid the ratification of the person having title under the law. The court will not in this proceeding hold it valid, but suggests that in order to such validity it would need such a ratification. Such ratification does not appear.

Coming to the first part of the second question: An alleged debtor cannot personally be compelled to pay costs, except of his own making, until he has been adjudged a debtor or costs have been adjudged against him. And until such judgment, of course costs not made at his instance cannot be collected out of his general property as a debt owing from him to the officer. Section 19 of the bankrupt law [of 1867 (14 Stat. 525)] contains an exhaustive enumeration of all claims that may be proved against the bankrupt's estate or any part of it. The enumeration compris es only claims owing by the bankrupt to creditors. No other kind of claim—no charge on specific property unless to secure a personal debt from the bankrupt, is good against the unexcepted articles in court; and it is just to conclude that what could not be enforced against an article if in court, cannot be a charge against it out of court, excepted by the assignee. Excepted articles have at least that measure of exemption that they would have if subject to distribution. Section 20 agrees with section 19; recognizes mortgages or pledges of real or personal estate, and liens, "for the securing of debts owing to the creditor from the bankrupt," as good charges on the bankrupt's estate, and by implication rejects all other charges.

The sheriff here has no lien answering the description of the law. His costs were at plaintiff's instance, and do not properly before judgment constitute a debt owing from the bankrupt defendant to the officer (in fact they cannot even after judgment properly be said to), and such costs could not anywhere, it is believed, before judgment, be collected by the officer against the defendant, unless, through the specific property attached. It would, indeed, be unjust to allow the sheriff to satisfy his costs out of the property of the bankrupt defendant in attachment, when those costs were incurred at the request of plaintiff, and when the suit being summarily superseded, the law creates no presumption in favor of the title of plaintiff to costs as against the defendant. Where a suit is thus superseded, the law creates no presumption in favor of either party. It might very well be, that defendant in the attachment suit would, if permitted, have been able to prove himself unindebted. How inequitable, in such a case, would be a diminution of the assets of the bankrupt, by the necessarily considerable expenses of an attachment certainly groundless, possibly malicious! It is to be noted that, under the laws of this territory, if the attaching plaintiff should fail in his attachment suit, the defendant would be entitled to a restoration of all his property attached, without diminution and subject to no lien growing out of the suit.

From these considerations, I am of opinion that the costs that accrued under the attachment prior to the filing of the bankrupt's petition are not a valid lien upon the property in controversy; unless, indeed, some of those costs were incurred at defendant's request, in which case there might be a lien for so much thereof so long as the sheriff retained the property. A release, voluntarily, of the property would be an abandonment of any lien upon it.

And this brings me to the second part of this question: The sheriff parted with the goods at his peril; his lien on them, if any he had, was lost when he let them go. Nothing less than the consent of the person entitled at the time of sale to the property could have made the sale good, and preserved the lien to take effect on the proceeds. The sale, without approval of the person legally entitled, cannot be regarded as good by this court, notwithstanding the purchaser had no actual notice of the dissolution of the attachment, and paid full value for the goods. The commencement of bankruptcy proceedings was notice to all the world of such dissolution. As the sheriff parted with the very goods attached, he could have no lien surviving, unless he sold by consent of the owner. But supposing the sale valid by consent of the proper party, I think that even then no lien could be enforced here. The property sold had been set apart by the assignee as exempt. Goods of that kind might, under readily supposable circumstances, lawfully be exempted. To the action of the assignee no exception was taken. I assume, therefore, his action in that behalf to be good. One object of the law is to place all the estate of the bankrupt in such a posture and so far in the control of the bankrupt court, that that court can fully and exclusively determine what is to be left to the bankrupt, and freely dispose of and distribute among the creditors the remainder. The estate of the bankrupt might be all personal property, and every article be subject to a lien to secure a debt owing to one or another creditor. By the operation of the law, no such lien, except at the option of its holder, would be extinguished. Every such lien would constitute for the person holding it a special property in the thing covered by the lien, be a part of that person's estate, possibly the most valuable part, and for the law to divest it might be to make one bankrupt in the endeavor to relieve another. The designation of the assignee does not, then, on the one hand, operate to divest any such lien, because that would be inequitable as we have just seen, and the bankrupt law accords the designation no such operation. On the other hand, the assignee is not obliged to designate articles on which are no lien; if he were, the bankrupt might have nothing exempted. Besides, the assignee is not a judicial officer to determine the question of lien or no lien. If the assignee should make such a designation of excepted articles as would by reason of the encumbrances on those articles be worthless, or insufficient to fulfil the beneficent design of the law in making exemption, I think the bankrupt could obtain redress by excepting to the determination of the assignee, and that such would be his proper remedy. His appeal from the assignee to the court would bring before the court the whole question of the existence and amount of the liens. But the question not being brought before the court by that mode, the bankrupt is remitted to such rights and remedies in the excepted property as any other man not a bankrupt has in his own property—with this exception, that this bankruptcy court will protect him in the enjoyment of his exempt property against all acts and claims contrary to the bankrupt law. Taking the designation of the assignee to be good, it follows that in contemplation of law the articles excepted never passed to the assignee and are not now and never have been in the possession of the court. The exemption, as well as the assignment, relates back to the filing of the petition. The excepted articles, in contemplation of law, remain the property of the bankrupt subject to all legal encumbrances. A lien on articles so excepted cannot be enforced in the bankruptcy court, because that court has not possession of the articles the lien affects. It has sent them beyond, or rather declined to receive them within, its jurisdiction, and would need to obtain jurisdiction by setting aside the ac-

tion of the assignee before it could enforce the lien. Only such liens as are on property in the possession of the court will be enforced by it. The lien the sheriff claims here cannot, as the case stands, be enforced in this court.

Question the third is answered by referring to sections 38 and 47 of the bankrupt act. Section 38 makes the filing of a petition for adjudication in bankruptcy upon which an order may be issued the commencement of proceedings under the act. Section 47 makes the fifty dollars deposit as security for register's fees merely an act preliminary to the issue of the warrant. An order of adjudication having issued, the time of filing the petition in the supreme court is the date of the dissolution of the attachment.

As to the regularity of the proceedings herein, I am of opinion that the petition filed by the assignee was improperly filed by him, inasmuch as he, having exempted the property attached was not interested in the subject matter of the petition. The special case, though not in all respects formal, is, taken together with the petition, sufficiently intelligible, and presents, by agreement of parties interested, a question properly determinable by this court.

The costs incident to the petition of the assignee, and all costs in this proceeding accrued prior to the filing of the special case, will be paid by the assignee personally; the remainder will abide the further order of the court.

[For prior proceedings in this litigation, see Case No. 11,393.]

Case No. 11,395.

PRESTON v. COOPER.

[1 Dill. 589.] [1]

Circuit Court, D. Iowa. 1871.

MALICIOUS PROSECUTION—ACTION FOR DAMAGES—EVIDENCE—PROOF.

1. Where a writ of attachment is sued out maliciously and without probable cause, and damage ensues, the defendant has a remedy on common-law principles, aside from the remedy on the attachment bond.

2. To sustain an action at common law for maliciously suing out an attachment, it is not enough to show merely that the writ was wrongfully sued out because there was no debt due. The plaintiff must show malice, want of probable cause, and damage.

[Cited in Thompson v. Gatlin, 7 C. C. A. 351, 58 Fed. 535, 536.]

[Cited in Burton v. St. Paul, M. & M. Ry. Co., 22 N. W. 300, 33 Minn. 193.]

At law.

Phillips & Phillips, for plaintiff.

N. M. Hubbard, for defendant.

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

PER CURIAM. 1. Where a writ of attachment is sued out maliciously,and without probable cause, and damage ensues, the defendant has a remedy on common law principles, aside from the remedy on the attachment bond.

2. The only remedy of the attachment defendant, it seems, is upon the bond, or by an action for malicious attachment, in which latter case it is not sufficient to allege that the writ was wrongfully procured, but there must be allegations of malice and want of probable cause.

3. Where by statute no bond in attachment was required, and none given, the defendant, in the absence of legislation giving the right, cannot maintain an action against the plaintiff in attachment, by showing merely that the writ was wrongfully sued out, because there was no debt due from him, but he must show malice, want of probable cause, and damage, as required by the principles of the common law in actions for malicious prosecution.

Case No. 11,396.

PRESTON v. GIBBONEY.

[Cited in Clark v. Gibboney, Case No. 2,821. See 29 Grat. 289.]

PRESTON (HATCH v.). See Case No. 6,208.

Case No. 11,397.

PRESTON v. McGAUGHEY.

[Brunner, Col. Cas. 174; [1] 1 Cooke, 113.]

Circuit Court, D. Tennessee. 1812.

SLAVERY—PARTICULAR ESTATE IN FEMALE SLAVE—ISSUE BORN—WHO ENTITLED THERETO.

The issue of a female slave, born during the pendency of a particular estate, are property of the remainder-man.

[Cited in McCutchen v. Marshall, 8 Pet. (33 U. S.) 241.]

On the 2d day of January, 1793, the plaintiff, Walter Preston, entered into an article of agreement with William M'Gaughey in the following words: "Articles of agreement, made and entered into, this second day of January, 1793, witnesseth, that William M'Gaughey hath sold unto Walter Preston one tract or parcel of land, lying in the Turkey Cove, in Powell's Valley, containing fourteen hundred acres, for the sum of forty-five pounds, to him in hand paid, the payment of which I hereby acknowledge to have received in a negro girl named Milly, about twelve years old; but in case the title of the land should fall through so that I cannot maintain said right to him, the said Preston, his heirs or assigns, then the said M'Gaughey shall deliver up the said negro; or in case she should be removed by death or other accident, then the said M'Gaughey

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

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

is to pay back the said sum of forty-five pounds to the said Preston, his heirs or assigns, for the true performance of which we bind, etc., etc." The negro girl was delivered up to M'Gaughey, and remained in his possession for several years, during which time she had three children. The land spoken of in the contract was ultimately lost, but after the children aforesaid were born, and after one of them had been sold by William M'Gaughey to the defendant George W. M'Gaughey. William M'Gaughey gave up the negro woman, but the defendant refusing to deliver the child, which he had purchased, Preston brought an action of detinue against him. Several questions were made at the trial by the counsel on both sides: Whether any, and if any, what estate had William M'Gaughey in the negro woman before the land was lost? Whether it was only a conditional sale? To whom did the increase belong?

Haywood & Whiteside, for plaintiff.
Cooke & Beck, for defendant.

McNAIRY, District Judge. It has been too long settled to be recalled, that if there be an estate for life in a negro woman, and pending the estate she has children, they will go to the remainder-man. Jones and Toller is a leading case, in which the most celebrated judges of North Carolina have acquiesced. Society have long acted under this as the law. All estates and family settlements have been made under the impression that this was the law; therefore, if this article of agreement can even be construed to vest a particular estate, or an estate for life, I would not break in upon a rule so long ago settled. But upon the construction of this article of agreement the court is of opinion that it was not the intention of the parties to vest any particular estate, much less an estate for life; it was a conditional sale, and to take effect only upon the condition that M'Gaughey's title to the land should prove valid. Therefore M'Gaughey is no more entitled to the issue of the negro woman, born while he had her in possession, than if he had hired her for one year. As to the pretended purchase of George W. M'Gaughey (son of William M'Gaughey), the court is of opinion that it does not vary the case, as it is in proof that he had full knowledge of the nature of his father's claim to the negro woman.

NOTE. Issue of slaves follow condition of the mother.—See McCutchen v. Marshall, 8 Pet. [33 U. S.] 240, citing case in text.

PRESTON (PLATT v.). See Case No. 11,219.

Case No. 11,398.

PRESTON v. STUART.

[Nowhere reported; opinion not accessible.]

PRESTON (UNITED STATES v.). See Case No. 16,087.

PRESTON (WORTHINGTON v.). See Case No. 18,055.

Case No. 11,399.

PRESTON v. YOUNG.

[1 Cranch, C. C. 357.] [1]

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

CONTRACTS—NOT COMPLETED—QUANTUM MERUIT.

If the plaintiff has done part of the work contracted for by an agreement under seal, and is prevented by the defendant from finishing the job, he may recover the value of the work which he has done, in an action of assumpsit.

Quantum meruit for work and labor done, (and materials furnished,) as a carpenter. The defendant proved a special agreement under hand and seal. The plaintiff offered evidence that he was interrupted by the yellow fever from proceeding with the work, and that before the fever subsided, the defendant employed another person to complete the work. The agreement was as follows: "Alexandria, July 29th, 1803. Memorandum of an agreement made, &c., that the said James Young doth agree to pay to the said Thomas Preston, $200, for building the shop as high as my dwelling, and to put in two 12-light frames, lay on 4-4 floor, and finding all the materials, glass excepted. Thomas Preston. (L. S.) James Young. (L. S.)"

The defendant prayed the court to instruct the jury, that if, from the evidence, it shall appear to them that the work, labor, and materials were done and furnished by the plaintiff for the defendant, in consequence of said written agreement between the said parties under seal, then this action of assumpsit will not lie. Which instruction, the court refused; but instructed the jury that if they should be of opinion, from the evidence, that the plaintiff was prevented by the defendant from proceeding to complete the work according to the agreement, in a reasonable time, then the plaintiff had a right to recover in this form of action, as much as he deserved to have for his work and materials. A bill of exceptions was taken by the defendant, and the judgment was reversed by the supreme court. [Young v. Preston] 4 Cranch [8 U. S.] 239.

THE COURT below, was of opinion, that Preston could support his quantum meruit, notwithstanding the written agreement. The grounds of that opinion were, that Young, by refusing to suffer the plaintiff to complete the contract, had dissolved the agreement, on his part, so that he could never have sustained an action upon it, against Preston, and if he could not have sustained an action upon it, he could not set it up to defeat the

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

action of the plaintiff. He had treated the contract as at an end, and thereby had authorized the plaintiff to consider himself absolved from its obligation. It is true, the plaintiff was not bound to abandon the contract, and might have brought suit upon it, and compelled the defendant, Young, to pay the whole $200. But he was not obliged so to do. He was at liberty to waive the contract, and sue upon the implied assumpsit. The defendant, by his own act, had abandoned the contract, and it did not lay in his mouth to insist upon it. A quantum meruit is an equitable action, and is more favorable for the defendant than action upon the contract. The case of Towers v. Barrett, 1 Term R. 133, was considered as having decided the principle that where a contract is put an end to, the plaintiff may recover back what he has advanced upon such contract. So, by analogy, it was inferred, that where labor and materials are advanced upon a contract which is put an end to, the plaintiff may recover the value of such labor and materials. And 1 Pow. Cont. 417, was relied upon as establishing the principle, that he who prevents another from fulfilling his part of the contract, can never maintain an action against the party who is thus prevented from performing. The court was therefore of opinion, that Young was, by his own act, bound to consider the contract as entirely dissolved. For although it is said that a contract under seal cannot be dissolved by parol, yet this was not a dissolution by parol, but by matter in pais. And where a cause of action arises, partly by deed, and partly by matter of fact to be proved by parol, the damages may be discharged by parol. In Giles v. Edwards, 7 Term R. 181, Lord Kenyon said, "This was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and to recover back the money that they had paid under it." Bull. N. P. 139. "If in a quantum meruit for work and labor, the plaintiff proved he had built a house for the defendant, though the defendant should afterwards prove that there was a special agreement about the building of it, viz.: that it should be built at such a time and in such a manner, and that the plaintiff had not performed the agreement, yet the plaintiff would recover upon the quantum meruit, though doubtless such proof on the part of the defendant might be proper to lessen the quantum of the damages." In the case of Atty v. Parish, 4 Bos. & P. 104, the plaintiff did not bring his action upon the ground that the special agreement was at an end, but on the ground of its being in full force, and actually offered it in evidence to support his general count. And the court of common pleas decided agreeably to the indisputable general rule of law, "that wherever the action is founded on a deed, it must be declared upon." In Cooke v. Munstone, Id. 351, there was a special count claiming damages for non-performance of a special contract; and a count for money had and received, claiming the money paid in advance upon the contract. The plaintiff, on the trial, proved a different contract from that laid in the special count, and a failure on the part of the defendant to comply with his part of it. It was decided that the plaintiff could not recover on the 1st count, because of the variance; and not on the 2d count, because a special contract, still open and subsisting, was proved on the trial. Both the cases, Atty v. Parish, and Cooke v. Munstone, fully recognize the law as laid down in Towers v. Barrett, 1 Term R. 133, and Giles v. Edwards, 7 Term R. 181, viz.: that where the contract is put an end to, the plaintiff may recover for what he has advanced on the faith of the contract; and that if the defendant prevents the plaintiff from performing his part, the latter has a right to put an end to the whole contract. See, also, Weston v. Downes, 1 Doug. 23; Payne v. Bacomb, 2 Doug. 651; Power v. Wells, Cowp. 818; and Hunt v. Silk, 5 East. 449.

PRESTON, The A. B. See Case No. 3,524.

PRETERRE (GOODYEAR DENTAL VULCANITE CO. v.). See Cases Nos. 5,595 and 5,596.

PRETTYMAN (DELAWARE R. CO. v.). See Case No. 3,767.

PREUSS (LEE v.). See Case No. 8,199.

Case No. 11,400.

PREVOST v. GORRELL.

[25 Pittsb. Leg. J. 125; 5 Reporter, 616;[1] 6 Am. Law Rec. 743; 7 Am. Law Rec. 236; 5 Wkly. Notes Cas. 151; 12 West. Jur. 369; 10 Chi. Leg. News, 228; 24 Int. Rev. Rec. 122; 2 Month. Jur. 40.]

Circuit Court, E. D. Pennsylvania. 1877.

JUDGMENTS IN FEDERAL COURTS—EXTENT OF LIEN—OTHER DISTRICTS IN SAME STATE—EXECUTION.

1. In the United States courts where a state is divided into several districts, a judgment obtained in one district is a lien upon defendant's real estate in all parts of the state. The right of lien depends upon the right of execution; and by section 985, Rev. St. [4 Stat. 184], all writs of execution may "run and be executed in all parts of the state."

2. Plaintiff has a right to concurrent execution all over the state.

3. The direction of the writ to one marshal is merely formal and of no consequence.

4. Section 985, Rev. St., construed, and the practice under it explained. Per McKennan, Circuit Judge.

Motion for an order to the clerk to issue an attachment in execution. On the seventh of July, 1877, a verdict was obtained by the plaintiff in the circuit court of the United

[1] [Reprinted from 5 Reporter, 516, by permission.]

States for the Western district of Pennsylvania, and judgment, nisi, was entered thereon the same day. A rule for a new trial was subsequently, on the 18th of August, 1877, discharged, and the judgment made absolute. [Case No. 11,404.] A certified copy of the record of the case was thereupon filed in the circuit court of the United States for the Eastern district of Pennsylvania. The plaintiff's counsel now move in this court for an order directing the clerk to issue an attachment in execution upon the certified copy filed here of the record of the judgment obtained in the Western district.

A. Sydney Biddle (with him, Bartholomew & Hughes and G. W. Biddle), for the motion.

By Rev. St. p. 174, § 915 [17 Stat. 197], it is provided that, "in common law causes in the circuit courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof, etc." It has also been held that the United States districts are to be considered as analogous to counties. Now, if we had obtained judgment in the court of common pleas of Allegheny county, we could have filed a certified copy of that judgment in the court of common pleas of Philadelphia county, and could have issued an attachment in execution in the latter court on that certified copy. Act April 16, 1840; Purd. Dig. 821. No injury can result from the fact that the same judgments exist in different counties on which executions may issue. The court in which the original judgment was obtained controls it. King v. Nimick, 10 Casey [34 Pa. St.] 298. In Baker v. King, 2 Grant, Cas. 254, it was said that where a judgment had been removed under the act, supra, into the court of another county, it had the same force, so far as regarded execution process, in the county to which it was transferred, as if originally entered there. This court is therefore bound, until the original judgment is satisfied, to allow execution to issue on the certified judgment filed here. It is true that by section 985, p. 184, of the Revised Statutes, it is provided that "all writs of execution upon judgments or decrees obtained in a circuit or district court in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from, and be returnable to, the court wherein the judgment was obtained." Under that provision we could undoubtedly issue an attachment in execution from the Western district and have it executed in the Eastern. Our contention is that we have the choice of two modes of remedy.

THE COURT (McKENNAN, Circuit Judge, and CADWALADER, District Judge). This is a new question of practice, and is not perfectly clear. It depends upon what is meant by "similar remedies" in section 915 of the Revised Statutes. The act from which that clause is taken was passed in 1872, while section 985 is taken from an act passed in 1826. As by the latter act all writs of execution may be executed throughout the state (where the state is divided into several districts), it would seem more reasonable to suppose that the clause of the subsequent act of 1872 was meant to give to the plaintiff the additional advantage of the writ of attachment (whether as a writ of execution or not) where it had not before been enjoyed, in which case the meaning of the statute would be that the plaintiff was entitled to similar writs of attachment as in the state court, but not necessarily to a completely similar use of the writ, as is contended here. This we decide to be the meaning of the statute where, as here, the plaintiff has a complete remedy under section 915, combined with section 985, without discussing the question of its meaning where the latter section does not apply, as where the districts are in different states.

Under this view the plaintiff's lien on the defendant's real estate in the Eastern district depends, not upon the certified copy he has filed here, but upon the original judgment he has obtained in the Western district, and goes back as to all real estate situated in this district to that date; for the right of lien depends upon the right of execution; and, as all writs of execution, which the plaintiff had a right to issue on his judgment, might "run and be executed in all parts of the state," by section 985, this lien was equally operative from the same date upon real estate situated in all parts of the state. Massingill v. Downs, 7 How. [48 U. S.] 768.

NOTE [from 5 Wkly. Notes Cas. 151]. This decision is of practical importance to the profession and to conveyancers, as under it searches must in future be made in both districts of the circuit court of the United States in Pennsylvania, instead of, as has heretofore been the practice, only in that in which the real estate is situated.

[See note to Case No. 11,404.]

Case No. 11,401.

PREVOST v. GORRELL.

[See Cases Nos. 11,400 and 11,402.]

Case No. 11,402.

PREVOST v. GORRELL.

[25 Pittsb. Leg. J. 125; 5 Reporter, 617; 12 West. Jur. 372; 6 Am. Law Rec. 744; 7 Am. Law Rec. 239; 5 Wkly. Notes Cas. 152; 13 Phila. 468; 35 Leg. Int. 147; 3 Cin. Law Bul. 212; 10 Chi. Leg. News, 229; 2 Month. Jur 40.]

Circuit Court, E. D. Pennsylvania. Oct. 13, 1877.

PRACTICE—EXECUTION—REV. ST. U. S. § 985.

Writs of execution from United States courts in states divided into more than one district run all over the state.

Sur application for instructions to the marshal in the execution of a writ of fi. fa. A writ of fi. fa., directed to the marshal of the Western district, had issued from the circuit court of the United States for the Western district of Pennsylvania, upon a judgment in the plaintiff's favor obtained in that court. Under this execution, property in that district had been levied upon, and the same writ was then handed to the marshal of the Eastern district, with directions that he should seize under it property in the last named district. The marshal applied to the court at chambers, for instructions, alleging that under the act of congress he was not instructed as to whether he had authority to levy under the writ directed to the marshal of the Western district, or whether an independent writ (either concurrent or subsequent) issued from the Western district, and directed to himself, was necessary.

A. Sydney Biddle, argued that the language of the act was plain. Section 985, p. 184, of the Revised Statutes [4 Stat. 184], provides that "all writs of execution upon judgments or decrees obtained in a circuit or district court, in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from, and made returnable to, the court wherein the judgment was obtained."

McKENNAN, Circuit Judge. The language of the statute is plain: "All writs of execution" are to run and be executed all over the state, where it consists of more than one district. "May" means at the plaintiff's option. He has a right to concurrent execution all over the state. It is impossible to give the words of the statute effect unless every writ is allowed to run in all the districts in the same state. The formal direction to one marshal is of no consequence, since the same act of congress which enlarges the territorial power of the writ enlarges the direction correspondingly.

[See note to Case No. 11,404.]

Case No. 11,403.

PREVOST v. GORRELL.

[3 Wkly. Notes Cas. 548; 24 Pittsb. Leg. J. 143.]

Circuit Court, E. D. Pennsylvania. April 7, 1877.

TRANSFER OF CAUSE FOR TRIAL — CONVENIENCE OF PARTY AND WITNESSES—INSUFFICIENT GROUNDS FOR REMOVAL.

Petition by defendant to remove cause from Pittsburgh, in the Western district of Pennsylvania, to Williamsport, in the same district.

The petition set forth that the suit was case for damages done to the plaintiff's colliery in Columbia county; that this suit was brought for the same cause of action as in the case of Prevost v. Gorrell, originally brought in common pleas No. 2 of Philadelphia county (reported in 2 Wkly. Notes Cas. 440), the latter action having been held by the supreme court of Pennsylvania to have been a local action, and therefore wrongly brought in the common pleas of Philadelphia county (reported 3 Wkly. Notes Cas. 366); that the trial of said cause had occupied several weeks, and that this would probably occupy an equal time; that the witnesses resided in Columbia county, and that it would be burdensome to the defendant and to his witnesses to take them to Pittsburgh, when the case might as readily be tried in Williamsport, which was more than a hundred miles nearer the residence of all parties interested.

H. M. Shick, for the petition.
A. Sydney Biddle, contra.

McKENNAN, Circuit Judge. Without the consent of both sides, I will not order a cause to be removed from where it had been brought unless for some extraordinary reason. Petition refused.

[See note to Case No. 11,404.]

Case No. 11,404.

PREVOST v. GORRELL.

[5 Wkly. Notes Cas. 149.]

Circuit Court, E. D. Pennsylvania. Aug. 18, 1877.

DRAINAGE OF MINES — ADJACENT COLLIERIES — DRAINAGE FROM ONE MINE TO ANOTHER —EASEMENTS—MEASURE OF DAMAGES.

[1. Where two adjacent coal mines were held under lease, and water flowed from one into the other through an opening wrongfully made by a prior lessee of the latter, *held* that the lessee of the former was nevertheless liable for damages resulting from the flow of all water escaping by reason of unskillful mining; from overflow from accumulations, due to insufficient pumping capacity; from overflow of water artificially conveyed from one part of the mine to another, and then permitted to escape; and for overflow of surface water entering the mine because of badly constructed surface ditches.]

[2. Under such circumstances it was the duty of defendant to provide pumping capacity sufficient to prevent the overflow from his mine, not only of the ordinary and usual drainage, but also the flow occasioned by heavy and continued rains and melting snow, which by their well-understood periodical occurrence might be anticipated.]

[3. The fact that a mine has been trespassed upon by a previous lessee of a subjacent mine who took away the wall between them, does not justify the owner of the upper mine in discharging water through the opening, if by reasonable means he can discharge it from his own mine in some other way.]

[4. The lessee of a subjacent mine cannot complain of the mere natural flow from an upper mine through an opening wrongfully made by a previous lessee of the lower mine. But the owner of the upper mine cannot conduct his operations in entire disregard of the effect of his mode of operation upon the lower mine, and he is bound to provide appropriate and reasona-

ble means to prevent the injurious escape of water into it.]

[5. In determining the damages recoverable for wrongfully permitting water to flow from one mine to another there should be included a loss of legitimate earnings, which plaintiff was prevented from making by the wrongful acts of the defendant, provided such loss of earnings is clearly proved.]

Rule for new trial.

Mr. Bailey (with him Bryson, Schick & Spinney, James Ryon, and John W. Ryon), for the rule.

A. S. Biddle, Bartholomew & Hughes, and G. W. Biddle, contra.

BY THE COURT. Trespass on the case for injuries to the plaintiff's business as a coal operator, through the defendant's alleged wilful and negligent acts in causing water to flow from his mine into the plaintiff's through a connection between the two collieries, which adjoined each other, which connection had been made prior to the plaintiff's occupation. [The case was first heard upon defendant's motion to remove cause to Williamsport for trial. Motion denied. Case No. 11,403.] The evidence showed that the plaintiff and the defendant were lessees of adjoining collieries under a common landlord; the plaintiff's lease being of the Centralia colliery, and dating from 1873; the defendant's being of the Hazel Dell colliery, and dating from 1870. The workings of the collieries had been joined in 1871 by the trespasses of one Freck, the prior lessee of Centralia, across the line of his lease, and upon the colliery of the defendant. The lower gangway of Centralia being lower than that of Hazel Dell, the flow of water was from the latter to the former colliery. Much evidence was given as to the defendant's having taken advantage of the connection to rid his mine of water by causing it to pass over to Centralia. Evidence was also given of the insufficiency of his pumping apparatus. The plaintiff gave evidence of the profits he would have made, but for the defendant's illegal acts, on the coal he mined, and also on what he was prevented from mining by the defendant's default. The situation of the two collieries is shown by the plan in Locust Mountain Coal & Iron Co. v. Freck, 1 Wkly. Notes Cas. 124.

The plaintiff, in his points, asked the court to charge: That the defendant was not responsible for the natural flow of water from his (defendant's), colliery upon the plaintiff's, which flow would have taken place through the connection between the collieries, provided the defendant had continued to mine in a skilful and workmanlike manner, but that the defendant was responsible for the results of the flow of his drainage upon the plaintiff's colliery to the extent and in the manner following, viz.: (1) For such of the drainage of the defendant's colliery as was made to flow upon the plaintiff's colliery by the use of artificial contrivances which would not have been resorted to by the defendant in the course of good and skilful mining. (2) For such of the drainage of the defendant's colliery as overflowed into the plaintiff's colliery after rising in a pool to a certain height in the defendant's colliery, provided such accumulation and overflow of water in the defendant's colliery was occasioned by the defendant's insufficient pumping capacity and bad mining. (3) For such of the defendant's drainage as he artificially conveyed from one part of his colliery to another, and thence permitted to escape upon the plaintiff's colliery; as to which last water the defendant was not exempted from responsibility by any inadequate effort or insufficient means which he might have taken to prevent the result. (4) For such of the surface water, as was introduced into the defendant's colliery by reason of badly constructed ditches upon the surface, under the defendant's control, and for which he was responsible, and was thence permitted to flow into the plaintiff's colliery, and which, if the defendant's pumping capacity had been sufficient for the requirements of skilful mining upon his part, would have been removed by him through his pumps without injury to the plaintiff. Further, that the measure of damages was the loss sustained by the plaintiff through the defendant's wrongful acts, including loss of the legitimate earnings of his business as a coal operator during the period in question, of which the jury found he had been directly deprived by the wrongful acts of the defendant, provided such loss of earnings was clearly proved. All the points containing the above propositions were affirmed.

The defendant requested the court to charge, inter alia:

(1) That under his lease he had a right to mine out all the coal therein demised by such method of good mining as he could have pursued if no connection had existed between the two collieries, and that he was not bound to change such mode of mining in consequence of the trespasses by the predecessor in occupation of the plaintiff's colliery which had resulted in the connection between the mines, especially if such change would increase the expense of mining and cause a loss of coal. Answer: The defendant undoubtedly had the right to take out all the coal within the boundaries of his lease, subject only to the requirements of skilful and careful mining; but if, by reason of the trespass of the lessee of the adjoining mine, a connection between it and his mine became practicable within the boundaries of the latter, and he made such opening, he would not be absolved from the duty of reasonable precaution against avoidable injury to such adjoining mine.

(2) That though the necessary consequence of the defendant's mining was to increase the natural flow of water towards the connection

between the mines, and through such connection, into the plaintiff's mine, and thus damage was occasioned to the plaintiff, if this method of working was simply consistent with the reasonable exercise of the defendant's own rights and sprang from no malice towards the plaintiff, the plaintiff could not maintain an action for any damage occasioned thereby. Affirmed.

(3) That the defendant was not bound to have pumping capacity sufficient to provide for more than the ordinary and usual drainage of his colliery; and that if, in cases of sudden and violent rains, a large quantity of water first accumulated in the defendant's colliery beyond the power of his pumping capacity, and thence escaped through the opening into the plaintiff's colliery, the plaintiff could not recover for the damage occasioned thereby. Answer: The duty of the defendant, as to the measure of his pumping capacity, is not limited to the ordinary flow of water assumed in this point. It extends also to the flow occasioned by heavy and continued rains and melting snow, which, by their well-understood periodical recurrence, may be anticipated. These are comprehended in the ordinary flow for which the defendant was bound to provide.

(4) That the plaintiff could not recover for profits which he might have made, but for the injuries occasioned by the defendant's unlawful acts, such profits being of a speculative nature, uncertain, contingent, and too remote. Answer: In cases founded upon tort, a tort feasor is liable for the whole loss resulting directly from his unlawful acts. He is therefore liable for loss of such profits as are a matter of computation and susceptible of definite ascertainment. In this case these are to be measured by the difference between the cost of mining and preparing coal for the market and the market price of the coal when prepared and ready for delivery, and upon such quantity as the plaintiff has satisfactorily shown to the jury he was provided with the necessary means and facilities to mine and prepare for market, and that he could ship and sell.

(5) That if Freck, the predecessor in occupation of the plaintiff's colliery, by driving his gangway upon a lower level than the gangway in the defendant's colliery, and cutting openings across his line, made the plaintiff's colliery a servient or subjacent tenement, he thereby subjected the same to the flow of all the water, which by nature rose in or flowed upon the defendant's colliery, which last colliery was, as to the plaintiff's, a dominant or superior tenement. Answer: Agnew, J., in the case of the Locust Mountain Coal & Iron Co. v. Gorrell (March 29, 1872) 29 Leg. Int. 101, as an accurate exposition of the law applicable to the facts here, stated, viz.: "When, therefore, as in the present case, the miner in the upper mine, in carrying forward his gangway, strikes into a breast which has been wrongfully worked by a trespasser up the dip of his coal vein, he is not justified in emptying the water flowing down the drain or gutter of his gangway into the opening thus struck, if by reasonable means he can carry the water across the drain into the gutter or drain leading into his own sump. * * * Good mining requires the owner of every mine to ditch his gangway and lead off the water gathering in it to his own sump, and thus to clear his mine of its enemy. There is no good reason, therefore, why the owner of the upper mine should suffer the flow of his gangway to run down upon the lower mine, when by reasonable diligence he can prevent it."

(6) That the defendant owed no duty to the subjacent (plaintiff's) colliery; that he had a clear right to mine out all his coal down to his lower gangway, and the plaintiff was bound to receive the natural flow of water from the defendant's colliery through the openings mentioned in the preceding point, or protect himself against it by leaving a sufficient pillar to prevent such flow. This rule is not modified by the mining of coal in the defendant's colliery, and the consequent subsidence of the surface at the outcrop of the vein. Answer: The defendant had a right to mine out all his coal to his lower gangway, but not in disregard of the effect of his mode of operating upon the subjacent mine. The operator of such mine cannot complain of the mere natural flow of water from the upper mine. Here again I adopt the language of Agnew, J., in the case before referred to: "When water, following the law of gravitation, after the removal of the coal in a careful and proper manner, finds its way by percolation, or through fissures unforeseen and unknown, into the lower mine, its owner cannot complain of it as an injury done by the owner of the upper mine. * * * I incline to think also that openings made before by a trespasser from the lower into the upper mine, and unexpectedly struck by the upper owner in mining, do not differ from natural fissures in the effect produced upon the lower mine." Beyond this natural flow the defendant was not absolved by the facts stated from the duty of providing appropriate, reasonable means to prevent the injurious inflow of water into the adjoining mine. The verdict was for the plaintiff for $128,808.41. This rule for a new trial was thereupon taken for the defendant.

Eo die. Rule discharged.

(See Thomas Iron Co. v. Allentown Mining Co., 28 N. J. Eq. 77, and cases cited in the reporter's note. And see Prevost v. Gorrell, [Case No. 11,400].)

[NOTE. Subsequently a motion for an order to the clerk to issue an attachment in execution was allowed. Case No. 11,400. The marshal of the Western district of Pennsylvania was directed to levy upon the property in that district, and the same writ was then handed to the marshal of the Eastern district, with directions that he should seize under it the property in that district. The marshal of that district then applied to the court for instructions as to whether he had authority to levy under the writ directed to the

marshal of the Western district, or whether an independent writ issued from the Western district directed to himself was necessary. The court held that the direction of the writ to one marshal was merely formal, and of no consequence. Case No. 11,402. Being unable to satisfy his judgment by execution at law, the plaintiff filed suits on the chancery side in aid of the execution against the defendant and others, to whom it was charged that the defendant had made conveyances of real estate for the purpose of hindering the plaintiff in the collection of his judgment. Demurrers to the bills in two of these cases were overruled. Cases Nos. 11,405 and 11,408. For a motion by one of the witnesses in this suit to be excused from appearing before an examiner for the purpose of being examined, see Case No. 11,405a.]

Case No. 11,405.

PREVOST v. GORRELL.

[7 Wkly. Notes Cas. 261; 7 Reporter, 296.] [1]

Circuit Court, E. D. Pennsylvania. Feb. 5, 1879.

EQUITY — PRACTICE — MULTIFARIOUSNESS — DEMURRER.

A bill filed by an execution creditor, in aid of execution, against his judgment debtor and others who have fraudulently combined with him to conceal his property, is not multifarious, although there is no averment of a common conspiracy between all the defendants, and though it is not alleged that each defendant was cognizant of the fraudulent acts of any of his co-defendants, other than those in which he himself took part with the judgment debtor.

Bill in equity in aid of execution at law, filed by Prevost, setting forth the following facts: The complainant had obtained a large judgment against Gorrell [See Case No. 11,404], and had then issued execution against all of his discoverable property, real and personal, within the state of Pennsylvania, the sale of which left a large part of the judgment unsatisfied. The bill alleged that Gorrell had owned large quantities of real estate, which during the pendency of Prevost's suit against him, and prior to judgment therein, he had fraudulently transferred to the other defendants respectively, without consideration, and with notice of his fraudulent intention, for the purpose of evading payment of the judgment. The bill stated specially various instances of these alleged fraudulent transactions, and averred a general fraudulent intention on Gorrell's part directed to the accomplishment of the particular fraud of injuring the complainant by depriving him or delaying him in collecting his judgment debt. The bill did not, however, allege a common conspiracy between all of the individuals who had received the alleged fraudulent conveyances, merely stating that Gorrell, the debtor, had carried out his general unlawful purposes by fraudulently conspiring with each of the other defendants separately as to each of their conveyances respectively. The bill alleged the impossibility of adequate relief without discovery, and prayed discovery and such reconveyances as the court might direct after taking testimony and a hearing, and the complainant submitted himself to such directions as the court might order, that an equitable division of the debtor's estate amongst creditors might be made. The defendants filed a demurrer on the ground of multifariousness.

The case was first argued before CADWALADER, District Judge, and subsequently reargued before McKENNAN, Circuit Judge.

Mr. McMurtrie and James Ryon (with them L. W. Smith, Swain, Kaercher, Mann & Brightly), for the demurrer.

The bill is multifarious because it joins distinct claims together in one suit. This proceeding, which is for discovery, joins with the principal debtor, Gorrell, twenty-four other persons between whom no common conspiracy to defraud the complainant is alleged, and to whom no common fraudulent motive is imputed. This is a bold attempt, not only to condense twenty-four proceedings in one, but to obtain as against each defendant whatever advantage has accrued to the complainant from any other defendant's testimony. Counsel will attempt to use the declarations and testimony of one complainant against the rest; and if it be answered that this cannot be done until the common fraud is shown, the demurrer is at once shown to be well founded, for the test of whether the bill is good is whether the defendants are so connected that one's testimony will affect the others. Moreover, if no damage were to result from testimony applicable in one case being used in another, observe the hardship. Each defendant must provide himself with counsel, and watch the testimony taken at each meeting, whether it relate or not to the allegations against him. The cost, labor, and time wasted are ill compensated by the costs of the case if the complainant fails, and even if he succeed each defendant is unjustly treated by joining with his case a score of others. In Maryland (Dunn v. Cooper, 3 Md. Ch. 46) the difficulty was felt and the principle recognized, though the decision was, for special reasons, in the complainant's favor; and in Metcalf v. Cady, 8 Allen, 587, the very point was decided in our favor. In that case a bill in equity was filed by the assignee of an insolvent debtor against several defendants to set aside mortgages upon different parcels of real estate executed to them respectively to avoid the provisions of the insolvent law. The bill was held multifarious.

A. Sydney Biddle (with him Hughes & Farquhar, Mr. Bartholomew, and Geo. W. Biddle), contra.

The rule is admittedly one of convenience, and the question in each class of cases is therefore, on which side do the advantages preponderate (1 Daniell, Ch. Pl. & Prac. 334)? Where one general right only is

[1] [7 Reporter, 296, contains only a partial report.]

claimed by the bill, it matters not that the various defendants have distinct interests, as in the well-known fishery case (Mayor of York v. Pilkington, 1 Atk. 282, cited Ld. Red. 182). And see City of London v. Perkins, 3 Brown, Parl. Cas. (Tomlin's Ed.) 602. But where the bill is by a creditor to enable him to obtain satisfaction of a judgment at law, which he has been hindered in doing by the acts of the judgment debtor combining with the other defendants respectively, the objection for multifariousness has always been overruled. Brinkerhoff v. Brown, 6 Johns. Ch 139; Fellows v. Fellows, 4 Cow. 682; Boyd v. Hoyt, 5 Paige, 65; Chase v. Searles, 45 N. H. 511; Trego v. Skinner, 42 Md. 432; Jacobus' Ex'r v. Jacobus, 20 N. J. Eq. 49; Gibbs v. Larrabee, 23 Wis. 495; Gaines v. Chew, 2 How. [43 U. S.] 642; Snodgrass v. Andrews, 30 Miss. 472; Lord Foley v. Carlon, 1 Younge, 373; Bartee v. Tompkins, 4 Sneed, 636; Randolph v. Daly, 1 C. E. Green [16 N. J. Eq.] 314; Jones v. Frost, 42 Law J. Ch. 47. And the reason is that in each case the proceeding is in reality an equitable execution. The property of the judgment debtor is still his, wherever the title may be, to satisfy the plaintiff's execution. The wrong is one, although perpetrated by many hands. It is the judgment debtor's fraudulent treatment of his property to injure the plaintiff. Again, if the complainant were to sue the principal debtor in twenty-four separate suits, the debtor might justly complain that an action had been split up into a great number, and might plead to each for the nonjoinder of essential parties. Granted the inconvenience to these defendants in this proceeding, it is not outweighed by the difficulties in the plaintiff's way if he were to separate his suits, and would not the judgment debtor be a loser by such a mode of procedure?

McKENNAN, Circuit Judge. This case was once argued at great length before Cadwalader, District Judge, in my absence, and although he at first entertained considerable doubt whether the objection of multifariousness was not well founded, he was afterwards convinced that the objection was untenable, and communicated his views to me. That fact would have great influence with me in determining a matter belonging to a branch of jurisprudence in which Judge Cadwalader was so pre-eminently skilled. But, after hearing the arguments of counsel, I must say that my own judgment concurs entirely with his in this matter. The rule is one of convenience. Defendants must not be oppressed by permitting the joinder of independent causes of action in one bill. This is the case where there is but one defendant, and he is sued for matters wholly distinct in their nature. But, as has been said, there is no absolutely unvarying rule upon the subject, and whether the bill is multifarious must be determined in each case. Now, where the complainant, a judgment creditor, seeks the aid of a court of equity against his debtor, showing that by the latter's fraud he is unable to proceed successfully at law, there is but one cause of action, the debtor may have put the property beyond his control by conveying it to many different hands. What matters it that each co-defendant was unaware of the details of the conduct of the other co-defendants, provided he united with the judgment debtor to defraud the complainant? Each separate fraudulent conveyance was part of the one general act complained of, and the complainant was bound to proceed against all the debtor's property, it matters not in whom the nominal title might be, in one proceeding, if he could do so. The demurrers are overruled, and the defendants are ordered to answer in thirty days.

[See note to Case No. 11,404.]

Case No. 11,405a.

PREVOST v. GORRELL et al.

[7 Wkly. Notes Cas. 264.]

Circuit Court, E. D. Pennsylvania. April 30, 1879.

PRACTICE—TAKING OF TESTIMONY.

1. Place of taking testimony, under special circumstances, where witness resides in a different place from the examiner.

2. Sur motion by one of the defendants to have his testimony taken in Philadelphia.

This was a proceeding in equity in which the matter had been referred by the court to the official stenographer of the Schuylkill county court, as examiner to take testimony. The examiner and two of the complainant's counsel lived in Schuylkill county; the other counsel of the complainant resided in Philadelphia. This defendant, Mr. Audenried, lived in Philadelphia; and being subpœnaed by the complainant to appear before the examiner at Pottsville, that his testimony might be taken on behalf of the complainant, he refused to appear, and made affidavit to the foregoing facts, and further stated that his going to Pottsville for the time necessary to have his testimony taken would greatly injure his business, and would greatly embarrass and annoy him, and cause him much loss.

Mr. McMurtrie, for the motion.

Two of the complainant's counsel live here. It would be very unjust to compel this defendant to go to Pottsville when he can be examined here quite as readily, and his going there would greatly injure his business.

A. Sydney Biddle and G. W. Biddle (Hughes & Farquhar and Mr. Bartholomew with them), contra.

The question is merely one of convenience. Our colleagues who are conducting this ex-

amination live in Pottsville, and if Mr. Audenreid is examined here, they must come here for that purpose. The examiner resides in Pottsville.

McKENNAN, Circuit Judge. The witness must appear before the examiner unless the court excuse him. Ordinarily this would not be done, but here there are special reasons stated in the affidavit, which are uncontradicted, from which it appears that the witness would be subjected to severe loss if he were forced to go to Pottsville. As some of the complainants' counsel live in Philadelphia, which is not only the witness' residence, but the place of holding court in the district, and as no inconvenience in taking Mr. Audenreid's testimony here before a commissioner is shown, the motion is allowed.

[See note to Case No. 11,404.]

Case No. 11,406.

PREVOST v. GRATZ et al.

[1 Pet. C. C. 364.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1816.[2]

TRUSTS—HOW ESTABLISHED — PROOF — DECLARATION OF TRUST—GAINS AND PROFITS—TRUSTEE'S PURCHASE—DEED — ERASURE — PRESUMPTION OF ACQUIESCENCE.

1. To establish a trust, the proof lies on the party who alleges it.

2. Where the grantee in a conveyance of a tract of land, had in an account between him and the grantor, made out subsequent to the execution of the deed, given the grantor credit for the proceeds of the sale of part of the land conveyed by the deed, this credit was held to amount to a declaration of trust, so as to repel the idea that the conveyance was intended to be absolute.

[Cited in brief in Miltenberger v. Morrison, 39 Mo. 75.]

3. When land is conveyed for a consideration which is to be afterwards ascertained by the price at which the grantee may sell it, there arises a resulting trust to the grantor, until the sale is made; and the grantee becomes a trustee, subject to all the equitable rules, which would have bound him had the deed in express terms empowered him to sell for the use of the grantor; and the grantor has in both cases an equal interest in the sale, and the same claim upon the best exertions of the grantee to obtain the highest price which the property will command.

4. Whatever profit is gained by a trustee by the sale of property held by him in trust, belongs to the cestui que trust; and a trustee can never purchase or hold the property, discharged of the equity of the cestui que trust to call upon him, in a reasonable time, to account for the profit, or to have a re-sale.

[Cited in Boynton v. Dyer, 18 Pick. 6. Cited in brief in Kennedy v. Keating, 34 Mo. 26; Meanor v. Hamilton, 27 Pa. St. 139.]

5. A purchase made by a trustee is not absolutely void, but voidable at the election of the cestui que trust, if he is dissatisfied with it, and in a reasonable time afterwards impeaches its validity. But, if after a knowledge of it he acquiesces in it, the sale will be valid both in courts of law and equity.

[Cited in brief in Appeal of During, 13 Pa. St. 234. Cited in Ashhurst's Appeal, 60 Pa. St. 315. Cited in brief in Campbell v. McLain, 51 Pa. St. 202; Fisher's Appeal, 34 Pa. St. 30. Cited in Hays v. Heidelberg, 9 Pa. St. 210. Disapproved in Marshall v. Carson, 38 N. J. Eq. 256. Cited in McKean & Elk Land & Imp. Co. v. Clay, 149 Pa. St. 277, 24 Atl. 213; Wesley Church v. Moore, 10 Pa. St. 273.]

6. An erasure in a deed, not shown to have been made before execution, is sufficient to avoid it, upon the plea of non est factum. The presumption in such a case is, that the alteration was made after the execution of the deed; and the same presumption arises in reference to a settled account, in which an erasure or alteration has been made.

[Cited in Bailey v. Taylor, 11 Conn. 535; Beaman v. Russell, 20 Vt. 210; Hills v. Barnes, 11 N. H. 397; Pipes v. Hardesty, 9 La. Ann. 152; Somerset v. Rehoboth, 6 Cush. 320.]

7. Length of time affords no presumption of an acquiescence in a purchase by a trustee of property held by him in trust, unless it appears that the cestui que trust had notice that the trustee had become the purchaser.

[Cited in Piatt v. Oliver, Case No. 11,115.]

8. A creditor who, after he is so, becomes a trustee for his debtor, does not by that act, impair rights which he had antecedently acquired against him.

9. If a trustee, executor or agent, buy in debts due by his cestui que trust, testator, or principal, for less than their nominal amount, the benefit arising therefrom belongs to the person for whom he acted.

[Cited in Oakley v. Hibbard, 1 Pin. 683.]

10. A court of equity will not permit a person acting as a trustee, to create in himself an interest opposite to that of his cestui que trust or principal. It is otherwise if the trustee was a creditor before the trust arose, in which case, he may pursue the same legal means for enforcing payment of his debt, which would have been open to him, had he not become a trustee.

11. There is no principle of equity which will invalidate the title of a trustee to land, which the law has taken out of his hands, and which he has purchased from one appointed to sell it. The reasons which forbid a trustee to purchase the trust property, where he is the seller, do not apply to such a case.

[Cited in Allen v. Gillette, 127 U. S. 596, 8 Sup. Ct. 1334.]

[Cited in Chorpenning's Appeal, 32 Pa. St. 317.]

12. Where a party has had it in his power to ascertain the importance of testimony before the hearing of his case, and has neglected to do so, and to obtain the testimony, a court of equity will not grant a re-hearing of the case, on the ground that the importance of the evidence had been ascertained after the decision, although the justice of the case might be promoted by it.

[Cited in Ruggles v. Eddy, Case No. 12,118; De Florez v. Raynolds, Id. 3,743; Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 333; Spill v. Celluloid Manuf'g Co., 22 Fed. 96; Witter v. Sowles, 31 Fed. 10.]

[Cited in Mulock v. Mulock, 28 N. J. Eq. 18; Lyon v. Bolling, 14 Ala. 753.]

This case was argued at the last term, and was taken under advisement until the present. It was a bill filed on the equity side of the court, by [George W. Prevost,] the administrator (de bonis non) with the will annexed of George Croghan, deceased, against

[1] [Reported by Richard Peters, Jr., Esq.]

[2] [Reversed in 6 Wheat. (19 U. S.) 481.]

the administrators of M. Gratz, deceased, who was one of the executors of G. Croghan. The bill charges M. Gratz and B. Gratz (whose representatives are no parties) with sundry breaches of trust committed during the life time of G. Croghan, and with waste, mismanagement, and neglect of duty in relation to the assets which came to their hands, after G. Croghan's death.

WASHINGTON, Circuit Justice. Many of the charges contained in this bill, were either abandoned, or not seriously pressed at the argument of this cause, and the complainant's counsel confined themselves in a great measure, to the three following grounds of complaint, and to some others of minor importance. The first respects a tract of land lying on Tenederah river, in the state of New York, which was conveyed by G. Croghan to M. Gratz, as containing 9050 acres, by deed bearing date the second of March, 1770, for the consideration of £1800. The complainant contends, that this conveyance, though absolute in form, was made under a secret trust, to be sold for the benefit of the grantor; and upon this ground he claims the amount for which this land was afterwards sold by M. Gratz, after the death of G. Croghan, with interest thereon to this time. This trust is denied by the defendants, or, if it existed, they contend that the land was afterwards purchased by M. Gratz, the trustee, with the consent of G. Croghan, for the sum of £850. 15s., New York currency.

The questions then are, first, was the sale to M. Gratz absolute as the conveyance purports, or was it in trust to sell for the benefit of the grantor; and if in trust, then, secondly, is the complainant entitled under all the circumstances of the case, to claim the amount for which the land was actually sold by M. Gratz?

First. To establish a trust, the proof lies on the complainant. The deed upon the face of it is absolute, and contains covenants unusual and unnecessary in a deed of trust, such as a general warranty, and others, in relation to the title of the grantor. It is also worthy of remark, that the other absolute deeds made by G. Croghan to B. Gratz, were followed soon after by a declaration of trust, which was not made as to this land.

But, strong as these circumstances are to warrant a presumption consistent with the terms of the deed, they are outweighed by the account of the 30th of March, 1775, settled between M. and B. Gratz and G. Croghan, in which the latter is credited for "cash received in August, 1774, from Howard, for the tract of land on Tenederah, sold to him by M. Gratz, with interest from the day of sale, —— pounds." The account found amongst the papers of M. Gratz, which is endorsed to be a copy of that delivered to G. Croghan, differs no otherwise from it, than by the pen being drawn through the word "Howard," and the interlining of the words "Michael Gratz." But if either of those persons was the purchaser from G. Croghan, in August, 1774, it follows that M. Gratz could not have been the purchaser in the year 1770. This credit, therefore, amounts to a clear declaration of the trust, so as completely to repel the idea that the conveyance to M. Gratz at that time, was intended to be absolute. What the real intention of the parties was, it is not easy from the evidence to determine. Yet it seems not improbable, that the land was conveyed as a security for a debt which was then due by G. Croghan to M. Gratz, that he might sell the same and apply the proceeds towards its discharge. It appears by the before mentioned settled account of March, 1775, that at the time this conveyance was made, G. Croghan was considerably indebted to M. and B. Gratz; and a memorandum subjoined to another account, No. 13, in the handwriting of G. Croghan, goes strongly to show that this land had been conveyed to M. Gratz, for a price not determined upon between the parties, but which was to be afterwards fixed, either by a sale, or by the subsequent agreement of the parties. But, whether the intention of this conveyance was that which has been just mentioned, or that which the complainant's counsel contend for, is not important in the view of a court of equity. For, where land is conveyed for a consideration which is to be afterwards ascertained by the price at which the grantee may sell it, there arises a resulting trust to the grantor until the sale is made, and the grantee becomes a trustee, subject to all the equitable rules which would have bound him, had the deed in express terms empowered him to sell for the use of the grantor. In both cases, the grantor is equally interested in the sale which the grantee is to make, and has the same claim upon his best exertions to obtain the highest price which the property will command.

Second. The next question is, is the complainant entitled, under the circumstances of this case, to claim all the profit which M. Gratz has made by the resale of this land? Nothing can be more just than the principles which govern a court of equity in relation to purchases made by the trustee of the trust property. He pledges his honest endeavours to promote the interest of the cestui que trust, by disposing of the property on the best terms which he can obtain; and equity will not permit him to create an interest in himself, inconsistent with this pledge, and which may seduce him from an upright fulfilment of his duty. Whatever profit is gained by the sale belongs to the cestui que trust, and the trustee can never purchase or hold the property discharged of the equity of the cestui que trust, to call upon him, in a reasonable time, to account for this profit, or to have a re-sale. The purchase, however, by the trustee, is not absolutely void, but voidable at the election of the cestui que trust, if he is dissatisfied with

it, and in a reasonable time after a knowledge of the fact impeaches its validity. But, if after such knowledge he confirms the sale, or unequivocally acquiesces in it, it will stand ratified by those general principles, which prevail as well in courts of law as of equity. M. Gratz, the trustee, having in this case, become the purchaser of this land, the only remaining inquiry is, was the purchase confirmed or acquiesced in by G. Croghan, after a full knowledge of that fact?

Here, unfortunately, we are left to wander very much in the field of conjecture. The evidence in the cause sheds a very feeble light upon this transaction. The account of the 30th of March, 1775, found amongst the papers of G. Croghan, informed him, that the land had been sold to a man of the name of Howard, for a certain sum, which in August, 1774, had been received by the trustee, and therefore interest is credited. This was not true in fact, as the evidence in the cause most abundantly proves, and as the defendants' counsel are compelled to admit. The counterpart of this account retained by M. Gratz, and found amongst his papers, having the signature of G. Croghan to it, states that M. Gratz, and not Howard, was the purchaser. If the erasure of Howard's name and the substitution of M. Gratz, were made prior to the signature of G. Croghan, the evidence of his knowledge of the fact that M. Gratz was the purchaser, and of his acquiescence, would be complete. This then is the turning point of this part of the cause. When were the erasure and interlineation made? If after the accqunt was seen and approved by G. Croghan, it was, to say the least of it, a very unwarrantable act, and such as the court would feel very unwilling, lightly, to impute to a man whose character has not been impeached, and who appears to have possessed during his life, the undiminished confidence of G. Croghan, and, after his death, of Colonel Prevost. Neither does it appear that he could have had any sufficient inducement to practise a deception of this kind, as it would seem from the evidence, that the price of the land credited in the account was about its real value at the time of the alleged sale of it. But, notwithstanding these favourable circumstances, and the strong inclination of my mind, as a man, to acquit M. Gratz of improper conduct in this transaction, I feel myself compelled, as a judge, to say, that the weight of the evidence is against the defendants. I find upon the face of the before mentioned account, retained by M. Gratz, as a copy of the one delivered to G. Croghan, a material erazure and interlineation, made in the hand writing of M. Gratz himself; and all this unexplained by any evidence whatever tending to show at what time they were made. These of themselves would be sufficient, upon the plea of non est factum to a deed, to avoid it. The presumption in such a case is that the alteration was made after the execution of the deed, and the same presumption arises in reference to a settled account. But, in this case a counterpart of the account was delivered to G. Croghan, and remained in his possession, in which no such erazure and interlineation appear. Were this a deed, then, what further evidence could be required, to prove that the alteration had been made by M. Gratz, after the signature of G. Croghan, than to produce the counterpart, and to show the variance?

It was said in behalf of the defendants, that the account delivered to G. Croghan, was probably made out by B. Gratz at Pittsburgh, where it bears date, under a mistake of his, that his brother had in fact sold the land to Howard; and that a parol contract for such a sale may have been made, but was not carried into execution; in consequence of which, the correction was made by M. Gratz, with the assent of G. Croghan, after he received the counterpart of that account. These conjectures may possibly be all true, but they are inconsistent with the evidence which the accounts themselves furnish, and there is not a solitary circumstance in the cause to countenance them. Both accounts bear date at Pittsburgh on the same day, and the one retained by M. Gratz, having the signature of G. Croghan, is, by an indorsement on it in the handwriting of M. Gratz, declared to be a copy of the account delivered to G. Croghan. The necessary presumption, then, is that the one account was delivered, and the other received the signature of G. Croghan, at the place and on the day so stated.

Upon the whole, I am brought to this conclusion, that G. Croghan did not know, and therefore could not confirm or acquiesce in the purchase by M. Gratz, so as to bar his equitable title to call for an account of the profit made of this property by his trustee. The antiquity of this claim—the apparent satisfaction of G. Croghan with the price at which the land was credited by M. Gratz—and the injustice of giving to the representatives of G. Croghan so enormous a profit as the subsequent rise in the value of this land would afford—have been strongly pressed upon the court by the defendants' counsel, as reasons for rejecting this claim. But length of time affords no presumption of an acquiescence; without which, or an express confirmation by the cestui que trust, the trustee can acquire no valid title, unless it appears that the cestui que trust had notice that the trustee had become the purchaser. Now in this case, there is not only the absence of all evidence of such notice, but the account left with G. Croghan, was calculated to impress him with a different belief, and to put a stop to all inquiry. If G. Croghan was informed of the fact, yet, from the absence of evidence to prove that he was so, the conclusion of law must necessarily be against the defendants, they will suffer as many others have done, from a similar cause. M. Gratz might easily have placed his title beyond the possibility

of danger, by taking some written acknowledgment from G. Croghan to sanction it; and his omission to do this, proves, either that he was chargeable with inexcusable negligence, or that no notice was given to G. Croghan, who was the real purchaser. If no such notice was given, then the land never did belong to M. Gratz, and there can be no hardship in compelling his representatives to account with the real owner, for the profit made by their testator, upon the sale of property to which he had no title, with interest on the same.

The second ground of complaint respects a judgment obtained by the representatives of W. M'Ilvaine, against G. Croghan, which was purchased by B. Gratz, during the life of G. Croghan, and was by him assigned to one of the defendants, who, under one or more executions issued on that judgment, became the purchaser of sundry tracts of lands, formerly the property of G. Croghan.

The material facts are as follows:—On the 30th of March, 1769, G. Croghan gave his bond to W. M'Ilvaine for the sum of four hundred pounds, which debt, by the will of M'Ilvaine, became vested in his widow, who afterwards intermarried with John Clark. A judgment was obtained upon this bond against G. Croghan, in the year 1774 or 1775, in the name of Wm. Humphreys, the executor of M'Ilvaine, and a fieri facias was issued thereon, returnable to April term, 1775. In March preceding the return day, B. Gratz purchased this judgment from Clark, and received an assignment thereof, for which he gave his own bond for three hundred pounds, with interest. B. Gratz having failed to discharge the whole of this bond, was sued by Clark, and a judgment was recovered against him, in the year 1794, for eighty-nine pounds six shillings and ten pence, the balance due, which sum was afterwards paid by M. Gratz. Sometime in the year 1800, B. Gratz assigned the judgment against G. Croghan to his nephew, Simon Gratz, one of the defendants, partly in consideration of natural affection, and partly in consideration of the above sum paid by M. Gratz. Simon Gratz having thus become the beneficial owner of this judgment, proceeded to issue executions thereon, after the death of G. Croghan, under which sundry tracts of land, amounting in the whole to about 1600 acres, were seized and sold, and were purchased by Simon Gratz for about 1000 dollars. On the 16th of May, 1775, G. Croghan, by two deeds of that date, for a valuable consideration expressed therein, conveyed to B. Gratz about 45,000 acres of land; but, by a declaration of trust, executed by B. Gratz on the 2d of June, 1775, he acknowledged that these deeds were intended to be in trust, to enable the said B. Gratz to sell the said lands, and with the proceeds to discharge certain enumerated debts, due by G. Croghan, amongst which is that of Clark; and B. Gratz covenanted to account with G. Croghan for the sales of these lands, as soon as he could dispose of them. Upon these facts, it is contended by the complainant's counsel, that B. Gratz ought to be considered by this court, as having purchased the above judgment with the trust funds, and consequently for the benefit of G. Croghan; and that even if it was purchased with his own money, still, being a trustee for Croghan, the purchase should be considered as having been made for his benefit, entitling B. Gratz to claim no more than the sum which he actually paid, and to retain the same out of G. Croghan's estate, the whole of which is charged with the payment of his debts. That Simon Gratz, being an assignee of this judgment, with notice of the trust, and without a valuable consideration paid for the same, can stand in no better situation than the assignor did, and ought therefore to be treated as a trustee for the estate of G. Croghan, of the lands which he purchased under the executions issued on that judgment, and be entitled to claim, merely the sum actually paid by B. Gratz, with interest.

It is to be observed in the first place, that there is not the slightest evidence on which to ground a presumption, that this judgment was purchased with trust funds. B. Gratz gave his own bond for the 300 pounds, at which time he and M. Gratz were considerably the creditors of G. Croghan; and it further appears by the exhibits in the cause, that the accounts between these parties, were regularly settled from time to time, leaving at each settlement a balance against G. Croghan. Neither did any funds arise from the trust property, no part of the same having at any time been sold by the trustee.

As to the argument predicated upon the admission, that the purchase was made upon the credit and with the funds of B. Gratz, I hold it to be altogether untenable. B. Gratz became the purchaser some months before the date of the conveyances to him, of the 45,000 acres of land, and I am yet to learn upon what principle of equity it is, that a creditor, who after he is so, becomes a trustee for his debtor, does by that act impair or affect rights which he had antecedently acquired against him. I admit the soundness of the doctrine laid down by the complainant's counsel, that if a trustee, executor, or agent, buy in debts due by his cestui que trust, testator, or principal, for less than their nominal amount, the benefit gained thereby belongs not to him, but to the person for whom he acted. A court of equity will not permit a person, acting as a trustee, to create in himself an interest opposite to that of his cestui que trust or principal. But this doctrine is inapplicable to the case of a fair bona fide creditor, who became so, prior to the assumption of his fiduciary character. In such a case he is entitled to claim the full amount of what was due from his cestui que trust, &c. and the latter has no right to inquire how much the former paid for it; so too, the

trustee, &c. may pursue all legal remedies for enforcing payment of the debt, which would have been open to him if he had not become a trustee.

It is said, however, that the declaration of trust of 2d July, 1775, contains a promise to discharge this very debt out of the trust property, as soon as the same could be disposed of. But it was not disposed of, and there are the strongest reasons for believing that it was altogether unsaleable. Independent of the doubts which clouded the title, it would seem sufficient to observe, that B. Gratz had the strongest temptations to sell, and even to sacrifice this property, if it had been possible to dispose of it upon any terms.

It is further contended, that the power of attorney given by G. Croghan, to B. and M. Gratz, dated the 10th of July, 1772, constituted them trustees of all his lands, with unlimited power to sell them and to pay off his debts. It is in this part of the case, that I experience the difficulty of deciding satisfactorily to myself in consequence of the antiquity of these transactions, and the death of all those who might have explained them. What became of this power of attorney, and why it was never acted upon, are questions which no evidence in the cause enables me to resolve. There are, however, strong reasons for presuming, that the powers vested in these agents, were found unproductive of any useful results; and, that the instrument which bestowed them, was afterwards delivered back to G. Croghan, or remaining with the Gratzes was considered by all the parties as a blank paper. This conjecture is strongly countenanced by the fact, that this paper, as well as the deeds of May, 1775, was found amongst the papers of G. Croghan, after his death. These very deeds furnish themselves the most persuasive evidence in support of this presumption. For if the general power to sell the whole of G. Croghan's lands, continued in force up to the year 1775, there could have been no necessity for giving to one of those agents, an authority to sell a part of them. The fact, that no part of those lands was sold by the agents, or by Croghan himself, without a complaint having been uttered by the latter, that appears, is nearly conclusive to prove that they were unsaleable.

Another point insisted upon by the complainant's counsel under this head is, that G. Croghan was not in reality a debtor to M'Ilvaine, inasmuch as there was found amongst Croghan's papers, a bond of M'Ilvaine to him, dated the 5th of March, 1769, with condition that M'Ilvaine should by a certain day re-convey to Croghan, certain lands lying in Virginia, which Croghan had conveyed to M'Ilvaine in trust for the payment of a particular debt, or in case it should not be in his power to make such conveyance, then to pay to Croghan the sum of £400. It was contended, that this bond being found uncancelled amongst the papers of the obligee, proves that neither of the conditions had been performed. The short, but conclusive answer to this argument is, that the condition of this bond was to be performed in the year 1770, and that if it was broken by the failure of M'Ilvaine to make the re-conveyance, M'Ilvaine became in that year a debtor to G. Croghan in the sum of £400 the equivalent; yet Croghan suffered judgment to pass against him, and execution to issue in the year 1775, after which he lived about seven years, without having brought a suit on the bond, or asserted in any manner whatever a right to the money. If after a lapse of so many years, and under these strong circumstances, the court is not bound to presume against the existence of this debt, I know of no instance in which such a presumption ought to be made. If in truth the debt was really due, the charge of neglect is fairly imputable to Croghan, but not to his executors. Upon the whole I am of opinion, upon this point, that the complainant is entitled to no relief.

The next question for consideration is, whether the complainant is entitled to call upon the defendants for an account of the personal estate of G. Croghan, which came to the hands of B. and M. Gratz, his executors, or which they might have received? As to the estate, of which an inventory was duly returned, it appears that the whole of it was sold and accounted for by Mr. Powel, another of the executors. There is not the slightest evidence that any of the testator's lands were sold by his executors, and the charge in the bill that such sales were made, is denied in the answer, so far as the defendants could deny it. The only question therefore is, whether an account ought to be directed of the credits stated in the exhibit E., taken after the death of G. Croghan? The bill calls upon the defendants to say, whether all or any of these debts were collected by the executors. In their answer, the defendants state, that they do not know or believe, that any of them were collected, but that they believe, that the whole of them were desperate at the time of G. Croghan's death, or were merely nominal, being unsupported by any evidence or liable to offsets, to their full amount. The debts contained in this list, consist of specialties and notes for the payment of money, bonds with collateral conditions, and open accounts. The complainant's counsel contend, that it is incumbent on the defendants, to show, that these debts were desperate or not due, or that the executors used due diligence to recover them and were unable to do so; that having failed to establish either of these grounds of excuse, the executors became personally liable for the amount of those debts. If I thought that by directing an account, the auditor could throw any light upon this subject, which does not appear in the present state of the cause, I might feel it a duty to make such an order. But it is manifest from the answer and ex-

hibits now before the court, that the defendants can furnish no further explanations, than they have already given; and it would therefore be improper to expose the parties to this additional expense.

The question is, whether under all the circumstances of this case, the defendants ought to be compelled to account for the credits stated in exhibit E.? And this I am now prepared to decide. What are those circumstances? G. Croghan died in the year 1782, at which time almost the whole of these debts, which were not specialties, were barred by the act of limitation; and the most modern of even the specialties, had been due nine or ten years. Though a very large land-holder, it is most obvious that Croghan was always in want of money and was considerably involved in debt. The power of attorney to B. and M. Gratz in 1772, and the subsequent deeds of trust, together with exhibit F. afford strong evidence of these facts. B. and M. Gratz were at all times his creditors, and were therefore under the strongest temptation of interest, not only to sell his lands, but to collect these debts. The necessities of Croghan were such as to stimulate him during his life to similar exertions, and to withhold indulgencies from his debtors. Upon what other ground can we account for the failure of all these parties to collect these debts, than this; that for some reason or other, payment of them could not be enforced? Soon after the death of Croghan, Colonel Prevost, residuary devisee by marriage with his only child, came to Pennsylvania; where he resided for some years, and interfered so extensively in the affairs of the estate, with the free consent and approbation of B. and M. Gratz, that he would appear from his correspondence with those gentlemen, to have been the active and they merely the nominal executors. So early as the year 1784, he called upon the executors for a statement of the affairs of the estate, and no doubt received it, as we hear of no complaint from him against these executors at any time; but on the contrary they appear throughout, to have possessed his entire confidence and friendship. There is every reason to believe that he had at all times free access to the papers relating to the estate, and made such use of them as he thought proper. After aiding the executors for ten or eleven years to wind up the business of the estate, he withdrew altogether from further participation in their duties, intimating his opinion, that any further exertions would be unavailing. Such appears most clearly to have been the opinion of the executors, who it appears were obliged to advance their own money for the small sums necessary for prosecuting such suits as were instituted, and for defraying their travelling expenses. From the year 1793, we hear no more of Colonel Prevost, and in the year 1812, thirty years after the death of G. Croghan, this suit was brought. If there ever was a case, where presumptions ought to be made in favour of executors, this is surely one. If Colonel Prevost had been under any disability to investigate the conduct of those gentlemen, or if he had been denied information necessary for him to possess, different considerations would have resulted. But no such disability or ignorance is even pretended, and I therefore feel myself compelled to say, that the circumstances of this case do so fully support the allegations of the answer in relation to these debts, that an account ought not to be directed. Under this head, it may be proper to notice a claim which was made by the complainant's counsel, though not seriously pressed, in relation to a tract of land purchased by M. Gratz at a sheriff's sale, under a judgment and execution of one Spears; for the profit made upon which, it was contended the defendants ought to account.

But I conceive that the rule laid down in respect to the Tenederah lands, does not apply to this case. I know of no principle of equity which will invalidate the title of a trustee to land, which the law has taken out of his hands, and which he purchased from one appointed by the same authority to sell it. This is precisely like the case of an executor, who purchases at a sheriff's sale the personal property of his testator, seized and sold under execution. The reasons which forbid a trustee from purchasing the trust property, where he himself is the seller, do not apply to such a case. An account has also been asked of 18,580 acres of land, which were conveyed by G. Croghan to M. Gratz, by deed dated the 29th of April, 1779, under a suspicion which the counsel entertain, that this sale was not a real one. The answer to this claim is, that there is not the slightest evidence to countenance this suspicion; and there is no reason for supposing that a reference to the auditor, will throw any additional light on this subject.

I shall therefore decree an account of the profits made by M. Gratz, upon the purchase and sale of the Tenederah land, with interest thereon, allowing to the defendants all just discounts, and dismiss the bill as to all the other matters contained in it.

After the decree was pronounced in the above case, the defendants applied for a rehearing, upon the ground of after discovered evidence. The affidavit stated, that since the decree, the defendants upon examining the papers in their possession, were led to conclude that a Mr. Symons of Baltimore might know something in relation to the Tenederah land, in consequence of which they had called on him and obtained his affidavit. This affidavit states that G. Croghan knew that those lands were purchased by M. Gratz. Cases cited against the motion; 2 Freem. 31; 1 Hen. & M. 177; Coop. Eq. Prac. 91.

WASHINGTON, Circuit Justice. I feel the strongest disposition to grant this motion be-

cause I am satisfied that the justice of the case would be promoted by it. But I should deviate so far from well established rules, and should open a door to such glaring inconveniencies, that I dare not indulge this inclination. The means whence this information was obtained, leading to this newly discovered evidence, have been in the possession of the defendants from the time when this suit was instituted; and their not obtaining the evidence, in time for the hearing, arose from the inattention or misjudgment of the defendants, neither of which is sufficient to entitle the party to a re-hearing.

[NOTE. Pursuant to an order of the court, a reference was made to an auditor. This cause then came before the court on exceptions to the auditor's report. The first exception taken by complainant, to so much of the report as debits him with the sum of £484 and interest from the 30th of April, 1775, was allowed. The second exception taken by complainant, to the refusal of the auditor to allow to the complainant a credit for £198. 2s., was overruled. The third exception to the allowance of too large a credit to the defendants for agency, commission, etc., was also overruled. Case No. 11,407. On appeal to the supreme court the decree of this court was reversed. 6 Wheat. (19 U. S.) 481.]

Case No. 11,407.

PREVOST v. GRATZ.

[3 Wash. C. C. 434.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1818.

EQUITY—VARIANCE BETWEEN ARGUMENT AND BILL—COMMISSIONS TO TRUSTEES.

1. In equity.—If the bill alleges a particular fact, the plaintiff cannot, in argument, urge that the fact is otherwise. He is bound by his admission; unless, before the hearing, he obtains leave to amend.

2. Under the equity of the act of assembly of Pennsylvania, which allows commissions to executors, trustees are entitled to claim them. Quere, if trustees are so entitled, by the general rules of courts of chancery.

[Cited in Muscogee Lumber Co. v. Hyer, 18 Fla. 698.]

[This was a bill in equity by George W. Prevost against Simon Gratz, Joseph Gratz, and Jacob Gratz, for a discovery and account of all the estate of G. Croghan.]

WASHINGTON, Circuit Justice. This case comes before the court, upon exceptions to the auditor's report, made in pursuance of the decrees of the 14th of October, and the 12th of November, 1816.

The first exception is taken by the complainant, to so much of the report, as debits him with the sum of £484, and interest from the 30th of April, 1775; being the purchase money for 10,000 acres of land on Raccoon creek, improperly credited to George Croghan, as it is alleged by the defendants, in the account settled between the said Croghan, and Barnard and Michael Gratz, on the said 30th of April, 1775.

The defendants endeavour to maintain the correctness of this debit, upon the ground, that the deed made by George Croghan to Barnard Gratz, of the above tract of land, bearing date the 10th of July, 1772, though absolute in form, was, in its origin, intended to be in trust for the said Barnard Gratz, to sell the same for the benefit of the creditors of the grantor; or, if not so, that it was converted into a trust, either by a subsequent agreement between the parties to it, or by the tacit acquiescence of Major Prevost, the husband of the only daughter, and residuary devisee of George Croghan; and also of the complainant, in the declarations of that fact, stated in the list of George Croghan's papers, taken by Marache and two others, on the 25th of September, 1782, in which this deed is styled a "deed in trust"; and, in the subsequent deed of Barnard Gratz, containing a more solemn declaration of the trust, bearing date the 12th of November, 1800. After the most mature examination of this subject, we are compelled to pronounce our dissent from these positions; but, as we shall decide the point, upon entirely different grounds, it will be unnecessary to be more particular in stating our reasons for this opinion.

The bill contains an acknowledgment of the fact, that this deed, though absolute in form, was in reality intended to be a deed in trust; which the answer admits. The allegations of the bill are, that George Croghan made to Barnard and Michael Gratz, or to one of them, various absolute deeds of his lands lying in Pennsylvania and New-York, to enable him to sell the same for the use of his creditors, or of himself; and amongst other exhibits, made parts of the bill, a reference is made to a declaration of trust, dated the 2d of June, 1775, made by George Croghan and Barnard Gratz, in relation to two other tracts of land, and also to the before-mentioned declaration of trust, of the 12th of November, 1800, relative to the tract in controversy; "in which," the bill states, "the trust aforesaid is in part acknowledged." It also refers to the list of papers taken on the 25th of September, 1782, as an exhibit to show which were the title papers of George Croghan, which came to the possession of Barnard and Michael Gratz; and the fifth interrogatory asks, if George Croghan did not make conveyances of lands to Barnard and Michael Gratz, which were absolute upon their faces; but which were in fact, trusts as before mentioned? Now let the fact of the trust be how it may,—the plaintiff having in his bill alleged, that this was in reality a deed in trust, it is not competent to him, to deny it in argument, or to disprove it by evidence; because, by such a mode of proceeding, he would deprive the defendant of the opportunity, by his answer and proofs, to show that the deed was, in reality, such as the bill admits it to be. The allegations and

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

proofs must agree;—neither the plaintiff, nor defendant, can allege one thing, and prove the contrary. If an allegation has been made by mistake, it can only be rectified before the hearing, by a motion to amend.

This being the situation of the complainant's case, in reference to this point, the next question is, are the defendants entitled to claim the amount of the consideration, stated to have been paid for this land, as a credit against the sum for which they are liable, under the decree? The decree in substance is, that the representatives of Michael Gratz, shall account for and pay to the complainant, the profit made by their intestate, by the sale of the tract of land called "Tenedera," or "Unadilla," over and above the sum for which George Croghan was credited, in the account of the 30th of March, 1775, with interest, &c.; making all just allowances for commissions due to Michael Gratz, or for advances made by him or by the defendants, on account of the estate of George Croghan; and allowing generally, all just credits to which the defendants were entitled. The purchase money for this land, was credited by George Croghan, in that account, as so much paid to him by Barnard and Michael Gratz; and it must therefore be considered as advanced by Barnard and Michael Gratz, for Barnard Gratz, which, it is to be presumed, he has accounted for; and if not, his estate is answerable for the amount. If, therefore, the estate of George Croghan be bound to repay that sum to any person, it can only be to the legal representatives of Barnard Gratz. But they are no parties to this suit;—they can receive neither benefit nor injury, by any decree which the court can now make. We must, therefore, allow this exception.

The next exception taken by the complainant to the report, is to the refusal of the auditor to allow to the complainant a credit for £198. 2s., received by Barnard Gratz, on account, as it is alleged, of George Croghan; and because he has allowed the defendants a credit for the balance due by George Croghan, to Barnard and Michael Gratz, according to the account of the 9th of November, 1781, without deducting the amount so received by the said Barnard Gratz. There is certainly some obscurity in relation to the transaction to which this exception applies; but as the circumstances relied upon by the complainant, to show that the note of R. L. Hooper was placed in the hands of Barnard Gratz by George Croghan, to enable him to collect the same for his use, are very slight and unsatisfactory; and the endorsement of the note in blank, is prima facie evidence of a transfer of it to Barnard Gratz, for value received at the time; or possibly, it might have been in satisfaction of money due from George Croghan to Barnard Gratz;—we cannot consent, after a lapse of so many years, to allow this sum to be offset against the balance of account, due by George Croghan to Barnard and Michael Gratz; particularly, as there is not the slightest evidence, to prove that this was a partnership transaction, or that Michael Gratz had any thing to do with it. This exception, therefore, is to be overruled.

The complainant's third exception is to the allowance of too large a credit to the defendants, for agency, commissions, &c., in relation to the land, for the sale of which the defendants were required by the decree to account. Without intending to meddle with the question, whether a trustee is entitled to commissions upon the general principles which prevail in courts of equity, we think he is so in this state, under the equity of the act of assembly; which allows them to executors, &c.; and such, we understand, has been the practice. Indeed, this point appears to be decided by the decree, which directs all just allowances to be made for commissions due to, and advances made by, Michael Gratz, on account of the estate of George Croghan. It must be acknowledged, that the rate which the commissions allowed by the auditor, bears to the sum for which the land was sold, appears to be considerable. But, as we have not the evidence before us of which the auditor had the benefit, and must therefore either confirm his report in relation to this subject, or set it aside altogether, and refer it again to him, we shall embrace the former branch of the alternative, and overrule this exception.

The above reasons apply with increased weight to the complainant's fourth exception, to the allowance made by the auditor to the defendants, for certain advances made by Barnard and Michael Gratz; which exception is of course disallowed.

The defendants' first exception, is to the manner in which the auditor has charged the interest on the two sums of £484 and £747. 12s. 6d.; the former being the consideration for the 10,000 acres of land, on Raccoon creek; and the other for the Unadilla land. The £484 being discarded from the account altogether, by the opinion before given upon the complainant's first exception, there can, of course, exist no question as to the interest on that sum. As to interest on the other sum, the court approves of the mode adopted by the auditor, of charging interest upon the principal sum, from August, 1774, to the 5th of March, 1795, so as to avoid the giving to the defendants the benefit of compound interest, as claimed by them. This manner of stating the account is in strict conformity with the intention, as well as with the letter, of the decree, which directs, that the defendants shall account for the profit made by Michael Gratz, by the sale of this tract of land, over and above the sum for which George Croghan was credited, in the account settled on the 30th March, 1775. All that was to be done, then, was to take this sum from that account and to credit it with legal interest, in the account directed by the decree, without further attention to the subsequent accounts, which the parties had settled.

The second exception taken by the defend-

ants, is to the disallowance of a credit of £180 specie, in April, 1779, with interest from that time, as claimed by the defendants, being the amount credited by Barnard and Michael Gratz to George Croghan, in the account settled on the ——— as the consideration of 18,580 acres of land, conveyed by George Croghan to Michael Gratz, with a general warranty.

The ground of this exception, is an alleged defect in the title of George Croghan to this land, which appears to be in the possession of adverse claimants; and for the recovery of which, ejectments have been brought, and are now depending. As this alleged defect of title is altogether without proof, and it does not appear that Michael Gratz, or those claiming under him, have been evicted by title paramount; this court, sitting as a court of equity, can afford the defendants no relief, either by decreeing a repayment of the purchase money, or by withholding from the complainant a sum equivalent thereto, until the title at law has been decided. It is a question purely of common law jurisdiction; and to that tribunal we must refer the defendants, should the covenant of warranty be violated.—This exception, therefore, cannot be sustained.

The third exception of the defendants, being embraced in one of the complainant's exceptions, and already decided, is of course overruled.

[On appeal to the supreme court, the decree of the circuit court was reversed. 6 Wheat. (19 U. S.) 481.]

Case No. 11,408.

PREVOST v. HEALY.

[7 Wkly. Notes Cas. 263.]

Circuit Court, E. D. Pennsylvania. April 19, 1879.

EQUITY JURISDICTION—BILL TO REMOVE A CLOUD FROM TITLE—DEMURRER—PRACTICE—ENTRY OF "JUDGMENT NISI, FOUR DAYS," MEANING OF.

An entry of "judgment nisi, four days," was made in the United States circuit court in a common law suit, upon the day of the verdict for the plaintiff. This judgment was subsequently made absolute, a motion for a new trial being dismissed. In the interval the judgment debtor conveyed to a stranger realty situated in the United States district where the judgment was entered. The plaintiff having subsequently purchased his debtor's title at a marshal's sale under his own execution, brought a suit in equity against his debtor's grantee for the cancellation of the deed of conveyance, as being a cloud on his title. The bill averred that the complainant was in possession. On demurrer, *held*, the complainant had shown a sufficiently good prima facie uncontradicted title, to support the bill.

Bill in equity, filed by Prevost v. Daniel Healy, averring that complainant had purchased at marshal's sale, on December 21, 1877, under a judgment obtained by him on July 7, 1877, against one Gorrell, certain real estate in Clarion county, therein described. The judgment of July 7, 1877, was entered upon the day of the verdict, and was in the following form: "Judgment nisi, 4 days." A motion for a new trial was dismissed, and the judgment made absolute on the 18th of August, 1877. [Case No. 11,404.] On the 14th of July, 1877, Gorrell conveyed this real estate to the defendant Healy, as the bill alleged fraudulently, to avoid paying the complainant his judgment. At the time the judgment was obtained, and from thence to the filing of the bill, the premises had been in the hands of lessees, who had complied with the conditions of the lease, and given the owner no ground for re-entry. The bill, however, averred possession in the complainant, and alleged that the outstanding title to the premises, in Healy, the conveyance to whom by Gorrell had been recorded in Clarion county, was a cloud on the complainant's title and prayed that the court would direct Healy to deliver it up to be cancelled, etc. Demurrer for want of equity.

L. W. Smith and James Ryan, for demurrer.

This is an attempt to have the title of the complainant to this land determined by a bill in equity, instead of by an ejectment. As a matter of fact, the complainant has never been in possession of this land, nor has he received any rent for it. The original lessees paid the rent to Healy after the judgment of July 7th, and afterwards, in consequence of this litigation, have paid it into court.

(BUTLER, District Judge. Do these facts appear in the bill, which the demurrer admits to be true?)

No, but a reference to them is necessary that the position of the parties may be understood. Now it is well settled that the relief sought for here cannot be obtained unless the complainant is in possession, and then only where the outstanding title is not actively pressed. It is only where the title in the complainant to the land is clear, and connected with possession, that he has a right to ask in equity for a removal of the cloud. Orton v. Smith, 18 How. [59 U. S.] 265; Polk v. Pendleton, 31 Md. 124; Harrington v. Williams, 31 Tex. 460; Bunce v. Gallagher [Case No. 2,133]. And see, also, Bisp. Eq. 515; Story, Eq. Jur. 700, note; Munson v. Munson, 28 Conn. 582. Here the title asserted is bad on the face of the bill. The complainant alleges a judgment nisi on July 7th. The meaning of that entry is this: "Judgment for the plaintiff, unless in four days a motion for a new trial is made." Such a motion was made within four days, and, although afterwards dismissed, it discharged the judgment nisi. The complainant's title, therefore, rests upon the judgment of August 18, 1877, prior to which time Healy had purchased the land from Gorrell, viz. July 14, 1877.

(McKENNAN, Circuit Judge. The meaning of the entry of "judgment nisi four days" is not what you suppose. Its effect is that unless a motion for a new trial is made

within four days, which is succeeded by an order for a new trial, the judgment is to stand from its date, instead of from the date when the motion is dismissed or the rule is discharged.)

The entry was irregular. It is not known in practice, and there is no rule of the United States courts authorizing it.

(McKENNAN, Circuit Judge. The practice is a common one in the United States court in the Western district of Pennsylvania.)

A. Sydney Biddle (with him Lin Bartholomew), contra.

(1) As for the objection that this is a substitute for an ejectment, the answer is that the bill asserts the plaintiff to be in possession, and this is admitted by the demurrer.

The defendant could have raised the defence by setting the facts upon a plea.

(2) As for the second argument, we admit that unless the plaintiff's title as set forth in the bill is clear and indisputable, the bill must be dismissed. But the complainant's title is plain. He bought on December 21, 1877, at marshal's sale, Gorrell's title to realty, under a judgment obtained July 7, 1871. The purchase vested the property in the purchaser, so as to avoid all intervening encumbrances since the judgment, and of course avoided Healy's title, even if his purchase had been bona fide, as the conveyance to him was dated July 14, 1877.

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

THE COURT. We are satisfied that the demurrer must be overruled. The only question of importance is whether the complainant's bill avers possession, and shows a clear title. This we think is the case. It may be that the complainant is not really in possession, and so, though entitled to the ownership, has begun this suit prematurely. But this the record, which alone we can look at, does not show. The bill avers possession, and this is admitted by the demurrer.

Demurrer overruled.

[See note to Case No. 11,404.]

PREVOST (HEALY v.). See Case No. 6,297.

PREVOST (PETERS v.). See Case No. 11,032.

PREWETT (LABITUT v.). See Case No. 7,962.

PREWETT (WILSON v.). See Case No. 17,828.

Case No. 11,408a.

In re PRICE.[1]

[3 Dill. 514, note.]

Circuit Court, W. D. Missouri. Sept. 28, 1875.

BANKRUPT ACT—NUMBER AND AMOUNT OF CREDITORS REQUIRED TO JOIN—INDIVIDUAL AND PARTNERSHIP CREDITORS.

[Partnership debts are also individual debts of each member of the firm. In estimating the number of creditors and the amount of indebtedness represented in the creditors' petition against a bankrupt member of a firm, it is necessary to take into account the partnership creditors and the amounts due them.]

[Appeal from the district court of the United States for the Western district of Missouri.

[In the matter of Thomas D. Price, a bankrupt.]

MILLER, Circuit Justice. The only question necessary to decide in this case, is whether the required number of creditors holding the required amount of debts provable under the bankrupt act have joined in the creditors' petition. In proceedings in bankruptcy against a member of a firm the debts due from the partnership are debts of each member of the firm, and are to be considered in determining the question as to whether a sufficient number of creditors, holding a sufficient amount of debts provable under the bankrupt act, have joined in the creditors' petition for an adjudication of bankruptcy against any member of such firm. The partnership creditors stand in the same relation to a member of such firm as do his individual creditors, so far as the required number of creditors and amount of provable debts are concerned in such proceedings. It does not sufficiently appear from the record in this case, that one-fourth at least in number of the partnership and individual creditors of said Price, the aggregate of whose debts, provable under the bankrupt act, amounts to at least one-third of the debts so provable against him, have joined in the creditors' petition.

Therefore it is ordered that the judgment of the district court of the Western district of Missouri, adjudicating Thomas D. Price a bankrupt, is reversed, and the cause remanded to said district court for further hearing, with leave to the parties to amend their pleadings and procure the signature of the required proportion of creditors of the debtor, and that the petitioning creditor pay the costs of the proceedings under his bill of review. Reversed.

[In 3 Dill. 514, this case is published as a note to In re Israel, Case No. 7,111.]

[1] [Reprinted by permission.]

Case No. 11,409.

In re PRICE.

[4 N. B. R. 406 (Quarto, 137).] [1]

District Court, S. D. New York. Feb. 8, 1871.

BANKRUPTCY—CAUSES FOR REMOVAL OF ASSIGNEE —EMPLOYMENT OF COUNSEL BY REGISTER.

1. An assignee who fails to deposit funds in his hands belonging to the estate of which he is the assignee, as required by the rules of court; who suffers the foreclosure of a mortgage, neglecting an opportunity to purchase it at less than its face; is guilty of similar neglect in regard to a judgment; pays money out of the estate to satisfy the judgment after a levy by the sheriff; pays seven per cent. interest while he is loaning moneys belonging to the estate at six per cent., and also fails to comply with the directions of the register, as required by the bankrupt act and rules of court, will be required to show cause why he should not be removed from his trust.

2. Register directed to employ counsel to represent the estate of the bankrupt at the hearing of the order to show cause.

By JOHN W. LITTLE, Register:

I, the undersigned register, in charge of the above bankruptcy, do hereby bring to the notice of this court the failure by Stewart Young, the assignee in said bankruptcy, to comply with the provisions of the rule of this court, adopted November 13, 1869 (3 N. B. R. 304, see rule), although the said assignee has, from time to time, had his attention called to said rule by the undersigned, and said assignee absolutely refuses to make and file any account whatever in the above matter.

In connection with the foregoing certificate the undersigned respectfully makes the following statement to the court of the condition of the estate of the above bankrupt, which has but recently come to his knowledge. Stewart Young was duly chosen assignee in the above bankruptcy on the 8th day of November, 1869; such choice was uly approved, and an assignment of said ankrupt's effects has been duly made to im; said estate consisted of both real and personal property, which were incumbered by mortgages. Soon after said assignment, said assignee entered upon, took possession of, and sold, all the assets of said estate, for about fourteen thousand dollars, without any order or direction from said court, but said assignee has not yet delivered a deed to the purchaser of said real estate; that the undersigned is informed by said assignee that he has received a considerable portion of said price, and still holds the same in his possession, never having deposited it, or any part thereof, as required by the rules of this court. That since said sale and the proceeds thereof came into the hands of said assignee, he has suffered an action to be commenced in the supreme court of the state of New York to foreclose a mortgage "past due" on the real estate of said bankrupt, which, at time of sale, said assignee agreed with the purchaser thereof, to pay out of the proceeds of the sale of said real estate; and a judgment of foreclosure and sale, with a large amount of costs to be entered therein at the circuit of said court by default, and said real estate is now advertised to be sold by the sheriff of Orange county under said judgment of foreclosure and sale, on February 11, 1871; that the owner and holder of said mortgage, before said action was brought, and before judgment thereon, offered to accept from said assignee a sum less than the principal secured thereby, without suit and without judgment, but said assignee refused to compromise the same. That said Stewart Young also suffered another judgment to be taken against him at the same circuit by default, by reason of an action taken, commenced in said court against him individually, to recover the amount of a debt against said bankrupt, secured by a chattel mortgage on certain personal property belonging to said estate, which had been taken and sold by said assignee as a part of the assets of such estate; that such judgment also includes a large amount of costs. The owner and holder of the mortgage in this case also offered to compromise the claim before said circuit and before judgment for a less sum than the amount secured by his mortgage, but said assignee refused to compromise the same; that said last mentioned judgment was taken against the said Stewart Young individually at said circuit by default, and that said Young has since paid the same out of the estate of said bankrupt to the sheriff of the county of Orange. That said assignee has loaned the funds belonging to said estate upon individual notes without security, and without authority or directions from the court, at the rate of six per cent. per annum interest, and paid interest out of the estate on secured debts at the rate of seven per cent. per annum.

BLATCHFORD, District Judge. The register will forthwith have issued out of this court and served on the proper parties, an injunction restraining the sale before named, advertised for February 11th, 1871. He will also cause to be served on the assignee a copy of the foregoing papers, with a notice requiring said assignee to show cause before this court on Saturday, February 18th instant, at 11 o'clock a. m., why he should not be removed from his trust. The register will employ on behalf of the estate some proper counsel to represent the estate and the creditors in the matters set forth in the foregoing papers.

[1] [Reprinted by permission.]

Case No. 11,410.

In re PRICE et al.

[6 N. B R. 400;[1] 1 Md. Law Rec. 236.]

District Court, D. Maryland. Jan. 3, 1872.

BANKRUPTCY—EXEMPTION OUT OF PARTNERSHIP ESTATE.

An exemption, in accordance with the provisions of the fourteenth section of the present bankrupt act [of 1867 (14 Stat. 522)], cannot be allowed to an individual partner out of the partnership estate, as such exemption can only be allowed in case there is a surplus after paying the partnership creditors.

[Cited in Re Handlin, Case No. 6,018; Re Hughes, Id. 6,842; Re Corbett, Id. 3,220.]

The state law allows an exemption of one hundred dollars. John S. Price applied for this allowance out of the partnership assets.

GILES, District Judge, passed the following order upon the petition, to wit:

Ordered, this third day of January, eighteen hundred and seventy-two, that the within petition be and the same is hereby dismissed, as it appears from the report of the register that the partnership assets are not sufficient to pay the partnership debts. By the thirty-sixth section of the bankrupt act, it is provided that after deducting out of the whole amount of the partnership assets the whole of the expenses and disbursements, the net proceeds shall be appropriated to pay the partnership creditors, and if there be any surplus, it shall be appropriated to the separate estate of each partner, and then only this surplus becomes liable to the provisions of the fourteenth section of said act, in reference to exemptions under state laws.

Case No. 11,411.

In re PRICE et al.

[8 N. B. R. 514.][2]

District Court, E. D. Michigan. 1873.

BANKRUPTCY—PETITION FOR ADJUDICATION—BURDEN OF PROOF.

By the express terms of section forty-one of the bankrupt act [of 1867 (14 Stat. 536)], the burden is upon the debtor to prove to the satisfaction of the court that the facts set forth in the petition filed against him for an adjudication of bankruptcy are not true, and unless he does so the petitioner is entitled to judgment.

[Cited in Re Jelsh, Case No. 7,257; Re Rogers, Id. 12,003.]

On the petition [of Price & Miller] for adjudication of bankruptcy and denial. No demands for trial by jury. The case coming on for hearing the debtor's counsel contended that the petitioner must first make out his case by proofs, the same as in any other issue. The petitioner's counsel, on the other hand, contended that, by the express terms of section forty-one of the bankrupt act, the burden was upon the debtor to prove to the satisfaction of court that the facts set forth in the petition are not true, and that unless he does so the petitioner is entitled to judgment. This is the only question for decision.

Mr. Griffin, for petitioners.

Mr. Pond, for debtor.

LONGYEAR, District Judge. If the solution of the question presented depend upon the language of section forty-one alone, there could be but little or no difficulty in the matter. The language used is plain and explicit, and scarcely admits of construction to ascertain its meaning, or of doubt as to what that meaning is. Section forty-one, in full, is as follows, that portion now under consideration being in italics: "Section forty-one. And be it further enacted, that on such return day or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy; *and, if upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true,* or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceedings, *the proceedings shall be dismissed* and the respondent shall recover costs."

Language more explicit could hardly have been used to indicate the intention of congress to cast upon the debtor the burden of disproving the facts set forth in the petition, in the first instance, and before the petitioner could be called upon to make any proof whatever other than that filed with his petition. The necessary result of this would be that if the debtor failed to make such proof the proceedings would not be dismissed and an adjudication of bankruptcy would follow. When we consider this language, however, in connection with language used in another part of the act, and in the prescribed forms, and in view of the somewhat anomalous character of the requirement, it must be confessed that the question is not entirely free from doubt.

Section forty-two provides that "if the facts set forth in the petition are found" (upon such hearing or trial, of course) "to be true * * * the court shall adjudge the debtor to be a bankrupt," etc.; and the adjudication, according to the prescribed form, number fifty-eight, must expressly recite that it was so found. The form of adjudication, under section forty-one, dismissing the proceedings, number sixty, requires that it shall be re-

[1] [Reprinted from 6 N. B. R. 400, by permission.]

[2] [Reprinted by permission.]

cited that "it was found that the facts set forth on the petition were not proved." Looking at the language used in these three several instances, without reference to section forty-one, I think it would be quite apparent, and that it would be so held, that it was contemplated by congress and by justices of the supreme court that the petitioner should at the hearing prove the facts set forth in the petition, and that if he failed so to do the proceedings should be dismissed at his cost. It will be readily observed, however, that such a meaning is clearly repugnant and utterly irreconcilable with the plain meaning of section forty-one. Such meaning should therefore not be attached to the language unless it is clear, beyond all question, that it will admit of no other; because, by a well recognized rule of construction, all the parts of a statute must be so construed, if possible, as to make them harmonious and consistent with each other. Let us see, therefore, how these seemingly contradictory provisions appear in the light of other provisions of the act which will now be noticed.

By section forty it must be made to appear to the court "that sufficient grounds exist" for filing the petition before an order to show cause can issue, or any proceedings whatever be had upon the petition. The requirement is absolute, and compliance with it is essential. "Probable cause" is not sufficient. It must be proved by legal evidence that such grounds exist, or, in other words, that the facts set forth in the petition are true, before a debtor can be brought into court to show cause against the same or be in any manner disturbed in his affairs by reason of the filing of the petition. How rigorous this proof is required to be is indicated by the forms of depositions prescribed to be filed with the petition. (Nos. 55, 56.) In the first place he must prove his claim, and in the second place the act or acts of bankruptcy alleged. That the justices of the supreme court so understand the requirement of section forty is further indicated by the recital in the form prescribed by them for the order to show cause. (No. 57.) That order commences with this recital: "Upon filing proofs sustaining the allegations of the petition," etc. The order to show cause requires the debtor to appear at a time and place specified "and show cause, if any there be, why the prayer of said petition should not be granted." Construing sections forty and forty-one together, therefore, the plain meaning is simply this: The court, addressing the debtor, says to him: "It has been proved that the facts set forth in the petition filed against you are true, and you will be adjudicated a bankrupt thereon unless you shall appear at such a time and place and prove to the satisfaction of the court or of the jury, as the case may be, that the said facts are not true;" and I can see no escape from this conclusion.

In the light of this conclusion, I think all apparent repugnancy and inconsistency between sections forty-one and forty-two and between the former section and forms fifty-eight and sixty, entirely disappear. If the debtor fails to disprove the facts set forth in the petition, as is incumbent on him under section forty-one, there is certainly no repugnance or inconsistency in saying that those facts, already sustained, as we have seen by proofs on file, "are found to be true," as contemplated by section forty-two and form fifty-eight. And, on the other hand, if the debtor does disprove the facts set forth, there is, it seems to me, no substantial repugnance or inconsistency in saying that it "was found that the facts set forth in the petition were not proved." It is but another form of stating that the proofs filed with the petition, and by which the facts set forth in it were maintained, have been overcome by other proofs. The language selected may not be the most appropriate to express the idea, but it is certainly not irreconcilable with the foregoing conclusion as to the meaning of sections forty, forty-one and forty-two.

The law, as above expounded, may seem harsh and oppressive. Perhaps it is. The duty of courts, however, is to expound and administer the law as they find it, and not as they would have it in case they disagree with the justness or propriety of its provisions. I think, however, that on reflection it will be seen that there are many features of it that relieve it of much, if not all, of the harshness apparent on first impression. In the first place, the debtor is secure against molestation without the requisite preliminary proofs. In the next place, he is furnished with a copy of the petition when the order to show cause is served upon him, thus placing him in possession, at the earliest moment, of the petitioner's full case; and the proofs by which it is sustained, being accessible to him, he is afforded the most ample opportunity of judging whether he has a defence, and of preparing for it if he has one. If he desires to cross-examine the petitioner's witnesses or the petitioner himself, the process of the court is ample to secure him that privilege. If the witnesses are beyond the reach of process, the powers of the court in another direction are no doubt ample for his full protection.

It was asserted at the hearing that it is the uniform practice of the bankruptcy courts for the petitioner to make his proofs at the hearing or trial, before the debtor can be called on to rebut the petitioner's case. I think this assertion is broader than the facts warrant. True, such has been the practice in this court; but it is well known that it has been because petitioners have submitted to it voluntarily, and, until the present case, have never claimed nor asked to avail themselves of the provisions of the act in this respect. And such may have been, and no doubt has been, the case in many of the other districts, but not in all, as will be presently seen. Considering the importance of the question, there is a re-

markable dearth of reported decisions of the courts or other authority, directly in point, in regard to it. While this is the case, however, it is a significant fact that in every reported decision in which this question has been nearly or remotely involved, or in any manner alluded to, the courts, with a single exception, so far as I can ascertain, have sustained the conclusion arrived at in this opinion. These decisions, and the exception, will now be noticed.

In Re Randall [Case No. 11,551], Deady, J., in discussing the question of the degree of certainty requisite in the statement of facts in a creditor's petition for adjudication, after quoting that portion of section forty-one here under consideration, says: "The effect of this provision is to throw the burden of proof upon the respondents, and a denial of the facts in the petition by the answer of the respondents does not shift this burden upon the petitioners. No other or less effect can be given to the language of section forty-one, requiring the debtor to prove that the facts set forth in the petition are not true. But it seems to me, on the other hand, that justice to the debtor requires that the facts to be disproved by him should be stated with such certainty and detail as to inform him of what he is to make an explanation or proof."

In Re Leonard [Case No. 8,255], Treat, J., in considering the question of a petitioner's right to amend his petition at or near the trial, by alleging additional acts of bankruptcy, says: "When a creditor's petition is filed and proofs submitted to the judge, if he grants an order to show cause why the defendant should not be adjudged a bankrupt upon the alleged acts of bankruptcy, the very terms of the bankrupt act require that, on the trial, the defendant shall prove that the facts set forth in the petition are not true. That provision of the act manifestly depends for explanation on the preceding, whereby upon the filing of the petition it must be 'made to appear' to the court 'that sufficient grounds exist therefor;' in other words, that a prima facie case has been established by the proofs offered to sustain the allegations made. * * * All of the subsequent proceedings are based on the initial proofs 'that sufficient ground exists,' that is, prima facie the defendant has committed the acts of bankruptcy charged. If no such proof is submitted, no further proceedings follow; the case is at an end, and all ancillary or dependent proceedings, stringent or otherwise, fall to the ground. If, on the other hand, the order to show cause is granted, then defendant has cast upon him the burden of proving a negative, (always a difficult and hard matter). * * * That construction has been uniformly given to the act by this court, and no reason has been suggested which induces a doubt as to the correctness of the rulings upon the point."

In Re Skelley [Case No. 12,921], Blodgett, J., in considering the question of the right of the debtor on the hearing or trial to show that the petitioning creditor's debt has been reduced, by payments since petition filed, below the requisite amount, after quoting the last clause of section forty-one, says: "Thus evidently intending to allow the debtor the right on the trial to disprove all the material allegations in the petition, or, in other words, to rebut the prima facie case made by the petition and the preliminary proofs filed therewith."

The only decision to which my attention has been called, or that has fallen under my notice, seeming to hold the opposite doctrine, is in the case of Brock v. Hoppock [Case No. 1,912], in which Blatchford, J., by a newspaper reporter's notes, originally published in the New York Times and an abstract transferred to the Bankrupt Register, is reported so to have held. The opposite does not seem to have been claimed or contended for, and the decision appears to have been in the midst of a jury trial; and, for anything that appears, it may have been conceded on behalf of the petitioning creditors. At all events, the conclusion does not appear to have been arrived at with that deliberation which would entitle it to the weight and respect usually accorded to the opinions of that learned jurist, and its authentication is not the most satisfactory. I think, therefore, it may be safely asserted that, in answer to the order to show cause, the burden is on the debtor to prove that the facts set forth in the petition are not true, in order to defeat an adjudication of bankruptcy against him, and obtain a dismissal of the proceedings. This is supported by authority as well as on principle.

It results, in this case, no objection being made to the sufficiency of the petition and of the proofs filed therewith, that an adjudication of bankruptcy must pass against the debtors unless they shall prove to the satisfaction of the court that the facts set forth in the petition are not true.

Case No. 11,412.

In re PRICE et al.

[1 N. J. Law J. 228; 26 Pittsb. Leg. J. 11.]

District Court, D. New Jersey. July 26, 1878.

BANKRUPTCY—IMPEACHMENT OF JUDGMENT.

A judgment obtained by the orderly proceedings of a court cannot be impeached or set aside on the ground that the creditor had reasonable cause to believe his debtor to be insolvent, unless the debtor does something to aid him in procuring his judgment.

[In the matter of Price, Bond & Co., bankrupts.]

This is an application to expunge a proof of claim with security filed by Silas Merchant, a judgment creditor, against the bankrupt's estate, on the ground that the judgment was a fraudulent preference and void as to the other creditors, under provisions of

section 5128 of the bankrupt act [of 1867 (14 Stat. 534, 536)].

NIXON, District Judge. Held, facts not proved. Since the decision of the supreme court in Wilson v. City Bank, 17 Wall [84 U. S.] 473, a judgment obtained by the orderly proceedings of a court cannot be impeached or set aside on the ground that the creditor, when the suit was brought, had reasonable cause to believe his debtor did something to aid him in procuring his judgment,—of which the proof seems to fail in this case,—he is entitled to the advantage which his diligence has given him over other less vigilant creditors. The motion to expunge must be denied.

PRICE v. The HIGHLAND LIGHT. See Case No. 6,477.

PRICE (ISAACS v.). See Case No. 7,097.

PRICE (JOHNSON v.). See Case No. 7,407.

Case No. 11,413.

PRICE v. KELLEY.

[2 Ban. & A. 534; [1] 11 O. G. 639; Syllabi, 175.]

Circuit Court, D. Minnesota. Feb., 1877.[2]

PATENTS—PORTABLE CIRCUS SEATS—INFRINGEMENT.

1. The complainant filed his bill upon three patents for improvements in show and portable seats and in circus seats: *Held*, that as the defendant constructed and used the ordinary circus seats, which were old and common, and upon every alternate board of which, when elevated, he put chair-seats, he did not infringe upon any claim of either of the patents.

2. Where no infringement is shown, it is unnecessary for the court to examine the other issues raised by the pleadings in the case.

[This was a bill in equity by David C. Price against James E. Kelley, for the infringement of certain letters patent.]

Davis O'Brien Wilson, for complainant.
Palmer & Bell, for defendant.

NELSON, District Judge. The complainant obtained two patents, Nos. 125,329 and 134,486, dated respectively April 2d and December 31st, 1872, as the original inventor of an "improvement in show and portable show-seats." He also secured patent No. 163,537 to be issued to himself as the assignee of the original inventor, Wm. H. Shuey, and dated May 18th, 1875, "for an improvement in circus-seats." He brings suit against James E. Kelley because of an infringement of his patents.

The complainant declares that his invention No. 125,329 has for its object "to provide an improved arrangement of seats for use in circus and other shows, the same being constructed with a view to the comfort of the spectator, while possessing the necessary qualities of security when erected, and compactness when packed for transportation." He claims as new an improvement consisting of notched support straps or bars and boards and chairs constructed and arranged as shown in a diagram; also chairs provided with slots or recesses through which boards can pass, and the seats be shoved along to the required position; also the combination with the supports and boards of the binding bars or straps and stakes to secure the supports. The diagram of this invention shows the ordinary stringers used in circus and outdoor portable seats, elevated and adjusted on an inclined plane, the stringers being notched for the support of boards, and elevated at the back by means of trestles. Every alternate board has a chair-seat upon it, and the board immediately in front is used as a foot-rest. The boards upon which are the chairs or seats, as well as the foot-rests, are secured in place at each end by a zigzag-shaped strap passing from the top of each stringer over the boards to the bottom, and terminating in an eye, through which a stake is driven into the ground. In No. 134,486, every alternate board is suspended at each end from the under side of the stringer by a band of metal running the length, or nearly so, of each one, and by forming the shape of a clevis, upon which the ends of the board rest, secures it in position like a hanging shelf, and is called a foot-rest. The complainant claims as new the series of foot-boards or rests, in combination with the supports (stringers) and braces (trestles). In No. 163,537 the invention is claimed as a "show-seat consisting of the frame F, the back H formed of a single piece of bent wood, pivoted to the sides of the said frame, and the jointed braces K, the back H being constructed to fold around and closely embrace the seat-frame in order that the upper surfaces may be flush, as and for the purpose specified." The defendant alleges want of novelty; denies that the patents are for original inventions, and denies that he has infringed either of the inventions and patented improvements. It is admitted that there is no novelty in using stringers and trestles to form portable show-seats, nor in making every alternate board on the stringers a foot-rest; but the combination of all these, in connection with a chair-seat and folding-back, and straps to secure the ends of the seat-boards in position, is urged by the complainant's counsel as new and patentable, and the infringement of this combination is charged.

An examination of the manufacture of the defendant shows that it has nothing in common with that of the complainant, except the notched stringers and the trestles, and the metal straps used to secure the seat-boards,

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

[2] [Affirmed in 154 U. S. 669, 14 Sup. Ct. 1208.]

the space between the strap and the stringer at the notches being sufficiently open to allow the ends of each board to pass easily through. The chair-seat proper has nothing in common except a cushion. The Price or Shuey patent has an open back in the shape of a yoke, pivoted to the side of the seat, and with braces attached and jointed to permit its being folded about the seat. The Kelley seat is composed of two leaves upholstered and connected at one edge by a hinge-joint, so as to hold the back, when open, and allow it to be folded upon the top of the seat. The hinged edges are rabbeted so that the back, when open, bears against the seat proper, and prevents the seat-board from splitting. Price suspends every alternate board in the ordinary circus-seat by a stirrup of metal fixed below the stringers for a foot-rest. He is thus enabled to bring his seat boards nearer together, and accommodate more spectators with no inconvenience. The knees and feet of the person when seated, being below the seat-boards, do not interfere with those seated in front. Kelley uses notched stringers, and raises his seat-boards so that they have the appearance of a high bench, upon which he puts his chair-seats, and then uses for a foot-rest every alternate board on the top of the stringers, as in the old and ordinary circus-seats. When the seat-board is raised, the board in front used as a foot-rest falls below the back of the seat immediately in front of it, and the persons seated do not interfere with those in front. The security and comfort of the spectators are attained by each, and the mechanism permits the seats to be packed in a small compass for transportation, and rapidly and easily adjusted, but the arrangement in each is different. The only device used by Kelley, not found in the old and ordinary circus-seat, is the upholstered chair-seat and back, and the metal strap or clamp fastened to the stringers which holds the seat-board in position. Price describes this strap in his patents, and claims it as new. The testimony of the mechanics and architects is, however, that this mode of securing boards or underlying axles by a clamp or clevis, in a firm and fixed position, is a common and ordinary device, and "is on the general principle of holding stairs or steps in their place, and securing windlasses," etc.

The complainant, therefore, cannot maintain his suit on account of the use of this device, and as defendant constructs substantially the ordinary circus-seat, which is old and common, and upon every alternate board of which, when elevated, he puts a chair-seat which is not an infringement, his bill of complaint must fall. It is unnecessary, then, to examine the other issues raised by the pleadings. Decree will be entered, dismissing the bill of complaint.

[On appeal to the supreme court, the decree of this court was affirmed. 154 U. S. 669, 14 Sup. Ct. 1208.]

Case No. 11,414.

PRICE et al. v. MORRIS et al.

[5 McLean, 4.] [1]

Circuit Court, D. Ohio. Oct. 1849.

EXECUTORS AND ADMINISTRATORS—LETTERS GRANTED IN ANOTHER STATE—AUTHORITY TO SUE—CERTIFICATION—PURCHASE BY ADMINISTRATOR—DEPOSITION TAKEN BEFORE MAYOR.

1. Administrators or executors in another state, may sue in this state under the laws of Ohio.

2. A grant of letters duly certified is sufficient authority to sue in Ohio.

3. A deposition taken before a mayor, without a seal, may be received as prima facie evidence of the right to take it.

4. Where an administrator becomes a purchaser, at his own sale of real estate, the sale may be set aside at the discretion of the parties interested.

5. Such sale is voidable, though no fraud be shown.

[This was an action by J. P. Price and others against Isaiah Morris and others, to recover certain land.]

Thompson & Andrews, for plaintiffs.

Scott & Frazer, for defendants.

OPINION OF THE COURT. This is an action of ejectment, brought to recover seventeen hundred and fifty acres of land, in Clinton county.

1. A certified copy of the patent was introduced by the lessors, Brook Duvall and Maria French, heirs of Daniel Duvall, deceased, dated 19th August, 1807. 2. A deed from William French and wife who married Maria French, dated 2d Nov. 1807, to the lessors of the plaintiff, four of the heirs of William D. Price, for one undivided half and five-sevenths of an undivided half. 3. Deed from William D. Price to James Price.

The marriage of Maria French was proved, and that she had seven children, some of whom died before the mother. They lived in Virginia. The heirship of the other parties proved by different witnesses. It was objected that the chief magistrate of Fayetteville, before whom some of the depositions were taken, did not certify the same under his seal, and that there was no proof of his official character. The depositions being certified by him as mayor, the court will presume that he is mayor unless the contrary be shown. He may have no seal. The certificate of a person named in the act of congress, as having authority to take depositions, is received prima facie, without further proof of his authority. The defendants claim under a sale by William Duvall, administrator of William Price; the proceedings in the court of common pleas, authorizing the sale were in evidence, and also the deed of the administrator, for the land sold to Haworths, dated 1st March, 1811. And

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

the account of the administrator rendered to the probate court, showed the payment of the consideration. The two hundred and forty-second section of the law of Ohio, respecting executors and administrators, provides, "that an executor or administrator duly appointed in any other state or country may commence and prosecute any action or suit in law or equity, in any court in this state, in his capacity of executor or administrator, in like manner, and under like restrictions, as a non-resident may be permitted to sue."

It is objected that there was no sufficient evidence that Duvall was appointed administrator; but the court held that the record of his appointment and the letters of administration, duly certified, were a sufficient authority for him to act as such in this state.

It was also objected that an administrator cannot sell to himself. It appears that Henry A. Christian bid off the land for Duvall, the administrator. A trustee cannot sell to himself; at least such a sale though not void, there being no fraud, yet it may be avoided at the discretion of the party interested.

In their charge to the jury, the court said: In this case the legal title must prevail. The patent to Brook Duvall and Maria French, heirs of Daniel Duvall, deceased, is dated the 19th of August, 1807. On the 2d of November, the land was conveyed by William French and Maria his wife, and Humphrey Brook Duvall to William Price. And the jury are to inquire whether Humphrey Brook Duvall and the persons named in the patent are the heirs of Daniel Duvall. That Humphrey was one of the heirs seems to be probable, from the fact that he united with Maria French and her husband, who owned one-half the land, and of whose identity there is no question, in executing a conveyance of the land. It was proved that William Duvall died the latter part of the year 1808. He left several children his heirs, who are the lessors of the plaintiff, and who are proved to have lived in Virginia and other states than Ohio, from their early years. On the 1st of August, 1842, the heirs of Maria French with one exception, executed a deed of confirmation for the land to the heirs of William Price. The above constitutes the title of the plaintiff.

On the 12th of November, 1808, administration was granted in Virginia to William Duvall, on the estate of William Price. Under the authority of the court of common pleas of Warren county, he sold, as administrator, an undivided half of the land in controversy to George and James Haworth. And in the same deed one moiety of the tract on his own account. In the deed it is stated that the land was patented in the name of Brook Duvall and Maria French, heirs of Daniel Duvall, deceased. J. C. Travis proves the heirs of Humphrey Brook Duvall, deceased, and that they reside in the states of Kentucky and Tennessee. The time of Duvall's death is not stated.

In relation to the statute of limitations which is set up in defense, Malon Haworth states that in the fall of 1804, George Haworth lived on the land. Witness has lived adjoining to the land since 1804. Mr. Frazer proves possession of George and James Haworth in 1804. Another witness proves that in 1809, in March, he saw George and James Haworth at his house, and that they informed him they were on their way to old Virginia, with a view of buying the land now in controversy. Henry A. Chirty, now reported to be dead, came to the country, as the agent of William Duvall, before Haworths returned. He made the application to the court on which the sale was ordered, and he purchased the land. It does not appear how William Duvall became interested in the land, owning an undivided moiety, unless by his purchase at his own sale as administrator. He was not one of the heirs of Daniel Duvall. And if his interest was acquired as above stated, the heirs had a right to set aside the purchase, merely on the ground that he could not be the purchaser at his own sale. This is contrary to the policy of the law, and is voidable on that ground.

The statute of limitations at that time did not run against non-residents, and possession before the emanation of the patent, did not run against the state. If the possession was adverse, and the non-resident who owns the land should come into the state, the statute would begin to run from such time.

Upon the whole, gentlemen of the jury, so far as the sale was made by the administrator, in his capacity as such, there seems to be no legal objection against the right, but it is not shown in the case that William Duvall had any other right than that which he supposed himself to acquire at his own sale; and which purchase the heirs object to by bringing the present action.

The jury found upon the first demise of the declaration, that the defendants are guilty in manner and form as the plaintiffs have declared against them, as to three-fourths of an undivided half of said premises in said demise and consent rules mentioned, being three-fourths of that part of said undivided half, which the defendants claim to hold under William Duvall by deed made by said Duvall, purporting to come in his own right, said half to James and George Haworth; and as to the residue of said estate and premises and the demises in said declaration, the jury do find the defendants not guilty. And thereupon the plaintiffs' counsel moved for a new trial, on which motion the cause was continued. At the next term the cause, at the instance of the counsel, was entered as settled, at the plaintiff's cost, judgment, &c.

Case No. 11,415.

PRICE et al. v. NICHOLAS.

[4 Hughes, 616.] [1]

Circuit Court, W. D. Virginia. May 16, 1878.

LEASE OF MINERAL RIGHTS—FAILURE TO DEVELOP—ABANDONMENT—LAPSE OF TIME—EFFECT OF LESSEE'S FAILURE TO SIGN LEASE.

[1. A complete executed lease of mineral rights for 99 years, renewable for a like term, *held* valid and binding on both parties though signed only by the lessor.]

[2. A lease of mineral rights in certain inaccessible mountain lands for 99 years, renewable for a like term, "to farm," with no specified time in which the lessee was obliged to develop the minerals, *held*, nevertheless, to require him to do so within a reasonable time in view of the circumstances and the situation of the land; and 25 years having already elapsed, and it appearing that a railroad had been projected which would make the lands accessible, *held*, further, that the lessees should be allowed two years more in which to commence operation, in default whereof the lease should be canceled.]

[This was a bill by Price and others, owning certain lands by purchase and conveyance from one Absalom Michael, to set aside the following lease, made by his grantor before complainant purchased the lands: "For value received, I hereby assign all my right, title, and interest for the term of 99 years, also with the privilege of renewal for a like period of time, to all the minerals of whatsoever description that may be found on my land in the county of Augusta, state of Virginia, to A. Nicholas, his heirs and assigns, to farm. The said A. Nicholas, his heirs and assigns, shall have the right of entry on condition that he pays one-fourth of the profits that may be obtained from any mineral on my said lands after deducting interest of the capital stock employed by said A. Nicholas or his heirs and assigns. Witness my hand and seal this 7th day of May, A. D. 1853. Absalom Michael. (L. S.)" The grounds on which it was sought to have the lease declared void were two: (1) That, as the lease was signed only by the lessor, it did not bind the lessee, and was therefore void for want of mutuality; (2) that by the lease the lessee was under obligation to develop and exploit the minerals, and, having utterly failed to do so for a period of 25 years, he had forfeited his rights.]

G. W. Berlin, for complainants.

Oferrall & Patterson, for defendant.

RIVES, District Judge. The plaintiffs appear in this cause under their deed from Absalom Michael of 11th May, 1875, in a double aspect: First, as the owners in fee of the minerals on the land of Absalom Michael; and, secondly, as the assignees of a lease previously given by Michael, to wit, on the 7th day of May, 1853, to the defendant Nicholas. They are now clothed with all the fee-simple proprietorship of Michael over these minerals, with full stipulations for all the privileges necessary to enable them to develop, use, and market them; and, further, with all the rights of the lessor under the aforesaid lease to the defendant. In this situation they find themselves hampered, both as owners and lessors, by this lease, under which nothing has been done for the period of twenty-five years. They file their bill for the rescission of this lease on the allegation of laches in its execution, as well as of want of obligation in Nicholas on grounds specially stated by them. Hence the bone of contention in this case is the construction of this lease and their remedies under it. To be better able to discover both, it is proper to advert to the character of the lands, the origin of these contracts, and the circumstances under which they arose. The land itself is wild, sterile mountain land, indifferently timbered, and of little intrinsic value, save for its hidden resources. A warrant was laid upon it and a patent obtained for it on the 27th January, 1850, by Michael, doubtless because of the discovery of coal adjacent to it. As an evidence of its little value, it is worthy of notice that by an agreement appended to the lease Nicholas had the option at any time within five years to take it at the price of 50 cents per acre. This lease, therefore, was manifestly a matter of mere speculation on the part of both Michael and Nicholas. The former was wholly without the skill or means necessary to explore or develop the hoped-for mines; and the latter, having a fancy for such adventures, could not have contemplated at that time any present chance of availing himself of his lease. The terms of the agreement indicate this very plainly. Michael demands no cash in hand. He could not then fancy it was worth any. He merely stipulates for one-fourth of the profits that may be obtained from the minerals on his lands after deducting interest on the capital stock employed by Nicholas. Nicholas, on his part, offers this consideration alone, because the execution of the contract on his part depended on future events which might justify an outlay, and ensure to both contracting parties a profit in the raising of these minerals. Hence there is no contract fixing a time, within which operations should be commenced, or the license abandoned. There was in 1853 no public work offering transportation to these coals, and without it there was no object to mine for them. No privilege, then, to expire in a few years, was worth the trouble of writing or the fees for recording. Hence it is a lease for 99 years with privilege of renewal for a like period. But it does not follow from this, as has been contended, that Nicholas, his heirs and assigns, have this enormous term to decide whether he will enter upon his lease or not. On the contrary, such a pretension militates against the terms of the contract. He does not take

[1] [Reported by Hon. Robert W. Hughes, District Judge.]

an assignment of these minerals absolute and without condition, but with an express limitation,—"to farm." He is not to have them as a hidden treasure in the bowels of the earth, alike unprofitable to himself and his lessor. He is not to hold a mere leasehold of intangible real chattels for the purpose of keeping off all other miners for the term of 198 years. By no means. He takes the assignment of these minerals "to farm"; that is to say, to bring them up to light and to commerce and make them profitable to the lessors and himself. No more pregnant or significant term could have been used to exclude the inference that he had the whole term to decide on the commencement of operations. This is a complete, executed contract on the part of Michael, fully obligatory on him and his assigns in this cause. It is not against the statute of frauds. It is good as a deed poll, and the idea that it is not binding on Nicholas, is refuted by his answer in this cause in which he claims its benefits.

But while the acts contemplated by this agreement are all in the future and in their nature executory, there has been no time fixed for the farming of these minerals to commence. But in this as in other contracts of the like nature, reason and authority alike declare that it must be done in a reasonable time. It would be a fraud to insist upon the retention of this privilege for an indefinite time, and as such, would be a good ground for cancellation in a court of equity. But should Nicholas decline after request and reasonable time to enter on the performance of his lease, then it should be in the option of his lessors or assigns to withdraw from the undertaking, and place themselves in the same situation as if it had never been entered into. Add. Cont. marg. p. 35. But the question of what is reasonable time must depend on the circumstances of the case. Michael has acquiesced in the delay of Nicholas. He would have been unreasonable if he had not. These minerals are in the fastnesses of the mountains, and have been wholly inaccessible to commerce. It is only since a railroad has been projected, and partially constructed, to these coal fields, that new interest has been imparted to them, and speculation rife about them. Out of this excitement and speculation has, doubtless, sprung the purchase of the plaintiffs. That it is on the increase, is shown by the great advance that Price, one of the plaintiffs, has realized on his share in this adventure. A good deal of testimony has been taken in this cause. I am not satisfied by it, as claimed by the plaintiffs, that they are damaged by Nicholas' delay; on the contrary, I incline to the opinion that these coals cannot now be profitably mined, as well for the want of demand and uncertainty of supply as for the want of adequate transportation. I am far from allowing that the defendant can hold on to this lease, baffle the owners of the enjoyment of their purchase, and retard the development of these mines in the hands of the plaintiffs, on the plea that he cannot work them profitably, and require them to stand aside till he has every conceivable facility to market. If, after reasonable indulgence, he is not satisfied that the farming of these minerals would be profitable to him, it is his duty to abandon the contract, and allow the proprietors to try their hands at their development or sale free of this incumbrance.

For these reasons, I think, relief should be given to the plaintiffs; but, inasmuch as defendant has not yet had reasonable time, under all the circumstances of this case, to begin the farming of these minerals, he should be allowed the term of two years from the first day of this month to elect whether he will execute or abandon his lease; and in the meantime this cause shall be retained on the docket, so that said contract of lease may be rescinded in case of his failure fairly and bona fide, and with adequate capital and force, to commence operations for the raising and sale of these coals.

Case No. 11,416.

PRICE v. SEARS.

[2 Lowell, 553; 15 Alb. Law J. 273.] [1]

District Court, D. Massachusetts. March 20, 1877.

SALVAGE BY SEAMAN.

A seaman cannot have salvage for the boat which has brought him to land after the loss of his ship.

[Cited in Peaslee v. Peaslee, 147 Mass. 183, 17 N. E. 516.]

[This was a libel for salvage by J. H. Price against J. H. Sears.]

C. G. Thomas, for libellant.

O. W. Holmes, Jr., and W. Munroe, for respondents.

LOWELL, District Judge. The libellant served as second mate on the defendants' ship on a voyage from Galveston to Liverpool, and thence towards San Francisco, until the vessel was unfortunately burned at sea. The libellant landed at one of the Marquesas islands after a long and difficult voyage in a boat which he commanded. The captain's boat and all in it were lost; the mate's boat arrived at land, but neither that officer nor any of the crew were within reach to be examined as witnesses in this case. The owners paid the libellant his wages, at the agreed rate, to the time of the loss of the vessel; but he maintains that he was engaged at Galveston one month earlier than is shown by the shipping articles; that

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 15 Alb. Law J. 273, contains only a partial report.]

he received one month's less advance than they express, and that he served as first mate during a part of the voyage after leaving Liverpool. (The judge then examined the evidence, and decided that the wages had been fully paid.)

The libellant asks salvage for the boat; but as the boat appears to have saved him quite as much as he the boat, that account is in equilibrio. Libel dismissed.

Case No. 11,417.

PRICE et al. v. TEAL.

[4 McLean, 201.] [1]

Circuit Court, D. Indiana. May Term, 1847.

BILLS AND NOTES — RATE OF EXCHANGE AT MATURITY.

Where a note is given in Indiana payable in New York, with interest and the rate of exchange. the rate of exchange will be, the time the note becomes due.

[This was an action on a promissory note by Price and Price against Teal.]

Mr. Yandees, for plaintiff.

OPINION OF THE COURT. This action was brought on a promissory note, payable in New York, with interest and the rate of exchange. The court directed the jury to calculate the exchange on the amount due on the note, at maturity, and not the exchange as it might be at the trial.

PRICE (UNITED STATES v.). See Cases Nos. 16,088–16,090.

Case No. 11,418.

PRICE v. YATES.

[7 Reporter, 582; [2] 19 Alb. Law J. 295; 25 Int. Rev. Rec. 113; 7 Wkly. Notes Cas. 51; 2 Nat. Bank Cas. (Browne) 204.]

Circuit Court, W. D. Pennsylvania. March 21, 1879.

NATIONAL BANKS — COMPOSITION BY RECEIVER — JURISDICTION — STATE AND FEDERAL — LIMITATION BY STATE STATUTE.

1. An order for the composition of a claim under section 5234, Rev. St. [19 Stat. 63], when the claim is not a "bad or doubtful debt," is invalid and a composition made under such an order is ineffectual.

2. Where there is a concurrence of jurisdiction, a state statute of limitation may be pleaded as effectively in a federal court as it could be in a state court; and in such cases the federal courts will follow the decisions of the local state tribunals.

[Cited in Butler v. Poole. 44 Fed. 586, 587.]

Action by the receiver of a national bank against a shareholder to enforce his liability.

Two questions were reserved at the trial of the case, and a verdict was taken for the plaintiff subject to the opinion of the court upon these questions:

The first question involves the effect of an order of the court of common pleas of Venango county, Pennsylvania, for the composition of the claim now in suit. The second relates to the statute of limitations. In 1867 suit was brought in that court by the receiver of the Venango National Bank against the present defendant to enforce his personal liability as a stockholder in that bank, which is also the subject of the present suit. [On the 23d of March, 1869, with the assent and concurrence of Judge Derrickson, then acting as the representative of the comptroller of the currency, and as the counsel of the receiver, the receiver made a written application to the court for an order to adjust and settle the suit by the payment of twenty-five dollars by the defendant, whereupon an order was made by the court that "the receiver may settle and compound the said suit and the claim involved therein on the terms prayed for in the proposition."] [2] The sum offered was afterward paid to the receiver. It also appears that the alleged indebtedness existed in May, 1866, when the receiver was appointed, but that this action was not commenced until June, 1876. No explanation of the delay was offered.

McKENNAN, Circuit Judge. The order of the court was made in the exercise of authority supposed to be given to it by the 5234th section of the Revised Statutes, and without an order of the court, which it was competent to make, the composition could have no effect. By a separate classification in the act of congress of the subject of the suit, as well as by the import of the terms of the act, the contested claim is excluded from the category of "bad or doubtful debts," which alone the court is authorized to order the receiver to "sell or compound," and hence the alleged composition was ineffectual for want of power in the court to direct or sanction it.

Is this suit barred by delay in the institution of it? It is brought to enforce the personal liability of a shareholder in a national banking association. This liability is clearly contradicted. By his stock subscription the shareholder stipulates to pay an additional sum equal to the par value of the shares subscribed for by him, to discharge the debts of the association, when he is legally called upon to do so. The obligation to pay is assumed when the subscription is made, and proof of subscription is plenary evidence of the whole of the shareholder's enjoyment, and of his consequent individual liability. This liability then accrues at the date of the subscription, but is not enforceable until needed to meet the debts of the association, and the comptroller has so decided and in-

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

[2] [Reprinted from 7 Reporter, 582, by permission.]

[2] [From 19 Alb. Law J. 295.]

structed the receiver. Hence it has been held, that this action of the comptroller is an essential preliminary to a suit against a shareholder. Kennedy v. Gibson, 8 Wall. [75 U. S.] 498. A right of action upon the contract does not therefore accrue until the comptroller has acted; and by the terms of the general currency act, all suits by or against a receiver are alike cognizable by the state and federal courts. Where there is this concurrence of jurisdiction a state statute of limitation may be pleaded as effectively in a federal court as it could be in a state court; and in such case the federal courts will follow the decisions of the local state tribunals, and will administer the same justice which the state courts would administer between the same parties. The supreme court of Pennsylvania has repeatedly recognized the general rule, that an act necessarily preliminary to the commencement of a suit upon a contract must be done within six years to avert the bar of the statute, unless sufficient reason for the delay is shown. In Laforge v. Jayne, 9 Barr. [9 Pa. St.] 410, it was applied, the court saying, "It was ruled in the case of Codman v. Rogers, 10 Pick. 112, that although an action will not lie in some cases without a previous demand, and that in such cases the statute did not run until demand, that nevertheless the demand ought to be made in a reasonable time, and when no cause for the delay is shown it ought to be made within the time limited by the statute for bringing the action." The same doctrine was re-affirmed and decisively applied in Pittsburgh & C. R. Co. v. Byers, 8 Casey [32 Pa. St.] 22, and in Pittsburgh & C. R. Co. v. Graham, 12 Casey [36 Pa. St.] 79.

[The application of this principle in this case is peculiarly appropriate. The date of the defendant's subscription, when his alleged indebtedness accrued, does not appear, but it existed before the 5th day of May, 1866, when the receiver was appointed. Nothing was done to authorize a legal demand upon the defendant to respond to his individual liability, until the 28th day of June, 1876, when the comptroller decided that the enforcement of this liability to its full limit was necessary, and instructed the receiver accordingly. This suit was shortly afterward brought. Not only six but more than ten years from the date of the defendant's enjoyment, was permitted to elapse before the essential conditions precedent to a legal call upon him to pay were performed. The delay seems to have been purely arbitrary—at least it is unexplained—and hence the strongest considerations of justice, and the obvious policy of the act of congress demand that the defendant should not be vexed with litigation, touching a claim which has about it such an odor of staleness.] [2]

Let judgment be entered for the defendant, non obstante veredicto.

[2] [From 19 Alb. Law J. 295.]

PRIEST (GILBERT v.). See Case No. 5,413.

Case No. 11,419.

The PRIDE OF THE OCEAN.

[10 Ben. 610.] [1]

District Court, E. D. New York. Oct., 1879.

COLLISION AT SEA—CROSSING COURSES—PRACTICE—SUPPRESSING DEPOSITIONS.

1. Where a collision occurred about 65 miles from Sandy Hook, on a clear moonlight night, between a ship loaded with petroleum and sailing S. E. ½ S. within 2 points of close-hauled, on the starboard tack and going 6 or 7 knots, and a schooner loaded with coal and sailing N. E. nearly before the wind with booms all off to starboard and going 4 or 4½ knots, each vessel seeing the other at a distance of two miles and each at the time of collision endeavoring to avoid the other, the schooner by going to westward under a starboard helm and the ship by going westward under a port helm: *Held*, that the change of course of the ship was made deliberately, not to avoid a collision but to go astern of the schooner, and that she was in fault for the collision, not having held her course as she was bound to do.

2. On a motion to suppress depositions of witnesses for claimant because taken before answer: *Held*, that no rule of practice requires answer to be filed before taking depositions; and no prejudice to the libellant in this case appearing, the motion must be denied.

3. Semble, that where answer is delayed for a purpose, and prejudice to the libellant's case appears, such a motion might prevail, in the absence of any rule.

In admiralty.

W. W. Goodrich and R. D. Benedict, for libellants.

H. T. Wing and W. R. Beebe, for claimants.

BENEDICT, District Judge. The vessel proceeded against in this action is in custody, and has been for some reason long detained without making application to be discharged on giving stipulation. I shall not therefore delay my determination of the case in order to specify in detail the portions of the evidence that have led to the conclusions I am about to announce. In regard to many of the facts of the case, there is no dispute. The action is brought to recover for the sinking of the three-masted schooner George W. Andrews in a collision between that vessel and the ship Pride of the Ocean, that occurred about 65 miles from Sandy Hook, on a clear moonlight night, when vessels could be seen at a distance of two or three miles. The schooner, heavily laden with coal, was on a course N. E. nearly before the wind, with booms all off to starboard and going some 4 or 4½ knots.

The ship was sailing S. E. ½ E. within two points of, close hauled on the starboard tack, going some 6 or 7 knots. Each vessel was seen by the other at a distance of some two miles. They came together nearly at right

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

angles, the ship striking the schooner on the schooner's starboard bow forward and causing her to sink almost immediately. At the time she was struck the schooner was heading to westward, as all the witnesses agree, and the way in which the vessels came together shows that the ship was then heading south, or, as some of her crew say, further to west than that.

At the time of the collision each vessel was endeavoring to avoid the other, the schooner by going to the westward under a starboard helm, the ship by going to westward under a port helm. As the vessels were sailing when they approached each other, it was the duty of the schooner to avoid the ship, and the duty of the ship to hold her course. The ship did not hold her course, but ported her helm. If when the ship ported her helm she was in extremis, by reason of the dangerous approach of the schooner without change, she is free from fault; otherwise she is liable for not having kept her course as required by law.

The claim made on the trial in behalf of the ship is that the only change made in her course was just as the vessels came together, at which time the captain rushed on deck, and helped to heave the wheel hard down, having been roused by an order to that effect from the second officer in charge of the deck, and when the schooner was crossing the ship's bows from port to starboard just ahead of her.

This view cannot be upheld.

The account given in the answer is different. The answer states that the ship's helm was ported when the schooner was moving from starboard to port. The testimony of the man at the ship's helm agrees with the answer, and shows that the course of the ship had been altered for the purpose of aiding the schooner in effecting a manœuvre which it was supposed on board the ship the schooner was about to attempt, namely, to cross the ship's bows instead of going under her stern.

That the ship's helm was ported and her course altered while the schooner was not dangerously near the ship, is plainly proved. Indeed, the man at the ship's helm says that he supposed the vessels were going clear at the time he ported, and the answer asserts that the helm was ported "for greater security in the premises." It further appears that this alteration of the ship's course was before the time of which the master speaks when he says he was awakened by the second mate's order to put the wheel hard down and then jumped on deck to the wheel and helped the man to get the wheel down, the wheel being three-fourths down when he reached it; for the man at the wheel omits all allusion to the captain's presence at the wheel when the wheel was first ported and the ship brought up to the wind until her sails shook. These and other circumstances, which a critical examination of the evidence discloses, have led me to conclude that the cause of the collision was an alteration of the ship's course made, not in alarm but deliberately, and for the purpose, not of avoiding a collision then imminent, but in order to go astern of the schooner.

Such an alteration on the part of a vessel bound by law to hold her course must be held to be a fault.

Before dismissing the case from consideration, I must notice a point raised by a motion made to suppress the depositions of the ship's crew. These depositions were taken in behalf of the claimant under the act of congress on due notice but before answer filed. Objection was made to the taking of the depositions before filing an answer, but no answer was filed until the depositions had been taken and filed, and the libellant thereupon, in due time, moved to suppress the depositions for this reason. It is conceded that there is no rule of practice that requires an answer to be filed before depositions are taken on behalf of the claimant, but the necessity of the adoption of such a rule is insisted on. While the case might arise in which prejudice to the libellants would result from being compelled to cross-examine the claimant's witnesses without knowing the ground of defence, no such prejudice has arisen in this case and there is no ground to suppose that any advantage over the claimant was sought to be gained by the delay in filing the answer. There is therefore no foundation for the motion to suppress in this case. In a proper case where the filing of the answer is delayed for a purpose, and the libellant is prejudiced in his case by the withholding of the ground of defence, it may well be that such a motion would be allowed to prevail.

Let a decree be entered in favor of the libellants, with an order of reference to ascertain the amount.

PRIEST (PALMER v.). See Case No. 10,694.

Case No. 11,420.

PRIETO v. WELLS.

[Cited in Galpin v. Page, Case No. 5,205. Nowhere reported; opinion not accessible.]

Case No. 11,421.

PRIME et al. v. BRANDON MANUF'G CO.

BRANDON MANUF'G CO. v. PRIME et al.

[16 Blatchf. 453; 4 Ban. & A. 379.] [1]

Circuit Court, D. Vermont. July, 1879.

PATENTS—ASSIGNMENT—NOTICE OF OUTSTANDING RIGHTS—EFFECT OF FAILURE TO RECORD—EXTENSION—COSTS.

1. Where an assignment of a right under a patent refers to the patented improvement as

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted by Hubert A. Banning, Esq., and Henry Arden, Esq., and here republished by permission.]

being in use by a certain party, such reference is express information to the assignee of the fact of such use; and, the party referred to being in possession to the extent of such use, such possession is constructive notice of the claim of right under which the possession and use are had.

[Cited in Dueber Watch-Case Manuf'g Co. v. Dalzell, 38 Fed. 600.]

2. An assignment of a patent by a bankruptcy court to the assignee in bankruptcy of the bankrupt owner of the patent need not be recorded in the patent office, in order to prevail over a recorded assignment of the patent from the administrator of the bankrupt, made after the bankruptcy, as, by section 5046 of the Revised Statutes of the United States [14 Stat. 522], all patent rights of the bankrupt vest at once, by operation of law, in the assignee in bankruptcy.

3. A patentee, during the original term of his patent, parted with his right to an extension, and agreed to sign all necessary papers to secure the extension for the benefit of his grantee. Afterwards, for the purpose of showing to the patent office that he would own the extension, if granted, the full title to the extended term was conveyed to him, before the extension was granted. The extension would not otherwise have been granted. The grantee paid all the expenses of obtaining the extension, and all parties understood that he really was to own the extended term: *Held*, that the original instrument was binding, in equity, on the patentee; that the equitable right to the extended term was in the grantee; that, as the conveyance back to the patentee was made to deceive the patent office, it was inoperative; but that, as the original grantee of the right to the extension could not claim the extension except by availing himself of such inoperative instrument, the court would leave the parties where it found them.

4. The special act of congress of July 15th, 1870 (16 Stat. 657), authorizing an application for an extension to be made to the commissioner of patents, did not vary the positions or rights of the parties.

5. No costs allowed, on dismissing a bill and a cross-bill.

[This was a bill in equity by David W. Prime and others against the Brandon Manufacturing Company, and a cross bill by the Brandon Manufacturing Company against David W. Prime, for the infringement of letters patent. Complainants demurred to the cross bill, and the demurrer was overruled. Case No. 1,810. It is now heard for a final decree upon both cases.]

W. G. Veazey and J. N. Edminster, for plaintiffs in the original suit and defendants in the cross suit.

Prout & Walker, for plaintiff in the cross suit and defendant in the original suit.

WHEELER, District Judge. This original bill is brought for relief against an alleged infringement of the extended terms of letters patent No. 14,119, dated January 15th, 1856, and No. 24,162, dated May 24th, 1859, and No. 25,148, dated August 16th, 1859, issued to Francis M. Strong and Thomas Ross, and of letters patent No. 35,348, dated May 20th, 1862, issued to John Howe, Jr., assignee of Strong, Ross and himself, all for improvements in weighing scales, and which the plaintiffs claim to own. The defendant admits use of the patented inventions, but claims ownership of them and the right to use them, and has filed the cross-bill, for a conveyance of such title as the defendants therein may have, and for relief against the setting up of title by the plaintiffs to the customers of the defendant, to the damage of its business, and the cause has been heard upon pleadings, proofs and argument of counsel.

The plaintiffs derive title from Strong and Ross, by a general release and assignment from Ross, of all his right, title and interest to such patents and extended terms, to Strong, dated March 31st, 1874, and a further like release and assignment, "excepting only such part of their interest as John Howe, Jr., assigned to the Howe Scale Company," dated September 15th, 1875; by an assignment from Strong to Prime, of all his right, title and interest to the patents and extended terms, but reserving a contingent interest in the profits, dated November 12th, 1875; and by assignment by Prime to Meacham of two-tenths, and to Luce of one-tenth, of what was assigned by Strong to Prime, each dated November 13th, 1875. And they claim, that, if Strong and Ross were affected by any outstanding equitable rights or titles, they are not, because they are bona fide purchasers, without notice. This latter claim may as well be determined here, because, if valid, it may save investigation of other questions. In their answer to the cross-bill they deny "that they knew, or had heard of, or suspected any of the claims or rights of the orator, as stated by the orator in said cross-bill, in and to said letters patent or extensions thereof." In each of the deeds from Prime to Meacham and to Luce, the deed from Strong to Prime is referred to as the source of Prime's title, and is described as "a certain conveyance to David W. Prime, of Brandon, Vt., in and to certain patents and royalties for 'improvements in weighing scales,' which are now in use by 'The Brandon Manufacturing Company, of Brandon, Vt.,' and are known as the Strong and Ross patents." The inventions were then, and for a long time had been, in full and open use by that company, and this reference to that use, in the very deeds to Meacham and Luce, was not only constructive notice to them of the fact of such use, but was express information of it, if they did not have that information otherwise. Cuyler v. Bradt, 2 Caines, Cas. 326. And this reference in the deed of Prime to the one to him, as being of patents so in use, shows, clearly, that he took his deed with full knowledge of that use; and the conveyances were so near together in point of time, that he must have had the fact of such use in his mind at the time of both buying and selling. This use by the defendant was possession of the monopoly, as far as that use extended, at least, which is as far as this controversy.

embraced in the original bill, extends; and this possession, when actually known, was constructive notice of the claim of right under which the possession and use were had, the same as the possession of land is notice to a purchaser of the legal title of any equitable right which the possessor may have. 1 Story, Eq. Jur. § 400; Pinney v. Fellows, 15 Vt. 525. Had they inquired by what right the use of these patented inventions was had, they would probably have learned the truth about it, and must now stand as if they had enquired and learned it, which leaves them with precisely the same rights as Strong, their grantor, had, which were the same that he and Ross had.

The right to the unexpired term of the patent of 1862 stands upon different footing from those to the extensions. Strong, Ross and Howe were joint inventors of that invention, and assigned to Howe, while an agreement between them relating to the use of all these and other patented inventions, dated September 1st, 1859, was in force, by the terms of which, if Howe or his representatives should elect not to continue the business of making scales, the rights of Howe, acquired by that agreement, would revert to Strong and Ross. Howe transferred the business of making scales to the Howe Scale Co. He and that company both got into bankruptcy; he has since died, and his representatives have not continued the business at all. It is argued, that this patent reverted, under the provisions of that contract. But, on the 1st of March, 1864, Strong and Ross made another conveyance of the patents which have been extended, and several others, to Howe, without mentioning the one of May 20th, 1862, and expressly rescinding the agreement of September 1st, 1859. This left the title to this patent in Howe, with no provision in force anywhere for depriving him of it. And that it was intended to remain there is apparent from the transactions. All the other inventions of Strong and Ross relating to scales were conveyed; they would not be likely to retain this fragment out of so many, all together constituting a whole; but, there was no necessity for inserting it in the new conveyance, for he already had full title to it. They have, however, an assignment of this patent from the administrators of Howe, and insist that they are entitled to hold it under that, because the assignment from the bankruptcy court to the assignee of Howe had not then been recorded, and the record title, at the patent office, appears to be in them. The bankrupt law (Rev. St. U. S. § 5046) vested all patent rights at once in the assignee. His title was like that which the administrators would have acquired if the bankrupt had died without bankruptcy proceedings being in force. It accrued by operation of the law, and such titles need not be recorded. The workings of the law are not matters for record in registries of titles

The deed from Strong and Ross to Howe, of March 1st, 1864, besides conveying the "inventions, improvements and patents," contained this further covenant: "And we, the said Strong and Ross, do hereby covenant and agree to sign all necessary papers for securing extensions on any patents heretofore granted, or hereby assigned or that may hereafter be assigned, to said Howe, and for said Howe's benefit. And we also agree to sign, whenever called upon, any papers which may be necessary to perfect the rights of said Howe under this assignment," with habendum to his heirs, executors, administrators and assigns. Although the statutes in force then, and under which the extensions were granted, seemed to contemplate that extensions should be granted only to inventors, for their own benefit, or to their personal representatives, there is no doubt, under the construction which has been given to them, but that, by appropriate instruments and words of conveyance, they could be conveyed wholly in advance. Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. [77 U. S.] 367. Nor but that an agreement for their conveyance, made beforehand, would be binding in equity. Hartshorn v. Day, 19 How. [86 U. S.] 211; Newell v. West [Case No. 10,150]. In Curtis on Patents (section 207) it is said: "It is clear, that the inchoate right to obtain an extension under a standing law, may be conveyed or controlled in advance, by the party who has the power to obtain and make it perfect; and it seems to be equally clear, that an inventor, either before or after he has obtained one patent, may so deal with the possibility of obtaining future patents on his invention, as to vest an interest in such future patents in his assignee or grantee. The question, in either case, will be, whether he has conveyed, or covenanted to convey, a future contingent interest." Hendrie v. Sayles, 98 U. S. 546, is to the same effect. It may be, that, under the strict construction put upon such an instrument in respect to extensions, by the supreme court, in Wilson v. Rousseau, 4 How. [45 U. S.] 646, this deed did not, by its own force, convey these extensions, although an intention, on the part of the grantors, to part with their whole interest in the inventions, including extensions and everything pertaining to them, is quite apparent. It is urged, however, that it is not even a covenant to convey, but is merely a covenant to procure extensions for themselves, if Howe should desire to have them, and have the use of the patents by paying for it as they should agree, rather than to have the inventions left to the public at the expiration of the original terms. They covenanted distinctly to sign all papers necessary for procuring extensions. Had they stopped there, it might be argued, in view of the strict construction before mentioned, that they were to do this for the benefit of themselves, to whom alone extensions could be granted, although then the argument would be somewhat strained. But, they went fur-

ther, and added, "for said Howe's benefit." This could mean only one thing, and that was, that Howe should have the extensions. After making this covenant they could not, with any show of justice, claim the benefit of any papers executed to procure extensions of these patents, to the exclusion of Howe or of his assignees. It was like a covenant to stand seized, and, in equity certainly, equivalent to a grant of the extensions, as such a covenant relating to land would be, and at law even, under the statute of uses. Milburn v. Salkeld, Willes, 673. The patent office understood it as a grant, and, when the application for the extension first applied for was made, regarded the effect of it as standing in the way of the rule requiring inventors to be the owners of extensions, if granted.

As, in equity, they parted with their rights to the extensions, they are not, in this suit in equity, entitled to any relief for an infringement of those rights, without showing, in some way, that those rights have been restored, so as to be infringed in their hands, or that they stand upon the rights of those owning them. They are claimed to have been restored in several ways. One is by the assignment to Strong of a note given by Howe to Ross and indorsed by him, for his share of the price of the patents, and secured by a lien upon them, with its securities. There are plain reasons why this claim is groundless. One of these is, that the lien never covered the extensions at all. Another is, that the note was proved as an unsecured claim, against the estate of Howe in bankruptcy, by the endorsee, of whom Strong obtained the assignment, and was discharged as such, which would have left the security, if there had been any, the property of the estate.

They also claim, that Strong was restored to, or acquired some rights by, an assignment of the extensions from two of three administrators of Howe. On the 17th of April, 1868, Howe conveyed the patents assigned to him by Strong and Ross to the Howe Scale Co., by deed, and in that deed was this recital: "And whereas I, on the 29th day of June, A. D. 1864, did sell, and agree to assign and convey, to the Howe Scale Company, (a corporation duly organized under the laws of the state of Vermont,) all of the aforesaid inventions and letters patent. And, whereas, I also agreed to assign and convey any further patents pertaining to scales or weighing apparatus, which might be granted to the said Strong and Ross and conveyed to me." The extensions had not then been granted, and no other mention was made of anything that would cover them, in that instrument. But, the words, "further patents," would cover them; and this recital was of an agreement on his part to convey them to the Howe Scale Co., the grantee in, and other party to, the deed. And this recital by Howe of an agreement by him to convey them, while he would otherwise hold the equitable title to them, is direct evidence against those claiming under him or his administrators since then, as an admission against his title and interest, that this title and right were subject to that agreement, which the recital is also evidence that he made, and from which it is found as a fact that he did make it. Downs v. Belden, 46 Vt. 674; Wing v. Hall, 47 Vt. 182; Wheeler v. Wheeler, Id. 637. This instrument was well known to Strong as well as to the administrators, because it is expressly referred to by date and place of record, in their deed to him, and they must have known of this agreement of Howe with the Howe Scale Co. They are certainly affected with presumptive notice of it. Newl. Cont. 511. The conveyance to Strong was made subject to the interest conveyed by Howe to the Howe Scale Co. "in letters patent as enumerated and conveyed" by that instrument, which would come very near to this equitable right, although strictly not including it. So, the Howe Scale Co. had acquired the equitable right to the extensions, and Strong, if he purchased anything, took it subject to that right. But, there was nothing left in the administrators, or to them, of any right to the patents. The provisions of the bankrupt law not only vested the title to patent rights which the bankrupt had, in the assignee, but all rights in equity, and choses in action, which would cover the whole. Rev. St. U. S. § 5046. It is insisted, that, as the assignee of Howe in bankruptcy did not claim the extensions, the statute of limitations to two years, of actions against and by him, would cut off all his rights. This may be true But that limitation commences to run only from the time when the cause of action accrues. Id. § 5057. Soon after his rights as assignee accrued, the defendant began to use these inventions, under a conveyance from him as assignee of the Howe Scale Co. Neither the administrators of Howe, or Strong and Ross, or either of them, were using them or claiming them, or doing anything by which any cause of action accrued to him, and there was no cause of action to be barred in their favor. The defendant was using the inventions when the extensions were severally granted, and has continued the use ever since, and more than two years elapsed after the granting of the last one, before the commencement of this suit. It is said further, that, as Howe had only an equitable right, and the legal title was somewhere else, and the equitable right only passed to the assignee, he should have brought a proceeding in equity, to enforce the equitable right, and that, not having done so for the space of two years, the equitable right is barred and the whole interest left where the legal title is. But, the right of Howe was to have the necessary papers executed by Strong and Ross for procuring the extensions, for his benefit. Before the time arrived within which by law applications for extensions could be

made, or for any of them, and on the 6th of May, 1869, the assignee of the Howe Scale Co. conveyed to Nathan T. Sprague, Jr., all its property, including many patents, among them these which have been extended, and also "all of the interest or right the said Howe Scale Co. has in and to any and all other patents, by virtue of any or all assignments heretofore made to the said Scale Co., whenever or by whomsoever made." This was broad enough to carry the equitable rights which that company had to these extensions. And, in the same language, Sprague made a like conveyance of the whole to the defendant, on the 9th of June, 1869. So, when the extensions were granted, the assignee, either as of Howe or of that company, had not any equitable right to enforce. The whole right in that behalf was in the defendant, who had no occasion then to enforce it, nor even until about the time of bringing this suit, for, until that time, all yielded to such right without question.

The statutes under which the extensions were granted authorized the granting them, if it should appear, "having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use." Act July 4, 1836, § 18 (5 Stat. 124). This language would seem to contemplate that the extension should be to the inventor directly, or so that he would receive the benefit of it, if granted, to make up to him the reasonable remuneration which he had failed to obtain. The course of the patent office was in accordance with this idea, and it required that it should be made to appear that the inventors would own some substantial interest in the extensions, so that they would be benefited thereby, before they would be granted. This became known to all concerned in procuring these extensions. While the application for the extension of the patent of January 15th, 1856, was pending, all the conveyances and assignments mentioned had been recorded, except that from Sprague to the defendant. The office construed them as showing that Strong and Ross, the inventors, would not own, nor take any benefit from, the extension, and, under the practice, this stood in the way of granting the extension. To obviate this difficulty, Sprague, acting for and in the interest of the defendant, made an assignment of all his right to that patent and invention in the states of New Hampshire and Connecticut, to Strong and Ross, which did not answer the purpose. Then Howe, who was employed by the defendant to, among other things, assist in procuring the extension, acting in the interest of the defendant, and not knowing of the record of the other conveyances, made an assignment to Strong and Ross of all his interest in and right to the extended term of that patent by virtue of the conveyance of March 1st, 1864. This also failed of satisfying the patent office, and, on the 15th of November, 1870, Sprague, acting as before, made a full assignment of the extended term to Strong and Ross, whereupon it was granted. The conveyance from Sprague to the defendant was recorded before the applications for the other extensions were made, and, in advance of each, the defendant assigned the extended term to Strong and Ross, for the purpose, as before, of making it appear that they would own the extensions, if granted, and thereupon they were granted. All the proceedings in respect to procuring the extensions were had for and at the expense of the defendant, and Strong and Ross executed all the papers which they executed at the request of the defendant, in pursuance of the covenants and agreements in their conveyance to Howe, of March 1st, 1864. This was done upon the full understanding, on the part of both Strong and Ross and the defendant, that the rights of Howe under that agreement had passed to the defendant; that Strong and Ross were in duty bound to execute the papers for the benefit of the defendant; that the assignments to them were merely for the purpose of making it appear that they would own the extensions; and that the extensions would really and in fact belong to the defendant by virtue of the rights which had before been, or supposed to have been, acquired. Ross suggested an assignment from himself and Strong, according to the understanding, but none was made. The business relating to procuring the extensions was transacted mainly through written correspondence, and the purposes, intentions and understandings of the parties, as found and stated, fully appear from it.

It is claimed, that these conveyances, notwithstanding the circumstances under which they were made, restored the title and right to the extensions to Strong and Ross, or estopped the defendant from denying the right of Strong and Ross to them. The apparent legal title to the extensions came to Strong and Ross; but the legal title to a patent may be in one person, and the equitable right to it in another; and this applies to extensions as well as to original patents, as fully appears from the principles and authorities before referred to. Hartshorn v. Day, 19 How. [60 U. S.] 211; Newell v. West [Case No. 10,150]. No consideration whatever was paid by Strong and Ross for the reassignments of the extensions; on the understanding stated, they were not to have them, but were to have merely the color of legal title to them, for the purpose which has passed. There are no just grounds for any estoppel in their favor, or in favor of the plaintiffs. They were not deceived into doing anything which they otherwise would not have done, by the conveyances, or the representations that the extensions would be for

their benefit. The misrepresentation was to the patent office, not to them. They fully understood the whole, and participated in it. As between them and the defendant, the estoppel, if any should be allowed to operate, would work the other way. These inventions were the foundation of the defendant's business, and large outlays were made in establishing it, on the expectation of having them; and it is not probable that the defendant would have permitted them to be granted without opposition, for Strong and Ross to have them, and much less, that the expenses of obtaining them would have been paid, to secure them to Strong and Ross. They cannot, in good faith, now claim the extensions, and, in equity, their claim cannot properly be enforced. Ross, in fact, never has claimed them, but has merely quitclaimed his rights, if any, to Strong.

These assignments were, however, made to deceive the patent office, and the parties, and their rights to relief in respect to the assignments, are to be considered as they are affected by that circumstance. The grant of these monopolies, like that of all other patents, was from the sovereign power of the general government, under the constitution. The patent office is the instrument of the government, in making the grants, under the law. The extensions would be detrimental to the public, to precisely the same extent that they would be beneficial to the grantees. The assignments, "by a feigned countenance and show of words and sentences, as though the same were made bona fide," in the language of the statute (27 Eliz. c. 4), induced the patent office to grant the extensions, when it would not have done so, if the real purpose of making the assignments had been known; and now it is claimed by the orators, that the assignments so made shall be held operative, and the defendant not allowed to set up the arrangement under which they were made, in defence, and by the defendant, that the title created by them, if any, shall be held in trust for the defendant, and that the trust be executed by decree in the cross cause. The statutes 13 Eliz. c. 5, and 27 Eliz. c. 4, made all conveyances within their purview void as to all those sought to be defrauded, and left them, or made them, binding between the parties to them. Those statutes are not a part of the laws of the United States relating to patents; and, if the laws of the state would control, in any degree, these conveyances would not come within the provisions of those statutes, as adopted in Vermont. Gen. St. Vt. p. 672, § 32. So, these conveyances must stand as at the common law. They were wholly without any consideration, and have never been executed by any delivery of possession. The defendant has all the while had the inventions in use, and the letters patent themselves, with the endorsement of extension thereon. The conveyances within the statutes cited, and those within 7 & 8 Wm. III. c. 25, and 10 Anne, c. 23, making conveyances for the purpose of conferring a right to vote void, only as between the parties thereto, have generally been held to be valid between the parties to them only by force of the express provisions of the statutes to that effect. Twyne's Case, 3 Reporter [Coke] 80b; Phillpotts v. Phillpotts, 1 Eng. Law & Eq. 339; Dyer v. Homer, 22 Pick. 253. And they would seem to have been void at the common law, at least so far as that they would not, as conveyances, afford sufficient foundation for a cause of action resting upon themselves alone. Alexander v. Newman, 2 C. B. 122, and 15 Law J. pt. 2 (C. P.) p. 134. The orators here have not any claim under these conveyances, except what lies wholly in action. They are not defending any possession taken under the conveyances, but are asking relief wholly, as to this part of the case, upon the strength of them. Unless they are held valid and operative, as conveyances, as those under the statutes mentioned were held, the orators have no case. The orator in the cross-bill cannot have the relief sought there, without having the conveyances held operative, and the title under them decreed to be a trust merely, and the trust decreed to be executed. It has been suggested, on the part of the defendant in the original bill and orator in the cross-bill, that all were equally in the wrong as to the purpose of these conveyances, and that, if they should be held inoperative, on account of this purpose, the title to the extensions would be left in the defendant. This might be true, if the extensions would have been in existence, with a title to them resting somewhere, without these conveyances having been made at all. But, the extensions were not in existence when the conveyances were made, and no one had any vested right to have them granted. They were not like original patents, or reissues, in that respect, but were grantable only in the discretion of the commissioner. Without these conveyances the extensions would not have been granted at all. Neither party can be aided here, without aiding the purpose for which the conveyances were made. The doctrine is universal, as it is salutary, that the courts of a country will not aid parties in what is prejudicial to the state. Collins v. Blantern, 2 Wils. 341; Law v. Law, 3 P. Wms. 391; Hanington v. Du Chatel, 1 Brown, Ch. 124; Parsons v. Thompson, 1 H. Bl. 322; Pingry v. Washburn, 1 Aikens, 264; Fuller v. Dame, 18 Pick. 472; Powers v. Skinner, 34 Vt. 274; Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314. This case seems to fall within that principle, as to these conveyances, and, as neither party has title except through or in consequence of them, this court will leave the parties, in those respects, where it finds them.

The original term of one of the patents, and the right to apply for an extension under the general law, expired before any application for an extension was made, and a special act

of congress was passed, approved July 15th, 1870 (16 Stat. 657), granting leave to Strong and Ross to make application to the commissioner of patents for an extension, and authorizing him to consider and determine it in the same manner as if it had been made in due season. It is claimed by the orators, that the right to that extension accrued under this special grant, and that Strong and Ross thereby acquired an express title to it, which they have never parted with but to the orators. There is no question but that a grant of a patent, or of an extension of a patent, by congress, as a bounty, would enure to the benefit of the grantees only, and that no right to it could be acquired, except by express conveyance from them. Wilson v. Rousseau, 4 How. [45 U. S.] 646. But this was not such a case. Congress merely removed a limitation, and left the commissioner to grant or refuse the application, precisely as he would under the general law. It was not a special grant, but the general law was made to cover the case. And the passage of this act was procured by the defendant as a part of the proceedings to obtain the extensions, in the same interest, and for the same purpose, and upon the same understanding. The position of the parties in respect to it is the same as in respect to the others.

These considerations fully dispose of the claim of the orator in the cross-bill for relief against setting up a false title, or falsely asserting that this orator has no title, to customers, causing damage, for, they show a want of foundation for maintaining such a claim, even if this court would have jurisdiction for such a cause of action, between these parties, who are citizens of the same state. But, such a claim would involve no federal question, of which this court could take jurisdiction between such parties. Hartell v. Tilghman, 99 U. S. 547.

The bill alleges, that the extension passed from Strong and Ross to Howe, by the conveyances stated. The orators, at the hearing, asked leave, by motion, to withdraw those allegations, so as not to be bound by them. The decision upon this motion was reserved. In the view taken of the effect of the conveyances, the amendment would be of no importance. If there should be an appeal, it might become of importance, and its allowance here be of importance. The allegation is one of construction rather than of a fact, and, perhaps, the orators ought not to be bound by it, if it should become material, further than the fact that it was made might show the understanding of those making it. That fact would remain, if the technical effect of it, as a pleading, should be obviated by the amendment, if the record should be left so as to show the whole. Therefore, the motion is granted, to the extent of allowing an amendment striking out those allegations to be filed separately, without obliterating them as they stand in the original bill.

The costs upon the original and cross-bills are probably so nearly equal, that none are allowed either way.

Let a decree be entered dismissing the bill and cross-bill.

PRIME (BRANDON MANUF'G CO. v.). See Case No. 1,810.

Case No. 11,422.

PRIME v. McREA.

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

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

DECEDENTS' ESTATES—LIABILITY FOR DEBTS IN VIRGINIA.

One half of the real estate of a testator in Virginia is liable for his debts, although not charged by the will. Quære.

CRANCH, Circuit Judge, doubted, whether a decree can be made to sell the real estate of Robert McRea in the hands of his heirs unless there be a mortgage or other lien; or unless the personal estate has been applied to relieve the real.

E. J. Lee, for complainant, cited Robinson v. Tonge, 3 P. Wms. 398, and Finch v. Earl of Winchelsea, in a note to that case, and Stileman v. Ashdown, 2 Atk. 608. (Cur. ad. vult.)

THE COURT afterwards decreed a sale of half of the lands and rents. [Case No. 11,423.]

Case No. 11,423.

PRIME v. McREA.

[1 Cranch, C. C. 294.] [1]

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

DEBTOR'S LANDS—SALE OF MOIETY.

By the laws of Virginia, in 1801, a court of equity could decree a sale of one moiety of the fee-simple of the debtor's lands in the hands of the heir at law.

The bill states that the plaintiff recovered judgment in Virginia, against Robert McRea and Mease, for ——— dollars, and received part from the estate of Mease. That McRea left certain real estate, which he prays may be sold to pay the balance of the debt.

Upon consideration of the cases of Robinson v. Tonge, 3 P. Wms. 398, and Stileman v. Ashdown, 2 Atk. 608, THE COURT decreed that half the rents and half the real estate should be sold.

[See Case No. 11,422.]

PRIMROSE (UNITED STATES v.). See Case No. 16,091.

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

Case No. 11,424.

The PRINCE.

[See Case No. 12,219.]

PRINCE (GOLDEN v.). See Case No. 5,509.

PRINCE (HOWARD v.). See Case No. 6,762.

PRINCE (POLYDORE v.). See Case No. 11,257

PRINCE (SABBICH v.). See Case No. 12,192.

Case No. 11,425.

PRINCE v. UNITED STATES.

[2 Gall. 204.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

CUSTOMS DUTIES — RELEASE ON GOODS CAPTURED BY ARMED VESSELS — ACT OF AUG. 2, 1813 — RETROACTIVE EFFECT.

1. The act of 2d Aug., 1813, c. 48 [2 Story, Laws, 1374; 3 Stat. 75, c. 49], releasing one third of the duties accruing on goods captured and brought into the United States by any private armed vessel of the United States, did not apply to the case of a vessel captured and brought in before the passing of the act, but not condemned until after it had passed.

[Cited in The Gertrude, Case No. 5,370; U. S. v. Starr, Id. 16,379.]

[Cited in Rich v. Flanders, 39 N. H. 367; Thompson v. Alexander, 11 Ill. 55.]

2. Duties accrue as soon as the goods are voluntarily imported, and this as well as to prize goods, as any other; for the condemnation relates back to the time of importation.

[Cited in U. S. v. Lyman, Case No. 15,647; U. S. v. Dodge, Id. 14,973; U. S. v. Boyd, 24 Fed. 694; McAndrew v. Robertson, 29 Fed. 246.]

[In error to the district court of the United States for the district of Massachusetts.]

This was a writ of error to the district court of Massachusetts, in an action of debt brought by the United States against the plaintiff in error, on a revenue bond for the duties payable on a certain prize cargo imported into the United States. It appeared from the pleadings, that the prize ship and cargo were captured by the private armed schooner Favorite on the 20th of June, 1813, and arrived in the port of Plymouth, where the entry was made, on the 21st day of July of the same year. A prize allegation was filed on the 10th day of the ensuing August, and the vessel and cargo finally condemned in the district court on the 5th of the succeeding month. By the act of congress of 2d of August, 1813 (chapter 48), it is provided, that on all goods, &c. captured from the enemy, and made good and lawful prize of war, by any private armed commissioned ship of the United States, and brought into the United States or their territories, there shall be allowed a deduction of 33⅓ per cent. on the amount of duties then imposed by law. The plea, after oyer of the bond and condition, and setting forth the facts above stated, averred, that the defendant, now plaintiff in error, had tendered the amount of duties, deducting one third.

Mr. Prescott and J. T. Austin, for plaintiff in error.

1. Did the statute apply immediately to all goods then within the country, or only to those which should arrive after its passage? The statute is to receive a liberal construction. The court will look at the mischief intended to be remedied, and if possible understand the language of the law in a sense sufficiently broad to meet that mischief. Now the evil complained of was, that the duties were so high, as to discourage privateers, and it was, therefore, thought useful to remit in their favor a part of those duties. This evil was not less felt by those, who were then proceeding in the courts of the United States against prizes before made, than by those who were afterwards to seize and bring them in; nor can any reason be given, consistent with the liberal intentions of congress, why the same indulgence should not be extended to the one as to the other. The language of the act extends to all cases where the duties had not actually been paid. There is nothing in the words themselves to show an intended future operation, and it is as reasonable to supply words, to give a retrospective, as a prospective effect. "All goods, &c. captured," must comprehend all those, which had been captured at any time before. The next clause alone indicates something future, and must mean, "which shall be adjudged good and lawful prize." The court will adopt a different construction, when the duties are to be reduced for the benefit of a class of men engaged in a hazardous service, which is supposed to be useful to the public, from what they would, if the duties were to be increased.

2. The right to duties accrues on the arrival of the goods at a port of entry; but goods brought in by the vis major are not "imported" in the legal sense of the word. In such case no right to duties accrues, until an election is made to enter. Until that time, they are not imported. When goods are brought in by one of our own cruisers, for inquiry and adjudication, the interest remains contingent until such adjudication. They may not be subject to condemnation. By the misconduct of the captors they may become the property of the United States. A claimant may appear, who destined them for some other country. Can any right to duties accrue, while the interest is thus suspended? Consider what inconveniences would follow. The collector, twenty-four hours after the arrival of a prize calls upon the captor and compels him to give bond for the duties. Four months afterwards the

[1] [Reported by John Gallison, Esq.]

goods are restored to a neutral claimant, who prefers carrying them to his own country to selling them here. In the meanwhile, the captor must pay his bond, without knowing whether the goods will be condemned or not. But, if the duties are to be secured, who is to give the bond? The captors have not the custody, and it would be unreasonable to require of the marshal, who alone can have the custody, to become personally bound for the payment of duties. If, on the other hand, the goods are held in the custody of law until a condemnation, and no duties are paid or secured until it is ascertained by a judicial decree, that they are not the property of neutrals, and they are then entered by the captors and the duties secured, the rights of all parties are preserved, and all inconvenience is avoided. If this be, as it is believed to be, the reasonable construction of the statutes, then the captors ought not to suffer in this case in consequence of their having given bond before the duties had accrued. All the rights and advantages should be saved to them, which they would have had, if the duties had not been secured until after condemnation, which was subsequent to the passage of the act.

Mr. Blake, Dist. Atty., for the United States.

By the act imposing duties on goods imported (U. S. L. 48), the duties accrue on arrival, in whose hands soever they may be, by whomever owned, and under whatever circumstances they may be brought in. This statute is not controlled by the provisions of the law, afterwards passed, regulating the mode of collection. If no one appears to enter the goods and secure the duties within fifteen days, they are then taken into custody, and in due time, no one appearing, they may be sold, to pay the duties. The only question then is, whether any part of the duties is released by the act of August 2d? But this act cannot affect the duties payable upon goods, which had arrived before it passed. These must depend upon the law existing at the time of arrival. Nor was this act intended to relate to goods then in the country. From its language it is obvious, that the legislature meant to provide only for future captures.

STORY, Circuit Justice. The question for the decision of the court is, whether the prize cargo, in this case, is entitled to the benefit of the act for reducing the duties on prize goods, the same having been imported before, but not proceeded against, or condemned, until after the passage of the same act. It is argued by the plaintiff in error, that the statute applies to all cases, where the duties had not become actually due, and had not been paid, before the time of its passage, or at least, to all cases, where the duties had not already accrued; that in prize cases, no title vests in the captors until condemnation, and, therefore, no right to duties can attach until such adjudication. By the general principles of law, duties accrue upon the voluntary importation of goods into the ports of a country, and the statutes of the United States, imposing duties, affirm these principles. Act 10th Aug. 1790 [1 Stat. 180], c. 39; U. S. v. Vowell, 5 Cranch [9 U. S.] 368. The prize act of the 26th of June, 1812, c. 107, § 14, (which was not cited at the argument,) declares that prize goods, when imported into the United States, shall pay the like duties, as goods imported in the ordinary course of trade are or may at the time (meaning of importation) be liable to pay. Both cases then are to be governed by the same principles. It is true, that until condemnation it cannot be ascertained that the capture was lawful, or the goods rightfully imported. The prize may be a neutral, and decreed to be restored by the court, and in such case no duties would attach, unless the cargo were afterwards voluntarily unladen, and an election made by the neutral to consider the United States, as the port of discharge. See The Concord, 9 Cranch [13 U. S.] 387. Still, though the transaction takes its character from the final adjudication, yet when once that character is ascertained, it relates back to the original importation. If, therefore, condemnation passes upon the property, the duties, by relation, attach from the time of importation, and are payable accordingly.

Such, then, would have been the legal result, if the act of the 2d of August, 1813 (chapter 48), had never been passed. Does that act extend to cases, where, by relation, the title to the full duties had already accrued? It is a general rule, that statutes are to be construed to operate in futuro, unless from the language a retrospective effect be clearly intended. "Nova constitutio futuris formam imponere debet, et non preterites." Bract. lib. 4, fol. 228; 2 Inst. 292. And this maxim applies as well to remedial, as to other statutes. There is nothing in the wording of this act, which points to a retrospective operation, and the whole intent may be satisfied by restraining it to future cases. On the other hand, if a retrospective effect is to be given to this act, the provision must equally apply to all cases of capture made since the war, whether the duties have been paid or not. The words must either read, "on all goods, &c. which have been captured from the enemy, and which have been made good and lawful prize of war, &c. and have been brought into the United States," or, "on all goods &c. which shall be captured from the enemy, and shall be made good and lawful prize of war, &c. and shall be brought into the United States," &c.—Independent of the objection to the former construction, which I have already stated, it is decisive against it, that the manifest object of the legislature would be defeated, for the act would have spent its whole force on past cases, and could not operate in futuro.

On the whole, I am of opinion, that the

prize goods, in this case, are not entitled to the 33⅓ per cent. deduction, and the judgment of the district court is affirmed.[2]

Case No. 11,426.

The PRINCE ALBERT.

[5 Ben. 386; [1] 15 Int. Rev. Rec. 35.]

District Court, S. D. New York. Nov., 1871.

DELIVERY OF CARGO—NOTICE TO CONSIGNEE.

1. A ship arrived at New York, having on board eleven cases of iron goods consigned to B., who, seeing in a newspaper that she had arrived, and knowing that she was to bring the goods, went to the office of the agents of the ship, and paid the freight on the goods. Two days afterwards he paid the duties on them, and a permit for their landing was obtained, and was received by the custom-house officers on board of the vessel. The eleven cases were discharged from the ship on the wharf. One of them went to the public store, and was ultimately received by B. The other ten remained on the wharf till the vessel left, and what became of them afterwards did not appear. B. filed a libel against the ship, to recover their value. The owner of the ship set up that the goods were duly delivered, and also set up that, when this suit was commenced, another action was pending in the supreme court of New York, between B. and the owner of the ship, for the same cause of action. *Held*, that whether the pendency of the suit in the state court would be a good plea in abatement or not, the objection should have been taken, if good, by a dilatory or declinatory exception, under rule 76 of this court; and that, moreover, that suit was not of the same nature as this, being a suit in personam, while this is in rem.

[Cited in Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. 281.]

2. The burden of proof was on the ship, to show that notice was given to B. of the place where the ship was to discharge, and, as she had failed to prove the giving of such notice, B. was entitled to recover.

[Cited in Unnevehr v. The Hindoo, 1 Fed. 629.]

In admiralty.

Roger A. Pryor, for libellant.

James K. Hill, for claimant.

BLATCHFORD, District Judge. The libel in this case is filed to recover the sum of $754, as the value, at the port of New York, on the 18th of June, 1866, of the contents of ten cases of iron goods, shipped at Hamburg, on the 30th of April, 1866, on board of the ship Prince Albert, under a bill of lading, which covered eleven cases of such goods, and contracted for their delivery to the libellant at the port of New York. The libel alleges, that the libellant paid the freight on the goods, and that, by the negligence of the master of the ship, after the goods were received by the ship, and before their delivery therefrom to the libellant, ten of the cases were wholly lost to the libellant.

The answer alleges, that, when the ship arrived at New York, due and reasonable notice of her arrival, and of the place of the discharge of her cargo, including the said eleven cases, was, in accordance with the usage and custom of the port of New York, given to the several consignees of cargo on board of the vessel, including the libellant; that, in pursuance of such notice, the eleven cases were landed and discharged on pier No. 43 East river, and delivered to the libellant, and accepted and received by him, and the freight thereon paid; and that the contract of affreightment evidenced by the bill of lading was performed. The answer also sets up, that, at the time this suit was commenced, an action was pending in the supreme court of New York, between the libellant, as plaintiff, and the owner of the ship, as defendant, for the same cause of action as that set forth in the libel herein.

It appears, from the evidence, that the libellant saw in a newspaper, that the ship had arrived at New York; that, knowing that she was to bring the goods in question, he went, on the 7th of June, 1866, to the office of the agents of the ship, and there paid the amount of freight specified in the bill of lading; that, on the 9th of June, he paid, at the custom house, the duties on the goods; and that a permit for the landing of the goods was obtained, and, in some way, but how is not shown, found its way to the officers of the customs on board of the vessel. The eleven cases were discharged from the ship on to the wharf at pier 43 East river. One of them was sent to the public store, to be examined and appraised. That one was ultimately received by the libellant. The other ten remained upon the wharf until the vessel left it. It is not shown what afterwards became of them.

The burden of proof is on the claimant, to show that he gave notice to the libellant of the place where the ship had got a berth and was to discharge the goods. He has undertaken to prove the giving of such notice, but the proof fails to establish the fact of the giving of such notice to the libellant, or to any one authorized to act for him in the premises.

But, even if such notice be regarded as not having been given, the claimant insists upon the pendency of the suit in the state court, as a bar to the action. To this objection it is a good answer to say, that it is a mere declinatory or dilatory objection, in the nature of a plea in abatement, and should have been taken by a dilatory or declinatory exception (rule 76); and that the two suits are not of the same nature, this one being a suit in rem, and the other one being a suit in personam. Certain Logs of Mahogany [Case No. 2,559]. But I must not be understood as assenting to the view, that the pendency of another suit between the same parties, for the same cause of action, in a state court, is a good plea in abatement of a suit in this court. Loring v. Marsh [Id. 8,514]; Wadleigh v. Veazie [Id. 17,031].

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[2] (As to the time when, and the cases in which duties accrue, see Hale on the Customs, Harg. Law Tracts, 213, 214–224.)

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

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant by reason of the non-delivery of the ten cases in question.

PRINCE ALBERT, The (BENARY v.). See Case No. 11,426.

Case No. 11,427.

The PRINCE EDWARD.

[4 Woods, 17.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1879.

COLLISION—STEAM AND SAIL—BURDEN OF PROOF.

On a clear moonlight night, a steamer and sailing vessel, running in opposite directions on a river between half a mile and a mile wide, collided with each other; the two boats having been in plain sight of each other immediately before the collision, while running a distance of about four miles. *Held*, that these facts put the burden of proof on the steamer to show that she was not in fault.

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

In admiralty.

G. H. Braughn, Geo. H. Buck, C. F. Dinkelspeil, and J. Ward Gurley, Jr., for libelant.

C. B. Singleton and R. H. Browne, for claimant.

WOODS, Circuit Justice. The suit is brought to recover damages sustained by the schooner Sargent S. Day, by reason of a collision between her and the iron steamer Prince Edward. The collision took place on the Mississippi river, about fifty-eight miles below the city of New Orleans, on February 1, 1876, at about the hour of 9 o'clock p. m. The schooner, which was of eighty tons burden, was descending the river and the steamer was ascending. The night was clear and the moon was shining brightly. The two boats were in plain sight of each other before the collision, while running a distance of three and a half or four miles. The river was between a half a mile and a mile wide at the place of collision, and there was a straight stretch of several miles. It was the duty of the steamer to keep out of the way of the sailing vessel. The fact that there was a collision under these circumstances puts the burden of proof on the steamer to show that she was not in fault.

There is some conflict of evidence, but the clear preponderance of testimony appears to me to sustain the claim of the schooner that she kept her course, and that she did not change it until the last moment, when the collision was imminent, and a change was absolutely necessary to keep her from being run down by the steamer. Entertaining this view, I must hold that a decree should be rendered for libelant for the damage sustained by the schooner. This is pretty well settled by the evidence and the report of the master to be $845.40. There will be a decree for that amount in favor of libelant, with interest from judicial demand, and costs.

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

Case No. 11,428.

The PRINCE LEOPOLD.

[Blatchf. Pr. Cas. 89.] [1]

District Court, S. D. New York. Dec., 1861.[2]

PRIZE — WHERE ARREST MAY BE MADE AND BY WHOM—PRACTICE.

1. Where an offence against the prize law has been committed, the vessel and cargo may be arrested anywhere at sea, or within the dominions of the capturing power, and by any person, officer, or citizen, as property belonging to the government.

2. The practice in prize proceeding in the courts of the United States is governed by the rules of admiralty law disclosed in the English reports, when not regulated by decisions or rules of the American courts.

Vessel and cargo condemned, as enemy property. The captors allowed to produce further proof on the question of breach of blockade.

BETTS, District Judge. This vessel was arrested September 11, 1861, in the harbor of New York, by the marshal, and was libelled as a prize, and also was forfeited under the act of July 13, 1861 [12 Stat. 255]. The first question raised on the defence, by the pleadings and on argument, went to the regularity of the proceedings—First. In respect to the arrest of the prize, that there is not a sufficient specification of the cause of arrest, and also that the jurisdiction of the court is, in that respect, rescinded by the act of congress. These considerations are sufficiently discussed in the previous cases of The Sarah Starr [Case No. 12,352] and The Aigburth [Id. 105], and the authorities dispense with all formalities of charge in the libel. 3 Phillim. art. 470; Am. Enc. art. "Prize," by Story, J. Second. That the seizure was by civil officers in the port of New York. When an offence against the prize law has been committed, the vessel and cargo may be arrested anywhere at sea, or within the dominions of the capturing power, and by any person, officer, or citizen, as property belonging to the government. By the English practice, custom-house officers capture vessels in port as prize (The Elize, 1 Spinks' Prize Cas. 88); and the seizure may be made even in the London docks (The Conqueror, 2 C. Rob. Adm. 303). The practice in prize proceedings in the courts of the United States is governed by the rules of admiralty law disclosed in the English reports (Brown v. U. S., 8 Cranch [12 U. S.] 135, per Story, J.; Jecker v. Montgomery, 18

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

[2] [Affirmed in Case No. 11,429.]

How. [59 U. S.] 110; see arguments and decisions in prize proceedings, Jecker v. Montgomery, 13 How. [54 U. S.] 498), when not regulated by decisions or rules of the American courts. The exceptions to the place and manner of the capture, and to the mode of pleading it, are not tenable.

On the merits: First, the claimants had sufficient notice that the port of Newbern was under blockade, with other ports, along the eastern coast of the United States south of Maryland. That the notice reached them before the blockade was made perfect on the part of the United States, or was efficient by the presence of an adequate force, is a fact not established by the evidence before the court, but may yet be made out by further proofs on the part of the captors. The vessel went to sea from Newbern, North Carolina, on the 1st of August. She was built in North Carolina, and was owned by Ellis, a merchant of Newbern, who shipped the crew on board on the 25th of July. He transferred her on the 16th or 18th of July to McLeod, who was a neutral British merchant, domiciled in business for several years previous in Charleston, and the British registry was made out in the name of McLeod. One of the crew testifies that the master, Wallace, told him in Newbern that he was part owner of her. She was loaded at Newbern with turpentine. The cargo is claimed by Wade, who came with it as passenger on the vessel. By the manifest, the cargo was shipped by McLeod (who admits that he belongs to the Confederate States), and was consigned to Wade. The cargo was put on board on the 23d of July. Wallace, the master, testifies that Wade told him the cargo belonged to McLeod. Wade, examined as a witness, is a native of North Carolina, and a resident there. He claims to be, in his private sentiments, a loyal citizen of the United States, opposed to the Rebellion, and that he designed to export the cargo claimed by him, and to withdraw from the state and travel in Europe. His private opinions cannot be inquired into by the court. He, as a native resident of the state, is unequivocally by law subject to all the responsibilities attached to his birth and residence, in respect to property he acquires in the enemy country and attempts to export from it. The points adjudged in the cases of The Sarah Starr [Case No. 12,352] and The Aigburth [Id. 105] apply to this, and must govern in these particulars the decisions of the case.

Judgment for the libellants, condemning the vessel and cargo as enemy property. The libellants are permitted to give further proofs on the question of breach of blockade, if offered within ten days after notice of this decree. The report of the navy department to the secretary of state, dated July 24, 1861, does not supply definite and adequate statements of the forces actually maintaining the blockade off the port of Newbern, or in that direct vicinity. It must be presumed to be within the competency of the navy department to prove affirmatively the acts of blockade performed by the squadrons, or particular vessels assigned to that service.

This decree was affirmed, on appeal, by the circuit court, July 17, 1863. [Case No. 11,429.]

Case No. 11,429.

The PRINCE LEOPOLD.

[Blatchf. Pr. Cas. 647.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—ENEMY PROPERTY.

Decree of the district court, condemning vessel and cargo as enemy property, and acquitting them on the charge of violating the blockade, affirmed.

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

In admiralty.

NELSON, Circuit Justice. This vessel was captured in the port of New York, on the 21st of August, 1861, by government officers. She was laden at the port of Newbern, North Carolina, with spirits of turpentine, and left that port on the 23d of July, 1861. There was no actual blockade of Newbern at the time. The vessel belongs to H. A. McLeod, a British subject, but resident in Charleston, South Carolina, at the time of capture, and the cargo to A. Wade, a resident of Newbern, and a citizen of North Carolina. The vessel and cargo were condemned as enemy property in the court below [Case No. 11,428], and acquitted on the charge of breaking the blockade. Upon the doctrine of the cases recently decided in the supreme court of the United States, the decree must be affirmed.

Case No. 11,430.

The PRINCESS ALEXANDRA.

[8 Ben. 209.] [3]

District Court, E. D. New York. July, 1875.

PILOTAGE—CONSTRUCTION OF STATE LAW.

The construction put by the highest court of a state upon a law of the state becomes a part of the law of the state, and is binding upon the courts of the United States in actions depending on that law, notwithstanding a different construction had been previously put on the state law by the supreme court of the United States.

[Cited in Winona & St. P. R. Co. v. Deuel County, 3 Dak. 1, 12 N. W. 569.]

In admiralty.

Thos. E. Stillman, for libellant.

Dunning, Edsall & Hart, for claimant.

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

[2] [Affirming Case No. 11,428.]

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

BENEDICT, District Judge. This is an action for off-shore pilotage, claimed by a pilot, whose services were first tendered to the bark Princess Alexandra and refused. The right to recover is conceded to depend upon the question whether the construction put upon the pilot laws of this state by the court of appeals of this state in the late case of Gillespie v. Zittloson, 60 N. Y. 449, is to be considered binding upon this court, notwithstanding the fact that the supreme court of the United States, in Ex parte McNeill, 13 Wall. [80 U. S.] 236, previous to any decision by the court of appeals, had placed a different construction upon the state law.

Upon this question—and I confine my decision to the question presented by the advocates, as above stated—my opinion is that the decision of the highest court of the state of New York as to the effect of the pilot laws of that state, is to be treated as becoming part of the law of the state, and so binding upon this court in an action depending upon that law. The libel is accordingly dismissed, but without costs.

Case No. 11,431.

PRINCESS OF ORANGE, Jewels Stolen from The.

[N. Y. Comm. Adv. Dec. 13, 1831.]

District Court, S. D. New York. 1831.

REMISSION OF FORFEITURE—ILLEGAL IMPORTATION—POWER OF COLLECTOR—GOODS STOLEN FROM FRIENDLY SOVEREIGN.

[1. Although a collector of customs has no control of a prosecution for the forfeiture of goods illegally imported, yet when the United States takes steps to remit the forfeiture he may, under Act March 3, 1797 (1 Stat. 506), show cause against the remission.]

[Cited in U. S. v. One Case of Silk, Case No. 15,925.]

[2. In a proceeding for the remission of a forfeiture under Act March 3, 1797, the judge has jurisdiction to determine whether the case presented to him falls within the statute.]

[3. A United States district attorney may, upon the authorization of the government, appear in behalf of a person seeking the remission of a forfeiture under Act March 3, 1797 (1 Stat. 506).]

[4. A proceeding under Act March 3, 1797, for the remission of a forfeiture, cannot be maintained until the forfeiture suit has proceeded to judgment.]

[5. Property stolen from a friendly foreign sovereign, and smuggled into the United States, is not subject to forfeiture for illegal importation.]

[Proceeding on behalf of his majesty, the King of the Netherlands, for the remission of a forfeiture of certain jewels, the property of the Princess of Orange, alleged to have been illegally imported into the United States. Heard on objections to the jurisdiction.]

BETTS, District Judge. In the month of July last, the collector seized a large and valuable quantity of diamonds and jewelry, as having been smuggled into this port, in violation of the revenue laws. He directed the district attorney to prosecute the goods for condemnation; and shortly after, pursuant to that direction, a libel of information was filed against them, and they were attached by the marshal. The suit is now pending in the district court. The diamonds were smuggled by a person of the name of Polari, and a female who passed as his wife. A petition is now presented to me, praying me to inquire into the circumstances of the case, and to cause the facts appearing upon such inquiry to be stated and annexed to the petition, and to direct their transmission to the secretary of the treasury of the United States, to the end that he may direct the forfeiture alleged to have been incurred to be wholly remitted, and the prosecution instituted for the recovery thereof to cease and be discontinued; and to direct the said jewels so seized and presented to be delivered forthwith to his excellency, Le Chevalier Bangeman Huygens, envoy extraordinary and minister plenipotentiary of his Majesty, the King of the Netherlands. The petition is headed: "The Petition of James A. Hamilton, District Attorney of the United States for the Southern District of New York, on behalf of His Majesty, the King of the Netherlands, presented pursuant to instructions from the Secretary of the Treasury, at the request of the Commander Benjamin Huygens, Envoy Extraordinary and Minister Plenipotentiary of His Netherlands Majesty;" and it is subscribed, "James A. Hamilton, District Attorney of the United States, on Behalf of His Majesty, the King of the Netherlands." Notice of the petition is addressed by the district attorney to the collector, and a written admission of its service is subscribed by the collector. The petition represents: That one Polari, accompanied by an unmarried woman by the name of Blanche, arrived in this port in the month of June last, from Havre. That they brought with them, concealed about their persons, and in a walking cane and umbrella handle, a large quantity of jewels, which they landed without having entered or paid or secured the duties, and without a permit; and that by the law, the jewels were subject to the payment of duties. That the collector, having obtained information of the illicit importation, on the 28th of July last seized the jewels, and on the 30th of July, pursuant to the provisions of the 89th section of the revenue law [1 Stat. 695], directed an action to be brought against the jewels, in order to condemn the same as forfeited, under the 68th section of the same act; though the collector was previously informed by the Chevalier Huygens that the jewels were the same which had been stolen from the palace of the Prince of Orange. That the said jewels, in the possession of the said Polari, and considered as his property, were, in consequence of such illegal landing, subject to for-

feiture to the use of the United States, and would, as his property, be so adjudged. But the petition avers that the goods ought not to be condemned or prosecuted as forfeited on account of the alleged illicit and fraudulent importation and landing of the said jewels by the said Polari, but that the same ought to be given up to the petitioner: First, because the said jewels, having been stolen, were without the consent of the owner thereof, imported or introduced into the United States, and consequently there was not on the part of the owner of the said jewels any intention to violate the laws of the United States; and next because the said jewels being the property of his majesty, the King of the Netherlands, "the well-settled principles of the laws of the nations that the property of one sovereign is not permitted to be seized within the dominions of another, and subjected to judicial decision, applies in this case, and they must be released." The petition then proceeds to detail the circumstances connected with the theft; the conduct of Polari in this country; the proceedings of the informer; of the Chevalier Huygens and the collector, after information was obtained; but it is not important to the present investigation to recapitulate those particulars.

Upon reading the petition the district attorney moves that the judge now proceed to take proofs summarily in support of it, in pursuance of the act of congress of March 3, 1797 [1 Stat. 506]. The collector appears in person and by counsel, and objects to the judge receiving the petition, because it is not presented by a party authorized by the act of congress to claim this procedure, and because no case is made by the petition of which the judge can take cognizance. On the other hand, the district attorney insists that the judge acts in behalf only in a ministerial capacity; his duty being merely to collect and report evidence; and that he is not empowered to adjudge whether the case or the parties are those contemplated by the act. Those matters must be referred to the decision of the secretary of the treasury. He furthermore contends that the collector is not authorized to counteract or control any proceedings taken in behalf of the United States. He insists that after suit brought the interests and rights of the collector are merged in those of the United States, and are subject to the discretion of the government, whether it may choose to abandon or enforce the prosecution. The latter position is no doubt substantially correct. The collector can assume no control in the management of the prosecution. The government may discontinue the suit, or remit the forfeiture without any reference to him; and whatever his interests may be in the subject matter, they are submitted to the discretion of the government, and are lost when those of the United States are relinquished or defeated. This has been distinctly adjudged by the supreme court. U. S. v. Morris, 10 Wheat. [23 U. S.] 246. But although the control of the prosecution is absolutely in the United States, yet the act of March 3, 1797, expressly requires that the party claiming the forfeiture shall have notice of any application for its remission, that he may have an opportunity of showing cause against such remission. The collector has received such notice in this case, and as such party he is entitled to appear and make all legal objections to the application, whether it is presented by the United States or an individual.

Neither can I accede to the other proposition of the district attorney, that the judge acts solely in a ministerial capacity in taking the proceedings required by this act. He does so undoubtedly in reporting the facts after ascertaining what the facts are, because he is not authorized by the act to express any opinion upon their sufficiency or effect; but he takes the proofs judicially, and must accordingly decide upon the competency and pertinency of the proofs offered (U. S. v. Hayward [Case No. 15,336]), and it must, as a necessary incident to the duty required of him by the act, devolve upon him to decide whether or no a case exists of which he can take cognizance.

It can hardly be maintained that a judge is obliged to collect proofs upon any petition of any party who may choose to exact that service of him, without being allowed to determine whether the law enjoins the duty upon him. On the contrary, the first duty of the judge is to compare the case presented to his consideration with the statute, and adjudge whether it is such an one as to call those special powers into exercise. If not, he must refuse to act upon it. The district attorney invokes the interposition of the judge in this case, under the provisions of the act of March 3, 1797. If that act does not supply authority for these proceedings, there is no pretence that they can be maintained.

Judge Story says the government can only remit a forfeiture upon a statement of facts furnished in the manner prescribed by the statute (The Margaretta [Case No. 9,072]), and if the powers of government over their own claims is not broad enough without the aid of the act to effect a relinquishment of demands they have in suit, it surely would not be supposed that any assistance could be derived from the acts of a judge out of court, further than those acts are required and supported by the express provisions of the statute. Is this petition, then, such as is required by the act? Under this inquiry, the objection to the competency of the district attorney to act in behalf of the petitioner comes properly under consideration. I do not accede to the construction of this act which limits the right of petitioning to the party in person, who has incurred a forfeiture, or whose property may be subject to forfeiture. He may constitute his proxy or attorney in fact, to act for him in this behalf. Nor do I undertake to declare that there is any incompatibility or impro-

priety in a district attorney appearing as such attorney in fact, in support of a petition seeking the remission of a forfeiture, after the forfeiture has been decreed or admitted. When the question of forfeiture is determined, his official services would terminate, and where there is no interference with his public duties, I should never be inclined to multiply inconvenient restraints upon the exercise of his professional talents in behalf of individuals. If, then, the objection rested only upon this point of form, I should be disposed to consider the official appellation employed in the petition as a descriptio personae merely, and, disregarding it as surplusage, accept the petition as presented by an attorney in fact, in behalf of his principal.

There is undoubtedly no little difficulty in sustaining this view of the case upon the evidence introduced by the district attorney in support of his right to present the petition. He acts under the explicit directions of the secretary of the treasury, and as a public officer. By a letter of the 6th of October, the secretary directs him "to file a suggestion with the court, stating those jewels to be the property of the Prince or Princess of Orange," and, without admitting the validity of the claim, to use the same zeal and diligence in sustaining it before the court as if it were a claim of the United States. By a subsequent letter of the 12th of November, the secretary requests him to "take charge of the Chevalier Huygens' application for a remission of the forfeiture, and conduct the proceedings on his behalf as he had been instructed to do in regard to the suggestion which was intended to have been filed." So the petition states that it is presented pursuant to instructions from the secretary of the treasury at the request of Chevalier Huygens, &c.

The understanding of the district attorney seems to be, and such is the bearing of these documents, that he does not act in his individual capacity for the King of the Netherlands or the Chevalier Huygens, but in his official character in behalf of the United States to support the claims of the King of the Netherlands. If such is the fact, it tends to complicate and embarrass the case, rather than free it from difficulty. In so far as the district attorney represents the government in this matter, the petition is the same in effect as if presented in the name and on the part of the United States. Not to animadvert upon the incongruity of the United States appearing to solicit for themselves a remission of a forfeiture, it is enough to say that most manifestly they are not a party who can, in any way, become petitioners, under the provisions of that act. There is not a clause of it which could be made applicable to them. They can never incur a forfeiture, nor can any property in which they are interested be subject to forfeiture under their own laws. If the United States, acting through their public officer, were soliciting this remission, there would be, in my opinion, an insuperable defect of parties. This, however, does not appear to me to be the character of the application. The letter of the secretary of the treasury, taken together, rather imports that the government will remain neutral between the petitioners and the officers of the customs. Probably, then, the government mean no more than withholding their own authority and interposition, to lend to the petitioner the aid and advantage of the official character of the district attorney in the management of the business. Nor do I feel it incumbent on me, on this application out of court, to pronounce on the rights or disabilities of the district attorney in respect to his official acts, further than shall be indispensably necessary in reference to the subject before me.

A different duty might be imposed upon me if this was the trial of an issue in court, in which the district attorney appeared under the direction of the government to support a claim hostile to that in prosecution in the name of the United States. But considering the directions of the government to this officer as a permission and request to appear and conduct this case for the King of the Netherlands alone, and that the king is the actual party petitioning through the district attorney, and that the district attorney is performing no function appertaining to his office, I am not disposed to declare it incompetent for him to perform that duty. The authorization of government may have been desired as an excuse for a course of proceeding not in strict conformity with the duties assigned him by statute. Disconnecting then the United States from the proceedings, and understanding them to be solely in favor of the King of the Netherlands, I shall hold that using his official designation of office will not disqualify the district attorney from presenting the petition, and conducting the application. He will still be regarded as in effect acting in his individual capacity.

The motives leading the government to interfere in this matter, as manifested in the correspondence before me, are of a character the most liberal and courteous towards the King of the Netherlands—a friendly power. A strong anxiety is exhibited, not only to remove every obstacle of a technical character which might impede the manifestation of the rights of the king, but to aid him in the prosecution of these rights by supplying him every facility consistent with the authority and character of our laws. I should certainly endeavor to interpose no obstacles to the fulfillment of purposes so honorable and commendable, but should wish rather to advance them by every means compatible with the duties of the place I hold. Thinking myself justified by the spirit of the act, I shall make the most indulgent allowances in respect to all matters of form, and shall accordingly hold that the petition is presented by a competent party, and so as if sufficient in point of substance, that the proof offered may be taken under it. A more extended considera-

tion has been bestowed upon this branch of the case, because it does not stand free of all embarrassment, and because it seems to have been the point upon which the greatest stress has been laid in opposition to the petition. I certainly feel bound to say that whatever my opinion may be upon the strict propriety of calling upon the district attorney in his official character to support and manage this matter, his own conduct has been without exception. He has proceeded in the business in a manner perfectly open, fair, and liberal, and with a manifest disposition to do no more than his obligation as an officer of government required at his hands.

The main question now arises upon the merits, whether the petition makes out a case of which the judge can take jurisdiction. (The act "To provide for mitigating or remitting the forfeitures, penalties and disabilities, accruing in certain cases therein mentioned," passed March 3, 1797, being chapter 361 of the Acts of the Fourth Congress, is here cited.) The practice under this act, since I have presided here, has invariably been to require two particulars to be established preliminarily to taking cognizance of a petition: (1) That the petitioner is interested in the subject claimed as forfeited, &c. This matter is sufficiently shown upon the petition now before me. (2) That a case of forfeiture, &c., &c., actually exists. This must appear by sentence of condemnation actually passed upon the subject matter; or by the distinct, unequivocal admission of the party intervening by petition. Not only the title and manifest scope of the act have reference to cases of actual forfeiture, but it appears to me its terms can only be satisfied by applying them to the case of property condemned, or in a predicament where a condemnation on trial must be inevitable. The expressions in the statute seem to have been studiously employed to denote that a person or his property had become charged and fixed with penalty, forfeiture, &c. How does one incur a disability? Not by being exposed to that prejudice; not by being so placed that it may chance to befall him, but according to the plain and incontrovertible import of language, by being already in the condition the supposed disability would produce. The expression carries a like signification in reference to the other terms "penalty," "forfeiture."

Neither in legal phrase, nor common parlance, is the word "incur" used to signify an inchoate or incomplete condition. It has reference to a state of things already passed and fulfilled. To incur a debt, or incur a responsibility, or incur loss, &c., is to have become absolutely liable in that behalf. So also the expression "subject to," when applied to seizure, forfeiture, disability, &c., is never found to mean only a probable or contingent liability. It imports that the penalty, &c., is actually affixed to and charged upon the party. When the revenue laws speak of commodities subject to duties, there can be no doubt of the intention of congress to declare the duty to be conclusively and inseparably attached to the article. The strongest expression in the law to denote property to be fixed with an incumbrance would be to represent it as subject to any particular claim or duty. The same remarks apply to the other term used by congress, "accrued." "Such fine, penalty, forfeiture, or disability shall have accrued," is a form of expression only adapted to convey the meaning that the fine, &c., was no longer a matter of question or uncertainty, but had become definitely fixed.

In ordinary acceptation, a debt cannot be said to accrue except when the right to demand it upon the one side and the liability to pay upon the other have become perfect. So in pleading, when the right of action is not consummate at the time of promise, the statute of limitation can only be alleged to bar from the right to sue accrued,—"actio non commuit"; because the party did not pursue his remedy within the period limited after he was fully entitled to enforce it. So in mercantile language, profits are said to accrue, not, certainly, when the adventure is instituted, but after the results are realised. The subsequent expressions in the act are of the same character. When the duty of the secretary of the treasury is designated, he is empowered to remit the fine, &c., "remove the disability," importing very distinctly that without such interference, to remit, the fine, &c. must be paid, and unless he remove it, the disability must be borne. This interpretation of the act, which renders the exercise of the powers conferred upon the secretary necessary only when an absolute loss must be sustained without such relief, secures to it its character of an act of grace, and harmonizes its provisions with those of existing laws. It could be required for no other purpose. Where the party has a defense sufficient to protect himself, or property on trial, there could be no occasion to provide him the high relief supplied by the statute.

It can hardly be implied that congress intended to depart so entirely from the uniform course of legislation as to furnish a party an immunity from prosecution. There could be no justice or hardship in leaving the citizen to his legal defence when he possessed an adequate one. That could never have been the mischief under the previous laws which the act of 1797 was designed to remedy. The defect of the former law was that it afforded the party no means of protecting himself or property except by a strictly legal defence. Congress most liberally furnished by this act a further aid to him. When he is remediless at law, he can now present his equities to a proper tribunal, and have a relief commensurate to these equities. This, it seems to me, was the sole purpose of the statute. I can discover no legal reason for interpreting it as a power to intercept suits

and prevent trials at law. It appears to me impossible to maintain that a party can avail himself of the relief indicated by that act, upon the allegation that he had violated no law, and that his property was not liable to any forfeiture. On the contrary, my opinion is that the only foundation upon which the benefits of this act can be invoked is that the party is rendered subject to a penalty or his property to forfeiture. I do not find that there has been any express adjudication in exposition of this statute—but the courts seem to consider the construction now suggested as that demanded by the act.

The supreme court state that the secretary of the treasury has adopted such construction, and impliedly admits its correctness. U. S. v. Morris, 10 Wheat. [23 U. S.] 295. Judge Johnson, in assigning his reasons in that case, intimates that the strict interpretation of the act would forbid any application for remission until judgment of conviction or condemnation had passed. Id. 298, 300. He very distinctly asserts that the act requires the petitioner to confess he had not violated the law when he petitions previous to judgment. I adhere. therefore, to the construction I have always given this act, and the petitioner, if he applies before sentence of condemnation, must equivocally admit the fact of forfeiture in order to give either the judge or the secretary of the treasury jurisdiction of the matter. This the petition now before you fails to do. It guardedly states "that the jewels in the possession of Polari and considered as his property" were subjected to forfeiture, and that, "considered as his property," would be so adjudged. This, if accompanied by no restrictions or qualification, would be an exceedingly faint and vague admission of the fact of forfeiture. If made by Polari himself, it would hardly amount to such a concession of the facts as to justify a sentence of condemnation in court, or afford occasion to ask for a remission. It is not inconsistent with the entire immunity of the property. But when made by a third party who denies all right of property in Polari; who represents the possession of Polari as tortious and felonious, and asserts a full right of property in himself, it is no admission, nor anything in the character of one. Clearly it was not intended to be an admission which would bind the property, if the secretary of the treasury refused to remit this supposed forfeiture. For the next paragraph of the petition advances claims which utterly countervail the hypothetical admission, and show that the property could not be condemned as forfeited. It demands its immunity from forfeiture, and its restoration to the petitioner upon considerations of the highest and most cogent character. It avers that the property was stolen, and was introduced into this country without the consent and in violation of the rights of the owner; and it asserts that the property belongs to an independent and friendly sovereign, and that the well settled principles of the law of nations do not permit it to be seized and subjected to judicial decision within the dominions of another sovereign power.

If the allegations of the petition are proved, no forfeiture has been incurred. The property must be acquitted on trial. The prosecution cannot be maintained against these facts. There can, therefore, be no occasion for the remitting power of the secretary. There would seem to be a gross incongruity in attempting to pardon or remit what was no offence. I am accordingly of opinion that this petition presents no case of which I can take cognizance.

Case No. 11,432.

The PRINCESS ROYAL.

[Cited in The R. E. Lee, Case No. 11,691. Nowhere reported; opinion not now accessible.]

Case No. 11,433.

In re PRINCETON.

[2 Biss. 116;[1] 1 N. B. R. 618 (Quarto, 178); 1 Am. Law T. Rep. Bankr. 125.]

District Court, D. Wisconsin. Feb., 1869.

BANKRUPTCY — PROOF OF SECURED DEBT — RELINQUISHMENT OF SECURITY.

A creditor accepting a chattel mortgage with reasonable cause to believe his debtor insolvent, and such act being declared an act of bankruptcy, cannot, by relinquishing his mortgage, become entitled to prove his debt.

[Cited in Re Colman, Case No. 3,021; Re Dewey, Id. 3,849; Re Tonkin, Id. 14,094; Re Randall, Id. 11,552; Re Walton, Id. 17,130.]

In bankruptcy. This was a motion on behalf of the general creditors of Thomas Princeton, the bankrupt, to expunge the proofs filed by certain mortgagees, on the ground that the giving and receiving of their mortgages was a preference, and a fraud on the bankrupt act [of 1867 (14 Stat. 517)].

Finches, Lynde & Miller, for creditors.
J. M. Gillett, for mortgagees.

MILLER, District Judge. The petition of creditors against this debtor represents as the cause of bankruptcy that he, being insolvent and unable to pay his debts and with intent of giving preference to certain creditors therein named, made seven chattel mortgages of his entire stock of goods. It is also shown that the aggregate amount of the mortgages exceeds the value of the goods; and that an agent of the mortgagees was in possession and had advertised the goods for sale at auction, when the marshal took them under a warrant issued on this petition.

Adjudication of bankruptcy against the debtor being made, on reference before the register to take proof of debts, objection was

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taken to the proof of the debts of the several mortgagees. The register suspended proceedings and certified the matters for the opinion of the judge.

The objection to the proof of those debts is founded on the following provision in section 39 of the bankrupt act: "If such person (the debtor) shall be adjudged a bankrupt the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to this act; provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy."

The bankrupt act being founded upon a principle of equity and just distribution among creditors forbids an insolvent debtor parcelling out his estate to preferred creditors. It is so rigid in this particular as to provide in section 35, that where a sale or transfer of property by an insolvent debtor is not made in the usual and ordinary course of business, the fact is prima facie evidence of fraud.

The act also imposes upon creditors, in regard to their debts, duties and even forfeitures. In this case a debtor notoriously insolvent made seven chattel mortgages of his entire stock in trade to secure creditors; and an agent of those creditors being placed in possession of the mortgaged property was about to dispose of the goods at auction when the marshal seized them under the warrant. The mortgages are prima facie evidence of a fraudulent intent on the part of the debtor, but they may not be per se of such intent on the part of the creditors. If a mortgage be given to a preferred creditor, without his knowledge, as is alleged on the part of some of the mortgagees, or if a creditor upon receipt of knowledge of such preference repudiates it, the prohibition or penalty of the law in respect of his debt is not to be enforced against him. The act only prohibits the proof of a debt where the preferred creditor "had reasonable cause to believe a fraud on the act was intended, and that the debtor was insolvent." The prohibition is clearly applicable in this case to the debts of those creditors who had reasonable cause to believe that their debtor was insolvent when they accepted the mortgages. or attempted to enforce them by a sale of the property.

It is alleged on the part of some of the preferred creditors, that they surrendered their mortgages, and should be allowed to prove their debts under the following provisions in section 23 of the act: "Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made, or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him, under such preference." It will be observed that the mere acceptance of a preference by a creditor does not preclude him from proving his debt or receiving dividends. In addition to such acceptance, the creditor must have reasonable cause to believe that the preference was made or given by the debtor contrary to a provision of the act, that is, as in this case, that the debtor was insolvent. And in such case under the 39 section the assignee may recover of the preferred creditor the property received, or its value. Under sections 23 and 39, where a creditor accepts a preference with reasonable cause to believe that his debtor is committing a fraud upon the act, he is barred from proving his debt or receiving dividends unless he make return of the matter so received, and on failure to do so he may lose both and all benefit from the preference and dividends of assets.

The phraseology and intent of sections 23, 35 and 39 are different. Section 23 provides that any person who, after the approval of the act, shall have accepted any preference having reasonable cause to believe, etc. Section 35, declares void preferences and fraudulent conveyances, and limits the time of prohibition to four and six months. These provisions of the act prohibiting preferences to creditors are general directions for the administration of the act upon the principle of equity. Section 39 prescribes the several causes of involuntary bankruptcy as frauds, and authorizes proceedings against the debtor at the instance of creditors. It is made a cause of bankruptcy for an insolvent debtor to prefer a creditor in any manner therein stated. And if the debtor shall be adjudged a bankrupt, the assignee may recover back the money or property received by the preferred creditor, provided such creditor receiving such preference had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy. This prohibition as to the creditors is predicated on the adjudication of bankruptcy upon the allegation in the petition against the debtor. And the creditor having reasonable cause to believe the alleged violation of the act by the debtor, is considered a participant in the offence against the act, and is therefore prohibited from proving his debt in bankruptcy. The act requires proceedings in cases of involuntary bankruptcy to be prosecuted at great expense, and it seems just that the creditor who knowingly encourages or aids a debtor to commit a fraud on the act to the prejudice of the other creditors should be deprived of benefits under the act. It cannot be permitted to a creditor who. with reasonable cause of knowledge, has participated in such

fraud on the act as to found a proceeding against his debtor, to relinquish his intended preference, and claim to prove his debt under the 23d or any other section of the bankrupt act.

NOTE. A chattel mortgage is a conveyance of property, and when given by a debtor supposed to be insolvent is presumed fraudulent, under section 39 of the act. In re Colman [Case No. 3,021]. A creditor who receives a chattel mortgage to secure a debt, from a debtor whom he has good cause to believe insolvent, is not entitled to prove his claim. Id. A creditor who takes a preference contrary to section 39 cannot prove his debt in bankruptcy if his debtor is adjudged a bankrupt within six months thereafter on the petition of a creditor. In re Walton [Case No. 17,130]. The clause in section 39 which prevents certain creditors from proving their claims is construed to apply to those cases only in which the assignee is compelled to resort to legal proceedings to recover the property. By voluntarily surrendering the property he ceases to be a party to the fraud, and his proof is admissible. In re Davidson [Id. 3,599]; In re Montgomery [Id. 9,729]; In re Scott [Id. 12,518]; In re Hunt [Id. 6,882]. Contra, Bingham v. Richmond [Id. 1,415]; Same v. Frost [Id. 1,413].

Until judgment or decree, a preferred creditor may surrender, and his right to prove his debt against the bankrupt's estate and to receive dividends will be revived. In re Kipp [Case No. 7,836].

Where the fraud is only constructive, and not actual, the creditor should in equity have a reasonable opportunity of considering whether he will surrender his preference, and pay all the costs and charges; but his decision must precede the final decree. The entry of the final decree may be suspended for a brief period to give him such an opportunity. Hood v. Karper [Case No. 6,664].

Case No. 11,433a.

The PRINCETON.

SCHUYLKILL NAV. CO. v. The PRINCETON.

LAWTON v. The PRINCETON.

[18 Betts, D. C. MS. 126.]

District Court, S. D. New York. April 12, 1851.[1]

TOWAGE — DUTIES AND LIABILITIES OF TOWING VESSEL—COMMON CARRIERS.

[1. The owners of a towing vessel are not liable as common carriers, nor are they subject to any higher obligation than that of bailees for hire. They are not guarantors, nor are they held responsible for the utmost possible skill and prudence in executing the service. Alexander v. Greene, 3 Hill, 9, explained.]

[2. If a towing vessel be regarded as assuming the responsibilities of a common carrier, it is yet within the power of carriers by water to limit their liability by contract (New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344); and where the contract is that the towage shall be at the risk of the master or owner of the tow, the towing vessel is not liable for a loss resulting from mere error of judgment, in the absence of gross negligence or willful misconduct.]

[These were libels by the Schuylkill Navigation Company and by Alfred Lawton against the steamboat Princeton, the first being filed to recover the value of a scow lost while in tow of the steamer, and the second to recover the value of a cargo of coal, which was on board the scow, and was lost with her.]

BETTS, District Judge. These two cases were heard upon the same proofs and arguments. The libellants in the first case proceed for the value of the scow No. 350, Patrick Carroll, master, and the freight of her cargo, being owners thereof; and the libellant in the second case sues for the value of 154 $^{2}/_{2000}$ tons of coal laden on board her, and owned by him, and for the safe delivery of which in the yard he took a bill of lading from the master of the scow, with the usual saving of the perils of the sea. Notwithstanding this citation between these parties, I think the owner of the coal may, upon the equity of the matter, maintain an action against the steamer for its loss, provided the steamer took the responsibility of common carrier in respect to the scow, or the loss was occasioned by gross negligence on the part of the officers or crew of the steamer. The Princeton is owned by the Camden & Amboy Rail Road & Transportation Company, who intervene in both actions as claimants. The capacity of the respective corporations to sue and defend, and the jurisdiction of the court over the subject matter, are admitted by the pleadings. It appears also by the pleadings and proofs that it is part of the business of the Schuylkill Navigation Company to forward in their boats, scows, &c., coal from Philadelphia to New York through the Delaware & Raritan Canal, and that it was also a part of the regular employment of the steamboat to tow these vessels from New Brunswick on the Raritan to the city of New York. In November, 1847, the libellant Lawton shipped at Carbon on board the scow No. 350 the coal in question, and then received a bill of lading executed by Patrick Carroll, engaging to deliver it in New York, the dangers of the seas excepted, to the libellant or his assigns, he paying freight $1.50 per ton, less $46.20; and on the 10th of December thereafter the claimants delivered to Carroll a ticket or undertaking in printed form as follows, the date, No. of the scow, place of departure and destination, and name of the agent being written in: "Dec'r 10, 1847. To the Captains of the Steam Tow Boats of the Delaware and Raritan Canal, and the Camden and Amboy Railroad and Transportation Companies: Take in tow canal boat No. 350, Carroll, master, and tow the same from Phil. to N. Y. and back again at the risk of the master & owners—they paying for steam-towing. (Signed) L. C. Pennington, Agent." On the back was endorsed: "I agree to have the within-named boat towed according to the terms specified within. (Signed) Patrick Carroll, Master." It is proved that the scow was deeply laden, and

[1] [Affirmed in Case No. 11,434.]

that she leaked, and when her master presented the above ticket to the captain of the steamer Princeton at New Brunswick the latter refused to take her in tow for those causes, but in the end, at the urgency of Carroll, consented to tow her, stipulating verbally in addition to the condition of the ticket that the towing should be at the risk of Carroll. She leaked badly on the passage, and the steamer anchored with her and the other vessels in tow, and lay over night, the captain of the steamer not considering it safe to take them across N. Y. Bay on account of her condition and the roughness of the water. The next morning they were brought to pier No. 2 on the North river, and all the vessels in tow except this scow No. 350, and the scow Orb, were then landed, these two being to be taken to the East river side of the city. It is proved that the captain of the steamer urged Carroll to have his scow landed on the North river side, as from the high wind and state of the tide it was dangerous to tow her into the East river, but Carroll insisted the agreement was to take him there, and said he would be taken at his own risk. The evidence as to the conversation between these parties, the speed of the steamer, and the good judgment and propriety of the mode in which she was managed and conducted in attempting to go into the East river, as also the state of the scow as to making water by leakage, and her depth in the water, are subjects upon which the testimony is highly discordant. I hold the evidence does not establish against the captain of the steamer any neglect of duty or omission of effort to tow the scow safely; and if any fault is imputable to him, it was the want of a correct judgment as to the manner in which it was safe to head the tide making from the East river as he entered it, and the degree of speed proper to be kept upon the steamer at that place. On striking the tide at the point where the tides from the East and North rivers meet, and which at the time in making created a swell or surge, the scow immediately sunk, taking the water over her bows, and going down head foremost. She and her cargo were totally lost.

I am inclined to the opinion, on a careful consideration of the conflicting evidence to these points, that the fair weight of it conduces to prove the officers of the steamer in attempting to carry the scow round, and in the measures actually adopted by them at the time she was brought into the East river tide, and was sunk, used all proper skill and precaution on board the steamer; but I do not discuss these topics fully, or pronounce any definite conclusion upon them, because, in my judgment, the decision of the two causes must be in favor of the claimants, upon considerations not necessarily requiring the determination of these particular facts.

I think the owners of a towing vessel have not imposed on them by law any higher obligation than that of bailees for hire, and that they certainly are not guarantors, and responsible for the utmost possible skill and prudence on the part of the towing boat in executing that service.

In these cases there is no reasonable ground upon the evidence to import wilful misconduct or gross negligence to the captain, pilot, or engineer on board the steamer. The allegations of Capt. Carroll, so far as they tend to maintain any such charge, are overborne by the evidence of other witnesses and the most which can fairly be deduced from the evidence is that there might have been some error of judgment in the mode of navigating the steamer.

It is claimed to be settled in the case of Alexander v. Greene [3 Hill, 9], decided in the court of errors of this state, that a towing vessel is a common carrier in that vocation, and chargeable with all the common-law responsibilities of a common carrier; and that she cannot, by any contract or reservation, discharge herself of that liability. I have examined the case carefully, and do not find that the senate, as a court, decided or sanctioned any such doctrine. Individual members may be regarded as entertaining those views, but the final result tends to establish entirely the contrary as the sentiment of the court. 7 Hill, 533. In that case a ticket or permit similar in substance to the one executed in this case was given by the agent of the owners, with the same qualification of the towing being at the risk of the master and owners of the vessel towed. On the trial at the circuit, evidence was offered to prove that the loss sustained by grounding the tow was occasioned by neglect in not properly conducting the towing vessel, and that her pilot was unskillful. The evidence was rejected by the judge, and the plaintiff was non-suited. The supreme court decided that the evidence was not admissible, and that on the terms of the permit, which governed the rights of the plaintiff, the defendant was exempt from liability even if the injury was incurred by his negligence. 3 Hill, 9. This judgment of the supreme court was reversed by the court of errors on the ground, so far as the opinions expressed by the members, that the owner of the towing vessel would be liable in case gross negligence was proved against him. The force and authority of the adjudication by the court of errors, if it be regarded one determining any particular point, or more than that for some cause or other the decision of the supreme court was wrong, is shaken, if not annulled, by the subsequent decision of the court of appeals, Wells v. Steam Nav. Co., 2 Comst. [2 N. Y.] 204, in which that high tribunal, with a careful attention to the case of Alexander v. Greene [supra], decided that steamboats employed as towing vessels are not common carriers and chargeable with the responsibility of such. The intimation is also thrown out that they are not bailees for hire.

It is clear, therefore, that by the law of this state the towing vessel is not now chargeable for losses received by the tow, unless owing to the fault of the one towing. So in effect the law was declared in this court, and confirmed on appeal to the circuit court. The Express [Case No. 4,598]. If it were otherwise, and the steamer employed as a towing tug takes the liability of a common carrier in respect to the tow and its cargo, since the solemn decision of the United States supreme court that carriers by water can qualify or limit their common-law liability by contract, then the obligations of the steamer cannot in this case be carried beyond the conditions of the ticket or permit, which expresses the terms of her undertaking (New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344); the rule applicable to carriers for hire, that their liability may be enlarged or limited by contract (Story, Bailm. § 33; Ang. Carr. § 59), being also now applicable to common carriers; and upon the principle of that decision as well as the one made by the court of appeals in Wells v. Steam Nav. Co., 2 Comst. [2 N. Y.] 204, the remedy of the owner of the scow and cargo must be limited to the engagement made by the permit, considering that as covering the whole service performed by the steamer. But if the engagement there made expired with the delivery of the scow in New York on the North river side, the rights of the libellants must still rest upon the verbal agreement with the master of the steamer to tow the scow round to a pier on the East river side. That agreement was also accompanied by the condition that it should be at the risk of the scow, and there is no more limitation to the power to connect a qualification to a verbal agreement, than there is to enter into the agreement itself. The service is not assumed in the character of a carrier, if in law he is one, but upon the special stipulations of the contract, which purport to exonerate him from liability for loss in any event, but may be so construed and executed by the courts as to make him responsible for his own misconduct or gross negligence, which are equivalent to fraud.

The testimony, in my judgment, clears the steamer of any just imputation of gross negligence or intentional misconduct. Ang. Carr. §§ 10, 21, 22. I think, it establishes the want of due skill and ordinary prudence in conducting the scow round the Battery. In the case of Vanderslice v. The Superior [Case No. 16,843] (U. S. Dist. Ct. Pa.), the court was inclined to disregard the rule declared in New York (Alexander v. Greene, 3 Hill, 9), and not only to hold the steam-tug to be a common carrier in her employment in towing a canal boat, but that she could not by express limitation and agreement qualify the responsibility attached by law to her in that capacity. In both those particulars it appears to me the decision is counteracted by the judgment of the circuit court for this circuit in the case of The Express [supra], and by the decision of the court of appeals (Wells v. Steam Nav. Co., 2 Comst. [2 N. Y.] 204), as to the tug standing in the character and responsibility of a common carrier; and by that of the United States supreme court in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, as to her right to limit her liability by contract.

I shall accordingly hold that this action cannot be maintained, and that the libel be dismissed, with costs.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 11,434.]

Case No. 11,434.

The PRINCETON.

[3 Blatchf. 54;[1] 12 N. Y. Leg. Obs. 5.]

Circuit Court, S. D. New York. Sept. 30, 1853.[2]

TOWAGE — SKILL AND DILIGENCE — EXEMPTION IN CONTRACT.

1. Under a contract to tow "at the risk of the master and owners" of the tow, a tug is responsible only for the exercise of ordinary skill and diligence in her navigation.

[Cited in Brown v. Clegg, 63 Pa. St. 56.]

2. Such a contract does not contain a stipulation for negligence.

3. Whether a contract stipulating for the exemption of the tug from proper and reasonable care and skill in navigation, would be lawful, quere.

[Cited in The Jonty Jenks, 54 Fed. 1,023.]

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

This was a libel in rem, filed in the district court against the steam-tug Princeton, to recover the value of a cargo of coal which was lost by the sinking of a canal-boat on which it was laden. The canal-boat was towed by the tug from the Raritan river, in New Jersey, to the port of New York, under the following order, signed by the agent of the claimants: "December 10th, 1847. To the Captains of the Steam Towboats of the Delaware and Raritan Canal and the Camden and Amboy Railroad and Transportation Companies: Take in tow canal-boat No. 350, Carroll, master, and tow the same from Philadelphia to New York and back again, at the risk of the master and owners, they paying the steam-towing." On this order, the master of the canal-boat endorsed the following agreement: "I agree to have the within named boat towed according to the terms specified within. [Patrick Carroll, Master.]" The court below dismissed the libel [Case No. 11,433a], and the libellant appealed to this court.

[The Princeton arrived at pier No. 2 North river, where she left some of the boats in her

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

[2] [Affirming Case No. 11,433a.]

tow, and started from thence with a barge lashed on her larboard side, and the scow of coal in question lashed outside the barge, to convey them to Rutger's slip in the East river; and, as we have said, as the tow entered the tide, which was then strong ebb, the scow was submerged and went to the bottom. There were three hands on board the scow at the time of the accident, and they concur in attributing the loss of the scow and cargo to the speed of the Princeton, at the time the scow struck the tide between Whitehall and Governor's Island; and also that they called repeatedly to the captain and hands on the tug, warning them of the danger, without receiving any answer or slackening their speed; there were four persons on board the tug at the time, and two on board of the barge in tow, all of whom concur in stating that the Princeton was slowed before entering the tide, and had nearly lost her headway, and attribute the accident to the circumstances that the scow was heavily laden, and had been in a very leaky condition from the time she was taken in tow on the Raritan river. There was a captain of a tow boat lying at pier No. 3 East river, who saw the Princeton coming round into the tide, and thinks she was moving at the rate of four knots an hour, but did not notice her slackening as she entered it till the scow went down. The preponderance of the evidence, I think, is in favor of the statement of the hands of the Princeton. The master of the barge who had no interest in the controversy, and was in a situation that afforded every opportunity to observe her speed, confirms in every material particular the hands on board the Princeton, as does also the steward.][3]

Dennis McMahon and Washington Q. Morton, for libellant.

Cambridge Livingston, for claimants.

NELSON, Circuit Justice. Under the contract in this case, the tug is responsible only for the exercise of ordinary skill and diligence in her navigation—such care and diligence as a prudent man would exercise, under like circumstances, in regard to his own affairs. In other words, the tug is liable for negligence, by which I mean the absence of ordinary and reasonable care and attention in her navigation. It is urged by the claimants, that, under this contract, she can be made liable only in case of gross negligence. It is somewhat difficult, however, to understand exactly what is meant by this expression in the law, unless, as has been said by an eminent English judge, in a recent case, it means little, if anything, more than negligence with an epithet. The absence of ordinary care and attention may be, under certain circumstances, gross negligence. But, in determining the rights of the parties to this suit, I do not enter into the supposed distinction between the different degrees of negligence, as the contract in this case does not, in my judgment, contain a stipulation for negligence at all. Whether any such contract can be upheld upon any sound principle of law, will be determined when the question arises. It does not arise here. Some express and positive stipulation to that effect will be required, before it can be presented for consideration. An agreement to be towed "at the risk of the master and owners" of the tow, does not exempt the tug from proper and reasonable care and skill in her navigation.

The tug had a barge lashed to her larboard side, and the canal-boat in question was lashed outside of the barge. As the vessels entered the tide in the East river, which was strongly ebb, the tow was submerged and sank. The preponderance of the evidence is, that the speed of the tug was slackened and she had nearly lost her headway, before she entered the tide, and that the accident was attributable to the tow's being heavily laden, and having been in a leaky condition from the time that she was taken in tow in the Raritan river. Some evidence has been given to show that the tug was in fault in not entering the tide head on, instead of entering it, as she did, somewhat obliquely, as she rounded into it. The master of the tug states that, when he entered the tide, it was a little on his larboard bow; that he has tried various ways at different times; and that he thinks that the safest course. There are different opinions on the subject. All the evidence impeaching the conduct of the tug, is, however, slight and unsatisfactory. The burthen of establishing the want of ordinary skill and diligence on the part of the tug at the time of the disaster rests on the libellant, and, as the preponderance of the evidence is the other way, the decree of the court below must be affirmed.

[3] [From 12 N. Y. Leg. Obs. 5.]

Case No. 11,435.

The PRINDIVILLE.

[1 Brown, Adm. 485;[1] 6 Chi. Leg. News, 291.]

District Court, E. D. Michigan. March 9, 1874.

PRACTICE—AMENDMENT OF CLAIM.

1. A motion to strike the claim and answer from the files, on the ground that it appeared on the hearing that the claimant had no interest in the property at the time the answer was filed, will not be entertained.

2. If the claim is not put in issue, and libellant goes to a hearing upon the merits without objection, it is a waiver of such preliminary inquiry, and an admission that the claimant is rightly in court.

3. A party will not be permitted to amend his claim by setting forth that at the time the cause of action arose, he was the true and bona fide owner of the vessel, and had agreed with

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

the present owner to discharge all liens against her.

4. The right of a party to appear and defend a suit in rem must be put in contestation, if at all, before the hearing, and then only by way of exception if the disability appear upon the face of the claim, or an exceptive allegation putting the right in issue if it does not so appear.

Motion of libellants to strike the claim and answer of Andrew B. Crawford and Jacob Crawford from the files, and the counter motion of the respondents to amend their claim. The tug was libelled and arrested at the suit of Mary Jane Peach, for repairs, in the sum of $1,275 35, and thereupon was bonded by and delivered to one George E. Brockway, as claimant. Subsequently Andrew B. and Jacob Crawford put in their claim and answer on oath, by the first article of which it was alleged "that these respondents are the true and bona fide owners of said tug, and no one else is the owner thereof." The case was then brought on for hearing, and witnesses were sworn and examined on both sides touching the merits of the controversy. It came out in evidence on the hearing, that, although the Crawfords were the owners of the tug when the repairs were made, they had subsequently, and before the filing of the libel in this suit, sold and transferred the tug to George E. Brockway, so that the Crawfords, at the time of filing the libel and of putting in their claim and answer, had no right or title to, or claim or interest in or lien upon the said tug. It further appeared, however, that in the sale and transfer to Brockway, the Crawfords had agreed and bound themselves to pay off and discharge all claims against and liens upon the tug then existing. After the proofs were all in and the evidence closed, counsel for libellant moved to strike the claim and answer of the said Crawfords from the files, for the reason that having no title to or interest in the tug, they had no standing in court and no right to defend; and for a decree pro confesso; and the counsel for the Crawfords moved for leave to amend their claim, so as to set up their relations to the tug and the subject-matter of this suit substantially as above recited. Both motions were heard together, and are now for decision.

H. B. Brown, for libellant, cited in support of his motion, admiralty rules 25, 34; 2 Conk. Adm. 203, 205; Ben. Adm. §§ 461, 463; Williams & B. Adm. 199, 200; The Packet [Case No. 10,654]; The Boston [Id. 1,673]; The Idaho [Id. 6,996]; The Killarney, Lush. 427, 435; The Cargo ex Galam, Brown. & L. 167.

W. A. Moore, for respondents, cited The Mary Anne [Case No. 9,195].

LONGYEAR, District Judge. Libellant's motion to strike the claim and answer from the files comes too late; and even if it had been made in time, it seems it would not be the proper mode of raising the question. The right of a party to appear and defend a suit in rem in admiralty must be put in contestation, if at all, before a hearing or other proceeding founded upon the claim and answer, and then only by way of exception if the disability appear upon the face of the claim, or an exceptive allegation putting the right in issue if it does not so appear. Such issue would then be formally heard and decided before a hearing upon the merits. If the claim is not thus put in issue, and the libellant goes to a hearing upon the merits without objection, it is a waiver of such preliminary inquiry, and an admission that the party is rightly in court and capable of contesting the merits. This identical question came before the supreme court as early as in 1828, in the case of U. S. v. 422 Casks of Wine, 1 Pet. [26 U. S.] 547, 549, and was then decided. I quote from the language of Story, J., in delivering the opinion of the court, not only to reproduce the argument upon which the decision was based, but because of the bearing that argument has upon the respondent's motion to amend. Justice Story there said: "This objection is founded upon a mistaken view of the time, nature and order of the proceedings proper in suits in rem, whether arising on the admiralty or the exchequer side of the court. In such suits the claimant is an actor, and is entitled to come before the court in that character, only by virtue of his proprietary interest in the thing in controversy. This alone gives him a persona standi in judicio. It is necessary that he should establish his right to that character as a preliminary to his admission as a party ad litem capable of sustaining the litigation. He is therefore, in the regular and proper course of practice, required in the first instance to put in his claim upon oath, averring in positive terms his proprietary interest. If he refuses so to do, it is a sufficient reason for the rejection of his claim. * * * If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party for the dismissal of the claim. If the claim be admitted upon this preliminary proof, it is still open to contestation, and by a suitable exceptive allegation in the admiralty, or by a correspondent plea in the nature of a plea in abatement to the person of the claimant, in the exchequer, the facts of proprietary interest sufficient to support the claim may be put in contestation and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry, and an admission that the party is rightly in court and capable of contesting the merits." No harm would necessarily result to the true owner, where the claimant is not in reality such, in case the merits are finally disposed of in favor of the claimant, because, as was

also decided in the case just cited, the court may, if the claimant's want of title appears upon the trial, in its discretion retain the property in its own custody until the true owner may have an opportunity to interpose a claim and receive it from the court. No such question, however, can arise in the present case, because the property has already been delivered to the true owner. It results that the motion to strike the claim and answer from the files must be denied.

Respondents' motion for leave to amend their claim will now be considered. If the amendment should be allowed, the libellant must, at the same time, be remitted to the same right of exception she would have had if the claim had been originally put in as amended. This would present a new issue, and one of a preliminary and dilatory character, and that after a hearing has been had upon the merits. This the court will never allow, except, perhaps, upon some urgent necessity, which, however, is not now apparent to the court, and certainly does not exist in this case.

What the effect of the amendment, if allowed, would have upon the standing in court of the respondents it is not necessary now to consider; but that such effect would be to deprive them of any standing in court, and to dismiss them and their defense from the case is beyond all question, upon principle as well as upon the uniform current of authority, English and American, without, I believe, a single dissenting opinion. Those who have an interest in examining the question will find it fully discussed and elucidated in the cases and authorities cited by counsel, supra. It results that the respondents' motion to amend must be also denied; and the case must proceed to a decree upon the issue as it now stands and the hearing already had. Motions denied.

PRINDEVILLE v. The MONITOR. See Cases Nos. 9,708–9,710.

PRIOR (TYSON v.). See Case No. 14,319.

PRIOR (UNITED STATES v.). See Case No. 16,092.

PRISCILLA, The (HINDRY v.). See Case No. 6,515.

Case No. 11,436.

PRITCHARD v. CHANDLER.

[2 Curt. 488.] [1]

Circuit Court, D. Massachusetts. Oct. 1855.

BANKRUPTCY—SUIT BY ASSIGNEE ON NOTE—LIMITATIONS—CONCEALMENT OF CAUSE OF ACTION.

1. An assignee in bankruptcy may sue in this court on a note of which the bankrupt is payee; and if the note was witnessed, such action is not barred by the law of Massachusetts until the expiration of twenty years from the time the note became payable.

[Cited in Smith v. Crawford, Case No. 13,030.]

2. If the bankrupt and the promisor of a note fraudulently conceal the cause of action from the assignee, from the moment when his title accrues, the two years limitation in the bankrupt act [of 1841 (5 Stat. 440)], does not begin to run. But a fraudulent concealment after the assignee's title accrued is not sufficient.

[Cited in Andrews v. Dole, Case No. 373; Baldwin v. Raplee, Id. 801; Walker v. Towner, Id. 17,089.]

In bankruptcy.

Mr. Sewall, for plaintiff.

Mr. Bartlett and James Dana, contra.

CURTIS, Circuit Justice. Upon the question whether this court has jurisdiction under the eighth section of the bankrupt act of 1841 (5 Stat. 446), I feel no difficulty. I concur in the opinion of Mr. Justice Story, in Mitchell v. Great Works Milling & Manufacturing Co. [Case No. 9,662], that a suit by an assignee to recover a debt due to the bankrupt, is a suit against a person claiming an adverse interest touching a right of property of the bankrupt, within the meaning of that section of the act, and that such a suit is therefore within the jurisdiction of this court. I consider also, that an assignee has precisely the same right to sue on a witnessed note that the bankrupt payee himself had; and that as the statute law of Massachusetts enables the payee to sue on such a note at any time within twenty years, the assignee has that right. The third section of the bankrupt act confers on the assignee, not only all property and rights of property of the bankrupt, including, of course, a promissory note payable to and held by the bankrupt, but also power to sue for the same as fully as if the same were vested in the bankrupt. This statute clothes the assignee with every right of action of the bankrupt founded on contract, and if the bankrupt would have had a right of action, if he had not become a bankrupt, the assignee has the same right of action. The replication to the pleas of the six years' statute of limitations is therefore good. Besides these pleas, the defendant has also pleaded, that this action was not brought within two years after the decree of bankruptcy, nor within two years after the cause of action first accrued to the plaintiff. To this the plaintiff has replied, in substance, that he first knew of the existence of the cause of action within two years before action brought; and that the defendant's intestate, "during his lifetime, fraudulently concealed the existence of any such causes of action from the said plaintiff; and that the said intestate was living long after the plaintiff was appointed assignee," &c. To this replication there is a demurrer.

It is not urged that mere ignorance of the

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

cause of action would prevent the bar. But that a fraudulent concealment of the cause of action by the debtor from the assignee will have this effect. Whether such a case could come into that class of cases in which it has been held that an action for a secret fraud did not accrue until its discovery, or whether the plaintiff might not be obliged to resort to a court of equity to enjoin the defendant from profiting by his own fraud, it is not necessary here to determine. It is certainly true, in this case, that if the statute once began to run, it must continue until the completion of the bar; and that to prevent the statute from beginning to run, the fraudulent concealment must exist at the moment when the plaintiff's title accrued. The replication alleges that the intestate, "during his lifetime, fraudulently concealed." It is not sufficient that he did this during his lifetime; it must have been on some particular day during his lifetime, namely, at the precise time when the plaintiff's title accrued, and thenceforward continually, until within two years before action brought. If, to a plea of the statute of limitations, by an administrator, the plaintiff should reply that the defendant's intestate during his lifetime was out of the commonwealth, I am induced to think it would be a bad plea. I should doubt if it showed, with sufficient certainty, that he was out of the commonwealth when the cause of action accrued. It would be like the case in Com. Dig. "Pleader," E, 5, where the defendant pleaded to an action of trespass, quare clausum, that the locus in quo was his freehold. The plea was held bad, because it did not allege it was his freehold at the time of the alleged trespass. We cannot construe the words of this plea, "during his lifetime," to mean, during the whole of his lifetime. Because, from the nature of the case there could be no fraudulent concealment from the plaintiff until his title accrued, which was during the intestate's lifetime. It must therefore mean that the concealment lasted but a part of the intestate's lifetime, and if so, the replication should have shown what part, that is, when it began. If it was intended to aver, it began with the plaintiff's title and continued during the residue of the lifetime of the intestate, the replication should so have averred; instead of saying, generally, the fraudulent concealment was during his lifetime, which, in this connection means only, during some part of his lifetime, not knowing what part.

For this reason I am of opinion that the demurrer is well taken. But I am so far inclined to the opinion that the replication, if made sufficiently precise, would avoid the bar, that if the plaintiff's counsel, on inquiry, should be satisfied he can make a case of fraudulent concealment by the intestate, beginning as early as the plaintiff's title, I shall allow an amendment, on terms. But it must be remembered that as the defendant's intestate was under no duty to make known the cause of action to the plaintiff, something more than silence on his part must be proved.

Case No. 11,437.

PRITCHARD v. GEORGETOWN.

[2 Cranch, C. C. 191.] [1]

Circuit Court, District of Columbia. Dec. Term, 1819.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENT ACTS OF AGENT—RAISING LEVEL OF STREET—WITNESS—TESTIMONY AGAINST INTEREST.

1. An action on the case will lie against a corporation aggregate, for damage done by its agent in raising the level of a street above the graduation fixed by a previous by-law, if it be done ignorantly or negligently by the agent; but not if done by the agent knowingly and wilfully.

2. A witness who is interested cannot be compelled to testify against his interest.

3. In order to make the corporation liable for damages, it is not necessary that the act should have been ordered by a by-law, or by any written order to the agent. If done by the agent by the previous authority, or subsequent assent of the corporation, it is liable.

This was an action upon the case [by Benjamin Pritchard] against the corporation of Georgetown, by its corporate name, to recover damages for injury done to the plaintiff's house and lot by raising the level of the street after the plaintiff had built a house, accommodated to a previous level fixed by a by-law of the corporation. There had been no proceedings in the nature of a writ of ad quod damnum, according to the 12th section of the act of congress of March 3, 1805 (2 Stat. 332), "to amend the charter of Georgetown," of the 4th section of the act of congress of March 3, 1809 (2 Stat. 537), supplementary to the act to amend the charter. The power given to the corporation by those acts, to open, extend, and regulate the streets, is accompanied by an express condition that they make just compensation to the persons thereby injured.

Mr. Key and Mr. Dunlop, for defendants, contended,

1st. That no action for a tort will lie against a corporation aggregate unless for an act within their corporate powers. Doe v. Woodman, 8 East, 228; Chit. Pl. 66.

2d. That the corporation is not responsible for the acts of its agents unless done within the scope of their authority as agents. Chit. Pl. 68; M'Manus v. Crickett, 1 East, 106; 1 Bl. Comm. 432, Christian's note, (26.)

Mr. Jones, contra, cited Chit. Pl. 98, and contended that the supreme court of the United States in the case of Patterson v. Bank of Columbia [unreported], had overruled the doctrine that a corporation aggregate is not liable for torts. That this action lies upon the general principle that if any injury is done to an individual for the general benefit, the public should make compensation. This principle is sanctioned by the 12th section of the amended charter of 1805, and the 4th section of that of 1809. If done

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

by the agents of the corporation, it is not necessary, in order to make the corporation liable, that the orders should have been in writing. Whether the agents acted by the authority of the corporation, is a question for the jury. If done by the agents in their official capacity, and it has been sanctioned by the corporation, it is liable; or if the agents did it ignorantly or negligently. If suit had been brought against the agents, they would have pleaded that they did it officially, &c.

THE COURT (CRANCH, Chief Judge, doubting) was of opinion, that there was no objection to the form of action. That if the act was done by the agents, ignorantly or negligently, the corporation is liable; but not if done by the agents, knowingly and wilfully. Verdict for the plaintiff, $300.

Case No. 11,438.

PRITCHARD et al. v. The LADY HORATIA.

[Bee, 167.] [1]

District Court, D. South Carolina. 1800.

ADMIRALTY JURISDICTION—REPAIRS ORDERED BY AGENT OF OWNER.

The contract for repairs being made on land, and the owners being represented on the spot by a consignee who has funds, a plea to the jurisdiction of the court of admiralty must avail.

[Cited in The Jerusalem, Case No. 7,294; Phillips v. The Thomas Scattergood, Id. 11,106; Leland v. The Medora, Id. 8,237; Packard v. The Louisa, Id. 10,652; Cox v. Murray, Id. 3,304; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 391; Cunningham v. Hall, Case No. 3,481; Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft, 46 Fed. 397.]

In admiralty.

BY THE COURT. This is a suit instituted against the schooner Lady Horatia for work done, and materials found by them as shipwrights. A plea, answer, and claim have been interposed by Wood, master of the schooner. As the plea goes to the jurisdiction of the court, and in bar to this suit, it is necessary to consider that in the first instance; because, if the plea is sustained, the suit must be dismissed without inquiry into the merits. Much time was unnecessarily taken up, in the production of arguments, that had no relation to the point before the court. I did not interrupt these arguments; but I shall not notice any that do not apply to the material point; that is, whether the court can sustain this suit. In support of the plea, it was contended, that this was a contract on land; and evidence was produced to prove it so. It was admitted, that this was a foreign vessel, and that her owners resided abroad; but it was proved that the consignee of the owners resided here, who had funds of the owners, arising from the sale of this cargo; that the captain; therefore, had no power to make any contract binding either on the owners or the vessel. That the contract for repairs was made with the consignee, and not with the captain; and that the former alone is liable. The law laid down in Hopkinson's from 179 to 190, was quoted; and the cases there referred to were relied on to shew that the plea to the jurisdiction must avail here. The advocates for the libellant contended that the shipwright had a lien on the vessel, and on the captain, and on them alone. That this was one of those cases of necessity that give jurisdiction to the court. That admitting the consignees to have monies belonging to the owners, they were not compellable to pay the present demand. That the shipwrights might elect whom they would credit, and make their charge accordingly. That they had done so, and chose to look to the vessel and captain, without reference to the consignee, whom they did not consider as liable, inasmuch as they had not bound him by a written agreement.

Three cases, decided in this court, were produced and relied on, viz.: North v. The Eagle [Case No. 10,309]; Williams v. The Polly [unreported]; O'Hara v. The Mary [Id. 10,467]. It was further contended that a lien was, in this case, established, and that, whenever this appears, the court will aid. That the lien is mutually beneficial to owner as well as shipwright. That the vessel is in the nature of a pledge; and that the shipwright may retain her, till his bill is paid. Many cases were produced to these points, two of which (Danvers, 270, and Cro. c. 296) were much relied on. In considering these cases, I shall first notice those formerly determined here. In North v. The Eagle it was stipulated, previously to their furnishing supplies, that the vessel only should be resorted to. None of the owners were known; and when it was afterwards discovered that there were thirty six of them, they all consented, except one, that the sale should take place, and applied to this court for its aid. In Williams v. The Polly, the shipwright had the vessel in his custody; the owner was dead; and if the administrator had got possession of the vessel, the property must have been distributed according to the statute. A failure of justice would have been the consequence; to prevent which this court interfered. The case of O'Hara v. The Mary is also distinguishable from this; for there, the party who, in Jamaica, had advanced money for necessary supplies, not only had a lien and an implied hypothecation, but would actually have libelled or attached the vessel in Jamaica, if the captain had not drawn a bill for the amount, and expressly engaged to make the vessel liable therefor. In reply to the other cases, I shall be satisfied with referring to the case of Shrewsbury v. The Two Friends [Case No. 12,819], before my

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

predecessor Judge Drayton, and to that of Boreal v. The Golden Rose [Id. 1,658], before me.

The law laid down in these, must govern the present case. Commerce would, indeed, receive a deadly blow, if it should be established that the consignee is not to be looked upon as in the place of the owners. As to the question of lien, it is not now before me. All I shall decide, therefore, is that, this being a transaction on land; the vessel not being on a voyage, but unladen and the cargo sold; and the owners being represented, on the spot, by their consignee, who has in hand ample funds arising from the sale of this cargo; no such invincible necessity exists, as the laws of all commercial nations seem to require, in order to vest a jurisdiction in the court of admiralty. I do, therefore, adjudge and decree that the plea is relevant, and that the bill be dismissed with costs.

PRITCHARD (MEYER v.). See Case No. 9,517.

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